

# False Jurisdictions? A Revisionist Take on Customary (Religious) Law in Germany

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## INTRODUCTION: CUSTOM AS A SOCIAL LEGAL ORDER?

Over the last decades, two important debates have echoed each other in Western European countries. The first is quite ancient, and touches upon the place of custom in the legal system and its distinction from (state) law.<sup>1</sup> The second debate, of more recent origins, pertains to the integration of minorities through recognition of their distinct religious normative orders.<sup>2</sup> Despite fundamental differences, both discourses share many interesting meeting points. Indeed,

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1. See H. Patrick Glenn's *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 74 (2007) (describing debates over the definition and legal status of customary law).

2. Bryan S. Turner & Berna Zengin Arslan, *Shari'a and Legal Pluralism in the West*, 14 *EUR. J. SOC. THEORY* 139, 151–52 (2011).

customary law is currently defined as a system that “grows out of the social practices [that] a given jural community has come to accept as obligatory.”<sup>3</sup> It is viewed as a “pervasive normative order.”<sup>4</sup> Customary law “arises when there is a long-standing practice and those affected by it recognise its legality.”<sup>5</sup> The virtues of customary law have been sung by many authors, who view it as a living, democratic, and social form of law, to be preferred over state law whenever possible.<sup>6</sup> For instance, one author argues that customary law is valuable because it “assur[es] [the states] citizens of their legal rights to believe in and practice their own different ways of life.”<sup>7</sup> Another commentator stresses the value of this form of law on the grounds that it is “made from the ‘bottom up’ by relevant communities.”<sup>8</sup> Finally, other authors underline the need “for a country to both respect and make space for the customary legal systems of its various populations.”<sup>9</sup> Customary law—often portrayed as a “bottom-up” approach to sustainable economic development in lieu of state intervention<sup>10</sup> or as a way to repair injustice committed by settler states towards aboriginal groups<sup>11</sup>—has been invoked in many different social contexts. Unsurprisingly, the view of customary law as an empowering social legal system has been especially strong with regard to religious and non-Western customary laws. One author thus deplored a tendency “to regard the rules of social intercourse observed in non-Western communities as not being in any true sense law.”<sup>12</sup> The author proposed that “we ought not therefore to refuse to recognise . . . an institution or status unknown in our Western countries”<sup>13</sup> but instead recognize all non-Western customs in the name of the “progressive integration of what is after all . . . a single world.”<sup>14</sup> Specifically with regard to the recognition of Islamic law in Western countries, some authors, likening Islamic law (Shari’a) to customary law,<sup>15</sup> have argued in favor of “allowing [Muslims]

3. T. W. Bennett, *Comparative Law and African Customary Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 641, 642 (Mathis Reimann & Reinhard Zimmermann eds., 2006).

4. Bennett, *supra* note 3.

5. RAYMOND YOUNGS, ENGLISH, FRENCH & GERMAN COMPARATIVE LAW 77 (2d ed. 2007).

6. See, e.g., David Pimentel, *Legal Pluralism in Post-colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 YALE HUM. RTS. & DEV. L.J. 59, 81–83 (2011) (noting customary law’s “flexibility and responsiveness to community needs” and arguing in favor of “enhancing the role for customary law and customary systems as much as possible” because they “are the most accessible, productive, and effective in meeting the dispute-resolution needs of the population”). For a genealogy of forms of social law in contemporary legal thought, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 40 (David Trubek & Alvaro Santos eds., 2006).

7. LEON SHELEFF, THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM 6 (2000).

8. DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, at x (2010).

9. Susan H. Williams, *Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*, 18 IND. J. GLOBAL LEGAL STUD. 65, 65 (2011). Susan H. Williams, however, criticizes customary law’s effects on women. *Id.* at 65–66.

10. PETER ØREBECH ET AL., THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT, at ix (2005).

11. JOHN BORROWS, CANADA’S INDIGENOUS CONSTITUTION 205 (2010).

12. R. D. KOLLEWIJN, *Conflicts of Western and Non-western Law*, in 2 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* 775, 776 (Alison Dundes Renteln & Alan Dundes eds., 1994).

13. *Id.* at 792.

14. *Id.*

15. Turner & Arslan, *supra* note 2, at 151.

to have the social space within which *Shari'a*-mindedness can flourish, thereby allowing pious Muslims to live a faith-based life.”<sup>16</sup>

In this Article, we problematize this idealized picture of customary law as harmonious. Based on fieldwork, we present customs as contested from the inside and open to decisions, strategies, and manipulations that sometimes alter their 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 the recognition of religious laws is concerned. Germany has been marked by debates surrounding the search for “pluralistic modes of incorporation”<sup>17</sup> of communities along the lines of their religious socio-legal orders, specifically as to the possibility for Muslims to organize their community along religious lines in an entity called a public law corporation, like German Christians and Jews are allowed to do in Germany.<sup>18</sup> A “religious conception of community,” such as that adopted with regard to the issue of religious public law corporations, bears much relevance to the topic of the recognition of religious custom.<sup>19</sup> Indeed, in addition to the pastoral organization of communities, debates have focused specifically on religious law and on whether “a European *fiqh* (Islamic ‘law’) is possibly developing.”<sup>20</sup> Germany, like other European countries, does not allow religious law to apply to national citizens, with very few exceptions. This Article tries to outline the challenges to an eventual recognition of religious law as custom, arguing that these challenges are considerable and downplayed or under-estimated by many legal scholars. To explore the dynamics of customary religious law in Germany, we present the findings of fieldwork among Jewish and Muslim communities in Germany and data from formal interviews with eight Jewish and Muslim women. Although the fieldwork focuses on Jewish and Islamic religious laws in Germany, our hypotheses are meant to be applicable to other sets of customary legal systems. More specifically, we argue that recognizing Jewish and Islamic law as custom is a project potentially fraught with conceptual difficulties and unintended distributive consequences. This state of affairs can be explained by the unstable

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16. *Id.* at 156. For similar positions see TARIQ MODOOD, *MULTICULTURAL POLITICS: RACISM, ETHNICITY, AND MUSLIMS IN BRITAIN* 141–43 (2005) (arguing for the accommodation of religion as a central element of integration policies); Natasha Bakht, *Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion*, 19 CAN. J. WOMEN & L. 119, 120 (2007) (arguing for “consideration for religious women who might want to live a faith-based life”).

17. Matthias Koenig, *Incorporating Muslim Migrants in Western Nation States—A Comparison of the United Kingdom, France, and Germany*, 6 J. INT’L MIGRATION & INTEGRATION 219, 228 (2005).

18. See Mathias Rohe, *The Legal Treatment of Muslims in Germany*, in *THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE* 83, 87 (Roberta Aluffi B.-P. & Giovanna Zincone eds., 2004) (explaining that the public law corporation constitutional status provides entitlements such as “the right to levy taxes from members of the community and to organize a parish,” among others); see also Pascale Fournier & Jens Pierre Urban, *La régulation des morts par le droit allemand: L’au-delà comporte-t-il des privilègiés? [The Regulation of the Dead by German Law: Does the Afterlife Consist of Privileged People?]*, in *LES CARRÉS DE L’ISLAM EN EUROPE* 13 (Atmane Aggoun ed., 2010) (discussing the possibility of German Muslim communities managing their own funeral rites and cemeteries through the public law corporation status and the resulting discursive and subjective implications).

19. Riva Kastoryano, *Religion and Incorporation: Islam in France and Germany*, 38 INT’L MIGRATION REV. 1234, 1248 (2004).

20. Mathias Rohe, *Islamic Norms in Germany and Europe*, in *ISLAM AND MUSLIMS IN GERMANY* 49, 51 (Ala Al-Hamarnah & Jörn Thielmann eds., 2008).

nature of religious legal orders and of law in general, which are socio-legal realities in which anyone concerned with customary or religious law should be interested.

After having presented in Part I the basic rules of Islamic and Jewish law and the German state law that regulates them, we delineate our socio-legal findings in two parts. Part II contends that the external boundaries of religious customary laws are often blurry and constantly redefined by adjudicators and bargaining parties, such that the religious legal order to be recognized may be undefined and varying in its scope, content, and normative reach. Part III then shifts the gaze towards the internal architecture of religious law, claiming that the adjudicatory outcomes and the procedures of religious marriage and divorce are often uneven and depend on the choices and decisions of particular adjudicators, parties, and stakeholders. We query whether these conflicting outcomes might be explained not only by boundless discretion and informality in the religious adjudication process, but also by customary law's internal structure. Thus, if the project of recognizing customs is to be maintained, it must take stock of the conceptual and practical conflicts inherent to the sphere of customary law, and to law more generally. These arguments are intended as a contribution not only to the literature on customary law, but also to the burgeoning literature on the interaction between secular state law and unofficial religious norms.<sup>21</sup>

By focusing on the experiences of women, this Article aims to assess women's positions in religious family law and customary legal systems. Observations about the vulnerability of women within traditional and religious family law are not new.<sup>22</sup> Scholars have noted that women "face greater restrictions on their rights to marry, their rights to pass on their nationality or membership to their children, their options and access to divorce, their financial circumstances and their opportunities to be awarded custody."<sup>23</sup> If we indeed acknowledge these observations and focus our fieldwork on the situations of religious women, we nevertheless aim to go beyond conventional feminist accounts of religious law.<sup>24</sup> The picture we paint is thus not

21. See generally MARIE-CLAIRE FOBLETS ET AL., *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* (2010); RALPH GRILLO ET AL., *LEGAL PRACTICE AND CULTURAL DIVERSITY* (Ralph Grillo et al., eds., 2009); RICHARD MOON ET AL., *LAW AND RELIGIOUS PLURALISM IN CANADA* (Richard Moon ed., 2008); JOEL A. NICHOLS ET AL., *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION* (Joel A. Nichols ed., 2011).

22. See, e.g., Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 483 (1964) (arguing that group-based identities "create obstacles for the realization of equality"); see also MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 7 (2000) (encouraging international, political, and economic discussion addressing justice issues for impoverished women).

23. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 600 (2004).

24. On Jewish women, see Carmel Shalev, *Women in Israel: Fighting Tradition*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 89, 92 (Julie Peters & Andrea Wolper eds., 1995) ("[S]ubstantive Jewish laws of marriage and divorce are pervaded by a double standard that is patently discriminatory."); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 462 (2004) ("The close ties between religion and the state in Israel clearly violate women's rights to equality."). On Muslim women, see MARGOT BADRAN, *FEMINISTS, ISLAM, AND NATION: GENDER AND THE MAKING OF MODERN EGYPT* 124 (1995) (denouncing Islamic family law as perpetuating the "[p]atriarchal domination remain[ing] most entrenched in the family"); Homa Hoodfar, *Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities*, in *SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES* 121, 124 (1996) (portraying Islamic marriage as a

one of total gender oppression. Instead, we present portraits of women moving through religious divorce as social agents<sup>25</sup> in order to outline that custom is a contested social space, which can be and indeed sometimes is used by women to their advantage. We try to grasp religious women's fragmented powers and knowledge as they move through the saturated social sphere designated as custom. In so doing, our aim is to move away from religious "gendered images" or "symbolic roles"<sup>26</sup> and closer to an image of women entering conflicting and multiple worlds of negotiation. This will allow us to outline some conceptual and social difficulties associated with viewing religious law as potential custom, or as a social way of life to be recognized by secular states.

## I. THE GERMAN LEGAL LANDSCAPE: RELIGION, STATE, AND CUSTOM

This section presents the basic rules that form the common ground of almost all variants of Muslim and Jewish law. We then present the German civil law of marriage and divorce, which often leaves religious law unrecognized in the private sphere. The concepts explored in this section form the basis of our subsequent exploration of the concrete manifestations of Muslim or Jewish normative orders in the private sphere of religion in Germany.

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 the marriage. Access to religious divorce is drawn sharply along gender lines.<sup>27</sup> Under Islamic family law, marriage establishes a reciprocity system in which each party is assigned a set of contractual rights and duties towards the other party.<sup>28</sup> An Islamic marriage contract is concluded through the principles of offer (*ijab*) and acceptance (*qabul*) by the two principals or their proxies.<sup>29</sup> Upon marriage, the husband acquires the right to his wife's obedience<sup>30</sup> and the right to restrict her movements outside the matrimonial home.<sup>31</sup> The wife acquires the right to her *mahr*<sup>32</sup> and the right to maintenance.<sup>33</sup>

"fundamentally unequal social institution").

25. On the topic of Muslim women's agency, see Anna C. Korteweg, *The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women's Agency*, 22 GENDER & SOC'Y 434, 444 (2008) (developing a conception of "agency . . . embedded in religion").

26. See Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 591 (2008) (discussing how "[f]or a complex set of reasons, women and the family often serve a crucial symbolic role in constructing group solidarity").

27. E.g., *id.* at 576; Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 464 (2008–2009) [hereinafter Estin, *Unofficial Family Law*]; HAIDEH MOGHISSI, FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS 20–21 (1999).

28. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1063–64 (2004).

29. JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 45 (3d ed. 2002).

30. *Id.* at 98; MUHAMMAD JAWĀD MAGHNIYAH, *THE FIVE SCHOOLS OF ISLAMIC LAW* 359 (1995); M. AFZAL WANI, *THE ISLAMIC LAW ON MAINTENANCE OF WOMEN, CHILDREN, PARENTS AND OTHER RELATIVES: CLASSICAL PERSPECTIVES AND MODERN LEGISLATIONS FROM INDIA AND MUSLIM COUNTRIES* 49 (1995).

31. NASIR, *supra* note 29, at 80.

32. *Mahr*, meaning "reward" (*ajr*) or "nuptial gift" (*sadaqa*), 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

Like Muslim marriage, Jewish marriage is finalized according to contractual principles. The parties execute a marriage contract (a *ketubah*, pluralized as *ketubot*), often written in Aramaic,<sup>34</sup> which lists the duties of each spouse.<sup>35</sup> 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.<sup>36</sup> Based on the Torah's articulation of a husband's duties towards his wife, this contract includes requirements for adequate food, clothing, shelter, and regular intercourse, as well as the sum of a payment for the wife in the event of death or divorce (traditionally, the sum necessary for the woman to support herself for one year).<sup>37</sup>

Islamic legal institutions such as *talaq* divorce, *khul* divorce, and *faskh* divorce determine the degree to which each party may or may not initiate divorce and the different costs associated with such transactions.<sup>38</sup> According to classical Islamic family law, women have the agency to use the *khul* or *faskh* divorce, but may not use the *talaq* divorce.<sup>39</sup> The *khul* divorce is introduced judicially by the woman, with the understanding that such route will dissolve the husband's duty to pay the deferred *mahr*.<sup>40</sup> 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.<sup>41</sup> In the case of termination of marriage by *faskh* divorce, unlike *khul* divorce, the wife is entitled to *mahr*.<sup>42</sup> Finally, the *talaq* divorce (repudiation) is a unilateral act that dissolves the marriage contract through the declaration of the husband only.<sup>43</sup> The law recognizes the power of the husband to divorce his wife by saying "*talaq*" (meaning "divorce") three times without any need for him to ask for the enforcement of his declaration by the court.<sup>44</sup> However, what comes with this unlimited freedom of the husband to

marriage." PASCALE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* 9 (2010) [hereinafter FOURNIER, *MUSLIM MARRIAGE*].

33. *Nafaqah*, or maintenance, is the "husband's primary obligation" to his wife and "includes food, clothing, and lodging." JOHN L. ESPOSITO & NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 26 (2d ed. 2001); WANI, *supra* note 30, at 194–95.

34. Nowadays Hebrew *ketubahs* are also used. Jonathan Reiss & Michael J. Broyde, *Preuptial Agreements in Talmudic, Medieval, and Modern Jewish Thought*, in *MARRIAGE, SEX, AND FAMILY* 192, 202 (Michael J. Broyde & Michael Ausubel eds., 2005).

35. Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of A Religious Mandate*, 45 DEPAUL L. REV. 493, 496 (1996).

36. As put by Elliott N. Dorff and Arthur I. Rosett, "[t]he parties may determine by contract only those elements of the relationship which the law permits them to decide." *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 453 (1988).

37. Solovy, *supra* note 35, at 496.

38. Kathleen Miller, *Who Says Muslim Women Don't Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT'L L. REV. 201, 218–25 (2009) (defining and explaining the different types of divorce in Islam).

39. *Id.* at 218–25.

40. See DAWOUD EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD*, 27–28 (1996) (discussing women's possibilities of getting a divorce from their husbands and the consequence of such a divorce); Abdal-Rehim Abdal-Rahman Abdal-Rahim, *The Family and Gender Laws in Egypt during the Ottoman Period*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 96, 105 (Amira El Azhary Sonbol ed., 1996) (explaining that *khul* divorce demanded by women must be conditioned on forfeiture of any dowry and alimony).

41. See Abdal-Rahim, *supra* note 40, at 105 (outlining that women can initiate divorce for legal reasons such as impotence, lack of piety, and nonperformance of Islamic duties).

42. *Id.*

43. EL ALAMI & HINCHCLIFFE, *supra* note 40, at 22.

44. *Id.* at 23.

divorce at will in the private sphere is the (costly) obligation to pay *mahr* in full as soon as the third *talaq* has been pronounced.<sup>45</sup>

Unlike Muslim women who may initiate divorce through *khul* or *faskh*, Jewish women are not in a position to religiously divorce their husbands. In order to be “*halakhically*”<sup>46</sup> correct, a Jewish marriage may only end in the death of a spouse or the voluntary granting of a divorce (*get*) by the husband<sup>47</sup> and its simultaneous acceptance by the wife.<sup>48</sup> The husband thus has the exclusive power to deliver the *get*,<sup>49</sup> which comes in the form of a surprisingly brief written document written mostly in the Aramaic language.<sup>50</sup> The most important passage of this document essentially states that the woman is now free to marry any man and that in so doing she will not be guilty of committing adultery.<sup>51</sup> If a Jewish woman is entitled to a *get* and has not received one due to her husband’s refusal, she is referred to as an *agunah* (pluralized as *agunot*); literally, a “chained” or “anchored” woman.<sup>52</sup> Several limitations are placed on a divorced Jewish woman who wishes to religiously remarry without a *get*. First, if she marries a man civilly, the relationship is considered adulterous under Jewish law.<sup>53</sup> Therefore, the woman is never permitted to marry that man religiously.<sup>54</sup> Second, any children born to a woman who has not received a *get* are

45. ASAF A.A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 133 (4th ed. 1974).

46. *Halakha* is the entire corpus of Jewish law, which draws on the Torah, rabbinical laws, and customs. *Halakhah*, in 7 *ENCYCLOPAEDIA JUDAICA* 1156–57 (Macmillan Co., 1971).

47. See Irwin H. Haut, *Divorce in Jewish Law and Life*, in 5 *STUDIES IN JEWISH JURISPRUDENCE* 18 (1983) (“It is a fundamental principle in Jewish law that only a husband can give a *get*.”).

48. Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 *ARIZ. J. INT’L & COMP. L.* 279, 281 (2009); see Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women’s Marital Freedom*, 20 *YALE J.L. & FEMINISM* 441, 443–45 (2009) (noting that developments in Jewish law “provide[d] women with a limited fault-based divorce right and [the right] to equalize the divorce prerogative by abridging a husband’s freedom to divorce his wife against her will”).

49. The biblical foundation for this prerogative is found in *Deuteronomy* 24:1: “When a man has taken a wife and married her, and it comes to pass that she finds no favour in his eyes because he has found some unseemliness in her, then let him write her a bill of divorce and give it in her hand and send her out of his house.” This passage was interpreted as bestowing upon the husband the exclusive privilege of initiating divorce. Yehiel S. Kaplan, *Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law*, 15 *JEWISH L. ANNUAL* 57, 61 (2004).

50. Heather Lynn Capell, *After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel*, 33 *TEX INT’L L.J.* 331, 336 (1998).

51. See Haut, *supra* note 47, at 27–28, (“Since the *get* certifies divorce and establishes the termination of the marital relationship, it is necessary to have words of complete separation set forth in it. It must therefore be explicitly stated that the wife is henceforth permitted to remarry at her will.”).

52. The situation of the *agunah* is mentioned but once in the Bible, at *Ruth* 1:13. However, the Mishnah and Talmud both refer to it frequently, as does the subsequent literature in response. AVIAD HACHOEN, *THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNAH PROBLEM: BACKGROUND AND HALAKHIC SOURCES passim* (Blu Greenberg ed., 2004). Originally, this term was reserved for women whose husbands had disappeared. Unless a woman had proof of her husband’s death, she could not remarry religiously. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 *COLUM. J.L. & SOC. PROBS.* 359, 359 (1998–1999). However, the modern *agunah* problem has more to do with recalcitrant rather than missing husbands. MICHAEL J. BROYDE, *MARRIAGE, DIVORCE AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA* 3, 8 (2001).

53. Joel A. Nichols, *Multi-tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 *VAND. J. TRANSNAT’L L.* 135, 155 (2007) [hereinafter Nichols, *Multi-tiered Marriage*].

54. Margit Cohn, *Women, Religious Law and Religious Courts in Israel—The Jewish Case*, 27

labeled as a *mamzer* (pluralized as *mamzerin*).<sup>55</sup> Such children are sometimes “effectively excluded from organized Judaism,” as they are illegitimate and may never marry anyone but another *mamzer*.<sup>56</sup> Although a wife can in theory refuse a *get* issued by her husband, in practice the consequences for the husband are neither as serious nor as far-reaching as they are for an *agunah*. As put by Joel A. Nichols, “[a] man who marries without a Jewish divorce has not committed adultery, but has only violated a rabbinic decree mandating monogamy; he is nonetheless considered married to his second wife, and his children are legitimate.”<sup>57</sup>

These basic rules of Islamic and Jewish law will serve to explore the challenges posed to the recognition and identification of religious customs in Germany. These concepts will be useful to our discussion of religious law in action. However, before we get to the results of our fieldwork, we now outline the German treatment of religious family law. The German legal system very scantily recognizes Islamic and Jewish divorce law. In short, even though foreign law is made applicable to all non-German citizens, of which there are many in the Muslim immigrant communities,<sup>58</sup> *talaq* and *get* divorces are only recognized if all relevant gestures were carried out outside of German territory.<sup>59</sup> When religious law is indeed recognized for foreigners, it is applied with reference to foreign law, with no regard for the customs applied by religious communities on German soil.<sup>60</sup> Moreover, German domestic family law, which applies to German citizens, does not allow for the performance of *talaq* divorces or the compulsion and performance of *get* divorces.<sup>61</sup> As a result, German law only very rarely recognizes religious customs. Instead, the latter often remains in the private sphere of non-legal religious devotion, a space we sought to enter to better understand its internal logic.

RETFAERD [SCANDINAVIAN JOURNAL OF SOCIAL SCIENCES] 57, 66 (2004).

55. *Id.*

56. Nichols, *Multi-tiered Marriage*, *supra* note 53, at 155.

57. *Id.*

58. German immigration policy is very restrictive. 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 (*ausländer*) to become citizens. See STAATSANGEHÖRIGKEITSGESETZ [STAG] [NATIONALITY ACT], July 22, 1913, BUNDESGESETZBLATT [BGBL.] III at 102, as amended on July 15, 1999, § 40a (Ger.); see also GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I, art. 116 (Ger.), translated at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (granting citizenship to those returning to Germany “of German ethnic origin or as the spouse or descendant of such person”). Germany’s citizenship policy has thus been described as “one of the most restrictive in the EU.” Simon Green, *Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany*, 39 INT’L MIGRATION REV. 921, 922 (2005). Even with the 1993 and 1999 amendments to Germany’s Nationality Act, which made possible the process of naturalization on the basis of long-term residency or of birth in Germany, German law maintains great hostility towards double citizenship, and imposes stricter conditions than most European countries on the legal status of the parents of the children applying for German citizenship. Marc Morjé Howard, *The Causes and Consequences of Germany’s New Citizenship Law*, 17 GER. POL. 41, 53–54 (2008).

59. See, e.g., Mathias Rohe, *On the Applicability of Islamic Rules in Germany and Europe*, 3 EUR. Y.B. MINORITY ISSUES 181, 186–87 (2003–2004) (stating that German courts may recognize a *talaq* conducted in a foreign jurisdiction).

60. Einführungsgesetzes zum Bürgerlichen Gesetzbuche [EGBGB] [Introductory Act to the Civil Code], Sept. 21, 1994, BGBL. I, last amended May 23, 2011, art. 16, (Ger.), translated at [http://www.gesetze-im-internet.de/englisch\\_bgbeg/englisch\\_bgbeg.html#BGBEGengl\\_000P6](http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#BGBEGengl_000P6).

61. EGBGB art. 17(2).



The jurisdictional issue occupying German courts with respect to *talaq* and *get* divorces (“private divorces” or *Privatscheidungen*)<sup>62</sup> turns on the question of which divorce law will be applied by German courts. In Germany, conflict of laws (*Kollisionsrecht*) issues with respect to international private law (*Internationales Privatrecht*) are governed by the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*), the Introductory Act to the Civil Code.<sup>63</sup> Generally, in the case of international private law issues, the law of the country to which the person has the closest connection through citizenship will be applied, to the extent that it is held to conform to German public policy, or *ordre public*.<sup>64</sup> However, German citizenship, even if it is only one of several citizenships, will lead the court to the application of German law according to Article 5(1) of EGBGB.<sup>65</sup>

German courts have been consistent in their treatment of *talaq* divorce. Before German courts, a *talaq* divorce will be recognized only if it has been carried out entirely in a jurisdiction which allows for such a divorce.<sup>66</sup> The situation is different when the *talaq* is announced on German territory. Such a divorce will not be recognized. This is addressed in Article 17 of EGBGB, which states that in Germany, only a court can pronounce a divorce decree (the “divorce monopoly of the court” or *gerichtliches Scheidungsmonopol*).<sup>67</sup> No “private divorces” are recognized in Germany.<sup>68</sup>

The main issue concerning the recognition of a Jewish *get* divorce in Germany is the fact that German courts treat it largely as a religious practice that the husband cannot be forced to perform.<sup>69</sup> The refusal to grant the *get* is problematic for the wife, since she can legally divorce before a German court, but without the religious divorce she will remain an *agunah*. In general, German courts will not perform *get* divorces themselves, nor pressure the husband to grant the divorce, but refer the parties to the appropriate jurisdiction: rabbinical authorities.<sup>70</sup> German courts have

62. See Rohe, *supra* note 59, at 186–88 (discussing the ways in which German courts have handled Islamic marriage and divorce).

63. EGBGB, BGBL. I at 2494.

64. The application of foreign law runs contrary to public policy when its application has effects that are “obviously incompatible with, for example, the main principles of German law.” Rohe, *supra* note 59, at 185. Among these principles are human rights enshrined in the Basic Law for the Federal Republic of Germany. See GG, May 23, 1949, BGBL. I, art. 3 (Ger.) (discussing equality rights guarantees).

65. “If referral is made to the law of a country of which a person is a national and where this person is a bi- or multinational, the law applicable shall be that of the country with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life. If such person is also a German national, that legal status shall prevail.” EGBGB art. 5(1).

66. See Kurt Siehr, *Private International Law*, in INTRODUCTION TO GERMAN LAW 337, 352 (Matthias Reimann & Joachim Zekoll eds., 2005) (“Ecclesiastical courts, consular officers or private parties (under Islamic or Jewish law) have no power to dissolve a marriage *if they are acting in Germany.*”) (emphasis added).

67. EGBGB art. 17(2).

68. *Id.*; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BGBL. at 295, as amended July 27, 2011, art. 1564 (Ger.).

69. See Oldenburg Oberstes Landesgericht [OLGR] [Oldenburg Court of Appeal] Mar. 7, 2006, OLGR OLDENBURG 362, 2006 (Ger.) (noting that the use of coercion to obtain a *get* is against German public policy); Bundesgerichtshof [BGH] [Federal Court of Justice], May 28, 2008, ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FAMRZ] [FAMILY LAW JOURNAL] 1409, 2009 (Ger.) (noting that a *get* is a contractual divorce).

70. Kammergericht Berlin [KG] [Berlin Court of Appeal], Jan. 1, 1993, 41 FAMRZ 839 (839–40) (Ger.) (declining jurisdiction on Jewish divorce in favor of rabbinical authorities).

confirmed that freedom of religion exonerates Jewish men from all coercion as to the giving of the *get*, whether the coercion results from domestic court decisions or the recognition of foreign judgments.<sup>71</sup> Otherwise, German courts will probably recognize *get* divorces that were performed outside of Germany by non-Germans, but only if all legal acts were performed outside of Germany.<sup>72</sup> At the domestic level, Jewish divorces are not recognized.<sup>73</sup>

For a German citizen, German divorce laws and procedure 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.<sup>74</sup> Provisions related to divorce are found in Book 4, Title 7 of the *Bürgerliches Gesetzbuch*, the German Civil Code, at Articles 1564–68.<sup>75</sup> 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.”<sup>76</sup> A religious authority does not have the jurisdiction to grant a divorce under German law.<sup>77</sup> This is again justified by German courts on the basis of the idea that a divorce in Germany can only be pronounced by a (state) court.<sup>78</sup>

Finally, it bears notice that even though customary law (*Gewohnheitsrecht*) is recognized along with statutory law (*Gesetz*) as an official source of law,<sup>79</sup> its importance in the German legal system is very small. Indeed, German legal scholars describe customary law as having “practically no relevance to the study of law”<sup>80</sup> and as a “very limited source of new law.”<sup>81</sup> Other authors have suggested that German customary law does not exist unless it is recognized by courts.<sup>82</sup> Formal recognition of religious custom in German law is thus not yet accomplished. One exception, however, to the non-recognition of religious family customs is the possibility for Jewish and Muslim individuals to have recourse to religious arbitration. Unlike in other polities such as parts of Canada,<sup>83</sup> religious arbitration is not precluded in

71. OLGR 362 (Ger.); BGH, FAMRZ 1409 (Ger.).

72. Oberlandesgericht [OLG Düsseldorf] [Düsseldorf Court of Appeal] 1968, FAMRZ 87, 1969 (Ger.) (recognizing a *get* that was performed outside Germany).

73. 41 FAMRZ 839 (Ger.).

74. GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 285–86 (Michael Jewell trans., 4th ed. 2006). The only ground for divorce is a demonstrable *Zerrüttungsprinzip*—“an inevitable breakdown of the marriage.” NIGEL G. FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 468 (3d ed. 2002). This doctrine is found in the BGB Article 1565, which states that there is a breakdown of the marriage “if the conjugal community of the spouses no longer exists and it cannot be expected that the spouses restore it.” BGB art. 1565(1). Generally the Code requires that the spouses live apart for one year before a divorce is available, however, an earlier divorce may be granted if “the continuation of the marriage would be an unreasonable hardship for the petitioner for reasons that lie in the person of the other spouse.” *Id.* art. 1565(2).

75. BGB arts. 1564–68.

76. *Id.* art. 1564 (emphasis added); see also ROBBERS, *supra* note 74, at 285 (stating that divorce can only be obtained “by order of court”).

77. Siehr, *supra* note 66, at 352.

78. EGBGB art. 17(2); BGB art. 1564.

79. YOUNGS, *supra* note 5, at 77.

80. FOSTER & SULE, *supra* note 74, at 38.

81. NIGEL G. FOSTER, GERMAN LAW & LEGAL SYSTEM 3 (1993).

82. ROBBERS, *supra* note 74, at 22.

83. See Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, 40th Anniversary ed. OTTAWA L. REV. 67, 80 (2006) (discussing proposed Ontario laws prohibiting some religious arbitration); FOURNIER, MUSLIM MARRIAGE, *supra* note 32, at 120 (describing a ban on Shari’a law in Quebec and Ontario).

Germany, whether in family law or in other private matters.<sup>84</sup> However, this recognition of religious law is not bestowed on the basis of the binding customary nature of the norms, nor on the bindingness of religion as a legal system. It is tolerated (indeed, ignored) as a consensual, “private” matter.<sup>85</sup> It should also be noted that the possibility of religious arbitration is being heavily questioned and criticized in Germany.<sup>86</sup> We now examine the dynamics of religious law to see whether it could be recognized as customary law and, if so, what the challenges would be for the recognition and delineation of such a complex legal order.

## II. PLURAL BELONGINGS AND RELIGION’S EXTERNAL BOUNDARIES

In this section, we aim to tease out the socio-legal reality of religious custom by interviewing eight Muslim and Jewish women in Germany. The interviews took place mainly in Berlin<sup>87</sup> and were conducted in the midst of intensive networking and fieldwork in sectors of German Muslim and Jewish communities.<sup>88</sup> Our participants came from a variety of backgrounds. Two of them had converted to their current religions: one to Judaism and the other to Islam.<sup>89</sup> Some were born in Germany, while others had immigrated at various stages in their lives. None of them were extremely poor, though several were by no means well-off. Many of the women spoke English as a third or fourth language. Almost all of them were educated at the undergraduate level and worked. All of these traits must be taken into consideration when trying to draw any conclusion about what these women’s accounts say about divorce and the use of customs in Germany. We are aware that the women interviewed are not necessarily representative of their entire communities. Moreover, caution is warranted when writing about such a small sample of participants. Nonetheless, some similarities in experiences among the participants point to consistent themes.<sup>90</sup> We use a story-telling approach to the field to develop hypotheses as to the ways in which legal agents navigate the religious and socio-economic endowments that community life produces. If it is indeed difficult to draw

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84. See Mathias Rohe, *Shari’a in a European Context*, in LEGAL PRACTICE AND CULTURAL DIVERSITY 93, 97–98 (Ralph Grillo et al. eds., 2009) (discussing European allowance of private agreements on optional civil laws).

85. *Id.* at 97 (“Private autonomy is the core value of the liberal European civil law orders. Thus, in matters exclusively concerning the private interests of the parties involved, these parties are entitled to create and to arrange their legal relations according to their preferences.”).

86. For an overview of the public debates surrounding religious arbitration in Germany, see Maximilian Popp, *Parallel Justice: Islamic ‘Arbitrators’ Shadow German Law*, SPIEGEL ONLINE (Sept. 1, 2011), <http://www.spiegel.de/international/germany/parallel-justice-islamic-arbitrators-shadow-german-law-a-783361.html>.

87. 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. The plan changed, however, 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 with translators, and one participant was from outside Berlin.

88. Although we advertised for volunteers through a website (<http://talaqgetgermany.wordpress.com>), e-mails to academic groups, and public posters, the majority of volunteers came to us by word of mouth and contacts within the Jewish and Muslim communities of Berlin. This method was approved by application to the Office of Research Ethics and Integrity of the University of Ottawa.

89. Participant #5 and Participant #6.

90. The participants were all asked the same basic questions, with follow-up questions varying depending on individual answers.

policy conclusions from stories,<sup>91</sup> we hope that our preliminary findings can inspire further scientific inquiry. We also use the story-telling approach—the origins of which can be traced back into feminist jurisprudence<sup>92</sup> and critical race theory<sup>93</sup>—based on the assumption that “law can never rest on a complete picture of reality, but it can acquire a fuller, more accurate vision by accumulating stories that widen the horizon.”<sup>94</sup> In this sense, qualitative interview analysis brings new, marginalized accounts of religious customs as they are experienced by religious women and thus build on existing scholarship from its margins. More specifically, this section explores religious law’s external boundaries and its interactions with the civil law, focusing on how parties and adjudicators redesign those boundaries through legal interactions. Part III will then turn to the internal structures of religious custom, revealing the deeply contradictory treatment of religious custom in Germany. Before we present our findings, however, a brief note on the legal structures of Muslim and Jewish communities in Germany is in order.

Under classical Islamic law, the Islamic court (*qadi*) usually does not arbitrate *talaaq* divorces,<sup>95</sup> but rather adjudicates *khul* divorces<sup>96</sup> and *faskh* divorces.<sup>97</sup> 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.”<sup>98</sup> In Germany, however, there is no organized system of *qadis* with jurisdiction over family law.<sup>99</sup> In the absence of religious courts, religious leaders known as imams, a word literally translatable to “prayer leader,”<sup>100</sup> “fulfill more responsibilities that could be attributed to the Islamic religious sphere.”<sup>101</sup> Notably, German imams celebrate Islamic marriages and adjudicate divorces.<sup>102</sup> This has allowed imams to “become central figures of the community”<sup>103</sup> in Germany. Thus, the informal

91. Marc A. Fajet, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1846 (1994).

92. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (discussing the use of narrative as a feminist legal method).

93. Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1191 (1993).

94. Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 284 (1994).

95. Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 574 (2005).

96. In cases of mutual consent where the wife waives the deferred portion of *mahr*, divorce can be finalized outside the court system. However, in most cases, the parties will disagree as to the amount of *mahr* and file their respective claims with the *qadi*. Also, in some countries, such as Egypt, the wife can even obtain a *khul* divorce from the *qadi* without the husband’s consent. *Id.* at 583.

97. EL ALAMI & HINCHCLIFFE, *supra* note 40, at 30.

98. *Id.* at 29. For example, under Egyptian Law No. 100 of 1985, a wife could only obtain a *faskh* divorce if her husband habitually failed his duty to provide her maintenance, suffered from a serious disease, was absent for a lengthy period, was imprisoned for a long-term sentence, or inflicted harm on her. Abu-Odeh, *supra* note 28, at 1106.

99. See Melanie Kamp, *Prayer Leader, Counselor, Teacher, Social Worker, and Public Relations Officer—On the Roles and Functions of Imams in Germany*, in 7 ISLAM AND MUSLIMS IN GERMANY 133, 143–44 (Ala Al-Hamarneh & Jorn Thielmann eds., 2008) (explaining that imams are assigned the family law-related duties normally attributed to *qadis*).

100. *Id.* at 143.

101. *Id.* at 143–44.

102. *Id.* at 144.

103. Kastoryano, *supra* note 19, at 1237.

practices of Islamic adjudication in Germany require empirical assessment, diverging as they do from the classical Islamic *qadi* model.

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*.<sup>104</sup> This tribunal of three Jewish judges (*dayanim*) functions according to formalities born from centuries of religious tradition.<sup>105</sup> Although the *beth din* oversees the process, it does not execute the divorce. This is undertaken by the parties themselves, and more specifically by the man: “[n]o one—not the government, not the courts, not even a rabbi—is authorized to divorce a couple except for the husband.”<sup>106</sup> Therefore, the power of the *beth din* lies in its persuasive authority rather than its ability to mandate results. Historically, the *beth dins* yielded considerable power and influence over the German Jewish communities.<sup>107</sup> However, in 1945, the Jewish community and its legal structure were decimated by the Holocaust and mass exile, leading to social isolation, emigration to Israel, and deep, understandable estrangement from German society.<sup>108</sup> From that point on, German Jewish communities have relied on American, British, and Israeli rabbis, given their institutional disorganization and demographic instability.<sup>109</sup> The influence of foreign rabbis and *beth dins* was indeed recurrent in our participants’ testimonies. That being said, since 1990 there has been a tectonic shift in Jewish community dynamics. German Jews have seen the development of “an, at first, pragmatic, but, later, self assertive, if ambiguous, recognition of Germany as home,”<sup>110</sup> which in turn bred a “positive attitude toward the idea of a Jewish diaspora and a reassertion of German Jewry and its traditions.”<sup>111</sup> In parallel, there has been conclusive evidence of institutional reconstruction, for instance with the creation of a new center for rabbi training, opened in 1999 to replace the historical “Higher Institute for Jewish Studies,” which had been closed by the Nazis in 1942.<sup>112</sup> Furthermore, the year 2006 saw the ordination of the first German rabbis since World War II.<sup>113</sup> For scholars studying the German Jewish community, which has tripled in number since 1990,<sup>114</sup> these recent developments in community institutions are indications that the existing accounts of Jewish life in Germany will soon be dated. The newly ordained rabbis and their evolving communities will shape Jewish law in ways that require scholarly attention. Specifically, there will probably be more contact points between Jewish

104. Lisa Fishbayn, *Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURIS. 71, 80–81 (2008) (citations omitted).

105. *Id.*

106. Yefet, *supra* note 48, at 442–43.

107. RUTH GAY, *THE JEWS OF GERMANY: A HISTORICAL PORTRAIT* 32 (1992).

108. Y. Michal Bodemann, *The State in the Construction of Ethnicity and Ideological Labor: The Case of German Jewry*, CRITICAL SOCIOLOGY, Oct. 1990, at 35, 40.

109. See Melissa Eddy, *A New Start for Rabbis in Germany*, PHILADELPHIA INQUIRER, Sept. 14, 2006, at A12 (“But for years, Germany has had to rely on rabbis trained in England, Israel and the United States because its last Jewish seminary, the Berlin-based Higher Institute for Jewish Studies, was shuttered by the Nazis in 1942.”).

110. Y. Michal Bodemann, *Between Israel and Germany from the “Alien Asiatic People” to the New German Jewry*, JEWISH HISTORY 91, 103 (2006).

111. *Id.*

112. Eddy, *supra* note 109, at A12.

113. Editorial, *Rabbis in Germany*, THE GLOBE AND MAIL, Sept. 18, 2006, at A16.

114. Eddy, *supra* note 109, at A12.

legal orders and German civil law, as well as more adjudicatory complexities to explore.

The contemporary German Muslim context also seems to leave some space for a decline of importance of the religious sphere among immigrant communities. Recent surveys reported by *Der Spiegel* in August 2012 showed a rising will among Muslim Germans of Turkish origin to “integrate into German society” and secular institutions, along with a paradoxical increasing religiousness.<sup>115</sup> This uneven influence of the religious sphere was a recurring theme in our fieldwork. It allowed many participants to ignore or marginalize religious legal norms when it was to their advantage. The ability of some religious individuals to pick and choose normative belongings contributes in important ways to fashioning religious law in action. Many participants mentioned that the 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 . . . .

Participant #8:

Interviewer: Do you think that the civil divorce also means something in the religious community?

Participant: No. . . . I mean, . . . the community, it is not very important what they say.

Participant #1:

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 can happen, for instance, when a woman convinces the adjudicator to recognize a civil divorce, even though the latter cannot in itself lead to a religious divorce by strict application of Jewish and Islamic legal rules. Both Muslim and Jewish participants have successfully obtained such a surprising outcome before religious adjudicators:

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115. *Young Turks Increasingly Favor Integration and Religion*, SPIEGEL ONLINE (Aug. 17, 2012), <http://www.spiegel.de/international/germany/survey-turks-in-germany-willing-to-integrate-but-more-religious-a-850607.html>.

Participant #2:

Once you have the secular divorce you're also divorced in God's eyes. 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 recognize your civil divorce from Germany?

Participant: Yes, of course. He was living here, of course.

If the civil law sometimes trumps religious law, however, it should be noted that there did not seem to be any uniformity in this civil and religious interaction. In some of the cases at hand, the adjudicators refused to consider civil law decrees, sticking instead to their own internal legal rules and criteria to grant the religious divorce and to celebrate religious marriages. To these actors and adjudicators, religious law is all that matters. This was confirmed by several Muslim participants:

Participant # 1:

Interviewer: So the imam would have remarried you if you had wanted to, whether or not you got a German divorce?

Participant: He would have, yes.

Interviewer: So they don't really care about what the German law is?

Participant: No, no. They care about your marriage in God.

Participant #2:

Interviewer: Is your family religious?

Participant: Medium. No, not very.

Interviewer: So, along with the civil wedding, was there a religious wedding as well?

Participant: Yes. Everybody has to, all Muslims must [have a religious marriage].

The fact that religious law sometimes trumps civil law was also a constant among several Jewish participants. One theme was that if their families or their spouses were from Israel—where all marriages are religious<sup>116</sup>—then the German

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116. SUZI NAVOT, CONSTITUTIONAL LAW OF ISRAEL 144–45 (2007); Hanna Lerner, *Entrenching the Status-Quo: Religion and State in Israel's Constitutional Principles*, 16 CONSTITUTIONS 445, 449 (2009). A bill was passed in May 2010 to allow civil marriage for partners who are both labeled as “lacking a

civil marriage was of especially little consequence. 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 after, 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 [was], they didn't know that; they're from Israel. . . . [W]e got married in Berlin in the civil court, and when we came in the afternoon, [my husband] arrived and he said, "Where are my parents?" I said, "What do you mean, where are your parents, why didn't you invite them, why didn't you tell them?" . . . So we came in, we made one, two, three, and that was it!

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.

Here, religious and civil norms are constantly and unpredictably reconfiguring their respective spheres of influence, shedding light on the ethical imperatives that influence individuals in their interactions with one another. As our study shows, religious women (and sometimes men) will attempt to bend the religious adjudication in their favor 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, with some relational costs. This strategic process redraws the lines of the religious legal order and distributes different endowments depending on context.

In addition to considerable paradoxical interplay between the civil and religious spheres, our fieldwork suggests that even inside the religious normative order, the voices of the law are plural. In such context, the customary legal power of official figures such as imams or rabbis are at times overshadowed and influenced by other stakeholders in religious communities, such as friends, families, and members of the community. This complex battlefield—and the open-ended space it creates—is often used by parties to adopt several tactics to secure the approval or support of some stakeholders, effectively engaging in what Robert H. Mnookin and Lewis Kornhauser called "bargaining in the shadow of the law."<sup>117</sup> For instance, it may lead some to spread false rumors about the other party in order to gather support to initiate a divorce:

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religion," however, it seems to apply to only a few Israelis. HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 214, n.16 (2011).

117. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (arguing that divorce laws create a framework affecting the bargaining power of spouses in the lead-up to divorce as well as during marriage).



Participant #8:

[He told] his friends and his family, “Do you know what she told about you?” and “Do you know what she has done?” . . . [He did that] before [the divorce] because he wanted to tell everyone why he wants to do this. Because nobody wanted to accept it.

It is interesting to note the difficulty in predicting what the stakeholders’ influence will be. Sometimes, families and friends will clearly and unambiguously support a party’s decision, making bargaining futile:

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.

In all these instances, we see that the concrete implications of customary religious law are dependent on the actions of third parties. As a result, the law is constantly mediated by intricate family loyalties, community networks and friendships that interact spatially in processes akin to what Michel Foucault called the “little tactics of the habitat.”<sup>118</sup> In some instances, the case-specific stakeholder strategizing has the potential to circumvent the customary legal rules, making them ineffective. For example, while polygamy is allowed under Islamic law, subsequent wives can refuse to marry and hamper a husband’s strategy, thus prompting him to ask for religious divorce much more quickly:

Participant #8:

Interviewer: So why would he want the religious divorce so quickly?

Participant: Because he wanted this to be halal [religiously correct] . . . . For him and her [his second wife], when we are divorced he can marry her. . . . He could also marry her [without getting the divorce]. He can marry [up to] four women. . . . But she didn’t want it, I think.

Interviewer: Okay. So she wanted to make sure that he was divorced before anything.

Participant: Yes.

This perpetual redesigning of the boundaries of religious customs serves as an illustration of legal pluralism’s insight that “law arises from, belongs to, and responds to everyone.”<sup>119</sup> Normative orders such as custom do not simply exist with clear

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118. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977* 149 (1980) (discussing how power struggles manifest themselves through architectural, economic and political spaces).

119. RODERICK A. MACDONALD, *LESSONS OF EVERYDAY LAW* 8 (2002).

contours and outer limits, but are constantly created by the legal subjects themselves as the latter “participate in the multiple normative communities by which they recognize and create their own legal subjectivity.”<sup>120</sup> In outlining precisely how these processes of norm-creation unfold in specific cases, our fieldwork is inspired by scholarship in the vein of “left law and economics”<sup>121</sup> and by insights from the traditional law and economics of family life.<sup>122</sup> This theoretical approach allows us to better picture the micro-level power relations in which religious parties are entangled.<sup>123</sup> The power relations that implicate friends and family spur the parties to respond to legal rules and decisions in a strategic manner in order to maximize the benefits generated by a given rule. This helps explain much of the strategic reactions of individuals who bend the religious sphere according to their needs and turn away from it when it does not work in their favor. Such an economic view of the parties’ agency and power helps us re-conceptualize the law not as a fixed corpus that can be easily recognized and delineated, but as a messy, constantly redefined entity. This outlook led us to heed Duncan Kennedy’s call to view the legal system as “providing background rules that constitute the actors, by granting them all kinds of powers under all kinds of limitations, and then regulating interactions between actors by banning and permitting, encouraging and discouraging particular tactics of particular actors in particular circumstances.”<sup>124</sup> It is this form of “everyday law”<sup>125</sup> that we have tried to unearth in the context of religious custom, discovering that there are many on-the-ground difficulties to conceiving custom as a fixed legal entity.

120. Martha-Marie Kleinhans & Roderick A. MacDonald, *What is a Critical Legal Pluralism?*, 12 CAN. J.L. & SOC’Y 25, 38 (1997).

121. See generally Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For an analysis of legal realist-inspired law and economics and its relationship to feminist thought, see PRABHA KOTISWARAN, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA* 185 (2011).

122. For economic analyses of family life, see Lloyd R. Cohen, *Marriage: The Long-Term Contract, in THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 10* (Antony W. Dnes & Robert Rowthorn eds., 2002). See generally FRANCINE D. BLAU, MARIANNE A. FERBER & ANNE E. WINKLER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* (1998); Robert A. Pollak, *Gary Becker’s Contribution to Family and Household Economics*, 1 REV. OF ECON. OF THE HOUSEHOLD 111 (2003).

123. Our conception of power and freedom owes much to Duncan Kennedy’s seminal, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

124. Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of “Informality” Analysis*, 4 J.L. IN SOC’Y 71, 80 (2002).

125. For an empirical study of norm-generating everyday interactions, see generally PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998). See also Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life, in LAW IN EVERYDAY LIFE 21* (Austin Sarat & Thomas R. Kearns eds., 1993) (noting the “variety of ways in which society responds to law, sometimes by ignoring it, reconstructing it, or using it in novel, unanticipated ways”); Sally E. Merry, *Everyday Understandings of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253, 253 (1986) (noting “the dual legal ideologies embedded within the American lower courts[:] one . . . [being] the dominant American vision of justice provided by the rule of law, the other a situationally based lenient, personalistic vision of justice produced within the local setting”); Austin Sarat, “. . . *The Law is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344–45 (1990) (discussing legal rules for people on welfare and noting that for “welfare recipients law is not a distant abstraction; it is a web-like enclosure in which they are ‘caught’”).

### III. ADJUDICATORY CONTRADICTIONS AND RELIGION'S INTERNAL STRIFE

This section shifts the analysis to the internal mechanisms of religious law, focusing on the roles of the Islamic and Jewish adjudicators. 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*.<sup>126</sup> Macfarlane has noted that the adjudicatory role of imams is particularly inconsistent, generating wildly diverging outcomes in various factual cases.<sup>127</sup> Since, as noted earlier, German imams assume roles similar to those of their North American colleagues, we have sought to examine whether their decisions and adjudication present any consistency. Our findings mirror those of Macfarlane: religious adjudication and bargaining in Germany may lead to wildly diverging results. After having outlined the unevenness of the legal processes of creation of religious customs, we put forward a tentative explanation of this inconsistency. Rather than being a misapplication of the custom, or a new custom that supersedes the classical religious law, we explore whether the unevenness may be due to religious law's own internal structure.

Oftentimes, the substantive and procedural rules of Islamic law will be disregarded by the adjudicators and the parties. This will lead to strikingly varied results like uneven requirements for marriage celebration. For instance, the marriage will sometimes be performed in the absence of the imam, like in the case of Participant #8, even though other women, like 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].

Participant #2:

Even if you're not overly religious or not religious at all, you have to have an imam wedding.

The same selective observance of procedural and substantive rules can be noticed among certain Jewish *beth dins* and rabbis. Specifically, the *get* ceremonial

126. See JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY 23 (2012) [hereinafter MACFARLANE, SHARI'A PATH] (“Laurence Rosen in his classic study of Moroccan *shari'a* courts concludes that these courts give wide discretion to the judges, or *qadis*. . . . The interpretation and application of Islamic law by North American imams appears to adopt the same tradition of contextualization described by Rosen and others.”).

127. See Julie Macfarlane, *Practicing an 'Islamic Imagination': Islamic Divorce in North America*, in DEBATING SHARIA: ISLAM, GENDER POLITICS AND FAMILY LAW ARBITRATION 35, 45 (A. Korteweg & J. Selby eds., 2012) (noting that adjudicating divorce is one of the most inconsistent areas of an imam's practice).

requirements were sometimes bent by the rabbis, who would create their own *get* procedures, humiliating and insulting women:

Participant #4:

[The rabbi] invented a ceremony for me . . . . He asked me through his secretary to come with a hat on my head and dressed with long sleeves. And it was July, it was very hot. . . . So after he finished insulting me, . . . he told me “Go to the wall. Come back. Go to the wall. Come back.” And then, he told me to take this paper and put it [inside my dress]. . . . [He said] “No, it must be deeper on your breast.” I was sure that it was something special for me, because I couldn’t imagine that it was part of the ceremony. And then I took it out, and he said “Give it to me now, and then go there again” . . . and I don’t remember if he said something, and then he cut it, and . . . that was the story.

However, interestingly, other religious adjudicators bend the procedural rules in favor of women. It would thus seem that the vagaries of customary 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:<sup>128</sup>

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: . . . It 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 illustrated by the case of the grounds for divorce. Under Islamic law, grounds to issue a decree of the Islamic *faskh* divorce include impotence on the part of the husband, insufficient material support and companionship (“the loneliness of the marriage bed”), non-fulfillment of the marriage contract, mental or physical abuse, or a husband’s lack of piety.<sup>129</sup> However, some imams apply these divorce grounds unevenly, being reticent to grant divorce for insufficient material support and

128. JAMILA HUSSAIN, *ISLAM: ITS LAW AND SOCIETY* 120–25 (3d ed. 2011).

129. See Abdal-Rahim, *supra* note 40, at 105; ESPOSITO & DELONG-BAS, *supra* note 33, at 50–52.

physical abuse, while favoring divorce claims on grounds of homosexuality or impotence:

Participant #1:

. . . If 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] . . . .

Likewise, we have found that some imams are reluctant to enforce post-divorce alimony, even though the woman is entitled to three months of additional maintenance under Islamic law:<sup>130</sup>

Participant #2:

Normally, [alimony] is in our religion but the imam doesn't do it anyway. Once you're divorced, you reach another status, you're no longer important in a sense . . . . The only time the imam puts any pressure is if you don't fast during Ramadan, if you don't go to the mosque and stuff like that. So it's really selfish, but whether you have food or not [is not important]. Yes, help the poor, but whether or not you and your children are starving doesn't interest him really, as long as you still come to pray half starved, he doesn't care.

*Mahr* also 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.

Participant #8:

Interviewer: What was the process for the religious divorce, after he called your parents, your dad?

Participant: He came with his brother. And my father and his brother, they were the witnesses. And then he said three times the *talaq*, and that was it.

Interviewer: Okay. And so there was nothing, no amount he had to give you for *mahr*, because anyhow—

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130. NASIR, *supra* note 29, at 142.

Participant: No.

Interviewer: Okay, it was just symbolic.

Undoubtedly, the inconsistencies in the application of religious customs often stem from arbitrary applications of the law, a phenomenon exacerbated by the informality surrounding religious customary law in Germany. However, we will now advance a different explanation for the pervasive inconsistencies in the adjudication of Islamic and Jewish law. 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.

Many Islamic legal rules are, in fact, dependent on bargaining power and strategic behavior in order to be binding. Their meaning has to be worked out by particular individuals in a particular set of circumstances. For instance, if a man repudiates his wife by issuing three *talaq*, the divorce is binding despite the wife's lack of consent.<sup>131</sup> The apparent potential for extortion of the *talaq* divorce has long been recognized in the literature on Islamic divorce.<sup>132</sup> However, the formally unequal rules of *talaq* play out differently in practice depending on the amount attached to *mahr* in the marriage contract. Islamic jurists conceived *mahr* as a powerful limitation on the possibly capricious exercise of the *talaq* as well as a form of compensation to the wife once the marriage has been dissolved.<sup>133</sup> Indeed, if *mahr* is very high, chances are the husband will hesitate before repudiating his wife. As put by Homa Hoodfar, "the larger the sum of *mahr*, the more effective the wife's leverage."<sup>134</sup> In most cases, this constitutes a source of security for wives who do not want to divorce. However, for those who do want a divorce,<sup>135</sup> high *mahr* can be disconcerting: it may only be at the price of behaving in a disgraceful manner that the woman can obtain a *talaq* from her husband.<sup>136</sup> Some participants' experiences offered interesting illustrations of various Islamic doctrines clashing with each other to produce asymmetrical bargaining positions. For instance, some participants described the unwillingness of their husbands to divorce them because of *mahr*. When the women indeed wanted to obtain divorce, some have had to waive *mahr*:

Participant #7:

131. See HUSSAIN, *supra* note 128, at 120 ("[A husband] can effect a divorce simply by pronouncing a *talaq* at the appropriate time and under the appropriate conditions. . . . This can be done by the husband at will and without any prior formalities. . .").

132. Judith Romney, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1, 17 (1982); Hindun Anisah, *Divorce, in ISLAMIC FAMILY LAW AND JUSTICE FOR MUSLIM WOMEN* 31, 41 (Nik Noriani Nik Badlishah ed., 2003).

133. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 167 (1982); NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 207-08 (1964).

134. Hoodfar, *supra* note 24, at 131.

135. This can often be the case. For instance, Judith Tucker, in analyzing peasant women in nineteenth-century Egypt, affirms that "[r]ecognizing, on balance, the material advantages of *talaq*, many women who wanted a divorce preferred that their husbands repudiate them." JUDITH E. TUCKER, WOMEN IN NINETEENTH-CENTURY EGYPT 55 (1985).

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

Participant: . . . We tried twice to make this divorce and the second time, when I gave him the money, he was more easy to divorce, like to get him to agree.

Interviewer: The money from your marriage contract that you were keeping for him?

Participant: Yes, yes. He wouldn't, he didn't want to divorce me without getting the money.

. . . .

Participant: I am for civil marriage and I will never get married according to Islamic law again. . . . He could have said, "I wouldn't give you a divorce at all if you don't give me the money." . . . We could have stayed like that for ten years if he wouldn't have divorced, and he could marry and divorce as much as he can and I don't have this kind of flexibility . . . .

In addition to *mahr*, the Qur'anic doctrine of the *idda* also modulates the bindingness of *talaq* divorce. This three-month waiting period after the man's pronouncement of the first *talaq* gives him time to reconsider his actions, withdraw the pronouncement of divorce, and potentially reconcile.<sup>137</sup> However, during this time, the husband is obliged to provide financially for the woman.<sup>138</sup> If the woman does prove to be pregnant, the support obligation will be extended until the birth of the child.<sup>139</sup> The husband could, even against his wife's will, take her back during the waiting period.<sup>140</sup> It is also theoretically open to the husband to take his wife back at the end of the *idda* period only to divorce her again, leaving her in what Joseph Schacht called "divorce limbo."<sup>141</sup> The Qur'an recognizes this possibility and specifically prohibits it, supplying the wife with an offsetting religious claim.<sup>142</sup> Indeed, to conform to Qur'anic requirements, reconciliation must be genuine and not entered into for the purpose of influencing the woman to give up *mahr*.<sup>143</sup>

Thus, upon closer look, the bindingness of the *talaq* divorce is revealed as highly contingent upon other religious institutions such as *mahr* and *idda*, which interlock with the *talaq* in complex, contradictory ways. The *talaq* will be applied differently according to the circumstances, depending on the bargaining interests of the parties, who will or will not push for a divorce depending on *mahr*, *idda*, and myriad other legal doctrines and religious and socio-economic interests. These various religious doctrines can be manipulated by bargaining spouses to affect the bindingness of the *talaq* and the outcome of the divorce proceedings.

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

137. Miller, *supra* note 38, at 214.

138. NASIR, *supra* note 29, at 142.

139. Joseph Schacht, *Talak*, in *ENCYCLOPAEDIA OF ISLAM* 151, 152 (P. J. Bearman et al. eds., 2000).

140. See QUR'AN 65:1–65:4 (declaring that Allah contemplates reunions).

141. Schacht, *supra* note 139, at 151.

142. QUR'AN 4:24.

143. Schacht, *supra* note 139, at 151.

recourse.<sup>144</sup> Hence, the opportunity for “strategic behavior”<sup>145</sup> in civil divorce proceedings is remarkable, making the *get* a potential tool for blackmail.<sup>146</sup> Lisa Fishbayn writes that “the power men enjoy under Jewish law to withhold a *get* is of concern to civil law because this power becomes an effective bargaining endowment in the resolution of civil family law disputes.”<sup>147</sup> In its seminal *Bruker v. Marcovitz* decision pertaining to the awarding of damages for *get* refusal,<sup>148</sup> the Supreme Court of Canada similarly suggested that “the spouse could say, ‘Give up your claim for support or custody of the children and I will offer the *get*.’”<sup>149</sup> The *get* thus appears at first glance as a potential unilateral blackmailing tool. That being said, the Jewish *agunah* has been provided with some countervailing bargaining instruments. If Jewish women cannot grant the *get* of their own initiative,<sup>150</sup> they may refuse their husbands’ *get*, which will prevent rabbinical authorities from dissolving the marriage contract.<sup>151</sup> 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.<sup>152</sup> Jewish men who are citizens of Israel may respond to this bargaining by obtaining an official permission to marry a second wife from an Israeli rabbinical court, effectively circumventing the wife’s refusal.<sup>153</sup> Although bigamy is prohibited under Israeli law, a permit obtained by a rabbinical court to marry a second wife is a valid defense to the crime of bigamy.<sup>154</sup> Throughout the first half of the 1990s, the Israeli rabbinical courts had issued an average of eleven permits per

144. See Estin, *Unofficial Family Law*, *supra* note 27, at 464 (pointing out the complications posed by the intersection of civil and religious law, specifically how recognition of a particular mechanism in one system does not guarantee recognition of that mechanism in the other system).

145. *Id.*

146. Joel A. Nichols notes several examples from the United States: “[O]ne recalcitrant husband agreed to issue a *get* only after receiving \$15,000 and a promise that his former wife would not press assault charges against him after he broke her leg. Other examples include a woman who mortgaged her house for \$120,000 to pay the amount demanded by her husband for issuance of a *get*, a woman who was forced to drop charges against her husband for sexually abusing their daughter so that she might obtain a *get*, and the increasing demands of a recalcitrant husband who asked for \$100,000 (which he received), then \$1 million, and then his wife’s father’s pension—in addition to demanding full custody of the children.” Nichols, *Multi-tiered Marriage*, *supra* note 53, at 158 (citations omitted).

147. Fishbayn, *supra* note 104, at 85 (citations omitted).

148. *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 (Can.).

149. *Id.* para. 8.

150. It is regarded as against the spirit of Jewish Law for a wife to be able to dismiss her husband by granting him the *get*. See MOSES MIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE AND ITS RELATION TO THE LAW OF THE STATE* 118 (1987) (describing the divorce process under Mosaic and traditional law as initiated by the husband even when a wife is wronged).

151. See *id.* at 120 (describing the rabbinical rule according to which a wife cannot be divorced against her will, except in certain circumstances).

152. Although little evidence exists with regard to the frequency at 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 2006, “some 180 women are ‘chained’ to their husbands, while a slightly higher amount of men are ‘chained’ to their wives.” Hillel Fendel, *Rabbinate Stats: 180 Women, 185 Men ‘Chained’ by Spouses*, ISRAEL NATIONAL NEWS (Aug. 23, 2007), <http://www.israelnationalnews.com/News/News.aspx/123472>. In nearly 350 divorce cases that were active as of 2005, 19% of the cases continue to be unresolved because of the man’s refusal to grant a *get*, while 20% of the cases showed that women failed to cooperate with the divorce proceedings. *Id.* Among the reasons cited for this “divorce blackmail” were the negotiation of custody agreements and spousal support. *Id.*

153. Blecher-Prigat & Schmuely, *supra* note 48, at 282.

154. *Id.*; Yifat Bitton, *Public Hierarchy and Private Harm: Tort Law as a Remedy for Gender Inequality in Israeli Family Law*, in (RE)INTERPRETATIONS: THE SHAPES OF JUSTICE IN WOMEN’S EXPERIENCE 115, 120 (Lisa Dresdner & Laurel S. Peterson eds., 2009).



year to marry a second wife.<sup>155</sup> One of the conditions to obtain such a permit is for the court to find that the wife is refusing the *get*.<sup>156</sup> However, it is interesting to note that singling out which party is refusing in a context of intense economic bargaining can be a complicated line-drawing exercise. For example, if the husband attempts to pressure the wife into foregoing alimony in exchange for the *get*, is the woman refusing the *get*? If the husband is trying to negotiate a more advantageous custody agreement and is momentarily withholding the *get* until the wife accepts the agreement, is this a case of *get* refusal? The Israeli rabbinical courts may be confronted with similar legal dilemmas in which Jewish legal rules conflict with each other.<sup>157</sup> A line has to be drawn between refusing the *get* and negotiating over its granting. Some of our participants' experiences illustrated very well the indeterminacy of such religious rules. These participants' husbands went to Israel to (successfully) argue that the women were refusing the *get*, even though the husbands had never even attempted to give the *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*.

Given the possibility for both men and women to refuse the other party's bargain over the *get*, the law creates a gap that has to be filled by the adjudicator deciding exactly who is refusing the other party's terms. Indeed, Ayelet Blecher-Prigat and Benjamin Shmueli report that many Israeli rabbis hold that when refusal to give the *get* is used by the husband as a bargaining tool, it is the woman who is refusing to receive the *get*.<sup>158</sup> However, that outcome is not dictated by the internal structure of the legal rules involved. Rather, a process of strategizing, persuasion, and choice is happening before rabbinical courts.

It would seem that religious law's inconsistencies stem not from its misapplication, but from its internal structure. Our field work on the workings of religious customs 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

155. RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 243 (2004).

156. Blecher-Prigat & Shmueli, *supra* note 48, at 282.

157. Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *A 'Deviant' Solution: The Israeli Agunah and the Religious Sanctions Law*, in *MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES* 89 (Mavis Maclean & John Eekelaar eds., 2013) (analyzing Israeli Jewish law and conducting fieldwork in Israel).

158. Blecher-Prigat & Shmueli, *supra* note 48, at 283.

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."<sup>159</sup> This quote can also apply to Islamic custom, as we have sought to demonstrate. The religious rule according to which *talaq* is unilateral, but creates an obligation to pay *mahr*, makes Islamic divorce an unstable legal system over which parties will fight economically and religiously. Its binding nature is obscured by this bargaining process, making every factual case unique. Hence, religious customs do not seem to be a homogeneous body of oppressive rules but an open-ended toolbox, which is 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<sup>160</sup> and Islamic law<sup>161</sup> is interesting in this regard, as it underlines that religious custom is, in fact, malleable and can be invoked to support many conflicting conclusions. These findings are quite problematic for the project of recognizing customary law as a bottom-up or faith-based legal system, not only because customary law may be lacking on the level of gender equality, but also, and most importantly, because the boundaries of customary religious law are constantly being redefined. To formally recognize these legal rules and practices by entering into a process of crystallization would thus lead to many unpredictable distributive consequences, which must be acknowledged and studied empirically before the fruitful conversation on the nature of customary law can continue.

159. Susan Weiss, *Israeli Divorce Law: The Maldistribution of Power, Its Abuses, and the "Status" of Jewish Women*, in *MEN AND WOMEN: GENDER, JUDAISM AND DEMOCRACY* 53, 63 (Rachel Elior ed., 2004); see also Philippa Strum, *Women and the Politics of Religion in Israel*, 11 *HUM. RTS. Q.* 483, 496 (1989) ("The problem is not *halacha*, . . . but who interprets it.") (internal quotation marks omitted).

160. See, e.g., NAOMI GRAETZ, *UNLOCKING THE GARDEN: A FEMINIST JEWISH LOOK AT THE BIBLE, MIDRASH AND GOD* 4 (2005) ("[S]ince feminism is inseparable from our religious orientation and is viewed as part of our concepts of spirituality and holiness, its teachings must be integrated. We bring to the texts questions from our time and seek to uncover meanings . . . that relate to these questions."); TAMAR ROSS, *EXPANDING THE PALACE OF TORAH: ORTHODOXY AND FEMINISM* xvi (2004) ("[F]eminism need not be seen as a threat to traditional Judaism . . ."); Esther Fuchs, *Jewish Feminist Scholarship: A Critical Perspective*, in 14 *STUDIES IN JEWISH CIVILIZATION* 225, 225 (Leonard J. Greenspoon et al. eds., 2003) (describing feminist Jewish scholarship as being "a new field of study"); Judith Hauptman, *Feminist Perspectives on Rabbinic Texts*, in *FEMINIST PERSPECTIVES ON JEWISH STUDIES* 40, 43 (Lynn Davidman & Shelly Tenenbaum eds., 1994) ("[T]here has been an explosion in the number of recently published popular works on feminism and Judaism."); Norma Baumel Joseph, *Jewish Law and Gender*, in 2 *ENCYCLOPEDIA OF WOMEN AND RELIGION IN NORTH AMERICA* 576, 588 (Rosemary Skinner Keller & Rosemary Radford Ruether eds., 2006) ("Since the legal system was established as a responsive one, much of [Jewish law's] content can be addressed in today's language and terms, using women's experience to pry it open."); ISAAC SASSOON, *THE STATUS OF WOMEN IN JEWISH TRADITION* vii (2011) ("[T]he presence of feminist research in religion has been intensified because there is more at stake than simple scholarly investigation.") (quoting CAROL MEYERS, *DISCOVERING EVE: ANCIENT ISRAELITE WOMEN IN CONTEXT* 6 (1988)).

161. See, e.g., LEILA AHMED, *WOMEN AND GENDER IN ISLAM* 63 (1992) (arguing that the voice of Islam can be "stubbornly egalitarian"); ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN 2 (2002) (arguing that "the Qur'an's epistemology is inherently antipatriarchal"); AMINA WADUD, *QUR'AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE* 79–80 (Oxford Univ. Press ed. 1999) (1992) (emphasizing that women can benefit from the "broader Qur'anic wisdom which aims at harmonious reconciliation"); FATIMA MERNISSI, *BEYOND THE VEIL: MALE-FEMALE DYNAMICS IN MODERN MUSLIM SOCIETY* 50–52 (Indiana Univ. Press rev. ed. 1987) (arguing that the *talaq* is an Arabian tradition which the Prophet himself did not live by).

## CONCLUSION: LEGAL SCHOLARSHIP IN TIMES OF DIASPORA AND MIGRATION

This Article has outlined several conceptual difficulties and challenges to seeing religious law as a social, harmonious sphere of identity that can be easily captured and recognized by the state. Part II has explored the processes through which the external boundaries of the customary religious order come to be defined. It revealed a recurring phenomenon in our fieldwork: the incessant cross-cutting of civil and customary religious orders. In fact, the cases at hand show that religious custom is deeply entangled with the civil law, the shadow of which is always lurking over social interactions in the customary legal space. For instance, religious parties often brandish civil law to influence religious outcomes or marginalize customary religious law. However, this process is not by any means constant or unidirectional. Indeed, the religious haunts the civil as well, sometimes overriding it completely. As a result, religious legal subjects are busy constantly redrawing the lines of these competing normative orders, such that clear-cut recognition of the boundaries of one or the other is practically unworkable.

Part III then shifted to the internal contours of religious custom, outlining its many conflicting treatments and invocations. In our sample, several parties and adjudicators were able to bend the religious rules to favor one party or the other, making it easy to consider religious law as a set of conflicting legal rules to be manipulated by bargaining men and women. Finally, our fieldwork helped form a hypothesis: religious law's malleability is neither due to arbitrary, bad law-making, nor to new customs that diverge from the black-letter religious law. Instead, the contradictory outcomes are closely related to religious law's indeterminacy, its internal gaps, conflicts, and ambiguities, which leave the door open to choice, agency, and strategic behavior in legal interpretation.<sup>162</sup> If this is so, the road to the formal recognition of custom will be fraught with difficulties, which should be acknowledged and studied closely through socio-legal fieldwork and doctrinal analysis.<sup>163</sup>

We do not consider these traits, however, to be peculiar to religious legal orders. In fact, we would argue that our hypotheses can be extended to other customary legal orders, as well as to state law. Indeed, a huge body of literature has already studied the indeterminacy and internal contradictions of non-customary (state) law.<sup>164</sup>

162. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 180–81* (1997).

163. It does not follow from our analysis that religious customs should never be recognized, nor do we suggest that civil state law is better than customs or that it is more determinate or egalitarian. Our argument does not align with secular feminists who emphasize the need to value civil law over religious law to preserve the interests of women. *See generally*, Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Joshua Cohen et al. eds., 1999); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 *COLUM. J. GENDER & L.* 154 (2003). Instead, we argue that any attempt to recognize religious law as customs must take into account the instabilities and indeterminacy of religious law.

164. *See, e.g.*, KENNEDY, *supra* note 162, *passim* (discussing the contradictory and indeterminate structure of legal argument which allows ideology to permeate adjudication); Pascale Fournier, *Transit and Translation: Islamic Legal Transplants in North America and Western Europe*, 4 *J. COMP. L.* 1 (2009) (discussing comparative law and the challenges of treating a single nation's laws as a coherent, determinate body of knowledge); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *HARV. HUM. RTS. J.* 101, 116–17 (2002) (pointing out that despite the high expectations placed upon

What provisory conclusions can we draw from our exploration? Scholarship around the recognition of customs has too often focused our attention on comparing legal orders (official law versus non-official law; rules versus norms; civil law versus religious law, etc.) and not enough on the hybridity produced by such interaction and the import and export dialogue that makes the jurisdictional or territorial model unstable. This instability should be better embraced, bringing us a little closer to individuals and the background rules and norms that shape their movement.

If our study does not pretend to offer a perfect policy alternative to multicultural recognition, it offers an awareness of the complexity of legal orders and of the unintended consequences of certain policy choices. It also aims to contribute to a much-needed discussion of the distributive impact of legal recognition of plural normative orders. In a context where international migration and transnational flows of people are ever-increasing, it is imperative for law to take stock of the many conflicting implications of proposed policies. A much-needed turn to private relational dynamics thus seems to be lacking in legal scholarship on minority legal systems and customary law. To be sure, brilliant legal accounts of the complex hybridity of legal identities and belongings have been emerging.<sup>165</sup> Fascinating fieldwork has also been produced on the topic of legal subjects' navigation of informal, religious legal orders.<sup>166</sup> However, a broader turn towards the empirical study of these socio-legal complexities will become even more necessary as time progresses.

Artists have provided us with interesting material to better conceptualize the power of normative pluralism in religious settings. As put by New York-based, Montreal-born Jewish writer Emmanuel Kattan, in this new global context, questions of faith and religion “put in place invisible borders inside the very heart of beings.”<sup>167</sup> His latest novel, *Les lignes de désir*, published in October 2012, depicts the journey of Sara, a woman born to a Jewish father and a Muslim mother, as she moves to Jerusalem to explore her superseding, internally conflicting identities (she is officially neither Jewish—born of a Jewish father—nor Muslim—born of a Muslim mother). Can customary law provide conceptual tools to picture the story of Sara? Which religious script would speak on her behalf, if any? How does state law interact or interfere with two religious systems which erase Sara's religious affiliation? The case

the law, legal outcomes are not free of the political influences that affect other areas of life); Kerry Rittich, *Who's Afraid of the Critique of Adjudication? Tracing the Discourse of Law in Development*, 22 *CARDOZO L. REV.* 929 (2000) (discussing the open-ended nature of the legal system that leaves judges room to maneuver and to pursue ideological projects within the law); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 *QUINNIPIAC L. REV.* 339, 341–45 (1996) (discussing indeterminate legal propositions that equally support an outcome in favor of the plaintiff and of the defendant).

165. See generally, Davina Cooper, *Talmudic Territory? Space, Law, and Modernist Discourse*, 23 *J.L. & SOC'Y* 529 (1996) (discussing the impact of social geography on conflicts between various identities and affiliations); Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World: Or How Sometimes Losing Your Asalah Can Be Good for You*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 152 (Annelise Riles ed., 2001) (giving a path-breaking historical account of post-colonial legal hybridity in Egypt); Shauna Van Praagh, *The Chutzpah of Chasidism*, 11 *CAN. J.L. & SOC'Y* 193 (1996) (discussing the ways in which individuals are influenced by different legal orders and combine these different legal orders to create unexpected outcomes).

166. See generally, Angela Campbell, *Bountiful's Plural Marriages*, 6 *INT'L J.L. CONTEXT* 343 (2010) (discussing the polygamist community of Bountiful, British Columbia); MACFARLANE, *SHARI'A PATH*, *supra* note 126, *passim* (discussing the development of Islamic law in North America).

167. EMMANUEL KATTAN, *LES LIGNES DE DÉSIR [THE LINES OF DESIRE]* *back cover* (2012) (our translation, “instaurent des frontières invisibles au cœur même des êtres”).

of Canada-based playwright Wajdi Mouawad is also interesting in this regard. Mouawad, born in Lebanon, educated in France, and raised in Canada, exemplifies the figure of the exilic, hybrid being. Mouawad's art vividly embodies the superposing, cross-cutting cultural belongings of transnational migration, as "the poeticity of his plays written in French camouflages the oral traditions of Arabic storytelling, with its specific rhythms and syntactic designs."<sup>168</sup> By the very internal rhythmic structure of his text, the exilic playwright teaches us about the complexities of culture, belonging, and identity in an age of migration. Can Mouawad's artistic insights shed light on legal reform projects? Hopefully, art and theatre can enrich the lawyers' gaze by, in German playwright Bertolt Brecht's words, "stripping the event of its self-evident, familiar, obvious quality and creating a sense of astonishment and curiosity about them."<sup>169</sup> Armed with this curiosity, legal scholars can perhaps begin the study of customary and religious legal orders afresh.

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168. Yana Meerzon, *The Exilic Teens: On the Intracultural Encounters in Wajdi Mouawad's Theatre*, 30 THEATRE RESEARCH IN CAN. 82, 97 (2009); see generally WAJDI MOUAWAD, *TIDELINE* (2002) (a play chronicling a young man's quest for his identity as he travels to his hometown to bury his father).

169. Peter Brooker, *Key Words in Brecht's Theory and Practice of Theatre*, in THE CAMBRIDGE COMPANION TO BRECHT 185, 191 (Peter Thomson & Glendyr Sacks eds., 1994) (quoting BERTOLT BRECHT, *GESAMMELTE WERKE* [COLLECTED WORKS] XV, at 301).

