

**A SYSTEMS THEORETICAL AND REFLEXIVE LAW
FRAMEWORK FOR THE REGULATION OF RELIGIOUS
FAMILY LIFE**

Doctor of Philosophy in Law

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ABSTRACT

What is the best institutional relationship between law and religion in family life? This question arises in response to a double-bind: some individuals within religious groups experience discrimination in their communities. However, in seeking civil remedies these individuals may be forced to abandon parts of their religious identities: they struggle to express themselves as both religious individuals *and* bearers of human rights because the systems that mediate their experience of the world make absolutist demands upon them.

This Thesis makes three central contributions based on reflexive law:

First, it identifies reliance on direct, command and control interventions in religious and family life as a common thread across existing models. Despite different conceptual positions on the relationship between law and religion, these interventions have tended to *rely on* and *assume* direct forms of State regulation.

Second, it argues that systems are resistant to these direct, external interventions, leading to a trilemma: ineffectiveness, unresponsiveness or incoherence. This Thesis uses the trilemma as an analytical lens to deconstruct the examples of *mahr* agreements and religious divorce across four example jurisdictions: UK, Canada, India and Israel. This analysis establishes two criteria to structure decisions about the circumstances and manner of State interventions in family life: first, interventions should preserve functional differentiation and communicative freedoms. Second, interventions ought to be justified according to the normative criteria of relational autonomy, substantive equality and care. These criteria – reflexive and normative - are interwoven: reflexivity is underpinned by values and in turn these values are necessary for this vision of a functionally differentiated society.

Third, this Thesis proposes a reflexive model for devising particularised, indirect interventions intended to alter these systems and modify power structures. This Thesis defends an arrangement that promotes bounded self-regulation of religious family life through a decentralised, collaborative and democratically experimental model.

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CHAPTER 1

INTRODUCTION

<i>Introduction</i>	<i>1</i>
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Introduction

In some family situations, law and religion seek to impose conflicting obligations on individuals or espouse inconsistent values. This tension places the individual within overlapping systems of social life with each employing its own rules and each demanding full attention. For those who are most vulnerable to the effects of this tension – namely, women – these consequences can be serious. Religious dispute resolution and religious family laws have existed for centuries, across faiths and

jurisdictions.¹ Believers, escaping institutionalised discrimination, following the rules of their faith or seeking to plan their private lives around their deeply held values have long turned to their communities, religious institutions and leaders to arbitrate their disputes and help arrange their lives. In more recent years, countries with uniform, (formally) secular family law systems like Canada and the UK have witnessed the rise of autonomy as a value in family law and the parallel privatisation, cost savings and individualisation of family justice.² This development has been given form through the rise of Alternative Dispute Resolution (ADR) more generally with couples seeking more control over the terms and forums for their family disputes.³ At the same time, with ever diversifying communities, established ideas about the regulation of family life in a multicultural society have been shaken to the core.⁴ In other jurisdictions, plural legal systems have long existed and have faced challenges against the ways these systems treat religious groups differently and expose the more vulnerable members within these groups to potential harms.⁵ Nonetheless, the same challenge of how best to treat these people as both religious individuals *and* bearers of rights is pertinent under

¹ Nicholas Walter, 'Religious Arbitration in the United States and Canada' (2012) 52 Santa Clara Law Review 501; Vandana Singh, 'Alternative Dispute Resolution in Islam: An Analysis' (2017) 1 Indian Law Institute Law Journal 137.

² Samia Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017); Audrey Macklin, 'Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration' (2013) 9 International Journal of Law in Context 343.

³ Alison Diduck, 'Autonomy and Family Justice' (2016) 28 CFLQ. See also, *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam); [2014] WLR 2299 [15].

⁴ Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Hart Publishing 2015).

⁵ Marc Galanter and Jayanth Krishnan, 'Personal Law and Human Rights in India and Israel' (2000) 34 Israel Law Review 101; Daphna Hacker, 'Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts' (2012) 27 JLR 59.

any arrangement in which law and religion interact with family life.⁶ This, in turn, leads to the challenge that Shachar identifies as the ‘paradox of multicultural vulnerability’: the fact that increasing accommodation and recognition of religious ‘laws’ results in greater conflict with civil and other human rights – in particular, as these relate to equality of gender and sexuality.⁷ Yet, although religious individuals often have the power to choose which norms should govern their family lives, as Ahmed argues:

... the exercise of this power to choose in favour [of] the general secular law appears to attract adverse consequences for [vulnerable individuals]. In particular, it harms a personal need of great importance – their social bonds.⁸

A consequence of all these trends is the coming together of religious liberty and minority rights with this commitment to autonomy in family law, creating the conditions for a more expansive role for religious institutions and norms in secular, democratic countries and questions over the continued appropriateness of plural systems of family or personal law.⁹ At the heart of this tension is the tendency of both law and religion to demand the allegiance of the believer, diminishing their ability to freely access a range of social projects and identities.

This tension is the central challenge which this Thesis seeks to address. It does so by way of two core and interconnected concepts: a modified systems theoretical

⁶ Cyra Akila Choudhury, ‘(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India’ (2008) 17(1) *Columbia Journal of Gender and Law* 45.

⁷ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001); Ayelet Shachar, ‘Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law’ (2008) 9 *Theoretical Inquiries in Law*. See also, Russell Sandberg, ‘The Right to Discriminate’ (2011) 13 *Ecclesiastical Law Journal* 157.

⁸ Farrah Ahmed, ‘Personal Autonomy and the Option of Religious Law’ (2010) 24 *IJLPF* 222, 230.

⁹ Shachar, ‘Privatizing Diversity’ (n 7).

account of law, religion and society; and a reflexive model of secularity.¹⁰ By way of definitions, ‘reflexivity’ refers to the application of a concept to itself such as the *regulation of self-regulation*, the norms of norm selection or procedures for ascribing procedures.¹¹ Moreover, ‘secularity’ is largely understood in systems theoretical terms as the systemic and individual freedom *to* and *from* religion as is necessary for the communicative freedoms required for participation in social life through a range of social systems.¹² This conception of reflexive secularity, whilst having broader application, is developed in this Thesis with respect to the specific system of ‘family’ life. The unique quality of the ‘family’ as a system is that ‘families are a subsystem that fulfills the function of including a participant in communication as a whole person.’¹³

This Thesis is an exercise in applied, normative theory as it situates the doctrinal rules within their contexts and relates these to a broader, overarching theoretical project. Chapters 2, 3 and 4 should be read together as relating legal *practice* and *normative values* in a process of reflective equilibrium.¹⁴ In another sense, this Thesis

¹⁰ Niklas Luhmann, *Social Systems* (Stanford University Press 1995); Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert and Fatima Kastner trs, Oxford University Press 2004); Niklas Luhmann and André Kieserling, *A Systems Theory of Religion* (Stanford University Press 2013); Ino Augsberg, ‘Religious Freedom as “Reflexive Law”’ in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging* (OUP 2014); Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239; Jean L Cohen, *Regulating Intimacy: A New Legal Paradigm* (2nd print., 1st paperback print, Princeton 2004).

¹¹ Andrew Arato, ‘Procedural Law and Civil Society’, *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998) 35.

¹² Gert Verschraegen, ‘Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory’ (2002) 29 *Journal of Law and Society* 258, 275.

¹³ Claudio Baraldi, Giancarlo Corsi, Elena Esposito, Katherine Walker (trs) *Unlocking Luhmann* (Bielefeld University Press 2021) 239.

¹⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Reprinted, Polity Press 2010) ch 3.

is a form of comparative project as it takes as examples the laws in four contrasting jurisdictions: England, Canada, India and Israel.¹⁵ However, this is not a true *comparative* mode of analysis but instead regards these jurisdictions as being emblematic of differing ways of negotiating the relationship between family laws and religion. It is, therefore, better to view the jurisdictional examples as ‘historically contingent communicative practices’ which form part of the constructivist approach to justifying and explicating the reflexive model of secularity and the human rights values defended in Chapter 6.¹⁶ This methodological approach will be expounded further in Parts 4 and 5, below, as well as in Chapter 3.

This Introduction develops the themes so far discussed in five Parts. First, it lays out the essential background and context to this Thesis by situating the discussion of the challenges faced by religious individuals in their family lives and explains the selection of jurisdictions. It then outlines the core research question of this Thesis: *to what extent does a reflexive law solution to the regulation of religious family life overcome the primary challenges of negotiating the communicative interaction of family law and religions, as identified from the systems theoretical perspective?* Third, this Introduction explains and justifies the methodological approach. Some of the challenges and limitations that flow from these methodological choices are also examined. Fourth, this Introduction outlines the jurisdictional examples so as to offer a basic grounding in the legal provisions being discussed, as well as justifying their

¹⁵ This Thesis predominantly examines Ontario, Canada. This decision is justified by Canada’s federal Constitution whereby family law matters are partially devolved to the Provinces. However, in some instances a broader discussion of Canadian law is required, particularly as it pertains to Canadian Constitutional law, and some cases are discussed in relation to Quebec.

¹⁶ Cohen, *Regulating Intimacy* (n 10) 52–53.

selection and explaining their relationship to the Chapters that focus on the normative development of the reflexive model. Fifth, this Introduction offers a structural summary of the Thesis and the development of the main arguments presented therein. This Part also introduces in outline some of the key concepts and conclusions.

1 Background and Context

How should the State respond to calls for greater institutional autonomy for religious groups in the context of family law dispute resolution? This is a question that has confronted and challenged the most basic principles that underpin the secular, democratic, multicultural state.¹⁷ On the one hand, multicultural societies accept and value different ways of living, and to various extents, accommodate those ways of living in the general law. Or, at the very least, they leave space for diversity to bloom outside the scope of state regulation. On the other hand, the principles that underpin multiculturalism are not neutral and there is growing acceptance that the accommodation of religious norms can pose challenges too, especially for women and minorities within minority groups. Yet, recent scholarship has also shown the radical potential for transformation within religious groups.¹⁸ As Singler remarks, such changes as occur within religious movements tend to have both relational and structural aspects and have complex interactions with developments in the law and society.¹⁹

¹⁷ Susan Moller Okin and others, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999).

¹⁸ Beth Singler and Eileen Barker (eds), *Radical Transformations in Minority Religions* (2022, Routledge). In this collection, a range of ‘new religious movements’ are examined, which, although demonstrating their own unique dynamics may also present a similar example to more established religions. In particular, Shanon Shah argues that the framework developed to examine ‘new’ religious movements may have some relevance to LGBTQ Muslims: Shanon Shah, ‘Using the New Religious Movement Framework to Consider LGBTQ Muslim Groups’.

¹⁹ Beth Singler, ‘Radical Transformations in Minority Religions: Reflections’ in Singler and Barker (n 18) 2-3.

The debates over accommodating religion have been numerous and wide-ranging: under what conditions should the State accommodate diverse religious practices, by introducing special rights in law that exempt adherents from following the general law? The regulation of religious institutions poses a slightly different question too: to what extent should the State allow for individuals to retreat from communal life, by ‘privatizing diversity’?²⁰ This arrangement entails some delegation or authorisation of control over religious family law to groups through, for example, religious tribunals. In either case, under what circumstances, if any, should religious or cultural norms be accorded legal status?

This question engages a complex relationship between gender and sexuality, religion, the State and structures of power. Both gender and sexuality involve a power dynamic in which one group has power over another. Likewise, religion forms part of a power structure, involving hierarchy and the exertion of (at the least) social sanctions to enforce their precepts. Religions are often controlled by men with little structural room for women in decision-making and norm creation and enforcement.²¹ The State is also built around its power. Although democratic societies are committed to human rights and equality these concepts are also influenced by prevailing moral and political norms. It could be seen, therefore, that a religious believer is part of multiple, overlapping systems that constitute the modern society – each with its own function

²⁰ Shachar, ‘Privatizing Diversity’ (n 7) 575.

²¹ Moller Okin (n 17) 11-12, 17. Of course, many religious believers do endorse an egalitarian ethic and are susceptible to reform and seek out reform from within.

and each making certain demands of the individual.²² Moreover, it is the development of these systems in relation to one another that can compound disadvantage. So, the question becomes: what happens when laws and religions align or clash? How are we to respond to the power structures within and between systems? How can these relationships be challenged and re-constructed?

This Thesis examines the ways in which religious groups seek to achieve personal or institutional autonomy in the context of family law with a particular focus on marriage, divorce and the ancillary issues of maintenance and the division of family property. It explores these questions through the concepts and lens of systems theory. Moreover, this Thesis recognises that any position taken in respect of this relationship between systems implies certain background assumptions about the role of the State and the community and the scope of individual and group religious autonomy in circumstances where potential clashes between secular and religious norms might cause tensions between an individual's loyalties and identities. This conflict could be resolved by insisting on the supremacy of one system of norms over the other. It could also be achieved by developing subtle ways of dividing up legal and religious domains, where certain questions are resolved by religious or state laws, with the freedom of choice accorded to individuals as between these systems. But in none of these ways do we squarely confront the challenge of *how* these systems interact; how the norms are constructed and de-constructed and how the State may use reflexive law to regulate religious family laws more effectively and to enrich and invigorate the democratic process. How can we best describe and regulate the normative and institutional

²² Christoph Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) 18 Oxford Journal of Legal Studies 61.

relationship between religious systems and the law? Moreover, what values ought to underpin that relationship?

This Thesis is not concerned primarily with whether religious law in general or particular types of religious law are compatible or not with secular law or human rights values. Nor will it attempt to interpret religious law, resolve debates within religious law or propose religious solutions. These are firmly outside the scope of this work. Nor is this Thesis concerned with the broader role of religion in society, although this is of keen relevance to the relationship of law, religion and family life. As an exercise in comparative, applied normative legal theory it is not an empirical study either. Yet it will explore secondary empirical data on how these systems operate, if and where this is relevant. Finally, this Thesis recognises that the debates about the role of religious institutions in private and public life have at times been weaponised in these jurisdictions as a means of attacking and marginalising certain communities. As such, it is important to reject generalised and stereotypical assumptions about the attitudes of religious believers and to critically reflect upon the implications of various possibilities for reform in light of the lived realities of religious and non-religious communities.

2 Research Questions and Contributions

The research question addressed in this Thesis is: *to what extent does a reflexive solution to the regulation of religious family life overcome the challenges of negotiating the communicative interaction of family law and religions, as identified from the systems theoretical perspective?* In particular:

- How, from the systems theoretical perspective, do religious ‘laws’ interact with secular family laws?

- What is the best way to negotiate this interaction to promote relational autonomy, substantive equality, relationships of care and democratic engagement?

This Thesis seeks to answer these questions in four stages. First, it argues that the common thread across the models of law and religion – namely, cultural voluntarism, delegation and religious authorisation - is presumed reliance on direct, ‘command and control’ interventions in religious and family life as the principal means of regulating family life. In other words: these models tend to assume that regulation is ‘*instrumental*’; that the *State* is central to that project; and, that *State law* is the principal means of regulating behaviour.²³ Although the forms of relationship between law, religion, family and State are highly diverse, this Thesis focuses on those societies which are neither theocratic nor secular absolutist.²⁴ It therefore assumes a general commitment to constitutionalism within each jurisdiction selected and within the systems theoretical account of society.

Second, this Thesis challenges these assumptions and argues that the apparent failure of these models in the exemplar jurisdictions flows from this resistance to direct, external intervention. In an exercise of applied, normative theory and comparative legal analysis it is possible to trace out the broad contours of Teubner’s regulatory trilemma – that is to say, to suggest that direct interventions are liable to result in ineffectiveness, unresponsiveness or incoherence. Moreover, although these labels are

²³ Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145.

²⁴ Paul Cliteur, ‘State and Religion Against the Backdrop of Religious Radicalism’ (2012) 10(1) *International Journal of Constitutional Law* 127, 128.

of analytic use it will often be true that these outcomes are overlapping and self-reinforcing and that the boundaries between the elements of the trilemma are subtle, describing a single phenomenon from different perspectives. The result of these conclusions is to challenge us to re-think our approach to religious family laws.

Third, if this characterisation of the interface between family law and religion is valid, then it points towards a *reflexive* solution. Reflexive law is the *regulation of self-regulation* and the corollary of the systems theoretical analysis. It relies upon the self-regulatory capacity of systems as steered by particularised, indirect interventions aimed at altering the environment in which these systems exist and the power structures within them (both religious systems and within the system of law itself).²⁵ Chapter 7 lays out some of the features of a reflexive solution that makes use of a ‘wider range’ of non-State mechanisms²⁶ to promote bounded self-regulation. These bounds are established in Chapters 5 and 6. This Thesis proposes a decentralised, collaborative and experimental approach to answering the question of whether and how religious norms should be utilised in governing family life.²⁷ This answer is not only a necessary implication of this analysis but is also supported by good normative reasons based on autonomy, increased participation and localised problem solving.

Fourth, this Thesis sketches the principles of reflexive law and relates this to a proposed solution to these challenges. Here, the two criteria for answering the research

²⁵ Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *CLP* 103, 126.

²⁶ *ibid* 145-6.

²⁷ Charles Sabel and William Simon, ‘Democratic Experimentalism’ in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (CUP 2017).

question are synthesised. The reflexive criterion tells us that interventions ought not to be justified unless they are dynamic and adaptive and marked by reliance on hybridity, multiplicity, and indirectness. This criterion not only ensures *effectiveness* but also protects a sphere of religious autonomy by structuring State interventions in such a way as to engage with social systems through creative, experimental local problem solving and monitoring.²⁸ The second criterion is normative: it envisages this reflexive model of regulated autonomy as being hemmed by substantive values such as relational autonomy, substantive equality, and the promotion of caring relationships. These values bound the process of deliberation *and* offer the normative limits. However, these values are not proposed as being immutable and absolute but as ultimately contestable and given meaning through on-going deliberation, reflexivity and democratic experimentalism.

3 Methodology

Habermas describes the systems theoretical model of functionally differentiated social systems as posing a challenge for the theorist:

... the systems approach self-referentially subsumes the sociological observer, who views himself and his science as just one subsystem among others²⁹

In other words, to recognise the truth in functional differentiation requires us also to recognise the limitations of our ability, as observers, to deconstruct meaning within systems. In particular, we must resist the temptation that formal, rational and *legal* modes of communication must necessarily take normative precedence.³⁰ Moreover, as

²⁸ Black (n 25) 111; Julia Black, 'Proceduralising Regulation, Part II' (2001) 21 OJLS 33.

²⁹ Habermas (n 14) 47.

³⁰ Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 HLR 4, 9-10.

outsiders the ability to deconstruct meaning and understanding about the experience of others must – to overcome this difficulty - be informed by the experiences and writings of those with lived experience of these systems.³¹ This allows us to acknowledge how: ‘... race, culture and religion are so resistant to our analysis whilst simultaneously being critical aspects of the personal identity of women – that raises the significant challenge for feminist theory.’³² However, for reasons to be more fully expounded in Chapter 2, the communicative closure of systems ought not to be overstated. This leaves open the room to critically evaluate the communicative interactions between systems, including the legal system without that same analysis being wholly ‘subsumed’.

The dominant methodological approach employed by this Thesis, therefore, is through the re-framing of case law and theory within the systems theoretical model of society.³³ But more precisely, the ‘regulatory trilemma’ forms a central element of the methodological approach of this Thesis.³⁴ The trilemma describes a set of empirical observations about regulation, law and society. However, the trilemma is re-formulated within this Thesis as an *analytic framework*. This analytic framework has (or could have) four purposes: to analyse the existing law; to help make predictions about the

³¹ Maleiha Malik, “‘The Branch on Which We Sit’: Multiculturalism, Minority Women and Family Law’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006).

³² *ibid* 223.

³³ See: Luhmann, *Social Systems* (n 10); Teubner (n 10); Niklas Luhmann, Dirk Baecker and Peter Gilgen, *Introduction to Systems Theory* (Polity 2013).

³⁴ Gunther Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in Teubner *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter 1989) 21; Christine Parker and John Braithwaite, ‘Regulation’ in Mark Tushnet and Peter Cane (eds), Christine Parker and John Braithwaite, *The Oxford Handbook of Legal Studies* (Oxford University Press 2005) Section 4.

ways communicative interventions between systems may occur and how best to manage these; to form the theoretical basis and the foundation of a reflexive scheme; and, to form an empirical framework for testing and evaluating the impact of regulatory changes in future research. In this Thesis, the main use of this analytic framework based around the trilemma is with respect to the first and third of these purposes. However, this Thesis also offers a further contribution by way of expounding a framework which may be of benefit to the second and fourth purposes as well.

In Chapter 3 this methodology is applied in the first analytic sense: the three regulatory pathologies captured by the trilemma – ineffectiveness, unresponsiveness and incoherence – are traced in turn through the jurisdictional examples by way of specific case studies focusing on the recognition of marriages, the regulation of divorce and the financial arrangements consequent on divorce. This Chapter first discusses the epistemic challenge in relation to each jurisdiction before focusing in turn on the ways the cases indicate evidence of the trilemma. In Chapter 4, the trilemma is put to its normative purpose. Here, the systems theoretical insights identified in Chapter 2 and the trilemma framework is used to develop a model of secularity, developing the work of Augsberg, Cohen and Shachar.³⁵

4 Models and Jurisdictional Examples

This Thesis also employs a form of comparative methodology – albeit, not for the purposes of formally comparing the doctrinal law across jurisdictions. The comparative

³⁵ Augsberg (n 10); Cohen, *Regulating Intimacy* (n 10); Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 IJCL 380; Shachar, *Multicultural Jurisdictions* (n 7); Ayelet Shachar, ‘Faith in Law? Diffusing Tensions Between Diversity and Equality’ in Seyla Benhabib and Volker Kaul (eds), *Toward New Democratic Imaginaries - Istanbul Seminars on Islam, Culture and Politics*, vol 2 (Springer International Publishing 2016).

approach is explained in more detail in the next Part. However, this Part introduces two interconnected and important touchstones for this Thesis: the theoretical models of law and religion in family life and the jurisdictional examples.

(a) Reflective Equilibrium

The methodology of the reflective equilibrium is employed in two principal respects in this Thesis: first, there is a broader dialectic within this Thesis between theoretical chapters and applied chapters. So, Chapters 3 and 4 form a dialectic between practice and theory. The former analyses concrete jurisdictional examples whilst Chapter 4 places these within a normative framework which is then further developed in Chapter 6. There is also a dialectic between the theoretical arguments for different arrangements of law and religion in family life (what this Thesis terms as models) and the case law and jurisdictional examples that act as a means of identifying *indicia* of these systems theoretical insights and concretising the models within worked examples. As such, this is not an empirical examination or exploration of the truth of the systems theoretical approach to conceptualising the life world. Instead, these jurisdictional examples and the theoretical discussions provide a form of reflective equilibrium whereby existing practice and tradition are brought into relationship with normative insights with a view to developing a more coherent understanding of these concepts.³⁶

(b) Models

³⁶ Cohen, *Regulating Intimacy* (n 10) 52–54; applying work by Habermas (n 14).

As explained, above, in Part 4 this Thesis is an exercise in applied, normative theory. As such, the analysis is a function of both normative theory and the exposition of applied examples. The normative component examines a range of different approaches to the relationship between law, society and religion. These approaches are termed, ‘models’ and every reference to a theoretical ‘model’ in this Thesis relates to either purposive abstention (or cultural voluntarism);³⁷ the delegation of legal authority to religious authorities; the institutionalisation of religious norms within state law;³⁸ or to a reflexive model of law and religion.³⁹ These models play the role of ‘ideal types.’⁴⁰ An ideal type is a hypothetical and abstract construct which can be used to ‘accentuate’ and describe real world phenomena.⁴¹ As such, we should not confuse the conceptual clarity provided by reference to models of law and religion with the more complex phenomena that exist within different jurisdictions. As Cohen explains, *all* ‘empirical entities’ are a ‘hybrid’ of these ideal types so, although this categorisation offers a conceptual basis for discussion it is better to see these types as a ‘combination of variables.’⁴² Therefore, these models reflect an axis of state interventions in religious

³⁷ John Eekelaar, ‘Laws, Values, Cultures’ in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill Nijhoff 2015). Other models can be employed, for example: Sezgin refers to ‘confessional’ jurisdictions. By these terms, Sezgin is distinguishing between different personal law systems based on whether the law is applied by State courts and whether those laws are confined to different confessional groups. See, Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge Core 2013) 1-8.

³⁸ John Eekelaar, ‘Law and Community Practices’ in Maclean and Eekelaar (n 4) 16–17.

³⁹ Augsberg (n 10).

⁴⁰ Max Weber, ‘Objectivity in Social Science and Social Policy’ in, Edward Shils and Henry Finch (eds and trans) *The Methodology of the Social Sciences*, (Free Press 1949), 90. See, for a use of the ‘ideal type’ methodology in analysing models of secularity: Jean Cohen, ‘Rethinking Political Secularism’ in Jean Cohen and Cécile Laborde, *Religion, Secularism and Constitutional Democracy* (Columbia University Press 2015) 121.

⁴¹ *ibid.*

⁴² Black (n 25) 121–122.

life reflecting different attempts to negotiate the relationship between laws and religion. Furthermore, these models illuminate a broader distinction drawn in this Thesis between formal, substantive and reflexive law.⁴³ The key insight in Chapters 3 and 4 is to relate Eekelaar's models to this broader regulatory debate about the assumed role and limits of law as a regulatory force. The contribution of these Chapters is to suggest that, to the extent that the regulatory pathologies identified by systems theory pertain, the reliance on formal and substantive modes of regulation is at issue. Instead, this Thesis seeks to identify and develop a reflexive model of regulation which builds upon the self-regulatory potential inherent within complex groups.

This explanation of the models as axes of idealised types of intervention in religious family life serves three purposes. First, as models with no empirical basis, the theoretical approaches must be brought into conversation with concretised examples. These will be termed 'jurisdictional examples' and any reference to the jurisdictions discussed in this Thesis ought to be construed as relating to a jurisdictional example of an ideal type of the models of law and religion. Second, therefore, these models are also organising concepts that are used with a view to the *selection* of the examples themselves. In order to engage in *applied* analysis there must be a jurisdictional example that can be employed as emblematic of – although ultimately still loosely related to – these models. Third, as was explained in Part 4(a), above, the models and jurisdictional examples also generate a form of reflective equilibrium as theory and practice are related to one another.

⁴³ Teubner, 'Substantive and Reflexive Elements' (n 10) Part IV.

(c) Jurisdictional Examples

The jurisdictional examples in this Thesis, therefore, are best understood as ways of concretising the different conceptual or theoretical ‘ideal types’ of approaches that can be taken in relation to family law and religion. As explained in the preceding section, one justification for the choice of jurisdiction is as they relate to these models. The models examined in this Thesis, and therefore, the jurisdictions which have been selected are all examples of States which reject both extreme positions of theocracy and political atheism.⁴⁴ These latter models are excluded from this Thesis as they are ‘irreconcilable with the central tenets of liberal democracy, namely freedom and equality.’⁴⁵ From the systems theoretical perspective, this same basic assumption is that these examples are characterised by a high degree of functional differentiation, which is to say that there is a complex social order and a degree of communicative freedom protected by rights.⁴⁶ Thus, it is necessary to ensure that the examples are appropriate comparators with one another and illustrate the models which have been described, above. A comparative approach provides a rigorous way of analysing how similar questions are addressed in different contexts. However, whether comparative study is justified in the first instance, and then, whether the comparative analysis of selected jurisdictions is appropriate, requires its own careful consideration.

The use of comparative examples can be especially valuable for three connected reasons: first, it aids in improving the range and quality of reasoning by identifying different arguments; second, reference to different jurisdictional examples challenges

⁴⁴ Cliteur (n 24) 128-130, 132.

⁴⁵ *ibid* 132.

⁴⁶ Verschraegen (n 12).

pre-existing assumptions around the best relationship between law and religion; third, introducing a comparative dimension provides further examples that test the rigour of the way we look at similar legal problems.⁴⁷

There are two questions necessary to consider with regards to family law and comparativism: ‘First, are systems of family law intimately associated with particular jurisdictions? Second, if they are, what does this association involve?’⁴⁸ In order to address these issues, this Thesis lays out the relevant aspects of the family law regimes in the selected jurisdictions as well as the key provisions of supplemental jurisdictions when they arise in discussion. Those who criticise comparative family law emphasise that family law most closely ‘reflects the conditions in which it has developed’.⁴⁹ However, this is no reason to reject a methodology under which the weight to be attached to the *arguments* that emerge from different contexts can be evaluated as part of a deliberative exercise.⁵⁰ At this point, however, it worth re-emphasising that the comparative *dimension* forms part of a discursive and applied mode of analysis rather than pure doctrinal methodology. This Thesis seeks to place the normative and doctrinal as part of a dialectic to examine the challenges of recognising and regulating religious family laws in democratic societies.

⁴⁷ Sandra Fredman, ‘Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law’ (2015) 64 ICLQ 631.

⁴⁸ David Bradley, ‘A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics’ (2005) 4 Oxford University Comparative Law Forum <http://ouclf.iuscomp.org/a-note-on-comparative-family-law-problems-perspectives-issues-and-politics/#3_Issues> accessed 11 April 2018.

⁴⁹ *ibid*, Part 1.

⁵⁰ Fredman, ‘Foreign Fads or Fashions?’ (n 47) 640–647.

(d) Canada, England, India and Israel

The selection of four jurisdictional examples – Canada, England, India and Israel – is based on three factors: constitutional commitments to human rights and democracy; the existence of distinct approaches, emblematic of the models described above, to the common challenge of resolving the tension between family law and religion; historical and contemporary connections between jurisdictions.

First, whilst recognising the cultural differences and the particular social, historical, economic, political, legal and constitutional factors that characterise these jurisdictions⁵¹ there are sufficient common commitments to human rights as enshrined in the constitutional laws and international treaties of these example jurisdictions.⁵² Second, all four jurisdictions face similar challenges relating to religion, equality and family law with a broad range of English language and translated materials. In all core jurisdictions there have been extensive judicial, academic and popular attention over the role and place of religious family laws, religious tribunals and religion within society, with each jurisdiction adopting different responses to this common

⁵¹ Galanter and Krishnan (n 5); Matthijs De Blois, 'Religious Law versus Secular Law The Example of the *Get* Refusal in Dutch, English and Israeli Law' (2010) 6 *Utrecht Law Review* 93; Marie Ashe and Anissa Helie, 'Realities of Religio-Legalism: Religious Courts and Women's Rights in Canada, the United Kingdom, and the United States' (2014) 20 *UC Davis Journal of International Law & Policy* 139.

⁵² Human Rights Act 1998. It should be noted that the UK Government has brought forward proposals to modify the UK's relationship with the ECHR although it remains the case that the Government intends for the UK to remain a Party to the Convention: UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights, Consultation Response' July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response> [Accessed 19/08/2022]; Canadian Charter, Section 2(a) and, although not explicit, Section 8 as interpreted by the Canadian Supreme Court in *Hunter v Southam Inc* [1984] 2 S.C.R. 145, 160; Basic Law: Human Dignity and Liberty: Sections 1 and 7(a); see also, Cr. A. 112/50 *Yosifof v Attorney General*, 2 Piskei Din 486, 598, 612; Constitution of India, Articles 14, 15 and 25. See also, *State of Bombay v Narasu Appa Mali* AIR 1952 Bom. 84.

challenge.⁵³ Although some of the basic essentials of the marriage and divorce regimes share sufficient similarity, they also include markedly different responses to common challenges.⁵⁴ Whilst each jurisdiction takes different approaches to the regulation of family life, this does not make comparison unhelpful. In fact, this contrast *justifies* the selection of these jurisdictions because it is through this contrast that it becomes possible and useful to analyse the different ways these regulatory schemes succeed or fail in the promotion of human rights values and the resolution of inter-systemic communicative interactions.

Third, there are deep historical and contemporary links between these jurisdictions. For example, the Indian personal law system was largely established under British colonial rule.⁵⁵ This model formed part of a colonial strategy of control and recognised the emphasis to transplant common law principles in the ‘public’ and commercial realms whilst sub-dividing ethnic and religious minorities as a means of control through religiously differentiated personal laws.⁵⁶ Whilst the Israeli *millet* system pre-dates British Mandate rule, having developed under the Ottoman empire, it

⁵³ Ashe and Helie (n 51); John Bowen, ‘How Could English Courts Recognize Shariah?’ (2010) 7 University of St. Thomas Law Journal 411; Maleiha Malik, ‘Minority Legal Orders in the UK: Minorities, Pluralism and the Law’ (British Academy 2012); Gillian Douglas and others, ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts- Report of a Research Study Funded by the AHRC’; Farrah Ahmed, *Religious Freedom under the Personal Law System* (First edition, OUP 2016); Tamanna Khosla, *Personal Laws in India: Reconciling Diversity with Gender Justice* (Vitasta Publishing Pvt Ltd 2019); Pauline Kollontai, ‘On Human Dignity and Rights: The Dialectics of Religious and Secular Law in Israel’ in Zhibin Xie, Pauline Kollontai and Sebastian Kim (eds), *Human Dignity, Human Rights, and Social Justice* (Springer Singapore 2020); Hacker (n 5).

⁵⁴ Khosla (n 53); Nigel Lowe and others, *Bromley’s Family Law* (12th edn, Oxford University Press 2021) chs 2, 3, 6, 8-9; Julien Payne and Marilyn Payne, *Canadian Family Law* (2020) chs 2, 6, 7, 8; Yitzhak Cohen, *The Unique Family Law in the State of Israel* (Academic Studies Press 2021).

⁵⁵ Galanter and Krishnan (n 5) 106–111.

⁵⁶ Ayelet Shachar, ‘The Thin Line between Imposition and Consent: A Critique of Birthright Membership Regimes and Their Implications’ in Martha Minow, *Breaking the Cycles of Hatred* (Princeton University Press 2009) 202.

was preserved during Mandate and forms the basis of the family law system in the modern state of Israel.⁵⁷ As Sezgin explains, ‘postcolonial nations adopted an instrumental approach towards institutions of personal status, and modified these pluri-legal structures in accordance with their ideological orientations.’⁵⁸ On the other hand, in England and Canada, the dawn of large-scale migration has seen the ‘transplantation’ of foreign concepts and religious and cultural norms.⁵⁹ This form of transplantation of norms into different contexts has established a ‘dialectic’ between religious laws and secular laws in Western countries.⁶⁰ As Bano notes, ‘Shariah Councils are the product of transnational networks and operate within a national and global space.’⁶¹ Much of the debate over religious ADR has been influenced by religious communities who have migrated to Canada and the UK and reflect the fact that religious norms are not confined within borders.⁶² Therefore, it becomes imperative to understand the interplay of law, religion and family across jurisdictions.

5 Structural Summary

This Thesis begins with an introduction to the concept of systems. This concept is utilised throughout the Thesis as a means of deconstructing and describing the law and

⁵⁷ Galanter and Krishnan (n 5) 120–127.

⁵⁸ Sezgin (n 37) Chapter 2 and see, 43-44.

⁵⁹ Pascale Fournier, ‘Flirting with God in Western Secular Courts: Mahr in the West’ (2010) 24 IJLPF 67, 76-77.

⁶⁰ Maurits Berger, ‘Understanding Sharia in the West’ (2018) 6 JLRS 236, 240.

⁶¹ Samia Bano, ‘Islamic Family Arbitration, Justice and Human Rights in Britain’ (2007) 1 Law, Social Justice & Global Development (An Electronic Law Journal) <https://warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/bano/> accessed 31 October 2018.

⁶² Bowen (n 53).

as a means of providing a critical perspective on the challenges that emerge from different models and institutional forms. Moreover, the systems theory basis for analysis also provides the two critical meta-criteria for reflexivity: the preservation of functional differentiation and communicative freedoms. Chapter 2 presents the argument that society is divided amongst semi-autonomous social systems each with its own epistemology – its own rationality, norms and internal logic.⁶³ What is more, systems theory posits that entering these epistemological worlds is difficult as our understanding of them is always – of necessity – constructed by and within the bounds of our own life worlds.⁶⁴ As a result, how is law to recognise and regulate religious norms when these seem to occupy their own systems which are resistant to external control? Or, to put it again within the ‘horns’ of Teubner’s trilemma: direct legal interventions are ‘either irrelevant or produce disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself.’⁶⁵ Or, more simply still: how can we avoid the possibilities of ineffectiveness, unresponsiveness or legal incoherence?⁶⁶ Chapter 2 introduces and critiques some of the basic assumptions of the systems theoretical perspective.

Chapter 3 applies the analytic framework in Chapter 2 as an exercise in applied normative analysis of the four jurisdictional examples. A summary of the basic structures of these jurisdictions is provided in Chapter 3, Part 1(c). The focus of this

⁶³ Luhmann, *Social Systems* (n 10) Chapter 11 and Chapter 12.

⁶⁴ Black (n 25) 145-146.

⁶⁵ Teubner, ‘Juridification’ (n 34) 3–48, see 21.

⁶⁶ Parker and Braithwaite (n 34) Section 4.

Chapter is to examine the different conceptual approaches through specific example jurisdictions. These jurisdictions act as bridges between conceptual models - the abstentionist or voluntarist models, the particularist model and the delegation and authorisation models - and practice. This Chapter examines these jurisdictional examples of these models of law and religion through examination of the issues of religious marriage and divorce and the communicative relationship with State family and human rights laws.⁶⁷

This Chapter, therefore, concretises the preceding analysis to demonstrate the analytical insights that the systems theoretical frame offers and to tease out the preliminary conclusion that a more effective result could be achieved through enhancing reflexivity. It also develops this analysis in line with the systems theoretical notion of ‘structural coupling’. This concept is related to the notion of co-evolution which describes how systems can become ‘coupled’ with other systems and the environment in ways that create mutual frictions, leading to a new equilibrium and the formation of interdependencies. Particular focus is offered on the structural coupling that arises through the legal medium of contract law. Taken together, the analysis shows the outlines of the ‘crisis in law’ that Teubner identifies and the corresponding ‘demand’ that we move towards a more decentred and responsive model with correspondingly new legal and social forms.⁶⁸ Thus, Chapter 3 offers tentative answers to question of how best to negotiate the relationship between State law and religions. The remainder of this Thesis takes this contribution forward to outline the ways in

⁶⁷ See, generally: Maclean and Eekelaar (n 4); Douglas and others (n 53).

⁶⁸ Teubner (n 10) 244.

which we might enhance reflexivity and promote human rights. The normative dimension of systems theory is thus developed into more concrete proposals through the reflexive paradigm.

Chapter 4 develops the second core element of this Thesis: the concept of reflexive secularity. It establishes two criteria for addressing the question of when to depart from the default, voluntarist presumption that religious norms ought not to be given legal effect. This Chapter introduces the reflexive criterion: interventions ought to enhance functional differentiation and communicative freedom. Second, it argues that this framework ought to align with the systems theory account of rights, further explained in Chapters 5 and 6. In this respect, this Thesis advances a second set of criteria: interventions ought to promote relational autonomy, substantive equality and relationships of care. Importantly, these values flow from the systems theoretical account of society *and* the particular context of the family, meaning that different conceptions of these values may be appropriate in other contexts where reflexive secularity may be applied. The project of Chapter 4 is to situate existing models of law and religion within this framework and to develop a reflexive framing of the secularity principle. It is contended that reflexive principles based around bounded self-regulation of religious family law or the ‘indirect regulation of self-regulation’ provide the most fitting means of addressing the systems theoretical limitations of direct regulation whilst also better structuring this relationship to promote human rights values. This is because a reflexive model can address the complex communicative interactions of systems in light of the regulatory trilemma. The added importance of this approach is that the reflexive model strikes a radically different relationship between law, religion and State whereby the sharp distinction between regulator and regulated is re-

conceptualised to offer a deliberative framework constrained around the bounds of a shared, multifunctional language based on autonomy, equality and relationships of care.

Chapter 5 addresses the question of how those bounds are to be set whilst Chapter 6 defends three particular values and relates these to the systems theoretical conception of rights. These Chapters reason that as reflexive law cannot be construed as neutral nor ought we to aspire for neutrality in this context, this framework must be hemmed by substantive human rights values. Chapter 5 first examines the balance between stability and experimentalism with a view to recognising the need for both *constraints* on the process of self-regulation and the transformative imperative that underlies the reflexive project. Therefore, these values must be open to new meanings as they emerge from that self-same process albeit retaining a family resemblance with these values and the meta-criterion of reflexivity. As such, building on the reflexive paradigm, this Chapter engages with the theoretical underpinnings of democratic experimentalism.⁶⁹

What are the roles of these values in a reflexive scheme? As argued in Chapters 2 and 4, reflexive secularity harnesses the internal regulatory power of religious communities. If this is to be effective and justified in a human rights context the design of the regulatory scheme must be imbued by those values. The principal purpose of a

⁶⁹ Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267; Oliver Gerstenberg and Charles Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199246083.001.0001/acprof-9780199246083-chapter-10>> accessed 16 June 2020; Sabel and Simon (n 27); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 154-156.

commitment to these normative values is to justify State interventions in religious family life, alongside the reflexive criterion. This means that the specific regulatory goals the State may seek to pursue through reflexive secularity ought to be justified, addressing the potentially harmful or manipulative aspects of reflexive law. Because there must be a logical connection between the justification for any intervention and the institutional arrangements that follow, these values have two further purposes within this Thesis. First, these values form the boundaries within which deliberation may occur.⁷⁰As explained in Chapter 5, although this Thesis commits to normative experimentation and localised problem solving, this form of democratic engagement must nonetheless remain consistent with the essence of these human rights values and the reflexive criterion. Second, these values also *condition* the deliberation by imposing certain pre-conditions. That is to say, without the establishment of rules that address substantive inequality and power structures, reflexive secularity cannot effectively function.

Chapter 6 examines and defends these three values and relates them to the context of religious family life. The values of relational autonomy, substantive equality and care are plausible constraints because they stem from life – from the values that exist in family relationships and a deeper normative commitment that flows from the imperative to maintain systemic complexity and individual communicative freedoms within family life. Their acceptability within other systems is supported through their contestation. The mechanism and structure of such a scheme will be examined in Chapter 7. At this junction, we are tasked with devising plausible limits to this

⁷⁰ Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013); Fredman, *Human Rights Transformed* (n 69).

engagement that are derived neither solely from the law nor from these systems alone – but which might share some common ground. This is because both law and religion have the tendency to exert absolute claims over individuals – and this tendency is the principal concern of the systems theoretical model of society.

It is the role of rights to maintain societal stability and protect a sphere of individual communicative freedom to engage with and access different social projects. These twin imperatives – stable systemic complexity and communicative freedom – are the result of the functional differentiation of society.⁷¹ It is the risk of de-differentiation and the collapse of this complexity into a more simplified society dominated by all-encompassing group claims that the reflexive model seeks to prevent. As such, this model of reflexive secularity has an expressly normative dimension. Although reflexive law is generally understood as a strategic response to an empirical reality, it is contended that the maintenance of social complexity expands individual freedoms and allows for the development of valuable connections with others. *The* distinctive feature of reflexive secularity is the relationship between the normative commitment to social complexity which goes beyond the strategic function of reflexive law as a means of resolving regulatory failures in a functionally differentiated society.

We can therefore see this Thesis as addressing two interrelated challenges: the strategic necessity to negotiate the functionally differentiated society in which communicative interventions are limited *and* the normative objective of promoting human rights values through maintaining social complexity and communicative

⁷¹ Verschraegen (n 12) 266-267.

freedoms. As such, this Thesis defends a concept of fundamental rights derived from these normative values and the reflexive criterion as the means of safeguarding institutional arrangements which maintain social complexity from all systems of domination, including both law and religion.⁷² Thus, not only does reflexive secularity reject all forms of fundamentalist State projects, it also seeks to promote social complexity within the liberal democratic societies as examined in this Thesis.⁷³ Taking the reflexive criterion and these normative criteria together, we can conclude that an intervention is only justified where it can promote reflexivity and these human rights values.

Chapters 7 and the Conclusion explore possible reflexive solutions. The reflexive attitude to regulation does not impose ready solutions to this question but creates the framework, mechanisms and processes under which some of the answers might be found, defended and refined, whilst hemmed by reasonably assured limits.⁷⁴ The earlier Chapters conclude that religious and state norms have the potential to clash, and that even when an individual wishes to hold the State at arm's length, there are good reasons to nonetheless intervene to promote valuable options and State interests. The main contribution of this Thesis is to add to the question of how best to regulate the relationship between law and religious life the meta-criterion of reflexivity. Thus, the starting point ought to be that the functional differentiation of laws and religious norms ought to be preserved unless doing so is aligned with reflexive principles and justified by good normative reasons. The best arrangement is that of a religious

⁷² Niklas Luhmann, *Grundrechte als Institution (Fundamental Rights as an Institution)* (Duncker & Humblot 1958).

⁷³ Applying the typology described in Cliteur (n 24).

⁷⁴ Fredman, 'Adjudication as Accountability' (n 70).

governance network whereby religious institutions operate within a sphere of regulated autonomy. This could be in the form of contingent recognition of status questions and determinations of religious tribunals if subject to a reflexive code of conduct to which each institution ought to subscribe in exchange for access to financial and legal recognition. Financial recognition could also be secured through charitable status whilst legal recognition can arise through contingent acceptance of religious institutional decisions within state courts.

6 Conclusion

This Introduction introduces the main concepts and jurisdictional background which should be read alongside the proceeding Chapters. It also justifies the selection of England, Canada, India and Israel is based on the fact that these jurisdictions are emblematic of differing conceptual models whilst also retaining sufficient similarities so as to ensure meaningful comparisons can be drawn. References will be made to the basic structure of these jurisdictions in line with that analysis, with further details on the basic structure of the jurisdictions in Chapter 4. However, some degree of cross referencing with this Introduction will be of general assistance throughout this Thesis. The next Chapter introduces the systems theoretical core of the analysis. It seeks to highlight the explanatory and analytic value of this approach and the main ideas on which the rest of this Thesis is built. Chapter 2 therefore begins to address the first sub-question of this Thesis: how do religions ‘interact’ with secular family laws?

Ultimately, this Thesis will argue that state law ought only to regulate religious family norms (including, where religious norms may be upheld as state law) where this is effective from the systems theoretical perspective and normatively justified on the

basis of relational autonomy, substantive equality and care. In such cases, regulation ought to be indirect: regulating the bounded self-regulatory potential of groups to experiment in terms of both substantive rules and procedures.

CHAPTER 2

A SYSTEMS THEORY FRAMEWORK*

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Introduction

The modern multicultural states examined in this Thesis have each been confronted with a proliferation of different ways of living. This has created a plurality of moral codes and generated the potential for conflict between and within groups and for violations of the human rights of women and LGBTQ people. Individuals and groups seek the space to arrange their private lives according to their religious beliefs. Yet, in doing so, vulnerable individuals are sometimes forced to choose between their full participation in civic life and their human rights on the one hand, and recognition within

their communities of their religious choices on the other. This is an impossible, unnecessary and pernicious choice between their culture and their rights.¹

This background presents a challenge for traditional modes of centralised, command and control regulation of family life and the assumptions that underpinned such approaches. Although not all models presuppose such a blunt form of legal intervention, it remains useful at this stage to set out the ‘command and control’ without suggesting there exists a strict definition nor that any of the models and jurisdictions cannot exhibit elements of de-centred and reflexive regulation.² Command and control values State legitimacy and State enforcement of the law, and conceptualises society as hierarchical with laws occupying a normatively superior position over other rules of social life.³ It envisions a top-down, largely negative approach to regulation which generally seeks to influence behaviour by prescribing minimum conduct and obligations.⁴ Underpinning this form of regulation are assumptions about the centrality of the State, its ability to affect change and a relatively ‘linear’ relationship between regulatory objectives, the means of achieving these objectives, and the possibility of

* This Chapter forms the basis for the publication: Tristan Cummings, ‘Utilizing Systems Theory Insights and Reflexive Law to Negotiate the “Collision between... Un-connecting Worlds” in Family Law’ (2021) 2(3) *Journal of Law, Religion and State* 212. Parts 2(a)-(b) and Part 3 are therefore developments of the ideas in 218-226. The discussion of *J v B* in Part 2(c)(ii) is also based on the analysis in 215-218 and Part V.

¹ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001).

² Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *CLP* 103, 105-106.

³ Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145.

⁴ *ibid.*

effective social change.⁵ Teubner argues command and control regulation tends to result in defensive compliance.⁶ This traditional account also means the law can fail to adapt to new and evolving social trends and developments in family life and religion. Models of law and religion which rely more heavily on the assumed role (or limitations) of law lead to less effective interventions and greater obstacles to realising human rights.

The State no longer performs these functions alone, nor does social steering occur solely through formal political processes and according to state norms – if these claims were ever true. Nonetheless, these assumptions have coloured the literature and cases in the past and are now in need of updating. One under-observed dimension to this debate is the interaction of social systems.⁷ And, from a systems theoretical perspective, existing attempts to regulate religious tribunals or other religious institutions and norms have often failed to achieve their objectives: interventions are ineffective, the systems are unresponsive or law itself loses its coherence.⁸ In a recent call to action, Sandberg argues that systems theoretical insights in law and religion necessitate ‘new radical ways of thinking’ in this area, that ‘question and disturb every stone’.⁹ This is the project of this Thesis: to explore and defend a systems theoretical

⁵ Gunther Teubner, ‘Autopoiesis in Law and Society: A Rejoinder to Blankenburg’ (1984) 18 *Law & Society Review* 291, 298.

⁶ Discussed in Chapter 2, Part 2(b).

⁷ Niklas Luhmann, *Social Systems* (Stanford University Press 1995) Chapter 1.

⁸ Applying and developing the discussion of Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239 to the question of law and religion.

⁹ Russell Sandberg, ‘A Systems Theory Re-Construction of Law and Religion’ (2019) 8 *OJLS* 447, 472.

analysis of religious family life and, through reflexive law, to devise new and radical strategies that might better negotiate the relationship between law and religion, enhancing reflexivity and promoting human rights. With this challenge in mind, how might we re-approach some of the questions raised by Ayelet Shachar in her seminal work, examining the interaction between religious personal laws?¹⁰

This Chapter sets out an analytical framework based on systems theory. The first section introduces the concept of social systems and explores its implications for understanding the justifiable limits of state interference in religious liberty and therefore for devising a regulatory scheme. Further, this section outlines the orthodoxy in relation to systems theory, as based on the sociological work of Luhmann and brings this into conversation with a particular conception of systems theory, as developed by Teubner. Such a framework draws out new dimensions to the debate, helps explain why other approaches to regulation have been unsuccessful and generates the potential for better regulation and recognition of religious norms within a human rights framework. Systems theory helps articulate the appropriate boundaries of interference *and* is normative in the sense that it puts forward certain principles that ought to be held in mind when considering the law/religion relationship. What we can positively distil from this analysis is, therefore, the simple proposition that the regulation of religious family law ought to be responsive to the interaction of systems. This section then looks at the problems of delineation between systems, the issue of individualism and community and the challenge of impermeability and argues that none of these present unanswerable objections to a systems theoretical approach to analysing religious law. As a result, this Chapter presents a *modified* account of systems

¹⁰ Shachar (n 1).

theoretical analysis as an appropriate framework in the context of family law and religion. It, thus, departs from some of the underlying assumptions of systems theory so as to envisage a theory and framework that can be used to deconstruct the law in example jurisdictions and form the basis for a reflexive model of law.

The contribution of this Chapter is, furthermore, to develop the groundwork for the reflexive model of law and religion as a means of both resolving the systems theoretical challenges identified in this Chapter and explored in Chapter 3, but also so as to balance imperatives about secularism, recognition, the protection of vulnerable groups and respect for religious freedom. In Chapter 3, this framework is used as part of a reflective equilibrium which relates the theoretical insights with established practice. The result of that process is defended in Chapter 4 as the basis for a model of reflexive secularity. This model helps strike an intermediate ground between models of joint-governance and cultural voluntarism because some of the assumptions about the role and limits of law that underpin these models can be addressed.

1 The Concept of Systems

The functional differentiation of modern society is grounded on the notion that social systems emerge in order to satisfy different human functions.¹¹ These functions include the satisfaction of needs through the market economy, and socialisation and the production of knowledge through the system of education and academia.¹² This also

¹¹ Niklas Luhmann and (trs) Stephen Holmes and Charles Larmore, *The Differentiation of Society* (Columbia University Press 1982). Importantly, however, Luhmann does not consider this the *exclusive* form of differentiation in society. Social life is also differentiated by segment and stratification.

¹² *ibid.*

includes the systems of law, family and religion.¹³ In orthodox systems theory, these systems are horizontally arranged, without normative priority being accorded to any of them. One key insight, however, is that ‘whole persons’ is no longer the sub-unit of society: instead, *communications* form the basis of social life. Thus, persons can no longer be described as singularly belonging to one system but *must* belong to and communicate between multiple systems.¹⁴ The one qualification of this claim relates to the sub-system of family life: the family is the domain in which a person is recognised in their *fullness* as a whole person.¹⁵ The family is also unique in two further ways: first, when we speak of the sub-systems of family life it must be observed that each family is distinct from another. Therefore, in strict terms, we should speak of the *systems* of family rather than of some generalisable form of communications. Second, the form of communications in family life are an *intimate*, reciprocal and interpersonal code in which one ‘person’s [whole] world’ becomes relevant to another.¹⁶ From this perspective, Luhmann suggests that love or intimacy is the medium of communications— albeit, that we should also recognise that not all ‘familial’ communications are coded in terms of love. These qualities of the family as a sub-system will be referenced in Chapter 6, where particular values are defended as necessary to support the reflexive model of secularity, as it applies to religious family life.

¹³ Niklas Luhmann and André Kieserling, *A Systems Theory of Religion* (Stanford University Press 2013); Niklas Luhmann, ‘Sozialsystem Familie’ in *Soziologische Aufklärung 5: Konstruktivistische Perspektiven* (Westdeutsche Verlag 1990). See: Catharine Walker (trs), Claudio Baraldi and others, *Unlocking Luhmann* (Bielefeld University Press 2021) 239-243.

¹⁴ Gert Verschraegen, ‘Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory’ (2002) 29 *Journal of Law and Society* 258, 266.

¹⁵ Baraldi and others (n 13) 239.

¹⁶ *ibid* 240.

These systems theoretical insights correspond with the recognition in multiculturalist theory of the ‘web of complex and overlapping affiliations which exist between these competing entities.’¹⁷ This is not to say, however, that the individual falls out of the picture. Individuals exist *outside* the concept of systems but must mediate their relationship with society *through* systems and therefore require access to systems in order to engage in those distinct areas of life.¹⁸ Changes that occur within systems – usually outside the control of individuals – vary the conditions within which individual choices are made as well as the possibilities open to them. Thus, the concepts of *inclusion* and *exclusion* are central to the systems theoretical account of the relationship between the individual and society.¹⁹ It also means the systems theoretical account of society requires *equality* of access, albeit, that systems may prescribe certain ‘differences’ as criteria of inclusion.²⁰

Systems theoretical analysis, therefore, also provides its own conceptualisation of secularity within the modern, liberal State. The starting point is in Luhmann’s work on religions. The first point of departure is that for Luhmann, religion is best explained as a semi-autonomous social system.²¹ Systems respond to their functions, and in the case of religion, Luhmann reasons that the function of religion is to make determinate

¹⁷ Shachar (n 1) 5.

¹⁸ Verschraegen (n 14) 266.

¹⁹ *ibid* 269.

²⁰ *ibid* 278.

²¹ Luhmann and Kieserling (n 13) .

that which is indeterminate.²² From the systems theoretical perspective, Luhmann's early works contend that secularisation is a natural consequence of functional differentiation.²³ This is so for two reasons. First, secularity emerges as an articulation of the idea of functional differentiation with the complex modern society: there must be a meta-code that distinguishes religious systems from other systems of social life. Second, because liberal democratic society can no longer be governed by a single, 'all-encompassing moral or religious worldview' it becomes necessary to articulate some principle of secularity as a means of reflecting this complexity.²⁴ Luhmann's account describes the religious system's response to the increasing complexity of modern social life: those functions played by religion in the past are specified within new and emerging systems of society.²⁵ However, as explained by Laermans and Verschraegen, Luhmann's later work rationalised the secularity principle more in terms of the self-reproductive nature of systems and the operation of *communications* within a specialised code.²⁶ This shift in Luhmann's thought therefore represents a movement from a focus on functional differentiation to communicative closure through the biological analogy of 'autopoiesis'. This represents the idea that, as with a biological cell, a system reproduces itself according to its coding and interacts with its environment indirectly. So, in this manner, the religious system becomes self-

²² Niklas Luhmann, *Religion of Society* (Suhrkamp 2000) 34, as translated in Rudi Laermans and Gert Verschraegen, "'The Late Niklas Luhmann" on Religion: An Overview' (2001) 48(1) *Social Compass* 7.

²³ Niklas Luhmann, *Religious Dogmatics and the Evolution of Societies* (E Mellen Press 1984).

²⁴ Laermans and Verschraegen (n 22) 9.

²⁵ *ibid.*

²⁶ *ibid.*, 10-11.

referential and the concept of secularity reflects the ‘basic problem’ addressed by religions which marks out the religious system from all others on the basis of a certain *form* that addresses immanence and transcendence.²⁷

Having introduced the grounding of a systems theoretical account of religion the question then turns to what is meant by the self-reproductive nature of society and the importance of communications as the basic unit of analysis. A system is self-reproductive through communications: the components, norms, structures and organisations of religious systems are developed in accordance with internal norms and their interaction with the environment.²⁸ Communications are the ‘symbolically generalized media of communication’ that form the spheres of meaning within systems.²⁹ And this communicative closure represents an acute challenge to a socially differentiated, modern society. If systems relate horizontally to one another and suffer from communicative closure as a result of their functionally differentiated coding, direct interventions are liable to fail to impart the desired meanings and effects. The central proposition of Luhmann’s analysis is that law and religion, as with other systems, become so complex and specialised that externalities cannot rationalise religious or legal communications adequately within these normative worlds, nor can laws adequately affect change within religious systems. This is, again, analogous to Luhmann’s idea of autopoiesis such that each system ought to be understood as

²⁷ Luhmann, *The Religion of Society* (n 14) 34, as translated in Laermans and Verschraegen (n 22) 13.

²⁸ Niklas Luhmann, ‘The Autopoiesis of Social Systems’ in Niklas Luhmann, *Essays on Self-Reference* (Columbia University Press 1990).

²⁹ Verschraegen (n 14) 261.

communicatively closed, but cognitively open.³⁰ As a system religion is constituted through religious communications – in particular, its coding of ‘immanence’ and ‘transcendence’.³¹ Over time, this self-reproduction of meaning becomes self-reinforcing: ‘the more accurately members communicate, the more similar their internal patterns become. This sets up a positive feedback process [whereby]...more interaction brings more similarity, more similarity brings more interaction.’³² As such, the specificity of the internal language becomes potentially more impenetrable to *external* interventions.

The challenge identified by this Thesis is that religious *laws* appear to mix codes. What do we mean by religious laws? In some jurisdictions religious law *is* state law. So, the mixing of codes is literal: pronouncements about law are also pronouncements about a religio-legal construct. However, in other jurisdictions, religious family laws are emanations of non-state institutions without any formal legal recognition. For clarity, references to *state* laws in this Thesis should be understood as meaning that the law in question is an emanation of state institutions. However, as explained above, the principal distinction between laws and non-legal communications is determined by their *coding*. How should we understand the pronouncements of religious institutions about the law? This is a mixture of coding, combining the distinctive code of the *legal/not legal* and communications relating to

³⁰ Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert and Fatima Kastner trs, Oxford University Press 2004) 8.

³¹ Laermans and Verschraegen (n 22) 16.

³² Robert Beam, ‘Fragmentation of Knowledge: An Obstacle to Its Full Utilization’ in Kenneth E Boulding and Lawrence Senesh (eds), *The Optimum Utilization of Knowledge: Making Knowledge Serve Human Betterment* (Routledge 2019) 161.

transcendence/immanence. A stylised example of this dynamic can be observed in the Canadian case of *Kaddoura*, as will be discussed in Chapter 3.³³ In this case, concerning whether a *mahr* agreement³⁴ could be a legally binding domestic contract, the judge was concerned to preserve a sphere of religious autonomy - into which the courts were neither qualified nor constitutionally justified in entering. That is to say, the judge recognised the communicative closure of religious and legal systems respectively, and the inability to construct an accurate (or appropriate) understanding of religious norms within the rationalisation of the law. In this way, whilst declining to give *legal* recognition to a *mahr* agreement and deferring to relevant religious authorities to determine these religious obligations, the judge recognises a distinct, quasi-legal role for religious tribunals within their own social system.

The complexity of this co-evolution between state law and religious family norms is exemplified in England. The fusing of legal and religious coding and the intermixture of religious and legal purposes undermines state law's supposed coordinating function. As Sandberg explains, the apparent return of religion to the public sphere – through religious tribunals - *could* be understood as offending the principle of functional differentiation.³⁵ Heelas remarks that the concepts of 'differentiation' and 'de-differentiation' form the fundamental touchstones for a

³³ *Kaddoura v Hammoud* (1998) O.J. No. 5054, 168 D.L.R. (4th) 503.

³⁴ A *mahr* agreement is akin to a marriage contract. It usually entails an immediate gift and a deferred sum that is paid out in the event of a divorce or the husband's death. For varied accounts of the Islamic marriage contract, see: Asifa Quraishi and Frank E Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Harvard University Press 2008).

³⁵ Sandberg (n 9) 456–457.

systems theoretical analysis of law and religion.³⁶ So, from this perspective, the risk of ‘de-differentiation’ and social simplification pose serious risks to the stability of ordered society.³⁷ This differentiation refers both to internal differentiation within religious systems as well as differentiation between religious systems and other systems of social life.³⁸ At the same time, religious life for some has also undergone a process of de-differentiation, whereby some individuals move more freely between different denominations as well as a de-differentiation between the religious and secular boundaries.³⁹ As a result, attention to these dual processes of the modern State and religious life pose two different, but connected challenges: first, that if the boundaries of differentiation become too strong, social life would be rendered impossible; if de-differentiation occurs so as to undermine functional differences, this process of simplification is liable to result in a loss of autonomy as the range of communicative systems declines and the dominating qualities of other systems begin to demand absolute loyalty.⁴⁰

Therefore, differentiation and simplification are at the heart of the different models of law and religion examined in this Thesis and the question of whether a fusion of operations and coding is liable to result in greater complexity – which is considered a positive feature of modern society – or greater simplification, with the disintegrative effects this is liable to create. As a result, this Thesis examines these inter-systemic

³⁶ Paul Heelas, ‘Introduction: On Differentiation and de-Differentiation’ in Paul Heelas, David Martin and Paul Morris (eds), *Religion, Modernity, and Postmodernity* (Blackwell Publishers 1998).

³⁷ Verschraegen (n 14) 271.

³⁸ Heelas (n 36) 3-4.

³⁹ *ibid* 3.

⁴⁰ *ibid* 4; Verschraegen (n 14) 277.

tensions both as an exercise of applied theory in Chapter 3 and as a matter of normative theory in Chapter 4. As Teubner reasons, social systems that employ a code of legality constitute laws in the full sense of the word.⁴¹ Or, to put more simply, the differentiated legal code and its internal norms constitute *laws* and distinguish law from all those norms that are *not* laws. This means that religious tribunals, such as those mentioned as operating England, are at the same time employing legal and religious codes. Such an eventuality – this fusion of operations, functions and coding- can be construed either as a regression towards a less differentiated social landscape or, as Sandberg argues, representing a further differentiation of this sub-system itself.⁴² Again, these claims will be interrogated in more detail in Chapter 3.

2 Law and Religion as Systems

This section introduces a systems theory framework that will be applied in Chapter 3 to analyse the law and identify the challenges of recognising religious norms and institutions.

(a) Introduction to Systems Theory

Systems theory holds that society is divided amongst non-hierarchically arranged, semi-autonomous sub-systems.⁴³ In simpler terms, society has become ever more complex and diverse. And these areas of social life have become differentiated from

⁴¹ Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) 13 *Cardozo Law Review* 1443.

⁴² Russell Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015) 259–262.

⁴³ Luhmann (n 7) 13–14; Teubner (n 5) 292–293.

one another to such an extent that they become self-reproducing and relatively closed off. Such systems and sub-systems span all aspects of life: from the market to the public administration, to law, religion and culture- each with sub-systems with increasingly differentiated functions. These are self-referential, in the sense that they create and develop their own norms according to their modes of function and define the boundaries which delineate them. They are also considered non-hierarchical. This challenges the general Western assumption that *state law* is preminent and capable of order behaviour through commanding and controlling. As Berger remarks, the general presumption within Western societies is that ‘religion is subordinate to the overall political and legal national structure.’⁴⁴ Norms are contested and are open to change over time: both religious and legal.⁴⁵ Law operates as a system, with potentially, sub-systems that specialise in particular areas of law. Yet religious law seems to combine legal and religious functions and cut across boundaries between these systems – creating new sources of conflict and contestation that systems theory is apt to analyse.

From the systems theoretical perspective, attempts by secular law to regulate religious norms are understood as intrusions on religious autonomy, whilst deference by secular law to religious norms threatens the hegemony of law and the cohesiveness of the State and risks violations of human rights. In the wholly de-centred society, state law occupies a ‘peripheral position, forming one system or disclosure in a disordered manifold of systems and discourses.’⁴⁶ This is the principal contribution of Luhmann’s

⁴⁴ Maurits Berger, ‘Understanding Sharia in the West’ (2018) 6 JLRS 236, 257.

⁴⁵ Silvio Ferrari, ‘Religious Law: A Discussion’ in Andrew Huxley, *Religion, Law and Tradition: Comparative Studies in Religious Law* (1st edn, Routledge 2012) 155.

⁴⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Reprinted, Polity Press 2010) 48.

sociological theory of modern society – by rejecting the notion that there must, in order to maintain social order, be some ‘centre’.⁴⁷ One response has been to impose secular law on religious norms through direct regulation. However, this threatens religious autonomy and those same problematic religious norms tend to find ways to survive in new forms. Nor is the threat to law as a system averted. Systems theory and reflexive law allows us better to understand this tension whilst also directing us towards a manner of regulation which strikes a better balance between these competing imperatives. Importantly, whilst this analytical framework has explanatory, prescriptive and predictive power, it must be stressed that social processes and systems are complex and defy attempts to neatly categorise and delineate boundaries. Thus, as Simmel remarks, it is important not to confuse *analytical insight* – such as that contributed by systems theory to the domain of religious law- with the notion of true description.⁴⁸ Consequently, the theoretical framework developed in this Chapter and the rest of this Thesis draws out interesting dimensions to the debate over the regulation of religious family life, reinvigorating the possibilities explored in the existing literature and cases. However, this should not be taken as ‘true description’ of the vastly more complex workings of religious groups, individuals and systems.

Systems theory envisages a landscape of social relations that is necessarily characterised by ‘conflict of interest, but also by interdependence, which constructs a fabric or linkage at once vulnerable and resilient: it is rather easily ruptured, but knits

⁴⁷ Niklas Luhmann, *The Differentiation of Society* (Columbia University Press 1982) 353-355. Compare: Talcott Parsons, *The Social System* (The Free Press 1951).

⁴⁸ Georg Simmel, *Conflict* (Translation, Wolff) (The Free Press 1955).

itself up again.’⁴⁹ This aptly describes the complex interrelationship between State, community and individual in respect of religious family law and the role of religious laws, a question addressed in more detail in Chapter 4 and 5. Each system is vulnerable to collapse and distortion and is perceived as being in vital conflict over basic, non-negotiable norms whilst at the same time these systems remain intimately interwoven – or structurally coupled.⁵⁰ This section describes and defends an account of systems theory that might advance the theoretical debate around religious family life, expanding upon earlier contributions and adding new dimensions to the question of whether – and how – religious norms can be accommodated within a human rights framework.

Systems theory will be relied upon in this Thesis to perform three principal functions: first, to create an analytical framework against which the cases, regulatory models and secondary empirical evidence can be better understood. Such analysis has yet to be fully performed and will bring new explanatory force to the debate which has so far largely operated outside of a systems theory framework. Second, systems theory has a degree of predictive potential. Whilst this Thesis will not seek to test such predictions, it is important to raise these challenges so as to ensure future theoretical and empirical research can explore and verify these claims. Third, through models of reflexive law, systems theory has normative force. Reflexive law does not itself decide between competing substantive values, but creates the space, meta-framework and

⁴⁹ Andrew Dunsire, ‘Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention’, *MPIFG Discussion Paper* 93/7 (1993) 6.

⁵⁰ Myriam Hunter-Henin, ‘Negotiating with Religion from a Legal Perspective’ in François Guesnet, Cécile Laborde and Lois Lee (eds), *Negotiating Religion: Cross-Disciplinary Perspectives* (Routledge, Taylor & Francis Group 2017) 198; Maleiha Malik, ‘Regulating Religious Diversity in Liberal Societies’, *ibid* 245.

practical mechanisms in which this debate can be conducted and advanced. This helps mitigate concerns about how such competing values may be reconciled in a multicultural society, committed to human rights.⁵¹ Later Chapters connect up with existing models and strategies for regulation, placing them within the reflexive framework whilst articulating and defending substantive human rights norms based on relational autonomy, substantive equality and the value of caring relationships.

(b) Systems Theory in Existing Literature

Whilst some of legal literature on religious family laws refers to systems theory, its implications have not been fully explored nor has it been used as a model for extensive, comparative, critical analysis. For example, Sandberg explores the social systems theory of Luhmann and Teubner but does not go on to apply this in any detail to case law, nor to explore in depth how systems theory generates a normative framework based around reflexivity.⁵² In this respect, systems theory offers a novel theoretical account of society, to which this Thesis seeks to contribute. As Sandberg states, ‘there has been no discussion of religious law as a social system, understanding how religious legal systems merge the functions and binary codes of the social systems of law and religion.’⁵³ Sandberg has developed some of these themes in his work, calling for a systems theoretical re-evaluation of law and religion as a ‘radical’ approach to

⁵¹ Maleiha Malik, ‘The branch on which we sit: Multiculturalism, Minority Women and Family Law’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 223.

⁵² Sandberg (n 9).

⁵³ Sandberg (n 42) 265.

understanding the interaction of these social systems.⁵⁴ He has also built on work by Malik, examining what she has termed, albeit making use of a different conception of the life world, as examples of ‘autonomous legal orders’.⁵⁵ Similarly, Fournier’s and Bowen’s analysis of religious ‘transplants’ could also be developed with reference to systems theory because it might better highlight the reasons why religio-legal concepts fail to adapt within a new context or why courts and legislators fail to translate them into existing legal frames such as contract, maintenance or family property.⁵⁶

Cohen, on the other hand, has developed a sophisticated theoretical account of reflexive law⁵⁷, but her work focuses on the US constitutional context with little comparative development, nor does she use systems theory to analyse the cases or the empirical data, but instead seeks to justify a reflexive solution to the church-state divide when regulating religion, which this thesis will draw on and develop.⁵⁸ Cohen has also explored the development of what she calls ‘nomos groups’ within constitutional democracies.⁵⁹ Adopting the concept from Cover’s work⁶⁰, a nomos group or

⁵⁴ Sandberg (n 9) 464, 472.

⁵⁵ Sandberg (n 42) 10–13; Maleiha Malik, ‘Minority Legal Orders in the UK: Minorities, Pluralism and the Law’ (British Academy 2012).

⁵⁶ Pascale Fournier, ‘Flirting with God in Western Secular Courts: Mahr in the West’ (2010) 24 *International Journal of Law, Policy and the Family* 67; John Bowen, ‘How Could English Courts Recognize Shariah?’ (2010) 7 *University of St. Thomas Law Journal* 411.

⁵⁷ Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton 2004) ch 4.

⁵⁸ *ibid*; Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 *International Journal of Constitutional Law* 380.

⁵⁹ Jean Cohen, ‘Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism’ in Cécile Laborde and Aurélia Bardon (eds), *Religion in Liberal Political Philosophy*, vol 1 (Oxford University Press 2017) ch 6.

⁶⁰ Robert Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 *HLR* 4.

community ‘determine[s] the authoritative rules of their own structure and processes and police[s] compliance with the group’s ethos.’⁶¹ However, Cover’s conception of a *nomos* is greater than the idea of a self-governing group – it is a ‘normative world’ constituted by ‘a system of tension between reality and vision.’⁶² Cohen’s use of this concept is extended to focus on religious groups instead of the legal *nomos*. In particular, Cohen’s project is to evaluate the claims to sovereignty from within non-State *nomos* groups in competition with the orthodox statist conception of sovereignty. Although critical of any devolution of authority from ‘publicly accountable’ bodies and the notion of group rights, Cohen recognises the need for novel solutions to the claims brought by religious groups to exercise a degree of control over religious, family affairs.⁶³ However, Cohen’s model appears largely uni-directional: it is a sophisticated model of reflexivity but where the norms are still nonetheless *imposed* on regulated groups. Instead, this Thesis takes this model further to argue that systems theory and reflexive law can be democracy enhancing because it can be *norm creating* too.⁶⁴ Norms could be generated by deliberation within communities over religious institutions which will generate new policy through democratic experimentalism and increase mutual-understanding.⁶⁵

⁶¹ Cohen (n 57) 553.

⁶² Cover (n 60) 9.

⁶³ Cohen (n 58) 390.

⁶⁴ Michael Dorf, ‘The Domain of Reflexive Law’ (2003) 103 Columbia Law Review 384.

⁶⁵ Michael Dorf and Charles Sabel, ‘A Constitution of Democratic Experimentalism’ (1998) 98 Columbia Law Review 267.

Other theorists have developed theoretical accounts relating to the interaction between religious norms and the State without reference to systems theory but where these insights may shed further light on the issues raised or solutions proposed.⁶⁶ Augsberg's principal concern is to elaborate a better model for differentiating between 'genuinely religious' claims to accommodations and those which derive from 'cultural' considerations.⁶⁷ His analysis is grounded on the maintenance of the 'equilibrated relationship' between law and religions.⁶⁸ This Thesis develops beyond these projects as part of the development of a model of secularity based on reflexive law: one that seeks to develop mechanisms for the regulation of religious systems, not the maintenance of pre-existing relations. Shachar's model of 'transformative accommodation' is, like Cohen's, also influenced by Cover's work.⁶⁹ As with the analysis in this Chapter, Shachar envisages the friction between 'nomoi' groups and the state as an occasion for transformation and greater responsiveness.⁷⁰ However, this too could be enriched through a systems theoretical understanding of how religious systems and law interact and a broader, more reflexive conception of regulation which could expand upon the range of strategies to be employed to modify behaviour. Eekelaar argues in favour of different models of regulating religious family life which could be taken further through a systems theory analysis, where some of the concerns

⁶⁶ Shachar (n 1); Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9 *Theoretical Inquiries in Law* 573.

⁶⁷ Ino Augsberg, 'Religious Freedom as "Reflexive Law"' in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging* (OUP 2014).

⁶⁸ *ibid* 87.

⁶⁹ Shachar (n 1) 2–4.

⁷⁰ *ibid* 117.

he raises about religious freedom and the challenges of cultural rights might be mitigated by this different paradigm for conceptualising law reflexively.⁷¹ A reflexive scheme sits somewhere between – and combines elements of – these approaches: it is neither substantive nor formal, it neither seeks direct regulatory control over the rules to be applied nor does it accept the justice of pre-existing distributions of resources (or power).

In addition to this rich theoretical literature, there has been significant empirical research into religious family law systems and religious tribunals.⁷² This Thesis is a work of applied, normative legal theory. However, insights from systems theory can and should be tested by empirical study. Future research and regulatory solutions ought to be tested and evaluated against this framework. So, this Chapter introduces and defines systems theory, address its limitations and put this conception in conversation with the theoretical literature. The next section explains the key idea of communications and introduces the empirical challenge that systems theory raises for effective regulations. This challenge manifests in the following section through a discussion of the regulatory trilemma.

⁷¹ John Eekelaar, 'Law and Community Practices' in Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Hart 2015) 16-21.

⁷² Samia Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain' (2007) 1 *Law, Social Justice & Global Development* (An Electronic Law Journal) <https://warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/bano/> accessed 31 October 2018; Gillian Douglas and others, 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts- Report of a Research Study Funded by the AHRC'; Malik (n 51); Malik (n 55); Sylvia Vatuk, 'The "Women's Court" in India: An Alternative Dispute Resolution Body for Women in Distress' (2013) 45 *JLPUL* 76; Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women' (2004) 1 *Muslim World Journal of Human Rights*; Anna Korteweg and Jennifer A Selby (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto Press 2012).

(c) Communications, Language and Logic

As Fredman explains, systems theory posits that each system and sub-system has its own ‘language and mode of function’, which cannot straightforwardly be ‘translated’ by other sub-systems.⁷³ As a result of this social fact, Teubner argues, formal legal rules and command and control regulation perform badly when attempting to impose substantive constraints.⁷⁴ Because ‘law’ is merely one of a number of interacting systems, it fails to achieve the outcomes it seeks through such means.⁷⁵ For law does not take a necessarily superior and hierarchically vertical position in relation to other aspects of social life or modes of regulating behaviour. Law is but one of a number of social systems that define concepts and impose norms, which may, on Teubner’s view, encompass religious laws *as law*.⁷⁶ Two complementary principles emerge from this: first, the imposition of substantive norms directly within religious systems is unlikely to result in effective outcomes. In fact, it is liable to result in a range of regulatory challenges described in terms of the regulatory trilemma, a concept elaborated upon in the next section. Second, notwithstanding the apparent communicative closure of systems, there are effective means of indirectly steering systems so as to promote human rights objectives and maintain an appropriate relationship between State interventions and religious autonomy.

⁷³ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 152.

⁷⁴ Gunther Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’, in Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter 1989) 21.

⁷⁵ Gunther Teubner, ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51 *Current Legal Problems* 393, 422.

⁷⁶ Sandberg (n 9) 465-467.

(i) Principle 1: Alteration of the Environment

Sources of social steering are numerous and complex. And institutions which seek to resolve questions of status occupy a highly functionally differentiated position: they are *legal* in a sense when making communications in a legal coding yet they also impose *religious* norms. When religious norms and state law interact, systems theory explains that translating these norms is difficult, with potential for misrecognition, distortion and ineffective communication on both sides. For example, in England, the law takes the complex sociological phenomenon of religion and re-constructs it in the language of voluntary associations – *or clubs* – when in doing so, all the foundational assumptions that underpin this conception flow not from religion but from law⁷⁷: membership of a religious group is not the same as voluntary membership of a political party or membership of a tennis club.⁷⁸ So, this potential for misrecognition, distortion and ineffective communication is the problem this thesis seeks to identify and address. However, for Teubner, the only effective means of steering behaviour is changing the external environment in which these systems exist.⁷⁹ Teubner suggests that external interventions fail in the ways they seek to modify behaviour. Instead, we should focus on providing the right ‘external perturbations’ to trigger the ‘development of new rules’ within sub-systems.⁸⁰ This is the first major insight of significant importance: it directs

⁷⁷ Russell Sandberg and Sharon Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) 6(1) OJLS 137, 152-153.

⁷⁸ Sandberg (n 9) 462.

⁷⁹ Gunther Teubner, ‘After Legal Instrumentalism? Strategic Models of Post-Regulatory Law’, *Dilemmas of Law in the Welfare State* (De Gruyter 1989) 422.

⁸⁰ Teubner, ‘After Privatisation’ (n 75) 422.

us not to *impose* substantive duties but to alter the environment more broadly to encourage change.

As systems translate interventions into their own ‘language’ – or, as Habermas suggests, differentiated versions of the same multifunctional language⁸¹ - and react to such interventions ‘reflexively’, law’s ability to regulate behaviour through traditional command and control is diminished.⁸² As Cotterrell argues, law suffers a degree of ‘discursive closure’ and possesses its own ‘conception of law as a distinct discourse, possessing its own integrity, its own criteria of significance and validation, its own means of cognition and constituting objects of which it speaks.’⁸³ A similar observation could be made of other systems such as religious family law systems. Berger identifies religious family laws as forming part of the norms that bind together ‘social groups’ which ‘generate or otherwise live in accordance with internal rules.’⁸⁴ Such groups, like the legal system, form ‘social-legal entities’ that interact with state laws in complex ways.⁸⁵

(ii) Principle 2: Communicative interactions are possible

The first principle leads to a difficulty: as concepts are rendered within these systems

⁸¹ Habermas (n 46) Section 2.1.

⁸² Fredman (n 73) 152.

⁸³ Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon Press 1996) 100.

⁸⁴ Berger (n 44) 250.

⁸⁵ Masaji Chiba, ‘Other Phases of Legal Pluralism in the Contemporary World’ (1998) 11 *Ratio Juris* 228, 240.

in different terms, how can there ever be effective regulation? Whether the systems theoretical framework accounts for the appearance of such ineffectiveness in existing regulatory solutions is an argument that will be tested in Chapter 3. Yet, at this stage, our second principle is what Habermas and Fredman both recognise in their work: interaction between systems is not impossible, and attempts to regulate them more directly than Teubner envisions are not futile. Instead, it is possible to combine these approaches by both altering the external environment, and creating indirect, particularised means and processes for imposing substantive human rights duties.

A few examples help illustrate the point. These examples focus on those areas of conflict that arise within family life and which have symbolic and material impact for both religious groups and the State. Thus, as Douglas and others highlight in their review of religious non-state tribunals in the UK, it is of no surprise that tensions arise over ‘significant life events’ such as marriage and divorce.⁸⁶ In UK law a civil marriage requires the satisfaction of a number of formal requirements.⁸⁷ If these requirements are met, a person is said to be ‘married’ according to law.⁸⁸ On the other hand, satisfaction of certain religious criteria *without* legal formalities will mean that this person is ‘married’ according to their faith alone. At once, they are married and not-married according to different criteria within these two systems. In Teubner’s sense,

⁸⁶ Douglas and others (n 72) 19.

⁸⁷ Marriage Act 1949 and Matrimonial Causes Act 1973 (MCA 1973).

⁸⁸ The 1973 Act recognises void or voidable marriages and non-marriage or, non-qualifying ceremonies. For a religious marriage that falls into the category of non-qualifying ceremony as a result of a failure to observe the requisite formalities under the Marriage Act 1949, the parties to that non-qualifying ceremony will not be entitled to the remedies available under Part 2 of the MCA 1973. For further discussion, see: Tristan Cummings, ‘Gendered Dimensions and Missed Opportunities in *Akhter v Khan* (Attorney-General and Others Intervening)’ 32 (2020) CFLQ 239.

these systems construct meaning according to their internal coding: here, law employs the coding, ‘legal’ or ‘not legal’ and concludes that – at least in the UK- a person will be legally married only if the legal requirements are met.⁸⁹ For Habermas, these systems need not be seen as applying entirely separate languages but instead, encoding different meaning within a shared, multi-functional language⁹⁰ as to what it means to be ‘married’. Yet, conflict may arise from this, with individuals pulled in different directions, forced to choose between vindicating their religious or civil rights. What this stylised example demonstrates is that systems construct meaning according to their own language and logic, and if law is no longer understood as hierarchically superior but relates to them horizontally and indirectly, this presents a challenge for traditional legal mechanisms of regulation. In response, systems tend to act defensively, restructure themselves in new and creative ways, risk collapse in the face of legal intervention or law itself may lose its coherence.⁹¹ This is the regulatory trilemma that will be discussed in the next section.

In *J v B* [2017] the court was confronted with what it described as ‘a collision between two un-connecting worlds.’⁹² This case considered the relationships between

⁸⁹ Of course, law also performs other functions beyond coding, discussed later. See, Cass Sunstein, ‘Law’s Expressive Function’ (1999) 9(2) *The Good Society* 9(2) 55.

⁹⁰ Habermas (n 46) 54-55.

⁹¹ Gunther Teubner, ‘Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital’ in Roeland J in ’t Veld and others (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Springer 1991) 1455.

⁹² *J v B* [2017] EWFC 4 [185]. The case has subsequently been appealed in *Re M* and was remitted to be re-decided in *Re A*. However, at this stage, the basic facts and approach taken at first instance is instructive as an example. For further discussion of this line of cases from the systems theoretical perspective: see, Tristan Cummings, ‘Utilizing Systems Theory Insights and Reflexive Law to Negotiate the “Collision between... Un-connecting Worlds” in Family Law’ (2021) 2(3) *Journal of Law, Religion and State* 212.

children, parents and community, following the breakdown of a marriage within the Charedi Jewish community of North Manchester. The father sought contact with the children after she left the family home to live as a transgender person.⁹³ Her argument was that she ought to be ‘sensitively re-introduced’ to the children and contact permitted outside the community, whose opposition ought to be ‘faced down’.⁹⁴ The court was here inserted into this complex interaction between *systems*. As explained by the judge: ‘It has also been said that transgenderism is a sin. Sin is not valid legal currency. The currency of the law is the recognition, protection and balancing out of legal rights and obligations.’⁹⁵ In so explaining, the court has to reconstruct meaning as between systems – understanding transgender identity in terms of legal *rights* outside the moral and religious construction of that status within some branches of Orthodox Judaism. This case also demonstrates acutely the ways in which religious individuals may be confronted by competing imperatives and strung between their desire to maintain their relationships within a religious community and exercise their rights. To this end, whilst the judge rightly understood that the case concerns ‘two apparently incompatible ways of living,’ his error was in seeing this as a *conflict between*, on the one hand, ‘the right of religious freedom, and on the other the right to equal treatment’⁹⁶ because this ignores the fact that the father is *both* a religious individual *and* a transgender woman. This case acutely elicits the question of how religious individuals might be empowered so as to live fully and be recognised in their wholeness as both

⁹³ *ibid* [1]-[6].

⁹⁴ *ibid* [8].

⁹⁵ *ibid* [180]

⁹⁶ *ibid* [162]

religious individuals and as bearers of rights.⁹⁷ This will be considered over the next few Chapters – drawing together systems theoretical insights, normative values and reflexive law.

This relationship between systems goes both ways: in ‘recognising’ religious norms and tribunals, the State also responds to external concepts, deconstructs and translates them into its own language and according to its terms of reference. Thus, religious tribunals are not only the objects of regulation but are sometimes recognised by having their decisions given legal effect or by being institutionalised in some way.⁹⁸ In so doing, both these systems are changed. As Black explains: ‘the information which systems possess about other systems is simply that which they have themselves constructed in accordance with their own criteria.’⁹⁹ Law necessarily understands religious systems through its own constructions. Thus, one of the most conceptually and practically difficult problems posed by the question of how the State interacts with – or establishes - religious tribunals is the ability of systems to translate and apply general, legal norms in respect of them. The information the State has about vulnerable minorities, their choices and motivations and the assignment of weight to different values will necessarily be imperfect. So, what has been largely absent from the debate on religious family laws is this attention to the communicative interaction of systems and the normative consequences that follow from these insights.

⁹⁷ Shachar (n 1) 1, Chapter 7, 120-121 especially discussion of the no-monopoly principle.

⁹⁸ Eekelaar (n 71) 17-18.

⁹⁹ Black (n 2) 107.

(d) Regulatory Trilemma

The manifestation of these problems is presented in stark terms by Teubner, as resulting in what he calls a ‘regulatory trilemma’.¹⁰⁰ As Teubner puts it, legal interventions are ‘either irrelevant or produce disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself.’¹⁰¹ Or, more simply: they lead to ineffectiveness, unresponsiveness or legal incoherence.¹⁰² Attempts to regulate religious tribunals using command and control will likely result in the intervention being ignored or lead to irreparable damage to that system’s ability to reproduce itself or damage to the system of law itself, undermining its normativity, creating a ‘crisis of legitimacy’ and surrendering its autonomy.¹⁰³ The systems targeted may become over-legalised or the law may become over socialised: in either case, this undermines the internal logic of these systems.¹⁰⁴ This trilemma has special prominence in the case of religion and personal relationships where there are informational and enforcement issues with regulating largely private, family decisions.¹⁰⁵ And religious norms derive from a separate and (perhaps for the believer) higher authority, meaning the very ability of law to bind is threatened. Two examples of this problem help sketch out this point.

¹⁰⁰ Teubner, ‘Juridification’ (n 74) 5, 19-22 ; Teubner (n 5) 298-299.

¹⁰¹ Teubner, ‘Juridification’ (n 74) 21. See further, Section 4.1-4.4

¹⁰² Christine Parker and John Braithwaite, *Regulation* (OUP 2005), Section 4.

¹⁰³ Teubner (n 8) 270.

¹⁰⁴ Teubner, ‘After Legal Instrumentalism? Strategic Models of Post-Regulatory Law’ (n 79) 311.

¹⁰⁵ A point developed in discussion with Professor Julia Black.

The Arbitration and Mediation Services Bill as initially brought by Baroness Cox in England, prohibited *all* family law arbitration, imposed equality law obligations and criminalised conduct that purported to be binding arbitration outside of this framework.¹⁰⁶ In that sense, it went beyond the reforms instituted in Ontario (to be discussed in later Chapters) which limited arbitration to Canadian law. And from a systems theory perspective, this might encounter serious difficulties. First, prohibiting all family law arbitration could – as is seen in Canada- lead to more informal means of dispute resolution with potential for harm outside any state safeguards.¹⁰⁷ Second, the *imposition* of substantive regulation about these groups where they have no input or ability to modify, adapt or respond constructively would likely lead to these systems responding defensively, only formally adhering to these norms or outright ignoring the intervention. Third, the use of command and control regulation is unlikely to lead to these equality norms being internalised and could – at the most extreme – lead to the destruction of these systems. This is the regulatory trilemma discussed above. One aspect of the Bill that did present promise was the ‘mediation settlement agreement’ which would have courts scrutinise mediation agreements to ensure proper consent.¹⁰⁸ In face of Government opposition, the 2011 Bill progressed no further. In subsequent years Baroness Cox brought further iterations of the Arbitration and Mediation Services Bill which no longer sought to prohibit *all* family arbitration but instead focused on imposing equality duties on arbitrators. Thus, the Arbitration and Mediation Services (Equality) Bill [HL] 2016-17 was likely to come across many of the same

¹⁰⁶ Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. I §4(3A) (Eng. and Wales) available at <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf>.

¹⁰⁷ Summarised in Korteweg and Selby (n 72) 12-32.

¹⁰⁸ cl. 5 § (2)(1)(5).

pitfalls of the regulatory trilemma as the 2011 Bill. These regulatory attempts will be discussed in detail in later Chapters. For now, it need only illustrate the potential of a systems theory analysis to identify potential problems with traditional regulatory tools and generate insights that can be used constructively to develop appropriate safeguards through reflexive solutions.

A second example focuses on Jewish divorce – the *get*. Across jurisdictions, certain Jewish denominations require a Jewish divorce.¹⁰⁹ Failure to obtain a *get* can be serious for women, who remain *agunah* or ‘chained’ to their prior marriage and their children excluded as *mamzerim*. Consequently, for some Jewish women obtaining a *get* is of vital importance.¹¹⁰ As with Islamic divorce, the husband has the unilateral right to grant the *get* –although subsequent developments limited this right, including requiring the woman’s consent.¹¹¹ Various legal systems have engaged with the question of *get* refusal in different ways. In Israel, a variety of techniques are employed. Rabbinical courts use moral recommendation decrees, impose obligations and manipulation of maintenance all the way to ‘compulsion’ decrees that compel husbands to grant the *get*. The civil courts may reinforce such techniques with novel tortious liability.¹¹² For example, Judge Tzvi Weitzman held that non-adherence to an obligation decree of a Rabbinical court could be reinforced by damages and stated

¹⁰⁹ The UK Divorce (Religious Marriages) Act 2002 and Canadian Supreme Court decision of *Braker v Marcovitz* 2007 SCC 54 [2007] 3 SCR 607 will be discussed in later chapters.

¹¹⁰ Matthijs De Blois, ‘Religious Law versus Secular Law The Example of the *Get* Refusal in Dutch, English and Israeli Law’ (2010) 6 Utrecht Law Review 93.

¹¹¹ *ibid* 95.

¹¹² *ibid* 105-106.

obiter that the court could even impose damages in case of a recommendation decree.¹¹³

Yet, such interventions have been resisted within the religious system, which sees such coercive means as undermining the religious basis of the *get*.¹¹⁴ How might a systems theoretical framework add new dimensions to this debate?

The problem of *get* refusal illustrates the regulatory trilemma in a different way. By imposing *legal* sanctions, the *moral* and *religious* basis of the obligation is potentially undermined: religious courts have found that this vitiates the voluntariness required under some interpretations of Jewish law. As Teubner observes, attempts to impose substantive outcomes through command and control risk that system acting defensively, by re-configuring norms in order to avoid such external impositions; or collapsing, because these external norms – if applied – would destroy the system as a whole; or, leading to the undermining of law’s normative powers, because law no longer binds or gives reasons for action that are not outweighed by opposing religious obligations. This example does not seek to prove that attempts to regulate or recognise the *get* through law are illegitimate or bound to fail. Instead, it seeks to show that the interaction of religious and legal systems creates unexpected outcomes that systems theory might be able to better help explain and which reflexive law might mitigate.

What these brief, stylised examples seek to show is that law constructs religious groups and norms within its own paradigm. And, when the State attempts to regulate

¹¹³ *Kfar Saba* 19480/05 in De Blois (n 110) 104-105.

¹¹⁴ Susan Weis, ‘Religious ‘Right’ to Civil ‘Wrong’: Using Israeli Tort Law to Unravel the Knots of Gender, Equality, and Jewish Divorce’ in Joffe and Nell (eds) *Gender, Religion and Family Law* (Brandeis 2013). See also, Yehiel Kaplan, ‘Enforcement of Divorce Judgments in Jewish Courts in Israel: The Interaction Between Religious and Constitutional Law’ (2012) 4 Middle East Law and Governance 1, 11-23 for a discussion of the issues around the enforced *get*.

religious systems through command and control – it ends up hurting those systems. Where religious personal law is captured in law, both systems are damaged: the religious system becomes legalised, and the legal system becomes socialised – that the distinctive legal coding and function of legal systems takes on a social and religious function - such that neither law nor religious norms properly fulfils their functions. Systems theory thus helps explain why regulatory interventions have failed and how these may be better designed to achieve our human rights objectives. Whilst this discussion opens up useful avenues for analysing the cases and legal materials, the next section examines some challenges around systems theory that need first to be addressed.

3 Challenges: A Modified Systems Theory

This systems theory account of law based around semi-autonomous systems developed in the previous section is subject to three primary criticisms. First, the argument that systems are impermeable might pose an insurmountable challenge to regulating and recognising other systems within law. If systems are truly self-referential and self-contained, how can law *ever* steer behaviour or construct accurate representations? Second, an opposing critique is that these systems may not be distinct at all. Instead, they may be overlapping and intermixed such that understanding systems as separate and semi-autonomous may be simplistic and unilluminating. Third, focus on the *system* may neglect the *individual*. It may do this in two ways: first, it may ignore the role of individuals within that system who leverage internal power. Second, it may neglect the rights of vulnerable individuals.

(a) The impermeability problem

Systems theory proposes that each system has its own inner language and logic. Moreover, it envisages systems as appreciating their distinctiveness from other systems, defining themselves in opposition to other systems and thereby becoming closed-off from full understanding of externalities.¹¹⁵ Law and religion – as with other systems – mark themselves off by reference to the formulation of its social communications. How, then, can we conceive of any means of inter-systemic communication? As discussed above, this creates challenges for traditional means of regulation because these come across the ‘regulatory trilemma’.¹¹⁶ As Habermas glosses this point, ‘language neither seeks nor gains an entry into the intuitive knowledge of participants.’¹¹⁷ This is because, for Teubner, each system inhabits its own epistemic world engaged in separate discourses with incompatible constructions of competing realities.¹¹⁸ This impermeability is, from the strictest systems theoretical perspective, all encompassing: law cannot perceive nor permeate even the ‘political process, the public sphere, and political culture.’¹¹⁹ What is more, because systems have their own logic, they can construct entirely justified and rational outcomes based on that logic which may not be permeated by external legal values, characterised by a different logic. As Cohen explains, the tendency towards ‘self-closure’ renders these

¹¹⁵ Niklas Luhmann, “The Autonomy of the Legal System”, in *The Differentiation of Society* (Columbia University Press, 1982).

¹¹⁶ Teubner, ‘Juridification’ (n 74) 5, 19-22 ; Teubner (n 5) 298-299.

¹¹⁷ Habermas (n 46) 48.

¹¹⁸ Black (n 2) 107.

¹¹⁹ Habermas (n 46) 51.

systems insensitive to externalities regardless of how internally ‘rational’ these systems are.¹²⁰ That is to say, what appears entirely irrational from an external point of view may be entirely rational within the epistemic world of that system. How is law ever to engage with religious systems if this is true? It suggests there could never be a shared language and that attempts to recognise religious norms will fail. Must ‘one episteme [be] reconstructed inside the framework of another’?¹²¹ The impermeability problem presents a formidable challenge that goes to the very heart of any regulatory project.

If this challenge is not overcome, attempts to construct and regulate through law fail. However, as Fredman argues, it is vital that the ‘opacity and impossibility of communication and coordination’ through law not be overstated.¹²² One option is to complicate the understanding of inter-systemic ‘observations’. For example, we might be able to engage in a recursive loop whereby the legal system observes within its own communications the ways in which religious systems observe its communications.¹²³ On this account, we continue to recognise complete communicative closure whilst simultaneously appreciating cognitive openness – with communication remaining illusive, disguised behind an increasingly complex process of adaptation.¹²⁴ The circularity of this process is obvious: as the courts attempt to refer to externalities about the religious interpretation of legal norms, those religious communications likewise

¹²⁰ Cohen (n 55) 155.

¹²¹ Habermas (n 46) 55, especially fn 15.

¹²² Fredman (n 73) 154.

¹²³ Hugh Baxter, ‘Autopoiesis and the “Relative Autonomy” of Law’ (1989) 19 *Cardozo Law Review* 1987, 2051.

¹²⁴ Luhmann (n 30) 8.

have formed in response to legal communications which form the background against which religious communications might take place. The decision in *Akhter v Khan*, for example, *not* to formalise a legal marriage is a response to a particular understanding of the scope of legal marriages in England¹²⁵; the High Court and Court of Appeal's reasoning likewise responding to the concept of 'marriage' within the Marriage Acts.¹²⁶

To accept such a conclusion, would have enormous and stark consequences and, as Habermas argues, ignores the possibility that, rather than envisaging a complex and circular loop of mutual and reciprocal observations, it is possible to have 'differentiated functional specifications' within 'the boundaries of a multifunctional language'¹²⁷. In this point, Habermas is correct when he observes that the orthodox systems theoretical analysis assumes 'mutual indifference' in such a way that empirical evidence cannot support.¹²⁸ Habermas contends, therefore, that systems show deeper 'interdependencies.'¹²⁹ More simply, we need not see each system as speaking in an entirely different language, but in the same language with differentiated usages. This also opens an important conceptual argument that the language of formal rationality as envisaged by Habermas may not be open to all groups, or those within groups. As a consequence, Fredman's argument based on crucial insights from Young is that the 'translation' of language must also accommodate these differences – not just in terms

¹²⁵ *Akhter v Khan* [2020] EWCA Civ 122.

¹²⁶ Tristan Cummings, 'Gendered Dimensions and Missed Opportunities in *Akhter v Khan* (Attorney-General and Others Intervening)' 32 (2020) CFLQ 239.

¹²⁷ Habermas (n 46) 55.

¹²⁸ *ibid* 51–52.

¹²⁹ *ibid*.

of the internal logic of each system, but also the *form* that speech may take.¹³⁰ This ‘multifunctional language’ sees various systems differentiated but also ‘intertwined’ through a single medium – albeit, unlike Habermas, this medium is not constrained to any particular mode of speech. So, within the general schema of the systems theoretical model – where the ‘excessive’ focus on distinct coding¹³¹ is re-framed in the manner here suggested – Habermas accepts that the evidence still shows that we may be ‘generally sceptical of the behaviour-steering effects of legal interventions.’¹³²

Although we can still accept the conclusion that attempts to impose external values through command and control are likely to be ineffective, it is not impossible to influence behaviour by utilising reflexive and indirect means as well as – by extension, more direct communicative interventions where space is created for these to exist in ‘different languages used by participants in a way which all can understand’.¹³³ What matters is that the means are effective in engaging with the internal, differentiated logic of systems – whether understood as communicatively closed but cognitively open or as remaining permeable to communicative interventions also. The question of how intervention ought to be constructed should itself be determined reflexively: by articulating norms and processes for determining which types of legal mechanisms ought to be used in a *particular context*.

¹³⁰ Fredman (n 73) 156–157.

¹³¹ Mark Patrick Hanna, ‘Barking Up the Wrong Tree? Systems Theory and the “Social Positivation” of Human Rights’ in Luca Siliquini-Cinelli (ed), *Legal Positivism in a Global and Transnational Age* (Springer 2019).

¹³² Habermas (n 46) 52.

¹³³ Fredman (n 73) 159; Julia Black, ‘Proceduralising Regulation, Part II’ (2001) 21 OJLS 33, 39–40.

So, if the basic ‘problem’ to be addressed by religion is to negotiate imminence and transcendence then what is the function of law? Once we accept that law is not an absolutely closed communicative system, Teubner reasons that the legal functions include the constitutive, integrative, symbolic and limiting functions. The constitutive function is the idea already developed in this section: law’s role in formalising and autonomising systems. This would protect the autonomy and rationality, for example, of the legal system from religious interference. As such, this is closely linked with the discussion of secularity as described from the religious system, above. Constitutional laws also seek to reduce and reconcile conflicts between social systems. The law achieves this integrative function through managing the communicative interactions between systems. The symbolic function aims to espouse the cultural and historic ‘myths’ that bind together that system. Finally, its limiting function protects other systems and the environment from the ‘expansive’ dynamics of any given social system.¹³⁴

Thus, although Luhmann is dogmatic about the centrality of ‘autopoiesis’, as explained in Part 1 of this Chapter, this is not true of the later developments in systems theoretical analysis where ‘contextual’ engagement as between systems is argued to be possible.¹³⁵ Further, Luhmann’s earlier work was more concerned with functional differentiation rather than the development of self-referential coding. Thus, the answer to this objection based on the radical self-referential nature of systems and the

¹³⁴ Golia and Teubner, ‘Societal Constitutionalism: background, Theory, Debates’ MPIL Research Paper Series No 2021-08, 11-12.

¹³⁵ Jan Kooiman, ‘Social-Political Governance: Overview, Reflections and Design’ (1999) 1 *Public Management: An International Journal of Research and Theory* 67, 72.

consequent communicative closure that results is two-fold: *first*, as a matter of principle, it is possible to de-centre the ‘excessive’ focus on differentiated *coding* and exaggerated notions of communicative closure. *Second*, as a matter of practice, the concept of autopoiesis can be understood as *one axis* or factor in the development of complex, differentiated societies and as *one* part of the picture as to why direct forms of regulation are prone to failure. Developing Mayntz’s understanding, we can conclude that ‘direct governance modes can have effect - if not as effectively as often thought and proclaimed’.¹³⁶ Examination of the form of contextual regulation is the project of Chapter 7. This tension between communicative closure and systematic permeability will be revisited in Chapter 3 where the case law in our four jurisdictions is deconstructed according to the analytic lens of the trilemma and the nature of any communications between systems is examined.

It should not, however, be assumed that command and control is more effective or robust or that reflexive methods are inadequate in relation to the *degree of potential harm*. In all cases, a holistic approach is required and the selection of norms and procedures should itself be conducted reflexively and dynamically, with close consideration of the norms of norm selection and an openness to experimental regulatory designs. Through reflexive law, a dynamic settlement could be established that negotiates these challenges whilst protecting and upholding rights, freedoms and the relationships of care that knit together all communities. As Habermas puts it, law cannot ‘operationalise its messages in a manner that is effective for *all types of addressees*’ but, through reflexive regulation, it can nonetheless be geared at pursuing

¹³⁶ *ibid.*

human rights goals when targeted at specific systems, with sensitivity to the ways systems react.¹³⁷ This insight provides a key counter-weight to the potential objection that – if systems truly are impermeable – then any and all attempts to recognise and regulate them will fail. In fact, they are not as impermeable as Teubner suggests, leaving space for effective interventions.

(b) The boundary problem

Attention to these different jurisdictions shows that the boundaries between systems are often unclear, both at a conceptual level and in terms of real life. Conceptually, distinguishing systems with precision is challenging, with blurred and unstable boundaries at the fringes. In practical terms, individuals may move between systems, or belong to multiple and overlapping ones.¹³⁸ In fact, Luhmann acknowledges as much: ‘The singular person can no longer belong to one and only one societal subsystem.’¹³⁹ However, this account still relies on the separateness of systems themselves, as defined by their coding and institutions.

However, a deeper challenge is also evident in that *systems* themselves may not best be considered as entirely separate and differentiated. If this were true, it would make designing interventions that target systems problematic or simplistic. It is clear

¹³⁷ Habermas (n 46) 52.

¹³⁸ Verschraegen (n 14) 255–256.

¹³⁹ Niklas Luhmann, ‘Individuum, Individualitdt, Individualismus’ in N. Luhmann, *Gesellschaftsstruktur und Semantik: Studien zur Wissenssoziologie der modernen Gesellschaft* (1989) translated in *ibid* 256.

from the examples in this Thesis that law and religions are intertwined. Thus, the idea that there are closed systems of ‘law’ and ‘religion’ is open to interrogation as is whether ‘law’ can emanate from sources outside of the State. As Fredman reasons, ‘there are many ways in which laws can be seen to emerge from a variety of sources apart from the State.’¹⁴⁰ Whether or not norms are labelled as ‘legal’ is of little consequence here, yet it demonstrates that the categories of systems are not easily defined. For Luhmann, the answer is simple and requires consideration of the coding employed by systems: those which communicate in terms of ‘legal’ and ‘illegal’ *are* part of the legal system; those which employ the coding of transcendence, as discussed in the first part of this Chapter, form part of the religious system. However, this presentation of functional difference is too stark, with the processes of differentiation and de-differentiation occurring in parallel such that the coding of systems becomes less distinct. In Heelas’ words, individuals seek to ‘raid the world’ for symbols and meanings from across systems such that the notion of religious systems as defined by their identification of ‘the spiritual’ represents but one facet of post-modern religious life.¹⁴¹

These ‘laws’ *may* include religious laws, whether or not they are formally promulgated as state laws: in which code must these be understood? In fact, in jurisdictions where there is a complete blending of law and religion (or a State construct of religion, filtered through that system’s internal logic) such categorisations are deeply undermined. As Sandberg remarks, religious tribunals have both legal and religious

¹⁴⁰ Fredman (n 73) 154.

¹⁴¹ Heelas (n 36) 5-6.

functions.¹⁴² They blur the boundaries between systems in this way and challenge the systems theory assumption of differentiated functions, because they seem to combine functions. This eventuality reflects a post-modern trend whereby functional differentiation has become less strict and post-modern religions adapt and intermingle religious codes from those across social life.¹⁴³ This development, evidenced across the jurisdictions studied, offers us both an opportunity and a challenge. First, with regards the opportunity, as the boundaries between systems become less pronounced and communications become more permeable. The tendency to ‘hybridity’ might suggest greater communicative possibilities between systems and evidence an ever greater form of *specialisation* (i.e. greater social complexity and functional differentiation), with religious groups taking on roles that were once the remit of the State (and vice versa).¹⁴⁴ On the other hand, as religious individuals become more willing to ‘combine codes’ the risks of de-differentiation are immediate and serious. Religio-legal communications might result in a destructive cycle that undermines individual and systemic communicative freedoms.¹⁴⁵

A good example of this complication is the personal law system in India, which enshrines a right to religious institutional autonomy under Article 26.¹⁴⁶ The case of *Vishwa Lochan Madan v Union of India* (2015) was a Public Interest Litigation case

¹⁴² Sandberg (n 9) 456.

¹⁴³ Heelas (n 36) 5. See further: James Beckford, *Social Theory and Religion* (CUP 2009) 24-26.

¹⁴⁴ Sandberg (n 42) 266.

¹⁴⁵ Christoph Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) 18 OJLS 61, 63.

¹⁴⁶ Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 403–404.

launched against the State in relation to the role of non-State religious tribunals, with the concern that these were exerting social pressures on vulnerable individuals and acting as a parallel legal system, functioning like courts. In particular, the case was initiated in response to the issuing of *fatwas* by non-State religious institutions on issues of marital status and the legitimacy of children born as a result of rapes. The petitioner sought a declaration that the practices of such tribunals were unconstitutional. The Supreme Court held that, because these tribunals lacked the qualities of a ‘legal system’ there could be no conflict with the Constitution and so rejected the petitioner’s case. However, the Court also made clear that ‘no Dar-ul-Qazas ... shall give verdict or issue Fatwa touching upon the rights, status and obligation of an individual unless such an individual has asked for it.’¹⁴⁷

India, state personal law is a mixture of codified and uncoded religious family law, administered in state courts.¹⁴⁸ However, due in part to the distortion of such religious laws by the State, non-State religious tribunals have been established as a way to re-exert communal control over religious family life.¹⁴⁹ Yet this demonstrates the deep intermixture of systems –religious, political, legal - and the ways these boundaries are blurred. It aligns with Luhmann and Teubner’s key insight of *functional differentiation* – and the attempts as between systems to maintain their functional differentiation according to certain characteristic features and coding. This power struggle between systems for both legitimacy and internal coherence forms part of the

¹⁴⁷ *Vishwa Lochan Madan v Union of India* (2014) Writ Petition (Civil) No 386 of 2005

¹⁴⁸ *ibid.*

¹⁴⁹ See, for example: Vatuk (n 72).

broader ‘larger and more complex’ system in which State and non-State groups seek to assert their power over individuals. The challenges the idea that religious norms exist in a pure, essential or authentic form but is instead the creation of this complex relationship between systems. An example of this communicative interaction is the Supreme Court’s strong endorsement of a principle of standing or ‘direct interest’ before non-State religious courts which it argues should form the procedural basis of any *fatwa*.¹⁵⁰

Thus, systems and sub-systems are not clearly delineated but instead are overlapping, reinforcing and constantly shifting.¹⁵¹ State and non-state actors may have ostensibly overlapping *functions*. As systems theory suggests, the Indian regulatory attempt – the incorporation of religious norms into state law- has led to ineffectiveness and resistance but has also led to progressive outcomes in the context of extreme contestation over religion and the law. *Vishwa Lochan Madan* held that non-State religious tribunals lacked the qualities of a ‘legal system’ – that is to say, the Court attempts to distinguish State religious laws and non-state laws according to functional differences - and decided on that basis that any discriminatory impacts were not unconstitutional. The shallow reasoning of the court failed to interrogate the interaction of systems, the impact of State religious tribunals and the sorts of informal, social and communal pressures that also create quasi-legal sources of obligation. *Vishwa Lochan Madan* illustrates the contestation over functions between systems and the ways these

¹⁵⁰ Kalindi Kokal, ‘To Lead or To Follow? Supreme Court and Community “Justice”’ (2014) 49(50) Economic and Political Weekly 19, 20.

¹⁵¹ See, for example: *Mohammed Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 566. More recently, the Supreme Court decision on ‘triple talaq’: *Shayara Bano vs Union of India* (2017) 9 SCC 1.

overlap and react defensively to one-another. Here, non-state religious tribunals purport to perform a legal function, albeit one that the state court's communicative closure fails to properly appreciate. This difficulty in comprehending the *legal* quality of communications made from non-state entities and the pre-eminence state courts accord to their own pronouncements inhibit it from properly engaging with the equality and human rights issues that emerged in this instance. Thus, whilst State courts purport to articulate the content of religio-legal norms they also fail to recognise the same phenomenon as emerging from non-state institutions. From the systems theoretical perspective, this results in a functional overlap based around the legalisation of religion, and the socialisation of law.

(c) The individualist problem

Systems are made up of people and are steered by powerful individuals within them:

Neither law nor society self-identifies. Neither norm nor social practice is self-evident in any particular context. Indeed, neither belief nor behaviour exists apart from believers and behavers.¹⁵²

There is a deep and interconnected relationship between individual and system: 'personality no longer coincides with fixed roles and typifications, but has to be [built] up by diverse and partial participation in different subsystems.'¹⁵³ These individuals, moreover, are not homogeneous but diverse and multifaceted. This reflects Phillip's central contention that the multicultural subject is not represented as merely 'driven by their culture and compelled by cultural dictates' but is an active participant in that

¹⁵² Martha-Marie Kleinhans and Roderick A Macdonald, 'What Is a "Critical" Legal Pluralism?' (1997) 12 Canadian journal of law and society 25, 27.

¹⁵³ Verschraegen (n 14) 269.

process of norm creation and development.¹⁵⁴ This ‘diverse’ participation across systems is, therefore, both central to personality but is also the foundations for discrimination and marginalisation as these ‘very real power structures’ often discriminate against the more vulnerable members of groups.¹⁵⁵

This section examines three important questions about the tension between individual and systemic dimensions. First, this section observes the basic idea that there is an interrelation between the individual and the system in which they are socialised. This section will argue, based on Mayntz's analysis, that orthodox systems theoretical analysis tends to underemphasise the role of agency in shaping values and preferences. As such, the legal response to the systemic dimension ought to give weight to the role of individuals, particularly the cultural ‘insider’, when responding to the trilemma. Second, as a result of this focus on individual rights, this theoretical perspective presupposes certain values as the conditions of deliberation. This link between individual rights and systemic stability is developed in Chapter 4, Part 1 and Chapter 6, Part 1. The nature and substance of these values are elucidated in Chapter 6, Parts 2(a)-(c). At this stage it is necessary only to note that this account of systems theory in the family context entails relational autonomy, substantive equality and respect for relationships of care as the foundational values of reflexive secularity. Finally, this section also makes the argument that the best way to ensure the normative conditions for deliberation are met is through respect for the reflexive criterion in the design of regulatory interventions in religious family life.

¹⁵⁴ Anne Phillips, *Multiculturalism without Culture* (Princeton University Press 2009) 8–9.

¹⁵⁵ Fredman (n 73) 156.

(i) Individual and System

This fact is at the nub of concerns over women's and LGBTQ rights as these form minorities or vulnerable groups within minority groups. It cannot be assumed that systems are free and equal or that all members have access to power, so the ways in which systems of power dynamics are identified and engaged with is 'crucial'.¹⁵⁶ In fact, Luhmann's central thesis is that the more vulnerable an individual is, the greater need to develop 'protection mechanisms', such as rights, for the 'self-presentation and mobility of the individual'.¹⁵⁷ Likewise, in the development of regulatory 'spaces' in response to the problems faced by some of those subject to religious family laws, acute attention must be given to the power structures that surround these spaces and the barriers which inhibit the individual's right to 'enter' them.¹⁵⁸

As explained above, although Luhmann's conception of systems focuses on the autopoietic quality of all systems – and understands this as absolutely fundamental – later developments of the systems theoretical model open up a multi-factor analysis, whereby other dimensions are recognised in the development of complex social systems. For example, Mayntz has argued that 'regulatory norms cannot motivate behaviour that depends on personal initiative, innovation and positive engagement.'¹⁵⁹

¹⁵⁶ *ibid.*

¹⁵⁷ Verschraegen (n 14) 270.

¹⁵⁸ John Gaventa, 'Finding the Spaces for Change: A Power Analysis' (2006) 37 IDS Bulletin 23.

¹⁵⁹ Renate Mayntz, 'Governing failures and the problem of governability: Some comments on a theoretical paradigm' in J Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage 1993) 14.

In other words, whilst communicative closures may explain part of the development of the functionally differentiated society, *the individual* herself must have a role to play and this is partly why sub-systems may be difficult to influence externally.

(ii) Deliberative Legitimacy and Individual Rights

The relevance of individuals and sub-groups within systems is of the highest importance because, as Réaume argues, group autonomy requires deliberative reflection and group decision making.¹⁶⁰ The internal dynamics and impediments to autonomy are just as important as assessing the impact of external interventions, such as those from the State. Réaume describes this process of autonomous group decision-making as being where:

... the choices of individuals play a part but no one such choice is decisive. The process is deliberative. Growth and development, change or reaffirmation of tradition arises out of debate and reflection within the group about the best forms of life for the members of the group.¹⁶¹

Two points emerge from these conclusions. First, that group autonomy is linked to individual autonomy and individual recognition is linked to group recognition.¹⁶² This necessitates a process of reflection and deliberative contestation that is not controlled by a small minority within that group or which subordinates the individual rights of the most vulnerable members of that group. Second, systems theory identifies these

¹⁶⁰ Denise Réaume, 'Justice between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 University of British Columbia Law Review 117.

¹⁶¹ *ibid* 132.

¹⁶² Farrah Ahmed, 'Religious Norms in Family Law: Implications for Group and Personal Autonomy' in Maclean and Eekelaar (n 71).

dynamics as creating the space for interventions, through shifting that balance of power in line with human rights and equality goals. This is a process termed collibration.¹⁶³ Collibration entails the manipulation of existing tensions within a system in order to promote the public interest or to achieve human rights objectives. Dunsire argues this has three stages: to identify ‘what antagonistic forces already operate’, to examine what ‘configuration of them provides the current stability’, and then to devise what ‘intervention would help to change that stability to an alternative one which is more in line with the policy makers' objectives’. This is achieved primarily by leveraging State power in support of ‘the side that needs it to do the trick’.¹⁶⁴ Or in other words, to use the State to destabilise existing power structures in ways that are likely to lead to human rights objectives.

As a result, whilst it may appear that external interventions in groups reduce their autonomy, the opposite may be true: external interventions may be necessary to ensure the conditions for autonomous group decision making by challenging, empowering and destabilising sub-groups to promote human rights and equality goals, thus *increasing* religious autonomy. As Mayntz puts it, reflexive approaches to regulation aim to:

... enhance the independent adaptive, reactive, and problem-solving capacities of societal actors, which means to motivate and to enable them to react purposefully at any moment to changing conditions¹⁶⁵

¹⁶³ Dunsire (n 49) 11-12.

¹⁶⁴ Andrew Dunsire, ‘Modes of Governance’ in Jan Kooiman (ed), *Modern Governance* (Sage 1993) 34.

¹⁶⁵ Mayntz (n 159) 15.

This can help lead to ‘societal self-organization’ which promotes ‘effective problem-solving’ at a communal level,¹⁶⁶ where group members may be more representative, responsive and understanding of their own needs, but always bounded by human rights. As Ahmed concludes, group autonomy ought only be respected when it is free of both external and internal ‘threats’ to autonomy¹⁶⁷ – although what ‘threats’ exist and who defines them are themselves contested issues that will be explored in Chapter 4 and 5. In solving complex problems, the State ought to use ‘contextual control through the setting of legal norms that can secure the success of collective societal problem-solving by self-regulation and horizontal co-ordination.’¹⁶⁸ This is the model of regulation that may best recognise religious norms without straying into undue interference and is the model this thesis will attempt to fashion in concrete terms in Chapters 5 and 6.

Systems theory ought not displace the role and importance of the individual. Individuals communicate between systems and belong to multiple and overlapping ones. This is apparent in many of these cases, where religious individuals articulate their claims through law. Pascale Fournier has examined this from the perspective of the strategic choices religious individuals make, either stressing or downplaying their religiosity to leverage power.¹⁶⁹ As Fournier puts it, individuals make use of religious concepts, such as *mahr* agreements, as ‘a tool of relative bargaining power’.¹⁷⁰ This is

¹⁶⁶ *ibid.*

¹⁶⁷ Ahmed (n 162) 36-37.

¹⁶⁸ Mayntz (n 159) 15.

¹⁶⁹ Fournier (n 56) Part C.

¹⁷⁰ *ibid* 3, 12-18.

also evident in the Indian cases. Take *Shah Bano*: here, a religious woman makes her case on the basis of her interpretation of the religious law.¹⁷¹ Or, consider the position of a religious widow in Israel: she may be prohibited from re-marriage if she is to receive her pension, and so seeks the protection afforded to reputed spouses. However, a religious individual may still be prohibited from cohabitation by virtue of her beliefs and be forced to forgo her pension.¹⁷² At this stage, however, the point is that we cannot oversimplify or overstate the systematic closure of these systems or the possibility that systems may overlap. Law and religion are traversed by many individuals with intersecting and changing identities, and aspects of these identities may be stressed or concealed at different times.

(iii) The role of reflexivity

Individuals, from a systemic perspective, remain relevant because, ultimately, it is the individual whose rights must be upheld through systemic interventions.¹⁷³ This means understanding the individual in all her complexity and centring her in any solution – locating the system and the group more as the *site* of her being and not as the ultimate normative unit. However, on the other hand, Mayntz argues that the system is not merely the ‘cumulative result of aggregated individual acts’ because of their *organised structures*. This is true of both law and religious, with ‘structural and procedural arrangements’ lending them to be appropriate subjects of systems theoretical

¹⁷¹ *Mohamed Ahmed Khan v Shah Bano Begum* (1985) 1985 AIR 945.

¹⁷² Pinhas Shifman, ‘Family Law in Israel: The Struggle Between Religious and Secular Law’ (1990) 24 *Israel Law Review* 537, 542.

¹⁷³ Verschraegen (n 14) 270-271.

analysis.¹⁷⁴ The system mediates the direct engagement of the State, mitigating the administrative complexity of dealing with individuals and families.¹⁷⁵ Mayntz concludes that the result is that regulatory solutions must ‘secure that in the decision-making process not only information about the *needs and fears of actors* in the policy field is taken into account, but more importantly also indications of side effects, interdependencies and emerging problems’.¹⁷⁶ These possibilities will be examined below and be explored more fully in Chapter 7. However, bringing these threads together, a proper understanding of the individual as situated within systems and the normative commitment to certain values implies a reflexive response to tensions in religious family life.

Bringing these threads together, this self-referential characteristic can be a danger to women and LGBTQ people. If the norms applied are harmful and external interventions unlikely to affect change, this creates a double injustice. That is to say, if religious norms are carefully internally rationalised then exposure to external norms – including the imposition of substantive constraints - may not have the behaviour and norm modifying effects that are intended. As Malik has identified: ‘women are always at the forefront of attempts to recreate collective identity because they reproduce and socialize future members of the group.’¹⁷⁷ Control over these functions, concentrated in a powerful group resistant to external change raises a weighty argument against

¹⁷⁴ Mayntz (n 159) 18.

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid* 20.

¹⁷⁷ Malik (n 51) 215.

legally recognising religious tribunals as an institution or otherwise giving legal effect to religious norms because it may cede power over the lives of women within a system that may not respect their rights.¹⁷⁸ Empirical evidence is closely contested and still being generated and interpreted, but it is commonly accepted that there is *at least the potential* for discriminatory norms to be applied.¹⁷⁹ This leaves us with two imperatives: how are we best to interact with religious systems and how are we best to empower and protect vulnerable members within these groups?

(d) The structural Problem

Systems theory recognises the ‘very real power structures’¹⁸⁰ that operate in ways that may be harmful to vulnerable individuals within minority groups. These structures are both an obstacle to realising regulatory objectives and a potential *means* of realising human rights goals.¹⁸¹ As mentioned in Chapter 2(c), above, it cannot be assumed that systems are free and equal or that all members have access to power. Ayelet Shachar warns of the risks of the entrenchment and amplification of patriarchal norms through ‘privatizing diversity’ – first through traditional conceptions of religious norms, then through state law.¹⁸² The debate around religious family life is as much about how

¹⁷⁸ Susan Moller Okin and others, *Is Multiculturalism Bad for Women?* (Princeton University Press 2011).

¹⁷⁹ Bano, (n 72); Korteweg and Selby (n 72); Karin Carmit Yefet, ‘Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction’ [2016] *University of Illinois Law Review*; Gopika Solanki, ‘Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Women’s Rights in India’ (Library and Archives Canada 2008).

¹⁸⁰ Fredman (n 73) 156.

¹⁸¹ Dunsire (n 49).

¹⁸² Shachar (n 55) 580-581.

religious minorities may be recognised in state law as it is about the right to retreat from shared, public norms in the domain of family life. Systems theory must recognise not just the institutional relationship between systems in the abstract, but the complex relationship between gender and sexuality, religion, State and power. That is to say, the abstract and theoretical analysis must be brought to earth through concrete examples so as to root the discussion in these power dynamics. Both gender and sexuality involve these power dynamics, in which one group have power over another. Likewise, most organised religions involve hierarchy, and can exert (at the least) social sanctions to enforce their precepts and are often controlled by men, with little structural room for women in decision making and norm enforcement. The State is also built around power, and although democratic societies are committed to human rights and equality, these too are influenced by patriarchal and heteronormative forces.

4 Conclusion

Systems theory recognises the complexity of modern life and the challenges faced by pluralist, multicultural societies. Today, individuals and groups seek the space to live their private lives according to their religious beliefs, to enter into and dissolve those religious unions which mean so much to them on their own terms. Yet, it has also long been understood that in doing so, individuals are forced to choose between their full participation in broader civic life and recognition within their communities of their religious choices: an impossible choice between their culture or their rights.¹⁸³ As Shachar recognised, this choice is pernicious and unnecessary. Yet her solution, a model of joint governance and shared responsibility between the State and

¹⁸³ Shachar (n 1) Introduction, 13.

communities is incomplete because it could further develop an explicit examination of the communicative interaction of social systems. The assumption of shared background values that underpins Habermasian deliberation and the strictly distinct epistemic worlds envisioned by Teubner need not be accepted in opposition. Instead, systems theory can and should recognise the distinctiveness of social systems at the same time as challenging the notion of their closure to external reasons, and the possibility of translating these norms between networks of actors.

Chapter 3 will turn to the application of this framework. In particular, the systems theoretical presentation of society will be used as a lens by which the cases can be deconstructed and normative conclusions to be derived. The answer to the challenges raised in Chapter 3 will be presented in Chapter 4 in the form of a reflexive model of secularity. ‘Reflexivity’ describes a concept that refers back to itself. That is to say, where the subject is reflexive of its object: the regulation of self-regulation; the creation of procedures in relation to procedures; and the elaboration of norms of norm selection.¹⁸⁴ These aspects – self-regulation, process and norm selection - will be developed later in the following Chapters as part of a multifaceted model for regulating religious family norms. Chapter 3, however, explores how systems theoretical insights may address the regulatory challenges that arise from the tensions between religious and other systems of public life, notably, to avoid Teubner’s ‘regulatory trilemma’¹⁸⁵ and to strike a better balance between religious autonomy and other human rights values. It, therefore, forms the first theoretical touchstone in this Thesis which lays out

¹⁸⁴ Cohen (n 57) 4–5.

¹⁸⁵ Teubner (n 74) 21. See further, Teubner (n 75).

an analytical basis for examining religious family law and religious norms; offers an explanatory hypothesis for how the regulatory failures that flow from the existing models might be understood; and, provides the grounding for the discussion in Chapter 4 where these challenges are bridged by reflexive secularity. Chapter 5 will articulate norms of norm selection and Chapter 6 will defend particular values which ought to underpin this regulatory framework. Chapter 7 draws together the strands of the theoretical and applied chapters through worked examples focusing on the specific regulatory strategies that might be employed to promote reflexivity and human rights.

CHAPTER 3

A SYSTEMS THEORY ANALYSIS OF JURISDICTIONAL EXAMPLES

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Introduction

Chapter 2 introduced a model of law and religion based on systems theory. This framework helps answer the question of how law communicatively interacts with other sources of obligations, especially where these norms conflict. From this perspective, law and religion form social systems with their own internal dialect and modes of

function that renders direct forms of regulation less effective. The purpose of this Chapter is two-fold: first, to relate the theoretical insights from Chapter 2 with practical examples; second, to deconstruct these examples with a view to better understanding the relationship between law and religion and derive normative implications as to how better to negotiate this relationship.

Chapter 3, therefore, makes concrete what in Chapters 1 and 2 had been abstract and starts the task of placing these theoretical approaches to law and religion into conversation with systems theoretical and reflexive principles through applied, normative theory.¹ It seeks to examine whether this framework provides an adequate account of the case law and legislation in the four example jurisdictions - Canada, the UK, India and Israel. This is because the ways in which religious norms might be accommodated is variable and context dependent² and interconnected with constitutional and other secular or human rights laws within each jurisdiction, resulting in ‘seemingly irresolvable’ contradictions between equality and religious freedom.³

Second, once this fit between theory and practice is established the framework established in Chapter 2 is used to evaluate the cases through the prism of the regulatory trilemma to identify the suitability of the existing models of law and religion – namely, voluntarism, delegation and authorisation.⁴ Common to these models is the assumption of law’s normative superiority and its effectiveness in regulating substantive

¹ For an outline of this methodology of reflective equilibrium, see: Chapter 1, Part 5(A).

² Farrah Ahmed, ‘Personal Autonomy and the Option of Religious Law’ (2010) 24 IJLPF 222, 223.

³ Cassandra Balchin, ‘Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change’ (WLUML 2010) 211 <<http://www.wluml.org/ru/bibliography/wrrc/content/“family-law-contemporary-muslim-contexts-triggers-and-strategies-change”>> [Accessed 27/11/20].

⁴ For a brief outline and discussion of these models, see: Chapter 1, Part 5(B) as well as a justification for the selection of the jurisdictional examples at 5(C) and 5(D).

obligations. This Chapter uses the systems theoretical framework to determine the extent to which the jurisdictional examples of these models demonstrate communicative closure and cognitive openness to their environments. Once these conclusions are exposed, this Chapter establishes the germ of a *normative* theory of regulation based around reflexivity. This is the criterion of reflexivity which this Thesis will argue should help determine whether and to what extent the State should be involved in regulating religious family life.

This Chapter is structured in four parts. First, it outlines the theoretical models and essential comparative context. It explains how these jurisdictions represent different conceptual positions, emblematic of contrasting theoretical stances on the relationship between state law and religious family life. Part two sets out the analytical framework as it will be applied in this Chapter. Part three examines and deconstructs the communicative interactions between family law and religious norms through the epistemic prism of systems theory, focusing on the examples of a *mahr* agreement and the practice of religious divorce. This section then analyses the law through the regulatory trilemma to evaluate the limitations of these various models of regulation and the ‘disintegrating’ or unexpected outcomes that result.⁵ Part four examines the juridification by law of other social phenomena – such as religions and the corresponding and expanding scope of religious norms, also in ways that appear to reject the functional differentiation of social life.⁶ The legal system will generally attempt re-construct ‘alien’ knowledge within its own terms so as to maintain its ‘full

⁵ Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter 1989) 21.

⁶ Gunther Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1991) 13 *Cardozo Law Review* 1443, 1455.

epistemic authority’ of the same ‘communicative’ events.⁷ Or, put another way: the legal system cannot authoritatively interpret religious knowledge as understood by religious individuals but this does not mean that law cannot nonetheless use these same communicative events to effect changes within other systems. This is the proposition which this Chapter seeks to elicit from the case law. As an exercise in applied normative theory, and not an empirical study, this Chapter sketches out broad trends and suggests that, across jurisdictions, attempts to directly regulate religious family life have led to the trilemma. The challenge of ‘translating’ legal interventions between systems through the wrong paradigmatic approach offers a possible explanation for the persistence of the tension between equality and religious norms.

The systems theoretical approach allows us to draw out two insights: first, the concept of co-evolution suggests that communications between systems result, over time, into a new equilibrium. The effect of structural coupling is that the various systems – family, religious and legal – not only become increasingly functionally differentiated but also develop interdependence. As Cohen explains, in systems characterised by State recognition of religious laws under *millet* systems, the result can mean the construction and ‘freezing’ of religious and gendered differences in State law.⁸ Second, however, the trilemma depicts three regulatory pathologies that may arise when command and control methods are used – but this conclusion only provides a partial picture, because beyond the trilemma lies further complexity as systems re-adjust in response to changed circumstances and evolve together to form new structures

⁷ Gunther Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’ (1989) 23 *Law and Society Review* 727, 738.

⁸ Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 *IJCL* 380, 383.

of power. As will be explored in Chapter 7, this process of structural coupling and the modification of systems through indirect means ought to form the backbone of the regulatory recognition and regulation of religious family laws.

1 Theoretical Models and Jurisdictional Examples

This Part is divided into three sections. First, it outlines three broad theoretical models as axes of State intervention - the abstentionist or voluntarist model, the delegation and authorisation models. Second, it presents a methodology based around four jurisdictional examples – England, Canada, India and Israel. Third, it introduces some contextual information about these jurisdictional examples in relation to religious family life. The analysis in this Chapter is limited to two case studies: the rules around maintenance (financial provisions upon divorce, excluding child support payments) and the rules around religious divorce. These case studies exemplify in each jurisdictional example the sites of contestation between law and religion in modern life and are common challenges across the selected jurisdictions. Traditionally, in some religions access to divorce has depended upon the unilateral rights of the husband, creating a power dynamic as between spouses, with women sometimes bargaining away their religious (or legal) entitlements to maintenance in order to extract a religious divorce from their husband with both material and recognitional consequences. As such, these cases provide acute challenges to all societies committed to human rights and equality – as well as demonstrating the limitations of state law as a means of realising these objectives from the systems theoretical perspective.

(a) Theoretical Models as axes of State intervention

This section provides an overview of the theoretical models of how the State might negotiate the relationship between state law and religious family life.⁹ Eekelaar sets out these models as a three part-categorisation of institutional arrangements as they relate to religion and family law.¹⁰ These models expose critical dimensions of the analysis and demonstrate a spectrum of possible relationships between law and religion in the context of family life across the jurisdictions studied.¹¹ However, Eekelaar's categories – the abstentionist models, the particularist models, and the delegation and authorisation models – should best be understood as representing positions on axes of state intervention in religious family life rather than conceptually distinct categories because, although these may represent 'ideal types' for theoretical purposes, once they are related to practice it becomes impossible to maintain these distinctions. Moreover, these models should be understood in relation to the systems theoretical distinctions between *formal* law and *substantive* law.¹² Although these three models do not *define* the jurisdictions examined in this Thesis, the models form part of the selection criteria to ensure that each model is exemplified with its real-world complexities.¹³ For example, whilst English law generally adheres to an abstentionist or voluntarist model,

⁹ These models were introduced and the terminology around models and their relationship with the jurisdictional examples was justified in Part 5 of Chapter 1.

¹⁰ John Eekelaar, 'Law and Community Practices' in *Maclean and Eekelaar (eds), Managing Family Justice in Diverse Societies* (Hart 2015) 16-17.

¹¹ A point developed in discussions from Sandra Fredman.

¹² Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239, 241-244, 257.

¹³ Jean Cohen, 'Rethinking Political Secularism and the American Model of Constitutional Dualism' in Jean Cohen and Cécile Laborde, *Religion, Secularism and Constitutional Democracy* (Columbia University Press 2015) 121.

in both the recognition of marriages and in relation to Jewish divorce, the law formally incorporates some dimensions of delegation or authorisation approaches.¹⁴

Whether a model presupposes formal regulation or substantive regulation of religious affairs depends on the nature of the relationship between religion and the State: formal models presuppose State non-intervention; substantive regulation seeks to directly modify religious norms. The models outlined in this Chapter may incorporate formal, substantive or reflexive elements. These will be examined and critiqued in Chapter 4 in more detail. The first of the models includes those arrangements based on authorisation where the State gives express or tacit force of law to *religious family norms*, administered by religious authorities.¹⁵ This is sometimes referred to as a *particularist* or *millet* system. However, authorisation models need not be synonymous with a ‘top down’ model where the State authorises religious groups directly. Instead, authorisation can employ elements of institutional diversity and religious self-governance.¹⁶ The second approach is captured by the delegation model: where ‘the state prescribes and gives [state] legal force to the norms to be followed ... so that families can be seen as *delegates* through which state law and policy is applied.’¹⁷ Finally, the State may rely on ‘purposive abstention’ whereby moral and social obligations are not given force of state law, ‘unless their failure threatens

¹⁴ Marriage Act 1949, Part II; Divorce (Religious Marriages) Act 2002.

¹⁵ *ibid*, 17-18; Daphna Hacker, ‘Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts’ (2012) 27 JLR 59.

¹⁶ Prakesh Shah, ‘Shadow Boxing with Community Practices: A Response to Eekelaar’ in Maclean and Eekelaar (n 10).

¹⁷ Eekelaar (n 10) 18-19.

community interests’ or ‘to achieve justice when families fall apart.’¹⁸ Under this model, mostly exemplified in England and Canada, the key idea is that ‘demands based *solely*’ on moral and religious considerations, should ‘generally not be reinforced by legal sanction’.¹⁹

These models are animated by different underlying principles and assumptions about the role of the community and the State and the degree to which the State is justified in interfering in individual and communal decisions relating to family life and religion. However, common to each of these models are assumptions around the incorporation of elements of command-and-control regulation. These models - and their jurisdictional examples - are grounded on a set of axes of State involvement in individual and communal autonomy revolving around the State’s purported centrality to regulation, State law’s asserted normative superiority over other norms and the general – although not exclusive - enforcement of state laws through commands backed by sanction.

None of the jurisdictional examples in this Chapter falls neatly within these model categories – but they do exemplify elements from across this range. Systems theoretical re-examination of these *theoretical* models can only take the analysis so far: what is needed at this juncture is analysis of the practical examples of these models – even if imperfectly, incompletely or diversely manifested by these jurisdictions. In this way, this Chapter bridges the existing theoretical models with both the analytical framework established in Chapter 2 and practical examples from the selected jurisdictions as part

¹⁸ *ibid* 16, 21-22.

¹⁹ *ibid*.

of a reflective equilibrium, moving between theory and especially by examining trends along the horns of the trilemma: ineffectiveness, unresponsiveness or legal incoherence²⁰ deconstructing existing practice in order to refine our normative conclusions.²¹ By making use of Teubner's empirical claims about regulatory failures as an analytical frame, this Chapter suggests that attempts to directly regulate religious family laws lead to ineffectiveness, as where the system remains unchanged after the intervention; damage, as where the system is (or would be) harmed by the attempt to impose substantive controls; and, incoherence, as where the regulatory attempts undermine the nature of law itself, by changing its character in ways incompatible with its purpose as law. The trilemma *as a framework* structures the doctrinal analysis and pieces together the existing literature. The next few sections deal with this bridging exercise by briefly re-capitulating the main principles of this methodology and some essential background to the jurisdictions.

The jurisdictions examined in this Chapter provide examples for normative analysis which allow us to diagnose evidence of regulatory failure and articulate the conditions for success. This framework will result in the 'criterion of reflexivity': the principle that models should avoid the direct imposition of substantive norms and leave greater space for internalising and steering systems towards human rights objectives *reflexively*. The concept and principles associated with reflective secularity are developed in Chapter 4. So, although abstract analysis can elucidate general principles, it is only through applied examples that the systems theoretical dimensions are truly

²⁰ Christine Parker and John Braithwaite, *Regulation* (OUP 2005), Section 4. This analytical framework was developed in Chapter 1 and 2 and is summarised, below, in Part 3.

²¹ An approach to structuring this discussion developed after discussions with Gautam Bhatia.

exposed. The jurisdictional examples will recur throughout this Thesis to help concretise the theoretical discussions. It is to these examples that we now turn.

(b) Jurisdictional Examples

This section lays out the four jurisdictions examined in this Thesis: Ontario, England, India and Israel. It provides some background contextual information and introduces the key legal frameworks, relating these back to the models – or axis - expounded in Part 1(a). This methodology increases rigour by mapping a more complete landscape of regulatory approaches to common and persistent challenges by using the models to select a range of regulatory solutions. In addition, by including a diversity of jurisdictional examples the range and quality of reasoning is improved²² and these examples can challenge assumptions and test more fully the appropriateness of the systems theoretical approach as offering a general framework for analysing issues around law and religion.

The first jurisdiction is Ontario, Canada.²³ Here, we see how attempting to categorise jurisdictional approaches poses problems, and why it is better to utilise these as examples that illustrate factors from across these models. In Ontario, marriage may be conducted according to religious or civil pathways²⁴ whereas divorce – and the

²² Sandra Fredman, 'Foreign Fads or Fashions' (2015) 64 International and Comparative Law Quarterly 631.

²³ Marriage and Divorce are Federal competencies under s91(26) of the Constitution Act 1867, although provinces have the power to regulate the solemnisation of marriages under s92(12).

²⁴ Marriage Act, RSO 1990, c M.3.

financial consequences thereof - is governed under the Federal Divorce Act²⁵ in conjunction with Ontario's Family Law Act.²⁶ Prior to the reform of the Family Law Act in 2006, people of all faiths were able to 'to arbitrate private disputes according to religious laws with little public debate'.²⁷ This changed when the legislature decided *not* to give legal force to religious agreements achieved through arbitration: only the laws of Ontario or another province can be made binding. Today, Ontario permits alternative dispute resolution (ADR) in family disputes including mediation and arbitration²⁸ such that, where these statutes conflict, s59(1) of the Family Law Act is to prevail. It remains possible to enforce religious settlements as a marriage contract under s52 and s56 of Part IV of the Family Law Act 1990, as amended. It is also possible for informal arrangements to take place through mediation. The law now provides scope to circumvent the intended effect of the 2006 reforms with religious agreements over family arrangements resulting from family mediation or other informal dispute resolution processes falling outside the scope of judicial intervention altogether.²⁹

²⁵ Divorce Act R.S.C., 1985, c. 3 (2nd Supp.).

²⁶ Family Law Act SO 2006 c.1.

²⁷ Alexandra Brown, 'Constructions of Islam in the Context of Religious Arbitration: A Consideration of the "Shari'ah Debate" in Ontario, Canada' 30(3) *Journal of Muslim Minority Affairs* (2010), 343, 344.

²⁸ Collaborative law is a mode of dispute resolution based around lawyer led negotiations and a commitment on the parties to engage in good faith and avoid resorting to litigation.

²⁹ Christopher Cutting, 'Faith-Based Arbitration or Religious Divorce: What was the Issue?' in Anna Korteweg and Jennifer A Selby (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto Press 2012).

The general position in England is that family laws are governed by secular principles³⁰ but with meaningful accommodations for certain religions³¹ – and a significant degree of latitude for individuals to incorporate religious principles within their family affairs. The Marriage Act 1949 recognises the solemnisation of religious marriages, according to the rites of the Church of England³² or according to Quaker and Jewish usages, when registered and conducted in any approved place.³³ Similarly, marriages conducted in other registered places of worship with the declaration of marriage recorded and the marriage itself registered will also be recognised.³⁴ Recent law reform proposals aim to remove the location-based aspect to the validity of a wedding³⁵, which has traditionally had a discriminatory effects on those from other religious backgrounds than those accommodated within the Acts already.³⁶

Couples may enter into marriages solemnized according to their chosen religion, however, divorce and the consequences that flow from divorce fall under the

³⁰ Some ostensibly ‘secular’ family law norms are closely related to and evolved out of Canon law and reflects a Christian ethic and tradition. As a result, whilst described as ‘secular’ it is not to be assumed that these norms are truly secular in the sense that they are derived from non-religious principles. See, Suhraiya Jivraj, *The Religion of Law: Race, Citizenship and Children’s Belonging* (Palgrave Macmillan 2013). In England, religious laws are recognised on the same plane as secular law under the Ecclesiastical Jurisdiction Measure 1963.

³¹ Tristan Cummings, ‘Equality as a Central Principle? - The Law Commission’s Solution to the Religious-Only Marriage Problem’ (2021) 33(1) Child and Family Law Quarterly 63

³² See, Marriage Act 1919, Part II.

³³ *ibid*, Section 26(1)(c) -(d).

³⁴ *ibid* Section 26.

³⁵ Law Commission, ‘Celebrating Marriage: A New Weddings Law’, 18/07/2022, HC 557 Law Com No 408.

³⁶ Vishal Vora, ‘Unregistered Muslim Marriages in the UK’ in Norbert Oberauer, Yvonne Prief, and Ulrike Qubaja (eds), *Legal Pluralism in Muslim Contexts* (Brill, 2019) 44.

exclusive power of the courts.³⁷ Increasing focus on autonomy, cost-saving and privatisation³⁸ means most disputes are settled through lawyer-led negotiations, mediation and arbitration with the court merely approving and granting the divorce and divorce settlement.³⁹ This means that the family courts do not recognise as *law* the decisions of religious tribunals nor enforce these *directly*.⁴⁰ However, England's highly developed network of non-state religious tribunals of all faiths⁴¹ has been shown to give tacit legal effect to religious family settlements in some instances.⁴²

In India, each religious group has its own body of personal laws which are largely codified in legislation⁴³ and applied by civil judges of the Family Division,⁴⁴ with secular alternatives to religious marriage available.⁴⁵ Some limited areas of

³⁷ Matrimonial Causes Act 1973.

³⁸ *Granatino v Radmacher* [2010] UKSC 42.

³⁹ England has a State-endorsed system of ADR: under Part 1 of the Family Procedure Rules 2010 it is an 'overriding objective' that, in dealing justly with family disputes, parties attempt to settle their cases wherever possible to save time and resources. S10 of the Children and Families Act 2014 requires attendance at family mediation information and assessment meetings. Legal aid is also tied to the use of ADR. See further: Arbitration Act 1996 and Institute of Family Law Arbitrators (IFLA) Rules.

⁴⁰ David Pocklington, 'Quasi-Law and Religion' in Russell Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015) 134.

⁴¹ Gillian Douglas and others, 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts- Report of a Research Study Funded by the AHRC' (2011).

⁴² See: *AI and MT* [2013] EWHC 100 (Fam); John Bowen, 'How Could English Courts Recognize Shariah?' (2010) 7 University of St. Thomas Law Journal 411.

⁴³ For examples: The Converts' Marriage Dissolution Act, 1866; The Indian Divorce Act, 1869; The Indian Christian Marriage Act, 1872; The Kazis Act, 1880; The Anand Marriage Act, 1909; The Child Marriage Restraint Act, 1929; The Parsi Marriage and Divorce Act, 1936; The Dissolution of Muslim Marriage Act, 1939; The Special Marriage Act, 1954; The Hindu Marriage Act, 1955; The Foreign Marriage Act, 1969; The Muslim Women's Protection Act, 1986. More recently, under The Muslim Women (Protection of Rights on Marriage) Act, 2019 the government has banned the practice of triple talaq, making it punishable by prison sentence.

⁴⁴ Family Court Act 1984.

⁴⁵ Special Marriages Act 1954.

uncodified religious laws remain and fall outside the scope of Constitutional protection – although this position has been subject to sustained critique.⁴⁶ Moreover, although a party to CEDAW, India has derogated from some rights under the Treaty. In its declaration of reservations, India justifies its position on the basis of its Constitutional commitment to the principle of ‘non-interference’ within religious communities and to issues of practicability in realising CEDAW’s aims in full within a very large, developing country.⁴⁷ Reservations to international treaties when they are permitted and properly formulated have effect to exclude or modify the application of the international norms in respect of that State.⁴⁸ The laws which apply to an individual depend, therefore, on their presumed religious identity under a set of religio-legal norms and their decision as to whether to select a religious or non-religious pathway.⁴⁹ This hybrid system was developed by British colonial powers as a means of controlling and understanding diverse religious groups and today the rules neither truly reflects the religious character of these groups nor is it structured entirely around civil law principles.⁵⁰ This has led to ‘extremely controversial’ tensions between and within these systems of personal law and the Constitution.⁵¹

⁴⁶ *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84. See, Justin Jones, ‘Towards a Muslim Family Law Act? Debating Muslim women’s rights and the codification of personal laws in India’ (2020) 28(1) *Contemporary South Asia* 1.

⁴⁷ United Nations, ‘Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women’ 23 June 2006, 14.

⁴⁸ International Law Commission, ‘Guide to Practice on Reservations to Treaties’ in *Yearbook of the International Law Commission (Volume II)* (2011), Part Two.

⁴⁹ Ahmed (n 2) 225.

⁵⁰ Anver Emon, ‘Islamic Law and the Canadian Mosaic: Politics, Jurisprudence and Multicultural Accommodation’ *The Canadian Bar Review* 87, 391.

⁵¹ Ahmed (n 2) 224.

Despite the Indian model's institutional recognition of religious family laws in the personal law system, it remains the case that legally non-binding, community tribunals are widely relied on to resolve family disputes.⁵² As Sylvia Vatuk notes, although the family courts were intended to be more 'informal' and 'accessible' barriers remain for access to justice⁵³ resulting in a 'shared adjudication model' under which, 'the state splits its adjudicative authority with ethno-religious groups in the governance of marriage and divorce.'⁵⁴ Likewise, Kokal explains that the 'large social relationships' characteristic of modern India finds space for 'community mediation'.⁵⁵ The popularity of family mediation reflects a desire to resolve disputes within the bounds of 'shared values'.⁵⁶ To this extent, organisations like the All India Muslim Personal Law Board and *Imarat-e-Shariah* have established forms of religious alternative dispute mechanisms that attempt to tap into these shared values⁵⁷ and informal ADR institutions have likewise been set up as *darul qazas*, which also apply religious law in family law disputes.⁵⁸ However, it would be wrong to conceive these informal mechanism as being only organic communal initiatives in all instances as

⁵² Kalindi Kokal, 'Turning to the State: Between Processing Disputes and Protecting Autonomy' in Tanja Herklotz and Siddharth Peter de Souza (eds), *Mutinies for Equality* (1st edn, Cambridge University Press 2021) 242.

⁵³ Sylvia Vatuk, 'The 'Women's Court' in India: An Alternative Dispute Resolution Body for Women in Distress' (2013) 45 *The Journal of Legal Pluralism and Unofficial Law* 76.

⁵⁴ Gopika Solanki, 'A Court of Her Own: Autonomy, Gender, and Women's Courts in India' in Samia Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017).

⁵⁵ Kokal (n 52) 242.

⁵⁶ *ibid* 242–243.

⁵⁷ *Vishwa Lochan Madan v Union of India* (2014) Writ Petition (Civil) No. 386 of 2005.

⁵⁸ *ibid*; Vatuk (n 53) 82-83.

these are also the product of governmental and non-governmental organisations development programmes.⁵⁹

Finally, in Israel a similar scheme of family law has been developed in what is characterised as ‘both a Jewish and a democratic state’. Israeli family law is mostly based on a *millet* system where family law is a ‘hybrid’ of civil and religious law, delegated to religious groups and imbues these institutions with the status that state sanctioned civil marriage entails through registration. As a result, whilst a party to CEDAW, Israel has entered a wide-ranging reservation in relation to its personal law system to article 16 of the Convention.⁶⁰ The family law system in place in Israel emerged from Ottoman rule and was retained under the British Mandate, as formalised in the Palestine Order in Council 1922. After the founding of the Israeli State, this system was adopted under the Law and Administration Ordinance 1948.⁶¹ Under this system, religious identity determines both the norms applied and the forum in which they are adjudicated, with each of the fourteen officially recognised religious communities having their own state funded religious tribunals. This system entails a complex interplay between secular State courts, religious courts, non-state tribunals and other forms of ADR.

The above summary of the basic structure of these jurisdictional examples is to be read alongside the discussion in Part 5 of Chapter 1 and guides the analysis in the

⁵⁹ Kokal (n 52) 243.

⁶⁰ Israel Reservation Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) 15.

⁶¹ The Law and Administration Ordinance, 1948, 1 LSI 9 (1948) (Isr.); see, further: Hacker (n 15) 61–62.

remainder of this Thesis. These examples will also be related to the theoretical discussion of the different models employed in Chapter 4. However, at this point, it is worth noting that each model and the jurisdictions that exemplify these contain the seeds of their own regulatory challenges. In England and Canada, the expansive roles of subjectivity and autonomy within these family law systems, alongside the rollback of the State created the legal mechanisms by which religious organisations are able to exercise a degree of self-governance.⁶² This movement allows for the religious systems to adapt or co-evolve in this altered environment to re-capture dispute resolution functions within their own normative systems. In India and Israel, the fusion of legal and religious functions creates ambiguity as between systems and their respective functions and codes.

Each of these models and the jurisdictions that exemplify them attempt to negotiate the interrelationship between systems – and the complexity that arises as institutions and individuals re-construct these norms within their own language or attempt to articulate religious or legal claims directly. The framework in Part 2 of this Chapter, below, seeks to test these notions through applied normative theory. It also starts the process of devising a different paradigm fit for this social reality based on the principles of reflexive law, a project to be developed further in the remainder of this Thesis.

⁶² Anna Korteweg and Jennifer Selby, 'Situating the Sharia Debate in Ontario' in Korteweg and Selby (n 29); Douglas and others (n 41) 5-8, 37-39.

2 Analytical Framework

This Part is divided in two sections. First, it outlines the theoretical framework based on systems theoretical insights to law and religion as developed in Chapter 2. Second, it explains how this framework is used as in as an exercise of applied theory, first by examining the ‘epistemic’ issue of constructing meaning between systems and secondly, by articulating its regulatory implications through the regulatory trilemma.

(a) Re-capping Systems Theory

As explained in Chapter 2, systems theory conceptualises law as one of a number of horizontally related, semi-autonomous systems. As societies have become ever more complex and diverse, with increasingly differentiated, self-referential social systems, the ability of law to directly regulate complex areas of social life has been exposed as wanting.⁶³ Systems generate norms according to their modes of function (their internal language and logic) and define the boundaries which delineate them. Whilst these norms are contested and are open to change over time, from the systems theoretical perspective, direct external interventions that fail to connect up with the internal functioning of systems are unlikely to be effective. Chapter 2 proposed two modifications of this orthodoxy, based on more recent trends: first, to complicate the boundaries between systems as being less distinct; second, to recognise the possibility of communication as between systems according to a shared, multi-functional

⁶³ Niklas Luhmann, *Social Systems* (Stanford 1995). See, Chapter 2 for full discussion.

language.⁶⁴ Emphasis is placed on the concept of functional differentiation whilst the autopoietic insight is understood as *one* factor in the relationship between systems.⁶⁵

Systems theory focuses on the *structural* dimensions of society but it does not ignore the *individual* either.⁶⁶ It is the cumulative effect of many individual communications that constitute the system.⁶⁷ And, moreover, the model of reflexive secularity developed out from the conclusions of this Chapter exists not only to effect the stability of systems in order to achieve human rights objectives, but also to recognise the interconnectedness between those rights as a condition for exercising individual freedoms – namely, the communicative freedom from the expansive and absolute claims of any given system over its member. The individual – as society has evolved and differentiated – sees their identity split between systems and the principal objective of reflexive secularity is to maintain societal complexity and the individual's rights to freely access those systems.

As a result, the analysis in this Chapter must appreciate both these dimensions – the structural and individual. Focusing on the individual tells us that the strategic choices of individuals cannot be discounted.⁶⁸ This Chapter therefore employs a pragmatic articulation of the systems theoretical account of law and society which

⁶⁴ Chapter 2, Part 3(c).

⁶⁵ See: Chapter 2, Parts 1 and 3(a).

⁶⁶ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 154.

⁶⁷ Renate Mayntz, 'Governance Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm' 18 in J Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage 1993). See, discussion in Chapter 2 Part 3(d).

⁶⁸ *ibid* 14.

underpins the regulatory trilemma. Focusing on the structural qualities of systems identifies those power structures that sustain the status quo and those interventions that are necessary to re-orient them towards human rights objectives.⁶⁹ This Chapter, therefore, cannot avoid engaging with overlapping sources of power and intersectionality of oppression.

(b) Trilemma as analytical Framework

As explored in the Part 1 of this Chapter, the principal models seek to impose secular laws on religious norms through various forms of direct regulation, codification, purposive abstention, or contingent recognition and interpretation subject to substantive and procedural constraints. However, systems theory posits that law does not hold a *necessarily* superior position in relation to other systems. As Murphy explains, confronting a landscape in which law is not hierarchically superior compels us to ‘learn to understand [law] in a world of horizontally’.⁷⁰ This section examines a two-step analytical framework whereby (i) the relationship between law and religious family life in each jurisdiction is examined from this systemic perspective and (ii) then traces the possible consequences of this dynamic through the trilemma.⁷¹

⁶⁹ Fredman, *Human Rights Transformed* (n 66) 156. Charles Sabel and William Simon, ‘Democratic Experimentalism’ in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017).

⁷⁰ Timothy Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford 1997) 184.

⁷¹ This framework and discussion of power structures and individuals is developed in Chapter 2. At this stage, only the core principles are summarised as they apply to the analysis in this Chapter.

First, for each jurisdiction the ‘epistemic’ challenge of systemic interaction is exposed through deconstruction of the case law: this analysis demonstrates the *appropriateness* of a framework based around systems theoretical insights and identifies the *potentiality* for resulting regulatory failure (and ultimately, generates the normative solutions to these challenges). Each system responds to external stimuli by re-constructing meaning within its own internal logic. The most radical construction of this argument extends to claiming that ‘not only is knowledge fragmented but ... information is socially constructed’ and consequently, each system remains epistemologically closed.⁷² Black explains:

Autopoietically closed sub-systems ... construct their images of other sub-systems only through the distorting lens of their own perceptual apparatus...⁷³

This epistemic challenge was re-cast in Chapter 2 in terms of *partial* communicative closure across a single, multi-functional language which allows us to be ‘more optimistic about the possibilities of communication and coordination through law.’⁷⁴ Modern society is ‘noncorporative’ where religion and law are more than the ‘organisations’ that operate within these systems.⁷⁵ Nonetheless, even recognising this modification, systems remain resistant to externalities and failure to account for these systemic interactions is liable to result in regulatory failures along the trilemma. The complexity and changeability of social systems means that the State struggles to have sufficient information and understanding of these systems in order to effect its intended

⁷² Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103, 107–108.

⁷³ *ibid* 107.

⁷⁴ Fredman, *Human Rights Transformed* (n 66) 154.

⁷⁵ Cohen (n 13) 130-134.

change through direct intervention⁷⁶ usually resulting in the regulatory trilemma.⁷⁷ The second dimension, therefore, follows naturally from these foregoing observations – from the very nature of a systems theoretical account of law, attempts to directly regulate religious laws through ‘command and control’ are likely to result in these interventions (i) being ignored or (ii) leading to damage to that system’s ability to reproduce itself or (iii) damage to the system of law itself, undermining its normativity, creating a ‘crisis of legitimacy’ and surrendering its legal autonomy.⁷⁸ The law abdicates its autonomy and coherence *as law*.⁷⁹ That is to say, direct legal interventions such as those summarised in Parts 1(a) and (c) in religious family life are liable to ineffectiveness, unresponsiveness or legal incoherence. This may be more acute where religious norms purport to operate on a ‘higher’ plain than secular norms.⁸⁰

This Part, therefore, explains the connection between the theoretical underpinnings, the empirical outcomes of those dynamics and the use of the trilemma as an analytical device in this Chapter. As such, this Chapter examines this understanding of partial closure through the jurisdictional examples. The contribution of this Chapter is, thus, the application of this framework in a novel manner in the context of case law examples in law and religion through the deconstruction of law in an exercise of applied normative theory.

⁷⁶ Black (n 72) 107.

⁷⁷ Teubner, 'Juridification' (n 5) 21.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011) 73.

3 Re-constructing meaning within systems

This Part first analyses the communications between legal systems and religious family life across jurisdictions and models, through the examples of *mahr* agreements and religious divorce. Its main contribution is to argue that when systems of law and religion communicate, both systems filtrate ‘external’ norms through pre-existing legal or religious structures. The result is that attempts to intervene within religious systems and attempts to recognise those systems in law, tend to have a distorting effect.

Second, this Part applies the regulatory trilemma as an analytical frame to examine the consequences of that relationship. Importantly, by tracing this relationship in doctrinal examples we can examine the ways in which both legal and religious systems articulate the ‘meta-rules’ that construct their relationship with one another – and with other externalities.⁸¹ It concludes that, notwithstanding the different approaches taken across these jurisdictions, more direct forms of intervention tend to experience the same systems theoretical challenges. The religious family systems targeted may become over-legalised or the law itself may become over socialised. In either case, this undermines the internal logic of these systems in ways that are potentially damaging both to systemic stability and individual rights. Interventions from secular laws are understood as intrusions on religious autonomy whilst deference to religious norms threatens the hegemony of law as a system and risks violations of human rights. These observations, whilst not *empirical facts*, are suggestive of the need for interventions focused on enhancing reflexivity – the sensitivity of systems to their environment.

⁸¹ Ino Augsberg, ‘Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts’ (2012) 1(3) JLSR 291, 297.

To summarise the findings of this Part, in Canada we see the court's attempts to maintain the functional differentiation of law and religion with the view that the blurring of these functional differences contradicts the secularity principle. However, as argued in Chapter 2 the courts nonetheless become *engaged* in this system. Similarly, in English law the courts are required to re-construct religious norms within the legal framework of contract law. In both Ontario and England, this dynamic plays out within the legal domain through predominantly *contractual* principles and demonstrates a form of structural coupling between law and religion as an equilibrium develops between these systems.

In Israel and India, the State seeks to incorporate religious norms within the law – a collapse of the functionally differentiated systems of law and religion. Yet, this is simply a *formal* integration of religious and legal norms – the same can be observed in all jurisdictions studied because we conceive of both *law* and *religion* in terms of communications. When we make legal communications, these are a form of *law*. So, when we make religio-legal communications, we make religious law – whether the institutions of law and religion are formally connected or not. In all these cases, the potentiality for regulatory failure through the trilemma is demonstrated – and the need for a reflexive alternative is made out. The following sections are divided by jurisdiction, then sub-divided between the epistemic problem and trilemma, identified in Chapter 2, Parts 2(c) and 3.

(a) Ontario – Canada

This Section first analyses the ways in which religion and law interact in Ontario

through a systems theoretical lens. In navigating this boundary between systems, judicial construction of religious norms and concepts have been formed within pre-existing legal and cultural frameworks, especially the concept of contract law. The second sub-section takes this further and deconstructs the law through the prism of the regulatory trilemma.

(i) The epistemic problem

The cases of *Kaddoura v Hammoud* (1998) in Ontario and the Canadian Supreme Court decision in *Bruker v Markovitz* [2007] show the challenges of judicial reconstruction of religious norms within legal frameworks. As Berger remarks, many religious concepts represent ‘notions that are alien to the legal language of that body’.⁸² This is part of the epistemic problem identified above: each sub-system has its own ‘language and mode of function’ which cannot straightforwardly be ‘translated’ by other sub-systems⁸³ but is best understood as sharing differentiated versions of the same multifunctional language.⁸⁴

The case of *Kaddoura v Hammoud* (1998) concerned a brief, difficult marriage of a young Muslim couple.⁸⁵ The husband signed a marriage certificate, in Arabic, which included the *mahr* agreement whereby he promised to pay \$35,000 to his bride. On marriage breakdown, the wife claimed two sums of money, one being the ‘deferred’

⁸² Maurits Berger, ‘Understanding Sharia in the West’ (2018) 6 JLRS 236, 237.

⁸³ See, Fredman (n 66) 152.

⁸⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Reprinted, Polity Press 2010) Section 2.1.

⁸⁵ *Kaddoura v Hammoud* (1998) O.J. No. 5054, 168 D.L.R. (4th) 503. The Marriage was validly conducted pursuant to religious and civil requirements under the Marriage Act, R.S.O 1990, c. M.3.

mahr – a sum given as a traditional element of Muslim marriages, considered to be the wife’s property, but usually paid upon separation or the death of the husband. Rutherford J distilled the dispute as being whether the husband is *legally* obliged to pay *mahr* to his wife.⁸⁶ The answer depended on whether the agreement was a marriage contract under s52(1) of the Family Law Act and whether it was enforceable as such.⁸⁷

Rutherford J held that the *mahr* agreement could not be enforceable before secular courts.⁸⁸ The agreement was constructed as a *solely* religious and moral obligation:

Mahr has its roots in the Holy Qur'an and it is an essential to Muslim marriage. Without it, there is no Muslim marriage⁸⁹

The experts argued that whether the wife was entitled to *mahr* was a *moral* question for religious authorities, not State judges. Rutherford J agreed, holding that it is ‘essentially and fundamentally an Islamic religious matter.’⁹⁰

In this case, we see two systems interact and - the court decides, contrary to the plain wording of the Family Law Act at the time⁹¹ - that these systems *must* be maintained as functionally distinct. The court constructs the concept of *mahr* through its own epistemic lens: Rutherford J compares it to the obligations within Christian

⁸⁶ *ibid.*

⁸⁷ Family Law Act (n 25).

⁸⁸ *Kaddoura* (n 85) 505.

⁸⁹ *ibid* 508.

⁹⁰ *ibid* 510.

⁹¹ S52(1): the parties ‘may agree on their respective rights and obligations under the marriage or on separation’.

marriage to ‘love, honour and cherish’ as a matter of ‘religion and morality’.⁹² Whilst this analogy is flawed because a written agreement within a statutory framework for the payment of a specific sum is not analogous to promises of this sort (nor is it understood as such by some Muslims), the court constructed them as of the same type of purely *moral* obligation because *mahr* flows from religious obligation.

Further, referring to the US First Amendment decision of *Serbian Eastern Orthodox Diocese v Milivojevich* (1976),⁹³ the judge was concerned that this case would lead a secular court to decide a case according to religious principles. Rutherford J stated that the court is ‘lacking in expertise ... perhaps ... constitutionally beyond its proper territory.’⁹⁴ As Fournier points out, nothing in the Act requires any distinction between religious and secular domestic contracts, so long as the other conditions are met.⁹⁵ In articulating strictly functionally differentiated systems of law and religion, the court conceptualises this dispute as falling *only* in the realm of a person’s moral and voluntary obligations, stating that this conduct remains dishonourable from the religious point of view, but not of legal consequence. The Court tacitly adopts the notion, as Auzberger puts it, that ‘only by keeping religion and politics [or law] apart ... [and] preventing a levelling of ... distinctions, can society maintain the full complexity of social possibilities enabled by functional differentiation’.⁹⁶ Thus, in

⁹² *Kaddoura* (n 85) 511.

⁹³ 426 U.S. 696 (1976).

⁹⁴ *ibid.*

⁹⁵ Pascale Fournier, ‘Flirting with God in Western Secular Courts: Mahr in the West’ (2010) 24 *IJLPF* 67.

⁹⁶ Ino Auzberger, ‘Religious Freedom as “Reflexive Law”’ in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging* (OUP 2014), 92.

Kaddoura we see the construction of the *mahr* agreement within the cultural and legal touchstones of the law alongside this apparent imperative to maintain functional differentiation between systems

A second example focuses on the issue of *get* refusal. In *Bruker v Marcovitz*, the Canadian Supreme Court held that a divorce settlement based on Jewish principles was enforceable, noting *Kaddoura*, which as a Provincial case in Ontario did not directly relate to the matter at hand based on Quebec law.⁹⁷ The husband agreed as part of the civil divorce settlement that he would grant a *get* (religious divorce) before the appropriate Rabbinical authorities once the civil divorce had been completed. This promise formed part of a legally binding court order. However, in fact, the husband refused to grant the *get* over the course of more than fifteen years, meaning that his wife was unable to re-marry within the Jewish faith (if she had wished to) and any future children could be ostracised within their community.⁹⁸

The husband argued that the agreement was moral in nature and contended that its enforcement would violate his religious freedom.⁹⁹ The Quebec Court of Appeal reasoned in the same way as Rutherford J had in *Kaddoura*, deciding that the ‘substance’ of the obligation to grant the *get* was religious, and so was constructed within the legal framework as an unenforceable moral obligation.¹⁰⁰ The Supreme Court rejected this argument. The majority held that the mere fact that the case had a

⁹⁷ *Bruker v Marcovitz* 2007 SCC 54 [2007] 3 SCR 607 [123].

⁹⁸ Women are said to remain ‘chained’ (*agunah*) to the marriage, and their children are excluded as *mamzerim*.

⁹⁹ *Bruker* (n 97) [11].

¹⁰⁰ [2005] R.J.Q. 2482 *per* Hilton JA [76].

religious dimension could not make the legal agreement non-justiciable.¹⁰¹ This was important, given the possibility of religious obligations being used as leverage in divorces that may put women at a disadvantage.¹⁰² The minority, in contrast, held that to uphold the order would be to give legal effect to the content of a religious obligation.¹⁰³

As with *Kaddoura*, the Supreme Court decision in *Bruker* had to navigate the communicative interaction of social systems. At the heart of this discussion is the question of whether the Court is interpreting the religious law through the secular lens whilst making assumptions about the relative distinctness of these systems of law and religion. As explained by Abella J, the disjunction between religious law and civil law ‘presents a dichotomous scenario’ in which a Jewish woman is ‘free to divorce her husband regardless of his consent’ in Canadian law but remains married in Jewish law unless he grants the *get*.¹⁰⁴ Thus, at once, she is married and not married within the conflicting coding of law and religion. The majority construct this dispute as being a balance between the husband’s religious liberty and the wife’s wellbeing as well as broader ‘democratic values.’¹⁰⁵ This seems erroneous because it neglects the religious rights of the wife which equally must contend in the balance. Nonetheless, Abella J understands this case as one in which the religious commitment is ancillary to a question of private contractual rights. The court, in interpreting the validity of the

¹⁰¹ *Bruker* (n 97) [42]-[47].

¹⁰² *ibid* [16].

¹⁰³ *ibid* [122]-[132].

¹⁰⁴ *Bruker* (n 97) [5].

¹⁰⁵ *ibid* [14].

contract in Quebec law states: ‘It is true that a party cannot be compelled to execute a moral duty, but there is nothing in the Civil Code preventing someone from transforming his or her moral obligations into legally valid and binding ones.’¹⁰⁶ Whilst the court was right to conclude that the moral content of the right had been given legal force through the consent order it nonetheless re-constructs this religious promise within the framework of contract law.¹⁰⁷

The majority attempt to negotiate this conflict between law and religion through the application of a strict contractual analysis: the commitment to grant the *get* is a moral obligation given legal force through its incorporation within the consent order:

We are not dealing with judicial review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a *get* was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences.¹⁰⁸

Once this analytic framing is accepted, the majority can avoid the communicative interaction of law and religious norms: any *moral* content, once incorporated within a contractual framework, is ‘transformed’ so as to be enforceable before a court.¹⁰⁹

The minority assert a strong principle of non-intervention based on neutrality and their interpretation of the role of courts and the lines drawn between religion and

¹⁰⁶ *ibid* [51].

¹⁰⁷ Finally, under the Quebec Charter Abella J doubted whether there was any infringement on his right to religion – partly because he raised no religious objections to granting the *get* – and to the extent there is any non-trivial interference, this is outweighed by its disproportionate impact on other rights and the public interest, see *ibid* [69]-[72].

¹⁰⁸ *ibid* [47].

¹⁰⁹ *ibid* [51].

law.¹¹⁰ This reflects from the systems theoretical perspective the assumption that law and religion are functionally *differentiated* such that their communicative interaction not only offends the principle of secularity *but also* because it entails social de-differentiation. That is to say, law should not be *socialised* and religion should not be *legalised*. To attach damages to the husband's failure to grant the *get* is to impermissibly 'sanction the religious consequences' of this action.¹¹¹ The minority held that there must be a 'rule of positive law' for the court to interfere, as the basis for demarcating the line between purely religious disputes and those with a legal dimension.¹¹² Here, the negative consequences for the wife flow from *religious rules* and not any law.¹¹³ Deschamps J states:¹¹⁴

The requirements for issuing a *get* and the consequences of not having a religious divorce are governed by the rules of the Jewish religion. The state does not interfere in this area.

In this case, the minority argued that 'only her religious rights are in issue, and only as a result of religious rules'.¹¹⁵ The minority firmly assert that religious law and secular law have 'no effect' on each other. These systems are strictly separate *and* ought to remain so. To this end, Deschamps J argues that the 'object' (seeking and obtaining a *get*) of this contract is incapable of 'juridical operation' because it is 'not capable of legal characterization'.¹¹⁶ Yet, as with *Kaddoura*, this conclusion results from the ways

¹¹⁰ *ibid* [102].

¹¹¹ *ibid* [103].

¹¹² *ibid* [122].

¹¹³ *ibid* [125].

¹¹⁴ *ibid* [129].

¹¹⁵ *ibid* [131].

¹¹⁶ *ibid* [174].

in which the *get* is constructed by the minority within the logic of the legal system as being intended as a purely moral obligation, rather than one that may also have ‘legal’ consequences.

(ii) Trilemma

The discussion in relation to Ontario so far sought to identify the potential applicability of systems theory as a frame of analysis. This Section takes that discussion further to apply the analytical device of the regulatory trilemma not as a set of socio-legal predictions but as analytical framework. This section examines the developments subsequent to *Kaddoura*, discussed above.

Ontarian law reforms sought to re-assert the distinction between law and religion and the supremacy of Charter values¹¹⁷ in the wake of the rise in religious arbitration of family disputes.¹¹⁸ Although the number of cases appealing decisions of religious arbitration were rare, especially so for Islamic arbitration, the legislature attempted to re-assert the normative superiority of state law through amendments to the Arbitration Act in the Family Law Act 2006.¹¹⁹ Part of the reason for this limited appeal to judicial intervention, MacFarlane argues, was due to a perception that legal norms could not be invoked to ‘review an outcome which they considered to be the word of God.’¹²⁰ Against this background, a broad ranging public debate took place

¹¹⁷ Shirish Chotalia, ‘Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective’ (2006) 15 Constitutional Forum 63, 68.

¹¹⁸ *ibid* 67.

¹¹⁹ MacFarlane (n 119) 148.

¹²⁰ *ibid*.

both in the public sphere and within the formal setting of the Boyd Commission.¹²¹ In Ontario, as elsewhere, we can see the fingerprints of a systems theoretical relationship between law and religion, with the debate being characterised by ‘continuous mischaracterizations and misconceptions, which did not diminish or disappear as a result of the information sharing.’¹²² Whilst the Commission’s conclusions, as will be discussed in Chapter 7, had the potential to enhance reflexivity – the process by which that deliberation was conducted was deficient.¹²³

Ultimately, the legislature rejected the Boyd Report’s proposals. The consequence of the 2006 Reforms meant that formal religious arbitration could no longer be conducted according to religious norms but this did not mean the end of the use of ADR schemes for family disputes, including those with a religious dimension.¹²⁴ The result has been the use of other legal mechanisms such as negotiation and mediation, now conducted ‘in the shadow of Islamic law’, with informal arrangements set up between Imams, Mosques and believers to resolve family problems.¹²⁵

This process of informal dispute resolution outside the framework prescribed by the Arbitration Act and the 2006 Reforms is facilitated by the fact that Ontario has a well-developed and comprehensive scheme for ADR, short of arbitration, which

¹²¹ Marion Boyd, ‘Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion-Executive Summary’
<<<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html>>>.

¹²² Afsoun Afsahi, ‘Deliberating Across Difference: Religious Accommodation and Deliberative Democracy’ (2020) 8 JLRS 34, 44.

¹²³ *ibid.*

¹²⁴ Family Law Act (n 25) Section 59.6(1)(a)-(d); Arbitration Act 1991 (2006, c. 1, s. 5 (10)) Section 5, Section 38.

¹²⁵ MacFarlane (n 119) 155; See also, Wendy Kennett, ‘Religious Arbitration in North America’ in Bano (n 54) 199.

parties to divorce proceedings are duty bound to rely on in the first instance, where ‘appropriate’.¹²⁶ One means of formalising mediated agreements in Ontario, therefore, is for a couple to agree a marriage contract under s52 of the Family Law Act to set out their ‘respective rights and obligations under the marriage or on separation, including with regard to the division of property and any obligations to provide support’.¹²⁷ Where an agreement is reached through arbitration, all that is required for an agreement to be made binding is that it is reached through mediation or collaborative law, is signed and put in writing by the parties and witnessed.¹²⁸ A domestic contract may only be set aside in limited circumstances under s56(4) such as if a party ‘did not understand the nature or consequences of the domestic contract’ or ‘otherwise in accordance with the law of contract’.¹²⁹ As Cutting puts it, ‘all’ religious agreements formalised as a marriage contract will be enforceable, such that the ‘2006 amendments to the 1991 Act provide no assistance’.¹³⁰ Couples ‘habitually contract out’ of the default rules in favour of various forms of private ordering, with limited state oversight, which can be animated by any values – religious or otherwise – so long as the final award is couched in Canadian legal terms.¹³¹

This outcome would be predictable under Teubner’s analysis as an example of

¹²⁶ Divorce Act (R.S.C., 1985, c. 3 (2nd Supp.)), Section 7.3: ‘To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.’

¹²⁷ Family Law Act (n 25).

¹²⁸ *ibid* Section 56(4).

¹²⁹ See further, *Quinn v Keiper* [2008] O.J. No. 3788 (Ont.C.A.).

¹³⁰ Cutting (n 29) 76.

¹³¹ Selby and Korteweg (n 62) 14.

an ineffective intervention, unable to connect with the internal logic of religious groups and their ‘creative’ resistance to the law. So, as long as moral obligations are re-framed in legal terms, the creative resistance of religious groups to reform mean that despite the intent of the statutory prohibition, religious couples remain able to access religious ADR and have the outcomes of these decisions made enforceable.¹³² The regulatory trilemma suggests that attempts to impose substantive outcomes will fail because systems lack the ability to easily translate these norms and can lead to ineffectiveness and resistance. As Kennett concludes, ‘in the wake of the arbitration debate, women continue to be subject to precisely the same pressures as before.’¹³³ Overall, the result of reforms in Ontario are broadly as expected: there has been the continued use of private ordering outside the scope of the 2006 Act *and* creative new uses of the existing law that *facially* satisfies the legal criteria, whilst in fact continuing to apply the same norms as before.

The approach to regulation that followed the 2006 Reforms appears to have fallen squarely within the horns of the trilemma. In its attempts to regulate religious arbitration through removing State backing from certain types of religious agreements, the systems have responded by utilising new avenues to resist these changes. Religious disputes now play out in more private and informal spaces or under the cover of mediation and binding domestic contracts.¹³⁴ Moreover, the 2006 reforms fail on their own terms because, if the rationale were to enhance protection for minorities, the result has been to further privatise religious family disputes outside the framework of reform

¹³² Cutting (n 29) 75-76.

¹³³ Kennett (n 125) 199.

¹³⁴ MacFarlane (n 119).

proposed in the Boyd report, without the safeguards present in such a scheme. The 2006 Reforms, which had sought to limit the practice of religious dispute resolution in Ontario, have largely failed.

(b) England

The discussion in relation to Ontario demonstrates two preliminary conclusions: first, that systems theory can be a useful tool for deconstructing the relationship between law and religion; second, that the regulatory trilemma can help identify the ways this dynamic leads to undesirable consequences. This approach is now applied in relation to English law. This section is again divided into two sub-sections: the first examining the ways a *mahr* agreement is constructed within English law and the second examining the example of *get* refusal.

(i) Epistemic Problem

This section examines the communicative interaction between law and religion in England with consideration of the role of non-state religious tribunals. As with the Canadian example, the English courts have had to interpret religious norms within the frameworks of state law, usually through the language of contract law. So, as Bowen explains, English law also provides significant scope for flexible, legal analysis, taking account of the religious ‘context’ as part of the background against which the parties enter the contract.¹³⁵ By re-framing *mahr* agreements within contract law, courts would follow the ordinary doctrinal rules, inquiring as to the intentions of the parties and

¹³⁵ Bowen (n 42) 435.

consideration: ‘Mahr agreements are contractual but they also are embedded in a set of social understandings and practices—as are all contracts’.¹³⁶

However, it nonetheless runs into the issue of whether and how the law re-constructs meaning within its own lens. Systems theory points us to the challenge: religious norms are re-constructed and re-constituted within terms that matter to the law. Hence, in their study, Douglas and Others note that English law treats religious group membership in the same way, for example, as it does membership of any other voluntary association:

The relationship of members as between themselves is governed by quasi-contract and the organisations are treated as a matter of law as members of clubs or unincorporated associations.¹³⁷

These groups are governed by the doctrine of ‘consensual compact’ and thus have the contractual freedom to define for themselves the rules applicable to that group. If members break them or reject these rules, the legal solution is exit.¹³⁸ This is illustrative of this general problem¹³⁹ of law’s inability to construct religious norms other than through its own prism. It also directs us to apparent solutions based in freedom of contract which has little relation to the realities of social life.

As discussed in relation to *Kaddoura* and *Bruker*, the English courts take a stance on the relative differentiation of these systems of law and religion and where

¹³⁶ *ibid.*

¹³⁷ Mark Hill, Russell Sandberg, Norman Doe, Christopher Grout, *Religion and Law in the United Kingdom* (Wolters Kluwer 2021) Part III, Chapter 1, para 57; Chapter 4, paras 181-182.

¹³⁸ Douglas and others (n 41) 9.

¹³⁹ Russell Sandberg, ‘A Systems Theory Re-Construction of Law and Religion’ (2019) 8 OJLS 447, 462–3.

they overlap, the courts face difficulty in negotiating externalities within the internal language and logic of each system. The law suffers a degree of ‘discursive closure’ and possesses its own ‘conception [of itself] as a distinct discourse, possessing its own integrity, its own criteria of significance and validation, its own means of cognition and constituting objects of which it speaks.’¹⁴⁰ The analysis in this section explores the systems theoretical dimensions of this judicial engagement based around the rules of contract and the re-construction of *mahr* agreements within the ‘discursive’ lens of systems theory.¹⁴¹

The UK has little in terms of express regulation of religious tribunals, yet they undoubtedly form part of the fabric of ADR in England: religious tribunals play an important role for believers of a range of faiths, especially for women, mostly for providing religious divorces but also for faith-based mediation and conciliation services.¹⁴² However, the courts, as a general matter have not confirmed that the same approach to consent orders following secular arbitration would be taken in response to religious agreements. In *S v S*, the court stated as an important caveat:

Different considerations may apply where an arbitral process is based on a different system of law or, in particular, where there is reason to believe that, whatever system of law is purportedly being applied, there may have been gender-based discrimination...¹⁴³

¹⁴⁰ Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1996) 100.

¹⁴¹ *Uddin v Choudhury & Ors* [2009] EWCA Civ 1205; *Shahnaz v Rizwan* [1965] 1 QB 390; *Al-Saffar v Al-Saffar* [2012] EWCA Civ (Unreported).

¹⁴² Douglas and others (n 41). See also, for a focus on Islamic arbitration: Sonia Nûrîn Shah-Kazemi, ‘Untying the Knot: Muslim Women, Divorce and the Shariah’ (The Nuffield Foundation 2001).

¹⁴³ *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam); [2014] WLR 2299 [27].

Further, in the court's *Practice Directive*, Munby P stated that 'the arbitrator must decide the case in line with the law of England and Wales'.¹⁴⁴ Although religious institutions make up an important part of the picture in English family law, their decisions are not accorded automatic validity and are treated differently from other arbitrations conducted under the IFLA Scheme.¹⁴⁵

Two examples help demonstrate the general attitude of the courts to religious norms and evidence dimensions of the systems theoretical account. In the cases of *Shahnaz v Rizwan* [1964] and *Uddin v Choudhury & Ors* [2009] we see two different constructions of *mahr*. In both instances, the courts recognise its effect – this time, not as moral or religious obligation but as contract.¹⁴⁶ In *Uddin*, the parties involved were both Bangladeshi Muslim immigrants who entered into a short-lived arranged marriage where, as is traditional, valuable gifts and sums of money were exchanged. Under the marriage contract, the bride was due £15,000 in *mahr*.¹⁴⁷ In the end, the couple never consummated their marriage nor did they undertake a further civil marriage.¹⁴⁸ On marriage breakdown, the bride sought access to an Islamic divorce (as she was not in a civil marriage, she need not – and could not – seek a civil divorce, with all the benefits this has to offer).¹⁴⁹ The husband agreed to this on condition that the gifts and money were repaid to him. The husband's father sued the Sharia Council (which was later

¹⁴⁴ James Munby, *Practice Guidance (Family Court: Interface with Arbitration)* (23 November 2015) [2].

¹⁴⁵ *S v S* (n 143) [27]; see, fn 38, above, for further explanation of the IFLA Scheme.

¹⁴⁶ *Uddin* (n 141). See for detailed discussion: Bowen (n 42) 424-425.

¹⁴⁷ *Uddin* (n 141 s) [2]-[5].

¹⁴⁸ *ibid* [3].

¹⁴⁹ *ibid* [2].

dropped as a party to the case) and the bride for the return of the gifts. At first instance, the judge accepted the evidence of a joint expert, a Muslim barrister, treating the exchanged items as gifts and deciding that all *mahr* should be paid to the wife. Importantly, the judge stated that the Islamic marriage and divorce had ‘legal effect’ (not as a marriage, but for the purposes of the legally binding contract) which was affirmed by the Court of Appeal.¹⁵⁰

In *Uddin*, there was the added complication that the parties had gone before a religious tribunal to determine matters relating to the divorce. As mentioned in *Kaddoura*, Rutherford J believed disputes over *mahr* to be a matter for resolution by religious authorities and according to religious norms. In *Uddin* this process had already been carried out because the religious marriage had been dissolved by a Sharia Council. Here, the same moral and religious obligations were constructed as having ‘legal effect’ through contract law because the dissolution of the Islamic marriage by the Sharia council triggered the legal obligation to pay *mahr*.¹⁵¹ In *Kaddoura*, the court – whilst not concerned with a determination of a religious tribunal – firmly asserted a firewall between legal and religious systems and their respective organisations and authorities.¹⁵²

Contract can be construed through the systems theoretical paradigm.¹⁵³ It is a form of structural coupling between systems of exchange and law: the imperative to

¹⁵⁰ *ibid* [11].

¹⁵¹ Bowen (n 42) 424.

¹⁵² *Kaddoura* (n 85) 510.

¹⁵³ Gunther Teubner, ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51 *Current Legal Problems* 393, 398-399.

consider the *context* in interpreting contracts is a reflexive process.¹⁵⁴ However, as Teubner rightly explains, regarding contract as exclusively a matter of *economic* freedom rather than, itself, facilitating the ‘discursive pluralization of contemporary society into many private autonomies.’¹⁵⁵ In a similar manner, we can observe a structural coupling of religious, legal and economic systems through the contextual analysis of religious contracts.¹⁵⁶ Ultimately, although structural coupling leads to stability, it does not guarantee effective permeation of values. The coupling that arises is the principal result of a modified environment, against which systems will respond within their own structural logic: Teubner argues there may only be ‘mutual and reciprocal observation’ not mutual communication. However, it is the argument of this Thesis that systems can engage in a deeper process of mutual recognition as a modification of the central systems theoretical theme of communicative closure on Habermas’ framework of communications.¹⁵⁷ Contract, as a legal institution, can affect some – albeit limited – communicative effects: the analysis of *Uddin* demonstrates an instance of mutual ‘observation’ with the potential for communication. The utility of contract as a means of enhancing reflexivity is explored further in Chapters 6 and 7, with particular attention given to the idea of relational contract theory.

A second example of this dynamic within English law is *Shahnaz v Rizwan* [1964].¹⁵⁸ This case concerned a couple who married in India under the Muslim

¹⁵⁴ Hugh Baxter, ‘Autopoiesis and the “Relative Autonomy” of Law’ (1989) 19 *Cardozo Law Review* 1987, 2046.

¹⁵⁵ Teubner (n 153) 399.

¹⁵⁶ Katherine Spencer, ‘Mahr as Contract: internal pluralism and external perspectives’ (2011) 1(2) *Oñati Socio-Legal Series* 3, 10-16.

¹⁵⁷ Jürgen Habermas and Maeve Cooke, *On the Pragmatics of Communication* (Polity Press 2003).

¹⁵⁸ *Shahnaz* (n 141).

Personal Law.¹⁵⁹ Under the marriage agreement the husband was to pay the wife *mehar* both at the time of marriage and deferred *mehar*.¹⁶⁰ Under this arrangement, the wife validly ended the marriage and sought enforcement before the English courts as a contractual right. The husband argued that as a matter of policy, UK courts should not enforce the marriage contract because it was a polygamous marriage over which UK courts have no jurisdiction.¹⁶¹

Winn J held, first, that because the polygamous religious marriage was valid in India it should not be considered *unlawful* under UK law,¹⁶² however the English courts would also not enforce any obligations that flowed from it.¹⁶³ So as to conceptualise such a marriage within the mode of function of English law – with its own normative requirements for recognising marriage and allocating the division of assets set out in the Marriage Acts and Matrimonial Causes Act 1973,¹⁶⁴ and its own scheme of contractual rights and duties – Winn J had to reconstruct this Muslim, polygamous marriage not as giving rise to rights *of itself* but as representing a contractual obligation *outside* marriage where the marriage was the *consideration* for that contract.¹⁶⁵ Again, the court must re-construct the religious marriage and *mehar* agreement within the prism of English law: allowing the judge to enforce the contractual right to *mehar*

¹⁵⁹ *ibid* 395.

¹⁶⁰ The word *mehar* is used here instead of *mahr* as elsewhere to reflect the language used by the judge in *Shahnaz*. Because of the diversity of Muslim marriage practice, different language is used to refer to a similar concept – albeit, one that has considerable variety depending on cultural background.

¹⁶¹ *ibid* 395-6.

¹⁶² *ibid* 397.

¹⁶³ *ibid* 399.

¹⁶⁴ See for details, Part 1(a).

¹⁶⁵ *ibid* 401-402.

without having to accept the marriage as the source of that right. Winn J argued that given the increased number of women entering the UK in such a situation the law ought to do more to enforce contractual promises around marriage whilst not recognising the marriages themselves as valid.¹⁶⁶

As argued above, it is too limited to consider the only form of communication as arising through mutual observation. How the communicative interactions between family law and religious laws are recognised by the courts relies on the law employing its own mode of function to construct a model that relates – or ‘translates’ - external concepts generated by religious tribunals and other religious norms¹⁶⁷ within a multifunctional but differentiated language. Contractual agreements are ‘rewritten by the judge against the backdrop of the national legal order’.¹⁶⁸ Thus, as Bowen argues about *Uddin*, the court turns certain events, such as the transfer or promise of goods or money and the writing of a marriage contract as having ‘clear Islamic content with an English legal effect.’¹⁶⁹ Whilst this may lead to a desired result in some instances, the courts must still filtrate these norms within a different functional language.

This section argues that contract law can, at the least, achieve a ‘fragile symmetry’ of concepts within different systems¹⁷⁰ whilst also exhibiting the potential to enhance reflexivity too. On the other hand, as in *Kaddoura* and the minority

¹⁶⁶ It is worth noting that, even in the supervening 50 years, the challenge of religious-only marriages and the ‘non-qualifying regime’ jurisdiction that has emerged is still a pressing social issue. See, Tristan Cummings, ‘Equality as a Central Principle? - The Law Commission’s Solution to the Religious-Only Marriage Problem’ (2021) *Child and Family Law Quarterly* 63.

¹⁶⁷ Fredman (n 66) 152.

¹⁶⁸ Fournier (n 95) 8.

¹⁶⁹ Bowen (n 42) 425.

¹⁷⁰ Teubner, ‘After Privatization?’ (n 153) 410.

judgment in *Braker*, ineffective and incoherent legal decision making may result from the attempted interpretation and analysis of religious concepts, with the courts seeking to maintain communicative closure and the functional differentiation of law and religion by re-iterating the line between their respective functions in fear of generating a destructive cycle that results in the regulatory trilemma, de-differentiation and the corresponding risks to individual freedoms.

(ii) Trilemma

This Section concludes that these same systems theoretical dimensions examined in the Canadian examples can be identified in England in relation to *get* refusals – and that the analytical device of the trilemma provides an explanatory and descriptive account of this practice whilst also, ultimately, generating the normative principles included with the concept of reflexive law in Chapters 4 and 7. The starting point for this discussion is *D v France* (1984) where the European Commission of Human Rights decided that refusal to give a *get* was not protected as part of the husband's Article 9 rights to manifest his religion.¹⁷¹ The husband was ordered to make payments to his ex-wife of 25,000 francs because of his refusal to grant a *get*. The Commission reasoned that first, it was 'customary' in Jewish law to grant the *get* as a matter of course after a civil divorce and that further, there was no plausible religious reason for a person not to do so.¹⁷² As a result, the Commission resolved that Article 9 was not engaged. Yet, over the course of the last forty years, courts and legislators in the UK have been addressing this same question and the challenge of how to influence behaviour around *get* refusal through targeted legal interventions.

¹⁷¹ *D v France*, Application No. 10180/82, December 6, 1983, D.R. 35, 202.

¹⁷² *ibid.*

Under the Divorce (Religious Marriages) Act 2002, the courts have the power to refuse to finalise a civil divorce until a Jewish husband grants his wife a *get*.¹⁷³ The Act establishes a statutory instrument, which authorises the Lord Chancellor to include other ‘prescribed religions’ within this provision, although this power has not been utilised.¹⁷⁴ Prior to this enactment, the courts struggled to deal with this clash between religious norms and civil law.¹⁷⁵ Courts utilised their discretionary jurisdictions in order to leverage fair results for the wife: for example, through increasing awards for civil maintenance¹⁷⁶ or making a consent order subject to the granting of a *get*¹⁷⁷ - even refusal to issue a decree absolute.¹⁷⁸ These are all examples of the sorts of perturbations, or alterations in the legal environment, which systems theoretical analysis predicts can be effective in generating responses within the religious system. For example, in *Brett v Brett* [1969], the Court of Appeal ordered that the husband would be obligated to pay an additional lump sum as spousal support payments if he were to refuse to grant the *get* within a set period of time.¹⁷⁹ Whilst the manipulation of the rules of maintenance payments in order to achieve fair outcomes had been considered legitimate it has subsequently been observed that other Rabbinical authorities ‘no longer accept it and regard it as a coerced *get*’.¹⁸⁰ The result of this resistance is to mean that the *purpose*

¹⁷³ Divorce (Religious Marriages) Act 2002.

¹⁷⁴ *ibid*, s10A to the Matrimonial Causes Act 1973.

¹⁷⁵ Matthijs De Blois, ‘Religious Law versus Secular Law The Example of the *Get* Refusal in Dutch, English and Israeli Law’ (2010) 6 *Utrecht Law Review* 93, 101–102.

¹⁷⁶ *Brett v Brett* [1969] 1 ALL ER 1007.

¹⁷⁷ *Beales v Beales* [1972] 2 ALL ER 667.

¹⁷⁸ *O v O* [2000] 2 FLR 147.

¹⁷⁹ *Brett v Brett* (n 176).

¹⁸⁰ Adrienne Barnett, ‘Getting a “Get” — The Limits of Law’s Authority?: N. v. N. (Jurisdiction: Pre-Nuptial Agreement) [1999] 2 F.L.R. 745’ (2000) 8 FLS 241.

of the mechanism was undermined: the religious system responds defensively, such that the approach is in some instances, ineffective.

The legislative response to these developments crystalised with the 2002 Act. As De Blois argues, although Jewish religious bodies supported the Act, ‘it was regretted by some in Parliament that the state had to interfere by means of legislation where the religious community itself saw no ways or means of addressing the problem.’¹⁸¹ Further, the Act does not itself compel a husband to grant a *get*. Instead, ‘the Act implies that a relevant religious authority confirms the compliance with the religious usages concerned’.¹⁸² It does, however, mean that the outcome of *religious* processes have an impact on the application of the general law.¹⁸³ The 2002 Act has not entirely resolved this challenge of *get* refusal. For example, in 2020, a Jewish woman who had been refused a *get* by her husband initiated a private prosecution against her husband under s76 of the Serious Crime Act 2015. Section 76 makes ‘controlling or coercive behaviour’ in family relationships a criminal offence.¹⁸⁴ The threat of criminal action prompted the husband to grant the *get*, which was supported by the London Beth Din. However, as with the discussion of the 2002 Act, it may be that, within some religious communities, a *get* extracted under threat of criminal prosecution will not be considered voluntary.

¹⁸¹ De Blois (n 175) 101.

¹⁸² *ibid.*

¹⁸³ See, R3, Family Proceedings Rules 2003.

¹⁸⁴ Tristan Cummings, ‘A novel approach to Get refusal: the use of the offence of coercive control to obtain a religious divorce’ (2020) Oxford Human Rights Hub Blog < <http://ohrh.law.ox.ac.uk/a-novel-approach-to-get-refusal-the-use-of-the-offence-of-coercive-control-to-obtain-a-religious-divorce/> [5/11/20].

In summary, the risk of the trilemma in the sense that, through legal intervention, the outcomes result in resistance within the religious systems by refusing to accept the validity of a coerced *get* or through destruction of that system, by rendering impossible an aspect of that system that is of fundamental importance. What these cases illustrate is that the communicative interaction of systems entails the construction of meanings within the language of those systems and that attempts to intervene directly may be too blunt and so remain incapable of connecting with the internal logic that guides that system. Or, in other words, methods of compulsion backed by sanction may simply be inadequate in the context of law and religion to affect change that is neither ineffective nor destructive – and that a different means of negotiating the interaction of systems may be necessary.

(c) India

The jurisdictions selected so far primarily exemplify approaches that, when confronted by the systems theoretical dilemma, attempt to maintain the functional differentiation of law and religion. They do this either by stressing the different functions of law and religion as in *Kaddoura* or by translating the religious norms within the discursive framework of the law. In neither case are religious norms generally given effect *as religious norms*: they are either considered legally irrelevant or re-configured within the language and logic of law, confronting the risk of the regulatory trilemma along the way. However, as noted in Part 1, these approaches do not exhaust the possible models of law and religion. Turning back to Eekelaar's axes of State intervention, religious laws may be incorporated *as law*, applied by communities or in state courts. India provides an example of both these approaches. This Section is sub-divided into two: first, it explores the relationship between state law and religious laws in the debate

around *Shah Bano* and the calculation of maintenance payments. Second, it deconstructs the law through the regulatory trilemma as an analytic device making use of examples based around the regulation of religious divorce.

(i) Epistemic Problem

The most absolute form of recognition of religion is through the incorporation of religious norms in state law. However, this model may expose individuals to the risk of misrecognition – how can the State *itself* define and delineate a religious concept, such as *mahr*?¹⁸⁵ In India, instead of the functional differentiation of law and religion we see *fusion* in the form of the religio-legal personal laws – something that could be understood as the co-evolution or structural coupling of religious and legal norms.¹⁸⁶ This form of relationship, however, might also be of concern in the functionally differentiated state as it tends towards social simplification and the more expansive claims of the legal system to govern religious family life. This fusion, moreover, perpetuates a challenge to the integrity and coherence of both the legal and religious systems.

Mohamed Ahmed Khan v Shah Bano Begum (1985) and those cases decided in its wake provide a useful example of the ways the State constructs religio-legal norms. These cases concerned ss125 and 127 of the Criminal Procedure Rules 1973, which impose an obligation on husbands to provide maintenance (called *iddat* or *iddah*) to

¹⁸⁵ For further discussion of the concept of recognition, see Chapter 6 Part 2(c)(iii).

¹⁸⁶ Niklas Luhmann, Dirk Baecker and Peter Gilgen, *Introduction to Systems Theory* (Polity 2013) 83-101.

their wives on divorce.¹⁸⁷ Maintenance is protected as a statutory right and has been widely construed to allocate financial resources and property to the wife¹⁸⁸ with the general position that maintenance is now awarded according to the principles laid down in *Parmar v Parmar* (2011) based on status, needs and capacity.¹⁸⁹ These cases, therefore, concerned *mahr* agreements (or, *Mehar*) indirectly, as the question was whether the payment of *mahr* discharges the duty of maintenance if the sum is considered ‘adequate’. In *Bai Tahira v Ali Husain Fissalli* (1979), the court considered the question of the scope of s125 and 127(3) of the Code of Criminal Procedure (1973)¹⁹⁰ and whether a sum ‘under any customary or personal law applicable to the parties’ was payable on divorce. Section 125 states outlines the conditions upon which a person is liable for failure to maintain their wife, children or parents. The relevant provision in this case was whether the ‘wife’ fell within the definition of s125(1)(a) and (d): ‘a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.’ Section 127(3) provides an exception to the duty under s125 to maintain, allowing a judge to alter or cancel an order for maintenance where the woman has ‘received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce.’¹⁹¹ At first instance, the court held that the wife was entitled to maintenance (in addition to the *Mehar* and a residential flat) but the High Court held that there was no jurisdiction under s125 to make such an award. The Supreme Court

¹⁸⁷ And now, under subsequent Statutes: such as, Section 20 of the Protection of Women from Domestic Violence Act 2005.

¹⁸⁸ See, below: line of cases on s125 and how it interacts with s127.

¹⁸⁹ *Parmar v Parmar* (2011) Civil Appeal Nos. 5831-5833 of 2011 [2011] Insc 633.

¹⁹⁰ *Bai Tahira v Ali Husain Fissalli* (1979) AIR 1979 SC 362.

¹⁹¹ Code of Criminal Procedure (1973), Section 127(3)(b).

determined that every divorcee is potentially eligible for maintenance payments given the broadly framed definition in s125(d). Moreover, the Court held that s127(3)(b) did not absolve a husband of his s125 duty without proof that maintenance under customary or personal laws is ‘more or less sufficient’ according to *secular standards*.¹⁹² In other words, it would not suffice to discharge the s125 duty to maintain by proof of a customary religious payment to the wife which is not ‘sufficient’ according to the general law.

As a result, the concept of adequacy is related to both the secular norms and customary and religious personal law such that small and time-limited religious or customary payments could not discharge the s125 duty unless it was ‘sufficient’ and reasonable and that these did not provide the wife a ‘double benefit’.¹⁹³ Legality, the court held, depends on ‘fulfilment of the social obligation’ and not by ‘ritual exercise’¹⁹⁴ as necessitated by the Article 15(3) of the Constitution, which guarantees equality and makes special positive provisions for women and children, alongside Articles 38 and 39 which set out principles of securing social and economic justice. Galanter and Krishnam argue that *Bai Tahira* avoids making contentious claims about the *content* of Islamic religious duty, focusing on statutory construction and the Constitutional rights engaged.¹⁹⁵ They argue that Iyer J, ‘judiciously weighed’ these sources of law to ‘arrive at decisions that appear to have been accepted and respected

¹⁹² *ibid* [80F](b).

¹⁹³ *ibid* [80H](d).

¹⁹⁴ *ibid*.

¹⁹⁵ Affirmed in *Fazlunbi v K Khader Vali* AIR 1980 SC 1730.

by the opposing parties.’¹⁹⁶ The Court sought to limit the communicative interaction between these systems – to the greatest extent possible under a personal law model – by emphasising the functional differentiation of law and religion.

In contrast to *Bai Tahira*, the case of *Shah Bano* became highly contentious, largely due to the fact that the Supreme Court ruled on the *content* of religious obligations.¹⁹⁷ Here, the Supreme Court once again considered the interplay between s125 and s127 and Muslim personal law in light of *Bai Tahira* and *Fazlunbi*.¹⁹⁸ The Supreme court affirmed these decisions but went further in ruling on matters of Islamic law itself. In the systems theoretical sense, it breached the functional differentiation of law and religion by seeking to impose external meanings within the system of religious law.

The Supreme Court examined the Islamic concept of *iddat* and analysed, as a matter of Islamic law, what payments were due to a wife.¹⁹⁹ The Court decided that the restrictive view of Muslim maintenance does not apply where there is a possibility of destitution on the part of the wife. In so reasoning, the Court held that there was ‘no conflict between the provisions of section 125 and those of the Muslim Personal Law.’²⁰⁰ The Supreme Court engaged in a major intervention into Muslim personal law, selecting an interpretation of the law that is compatible with state law and the

¹⁹⁶ Marc Galanter and Jayanth Krishnan, ‘Personal Law and Human Rights in India and Israel’ (2000) 34 Israel Law Review 101, 114.

¹⁹⁷ *Mohamed Ahmed Khan v Shah Bano Begum* (1985) 1985 AIR 945.

¹⁹⁸ *Fazlunbi* (n 195).

¹⁹⁹ *ibid* [858D-G], see further, 859C-D; 862C-D.

²⁰⁰ *ibid*.

Constitution. As is demonstrated in relation to the response of the Muslim Personal Law Board²⁰¹ and the proliferation of non-State religious tribunals, externally generated reforms within the personal law systems have initiated a ‘new movement’ to ‘find ways to avoid state interference.’²⁰² This is not, however, to say that the decisions were universally resisted within Muslim communities with some supporting the judgment.²⁰³ The case enters the realm of the regulatory trilemma, in leading to ineffectiveness and resistance *and* in an undermining of the law’s coherence *as law*.

Shah Bano does not represent the end of this story. In response to the Supreme Court decision and the extreme public reaction to its interpretation of Muslim personal law, Parliament passed the Muslim Women (Protection of Rights on Divorce) Act 1986. Under s3(1)(a), a Muslim woman is entitled to ‘a reasonable and fair provision and maintenance to be made and paid to her *within* the *iddat* period by her former husband’.²⁰⁴ In *Danial Latifi v Union of India* (2001) the Court was once again required to re-construct this religio-legal duty.²⁰⁵ It was argued that the Act violated Articles 14, 15 and 21 of the Constitution.²⁰⁶ In upholding the Act, the court decided on Islamic religious principles that the period of maintenance was not confined to a matter of months, but instead could be an ongoing obligation. The Supreme Court reasoned that

²⁰¹ Sabiha Hussain, ‘Shariat Courts and Women’s Rights in India’, Centre for Women’s Development Studies; 2007, Occasional Paper No. 47 (2006).

²⁰² Shah (n 16) 58.

²⁰³ Amartya Sen, ‘Secularism and its Discontents’ in Rajeev Bhargava, *Secularism and its Critics* (OUP 2000) 466.

²⁰⁴ Muslim Women (Protection of Rights on Divorce) Act 1986.

²⁰⁵ *Danial Latifi and Another v Union of India* (2001) Writ Petition (Civil) 868 of 1986.

²⁰⁶ *ibid* 13.

Parliament would not intend to legislate contrary to the Constitution²⁰⁷ and concluded that ‘at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs.’²⁰⁸ The Court decided not to re-open its analysis of Muslim personal law from *Shah Bano* but to adopt its earlier interpretation of the Islamic doctrine as correct.²⁰⁹ In so doing, the Court rejected the religious argument that such payments are merely acts of ‘charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife.’²¹⁰ Instead, it re-affirmed the ‘basis’ on which *Shah Bano* was decided: that where a Muslim wife will be unable to maintain herself after the period of *iddat*, she is entitled to ‘*Mata*’ – or on-going payments.²¹¹ This conclusion marks a collision of religious, political and legal systems to construct and re-construct religious concepts within the scheme of family law and the Constitution. As explained above, this process could be interpreted as a discursive process whereby these systems co-evolve in response to both communicative interventions in the discourse and an altered environment resulting from external perturbations. In this manner, it may be possible to identify the development of a shared, multifunctional language of religio-legal norms which represents a further re-differentiation of society rather than social simplification.²¹² Yet, an alternative interpretation is that whilst the Court ultimately found that its interpretation of the content of Muslim personal law and the intervention

²⁰⁷ *ibid.*

²⁰⁸ *ibid* 11.

²⁰⁹ *ibid* 12.

²¹⁰ *ibid* 13.

²¹¹ *ibid* 13-14.

²¹² Sandberg (n 139) 456-457.

of Parliament coincided, it did so only by distorting each of these systems so as to diminish their internal coherence.

(ii) Regulatory Trilemma

The solutions examined in the *Shah Bano* line of cases fall into the regulatory trilemma with the socialization of law and the juridification of religion. Ultimately, the law reforms fail to result in any meaningful benefit for many of the woman who brought these cases, including in *Shah Bano* itself.²¹³ In the end, as a direct result of community pressures, the claimant was ostracised by her community and compelled to renounce the legal decisions and donate the maintenance she received.²¹⁴ In fact, as Nussbaum remarks, it was her life and *very salvation* that was at stake if she were not to repudiate the legal decisions in her favour.²¹⁵ The foregoing analysis helps establish a link between the *construction* of norms through the epistemic lens of distinct social systems and the increasing potential for misrecognition, distortion and regulatory failure. The next section takes this further by examining the law through the three-fold lens of Teubner's trilemma.

In these cases, the communicative interaction and overlapping of systems has fallen into the regulatory trilemma with the result being the by-passing of state law through informal arrangements, similar to those also evident in England and Canada. As Hussain argues, judicial and legislative interventions have created a lack of trust,

²¹³ Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (Macmillan 2007).

²¹⁴ *ibid* 581.

²¹⁵ Martha Nussbaum, 'India: Implementing Sex Equality through Law' (2001) 2 *Chicago Journal of International Law* 35 44-46.

and whilst the system of Muslim personal law is not destroyed, these decisions have been ineffective to the extent that they have led to resistance and attempts to circumvent State court jurisdiction.²¹⁶

The All-India Muslim Personal Law Board (AIMPLB) has long argued that religious tribunals should be given legal force and seeks to preserve a particular ‘Muslim identity’ against state interventions through such institutions. Hussain explains that: ‘[The Board] also claimed that state courts might deliberately seek to “misinterpret” the Shariah, which they see as part of an alleged “conspiracy” to destroy Muslim identity and absorb Muslims into the “national mainstream.”’²¹⁷ Likewise, Hasan argues that the personal law has become *symbolic* for some Muslims of their significant-minority status and key to ‘safeguarding the community’s socio-religious identity’.²¹⁸ Further, these informal tribunals are evidence of what systems theory *would predict* – internal resistance against external efforts to impose substantive reform. It is therefore unsurprising that the President of the AIMPLB justifies *Darul Qazas* (Muslim Courts) because there is ‘little hope for getting decisions based on the Shariah from judges in state court.’²¹⁹ Further, the Board has developed a model *Nikah* agreement, which expressly seeks to oust the state courts in resolving issues relating to marriage and divorce.²²⁰

However, a second example of this interrelationship between religious law,

²¹⁶ Hussain (n 201).

²¹⁷ *ibid* 3–4.

²¹⁸ Zoya Hasan, ‘Minority Identity, State Policy and the Political Process’ in M Khullar (ed), *Writing the Women’s Movement: A Reader* (2005 Zubaan) 204.

²¹⁹ Hussain (n 201) 2.

²²⁰ *ibid* 3–4.

family and state relates to the process of obtaining unilateral divorce through so-called ‘triple talaq’ or *talaq-e-biddat*. This cultural practice entails a unilateral power of the husband to repudiate the wife which is effectuated by the pronouncement of *talaq*.²²¹ This is one of the ‘extra-judicial’ forms of divorce permitted in Islam, which means that the divorce can take effect without a ruling by a religious authority. The Supreme Court in *Shayara Bano v Union of India & Others* (2017) analysed the legality of this practice under s2 of the Muslim Personal Law (Shariat) Application Act 1937.²²² In this case, before witnesses, the husband signed a petition that, after giving reasons, concluded by purportedly unilaterally ending their marriage by proclaiming *talaq*.²²³ The court examined both the religious basis of triple *talaq* with reference to the Islamic jurisprudence²²⁴ and its Constitutional status. The petitioners and respondents both drew heavily on Quranic and other Islamic juristic texts and scholars in a discussion that focused substantially on the validity of triple *talaq* within Islam and the proper understanding of the content of Islamic divorce.²²⁵ Once again, the Court was inserted into the systems theoretical bind – required to engage with and re-construct meaning within its own frame of reference and legal epistemic world. It is notable, as Ahmed points out, that ‘even the most established scholar ... of Islam, would have to follow

²²¹ Zakia Soman and Noorjehan Safia Niaz, ‘No More Talaq, Talaq, Talaq’ (Bharatiya Muslim Mahila Andolan 2016) < <https://bmmaindia.files.wordpress.com/2016/01/triple-talaq-report.pdf> > accessed 13 February 2023, 1.

²²² Writ Petition (C) No. 118 of 2016.

²²³ *ibid* [7].

²²⁴ *Shayara Bano* (n 222) *per* Khehar CJ (dissenting) [17]-[21]; Kurian J (concurring) [1]-[3], [6]-[10]. The Majority decision of Nariman and Lalit JJ likewise spend significant time explaining the religio-legal status of *talaq*: [1]-[10].

²²⁵ *Shayara Bano* (n 222) *per* Khehar CJ [35]-[78].

the court's interpretation of Islamic family law.'²²⁶

The majority decision was divided between reasoning based on the incompatibility of triple *talaq* with Article 14 of the Constitution and, in the concurring Opinion of Kurian J, arguments based on the apparent incompatibility of the practice with Islamic principles.²²⁷ Nariman and Lalit JJ first held that the practice of triple *talaq* operates *through* codified statute and therefore comes within the Constitutional scheme of Article 13(1) and applicable constitutional rights.²²⁸ The majority then had to consider whether triple *talaq* was protected under Article 25 because it formed part of the 'essential' practice of the religion.²²⁹ However, the majority held that the practice of triple *talaq* on a *proper understanding of Islamic law*, and contrary to the arguments of the AIMPLB, is not essential to the religion as it is considered sinful.²³⁰ The majority then held that the practice is arbitrary and cannot survive scrutiny under Article 14. On the other hand, Kurian J in his concurring judgment asks the question: whether that which is 'Quranically wrong can be legally right' and answers that it cannot.²³¹ In so doing, the concurrence expressly seeks to explore the Islamic basis of the practice, referring to High Court decisions and Quranic and other Islamic sources.²³² In both the majority and concurrence, the judges engage in the task of interpreting and distilling the content and essence of the Muslim personal law, all whilst constructing it within

²²⁶ Ahmed (n 2) 238.

²²⁷ *Shayara Bano* (n 222) Kurian J [26].

²²⁸ *ibid* Nariman J [16]-[19]. Following *Narasu Appa Mali* (n 46), uncodified personal laws remain outside Constitutional scrutiny.

²²⁹ *ibid* [23].

²³⁰ *ibid* [25]-[30].

²³¹ *Shayara Bano* (n 222) Kurian J [1].

²³² *ibid* [11].

the Constitutional scheme at hand.

Although the minority declined to ‘interpret nuances of Muslim personal law’²³³ and rejected the contention that the moral status of triple *talaq* within Islam is of legal relevance²³⁴ it nonetheless continued to examine the Islamic basis of *talaq*.²³⁵ In the end, the minority held that the Shariat Application Act 1937 does not change the nature of the personal law which exists from ‘time immemorial’ and which is protected under Article 25 as an essential aspect of Islamic practice in India, as accepted by the majority of Muslims.²³⁶

Despite this strong judicial intervention, systems theory suggests that substantive interference in religious systems from external sources is likely to be unsuccessful across the breadth of the regulatory trilemma. Attempts to construct meaning of religious self-concepts within the legal framework is unlikely to be acceptable to those within the religious system.²³⁷ Following *Shayara Bano*, it was reported that there were at least ‘one hundred cases of instant triple talaq’.²³⁸ This prompted a number of legislative interventions designed at further discouraging the practice under the Muslim Women (Protection of Rights on Marriage) Bill 2017, which faced strong opposition leading to the passing of the Muslim Women (Protection of Rights on Marriage) Ordinances of 2018 and 2019. In 2019, the latest variant of this

²³³ *Shayara Bano* (n 222) Khehar CJ (dissenting) [137].

²³⁴ *ibid* [127].

²³⁵ *ibid* [130]-[136].

²³⁶ *ibid*

²³⁷ Augsberg (81) 294-295; Augsberg (96).

²³⁸ The Times of India, ‘100 cases of Instant Triple Talaq in the Country Since the SC Judgment’, 28/12/2017 <https://timesofindia.indiatimes.com/india/66-cases-of-triple-talaq-in-the-country-since-the-sc-judgement-law-minister/articleshow/62279519.cms> [Accessed 25/11/2020].

Act was passed on the basis that over 550 cases of triple *talaq* had been reported since *Shayara Bano* - and notwithstanding the Ordinances that sought to fill this gap.²³⁹

Section 3 of the 2019 Act states that the practice of triple *talaq* is ‘void and illegal.’²⁴⁰ The punishment for such pronouncements is stipulated as a fine and up to three years imprisonment.²⁴¹ Thus, the Act – in response to this serious social problem – makes use of command and control as its *primary* means of steering behaviour. As will be discussed in Chapter 7, the use of sanctions is not necessarily incompatible with a reflexive regulatory model. Instead, the reflexive *attitude* calls on the use of the most appropriate regulatory tools, taking account of the trilemma, but initially favouring more indirect interventions.²⁴² Whilst more time and empirical study is required to understand the full consequences of the reforms, systems theory suggests such an approach is unlikely to lead to its desired results – the elimination of this social practice without harm to the broader, and valuable, religious system as a whole.²⁴³ The State’s aim is to undermine the system in respect of the practice of pronouncing *talaq*. However, it may still be the case that, as in the wake of *Shayara Bano*, this could lead to ‘creative’ resistance within the system and sees this intervention rendered

²³⁹ BBC News, ‘Triple talaq: India criminalises Muslim “instant divorce”’, 30/07/19 <<https://www.bbc.co.uk/news/world-asia-india-49160818>> [Accessed 27/11/20].

²⁴⁰ Muslim Women (Protection of Rights on Marriage) Act 2019.

²⁴¹ *ibid*, Section 4.

²⁴² Fredman (n 66) 157–158.

²⁴³ Recent Indian Government data suggests a significant drop in prevalence: *The Hindu*, ‘About 82% decline in triple talaq cases since law enacted by Modi govt: Naqvi’, 22/07/20 <<https://www.thehindu.com/news/national/about-82-decline-in-triple-talaq-cases-since-law-enacted-by-modi-govt-naqvi/article32160348.ece>> [Accessed 27/11/20]. More empirical evidence is required to identify the full implications of these reforms or whether the practice has been retained in new forms. Cases of triple-*talaq* still remain: *NDTV*, ‘Case Against Man For Giving Triple Talaq To Wife In Madhya Pradesh’, (NDTV, 5/10/20) <<https://www.ndtv.com/india-news/case-against-man-for-giving-triple-talaq-to-wife-madhya-pradesh-cops-2305544>> [Accessed 27/11/20].

ineffective.²⁴⁴ This is the view of the Bebaak Collective, a group instrumental in *Shayara Bano*, which now opposes the law as ineffective and liable to have unintended consequences by criminalising husbands and leaving women in a precarious situation.²⁴⁵

(d) Israel

This final section looks at Israel. In contrast to the Indian approach, examined above, the Israeli system is based on a *millet* model in which state authorised religious bodies adjudicate family disputes according to religious (and civil) laws.²⁴⁶ Israel recognises legal pluralism in both its institutions and in law such that depending on which of the official religions a person belongs to, the legal venue and applicable law will vary. Only those who do not have a religious affiliation may ‘Covenant’ with each other, as a civil alternative to marriage.²⁴⁷ As de Blois summarises: ‘religious courts are to a certain extent subject to (secular) Israeli law, while state courts may have to apply religious law in questions of personal status, family law and inheritance law.’²⁴⁸ The operation of religious courts is thus subject to secular laws such as the Women’s Equal Rights Act 1951 and the Constitution, which enshrine Jewish and secular values. From

²⁴⁴ See, Jeffrey Redding, ‘Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion, and Law’ (2006) 4(3) *NJIHR* 436, 461-466: the parallel with the prohibition of Hindu polygamy – some Hindus convert to Islam to avoid the prohibition, and some go ahead and marry several wives anyway.

²⁴⁵ *The Wire*, ‘Complete Charade’: Activists, Civil Society Groups Condemn Triple Talaq Bill’ (*The Wire* 31/07/19) < <https://thewire.in/communalism/triple-talaq-bill-muslim-women> > [Accessed 27/11/20].

²⁴⁶ Pinhas Shifman, ‘Family Law in Israel: The Struggle Between Religious and Secular Law’ (1990) 24 *Israel Law Review* 537; Karin Carmit Yefet, ‘Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction’ [2016] *University of Illinois Law Review*. Notably, as Ahmed explains, it is right to distinguish the personal law and *millet* models due to their distinct institutional arrangements: Ahmed (n 2) 4-5.

²⁴⁷ Covenant Partnership for the Religionless Law 2010.

²⁴⁸ De Blois (n 175) 102.

the systems theoretical perspective, the question is then *how* these systems of religious law and civil courts construct meaning within their own language and logic.

(i) Epistemic Problem

Israel presents a similar, but distinct challenge from the systems theoretical perspective as in India. The civil courts may overlay civil legal values over religio-legal norms or share jurisdiction with religious courts, where both courts are required to apply the secular or religious norms appropriate to the context.²⁴⁹ This relationship has been described as a ‘dialectic’ between religious and secular law, whereby ‘Jewish tradition’ has over time coloured the modern conceptions of rights and dignity (*kvod habriot*).²⁵⁰ Therefore, when discussing the ‘secular’ laws which govern certain aspects of family life it is important to recognise the embedded Jewish (as well as Christian and Islamic) ethical and religious background to the development of the Basic Law and other secular family legislation.²⁵¹

Although issues of recognising marriage and divorce are subject to religious jurisdiction,²⁵² financial matters such as spousal support²⁵³ are part of the exclusive competence of secular courts.²⁵⁴ For example, for Jewish Israelis, the jurisdiction for

²⁴⁹ Yefet (n 246).

²⁵⁰ Pauline Kollontai, ‘On Human Dignity and Rights: The Dialectics of Religious and Secular Law in Israel’ in Zhibin Xie, Pauline Kollontai and Sebastian Kim (eds), *Human Dignity, Human Rights, and Social Justice* (Springer Singapore 2020).

²⁵¹ *ibid* 156–157.

²⁵² Section 2, Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.

²⁵³ LCA 8256/99 *Plonit v Ploni* 58(2) PD 213 (2003) (Isr.)

²⁵⁴ HCJ 2232/03 *X v Regional Rabbinical Court* 61(3) PD 496 (2006) (Isr.)

dissolving a marriage is the ‘sole jurisdiction of the rabbinical courts.’²⁵⁵ Thus, the *validity* of a marriage might be determined according to *religious norms*, but some of the financial consequences are governed by a *civil* regime.²⁵⁶ In practice, systems theory predicts that both religious and secular courts filtrate these norms through their own internal logic in a process of co-evolution and communicative complexity. There is significant evidence of this interdependence between religious and secular norms through judicial attitude and through deliberate policy decision making, such as to essentially exempt laws governing the recognition of marriages and divorces from equality provisions.²⁵⁷ Yet, the Israeli Supreme Court has confirmed that, ultimately, religious courts should interpret the law in light of the provisions of the Basic Laws.²⁵⁸

Systems theory identifies this tendency for co-evolution and regulatory resistance as problematic on two grounds. As discussed in Chapter 2, one reason *for* the separation of religion and state law from a systems theoretical perspective flows from the challenges that arise when systems interact – that is to say, when functionally differentiated sub-systems appear to overlap, resulting in the regulatory trilemma. Secularity is a principle that responds to the *regulatory* limits of law and the need to maintain functional differentiation as the bedrock for the freedoms enjoyed by individuals. In Israel, the creative resistance expected from direct regulation of religious and family life manifests through marriages registered abroad and the use of

²⁵⁵ Section 1, Marriage and Divorce Law (n 236).

²⁵⁶ Susan Weis, ‘Religious ‘Right’ to Civil ‘Wrong’: Using Israeli Tort Law to Unravel the Knots of Gender, Equality, and Jewish Divorce’ in Joffe and Nell (eds) *Gender, Religion and Family Law* (Brandeis 2013).

²⁵⁷ Frances Raday, ‘Religion, Multi-culturalism and Equality’ (1995) 25 *Israel Yearbook on Human Rights* 193, 211.

²⁵⁸ H.C. 6751/04, *Sabag v The High Rabbinical Court of Appeal*, (2004) P.D. 59 (2) 834.

other civil alternatives to marriage. Two cases help illustrate these points.

In *Plonit v Ploni* (2003) the court was required to consider the extent of a husband's obligations in relation to his wife upon divorce.²⁵⁹ The parties were both Jewish and resident in Israel but legally entered a marriage abroad. At first instance, the judge held that the parties were not legally married because they had not entered a marriage according to Jewish law. However, maintenance payments are governed not by religious norms but under s2(a) and 17(a) of the Family Law Amendment (Alimony) Law 1959. The judge reasoned that Jewish couples resident in Israel and *capable* of entering a religious marriage cannot circumvent the personal law through a foreign registered marriage. However, on appeal, Barak J explained that the *validity* of a marriage is not solely determined by religious norms but *also* with reference to private international law.²⁶⁰ That is to say, the courts resisted the religious jurisdiction and exerted civil principles over the relationship. Barak J found that the relationship between the parties was also governed by *contract law* and the 'contractual relationship created between the couple in practice' and their reasonable expectations towards one another.²⁶¹ As explored in relation to the other jurisdictional examples, contract plays a key mediating role between religious and secular norms – which is accommodated by the flexibility of contractual doctrine and its ability to function as a tool of structural coupling between religious norms, family laws and the economic system.

A second example of this systemic, communicative interaction is the Supreme

²⁵⁹ *Plonit* (n 253).

²⁶⁰ *ibid* [9].

²⁶¹ *ibid* [10].

Court decision of *X v Regional Rabbinical Court* (2006).²⁶² Here, the Court also had to consider the case of a Jewish, Israeli couple who chose to marry abroad in Cyprus, with the marriage subsequently breaking down and the Rabbinical courts dissolving the marriage. The wife challenged the decision. The Rabbinical Court judgments had stated that the parties were not married ‘in accordance with Jewish law’ – but that this did not rule out that the parties may nonetheless be married under the civil law.²⁶³ That is to say, the Rabbinical court was not capable of determining the status of the *civil marriage*. This was accepted by the Great Rabbinical Court which held that the Regional Court *could have*, but failed to, dissolve the civil marriage by issuing such a decree. Its declaratory judgment to the effect that they were not married in Jewish law was insufficient for civil purposes. This was again challenged by the wife, on the basis that this would allow the husband to unilaterally dissolve what was otherwise a valid civil marriage for failure to adhere to Jewish law alone.

Evidently, the relationship between civil and religious norms here demonstrates the ways in which these two overlapping systems communicate, constructing meanings within their own internal logic – one based on civil legal principles including private international law, the other applying religious norms. The Great Rabbinical Court states to this effect: ‘Jewish law admittedly refuses to give full recognition to “civil marriages,” and it requires Jewish couples to complete the relationship between them by means of a marriage in accordance with Jewish law.’²⁶⁴ These lead to conflicting conclusions on this question of status: married in civil law, accepted as married ‘from

²⁶² *X v Regional Rabbinical Court* (n 254).

²⁶³ *ibid* [2]-[5].

²⁶⁴ *ibid*, Supplementary Judgment of the Great Rabbinical Court, 11.

an external viewpoint' according to Jewish law, but never married within the internal norms of Jewish law.

The Supreme Court reasoned that a marriage conducted validly abroad between non-Israeli citizens or residents will be recognised as valid 'from the viewpoint of civil law and the civil courts' and private international law.²⁶⁵ However, in respect of Jewish Israeli citizens competent to marry in Jewish law, the court distinguishes between a private international law approach and an approach based on personal law. The Great Rabbinical Court took the view that 'from the viewpoint of civil law the parties married in a civil ceremony and they are considered married throughout the world' and in Israel and this was accepted by the Supreme Court.²⁶⁶ On the other hand, the Rabbinical Court rejected that couple is married according to *Jewish* law, giving it a distinct status as a 'marriage of the Children of Noah.'²⁶⁷ This only relates to its external validity – the ramifications in respect of third parties – and not the internal aspect, relating to the obligations *between* spouses, such as the obligation to pay maintenance.²⁶⁸ This is a matter for the civil courts, applying contract law and the principle of good faith.²⁶⁹

These various classifications illustrate how the status of the marriage is recognised variously depending upon the system of law that applies, constructing conditions of validity that cannot easily be tested externally based on the internal

²⁶⁵ *X v Regional Rabbinical Court* (n 254) [23].

²⁶⁶ *ibid* [26]

²⁶⁷ *ibid* [27]

²⁶⁸ *ibid* [31].

²⁶⁹ *ibid* [42]. See also: Spouses' Property Relations Law, 5733-1973.

norms, ‘coding’ and logic of each system. As explained in its concluding remarks, the Supreme Court considers the Great Rabbinical Court’s approach to be important: ‘Even though it does not involve a recognition of a full status of civil marriage, it makes a contribution to preventing a rift between civil law and religious law.’²⁷⁰ These decisions also have implications for divorce: a couple that is not married according to Jewish law, but whose marriage is nonetheless recognised in civil courts, still requires a divorce from the Rabbinical Court: ‘A *Get* and a divorce are not the same’.²⁷¹ In this light, the ‘civil court system has no good and effective civil alternative for dissolving a marriage between a Jewish couple.’²⁷² So, this ‘rift’ is inevitable in the sense that the validity criteria and authority to recognise a divorce can *never* entirely match as between systems – even accepting the Habermasean conception of a shared, multi-functional language – because these criteria of validity are internally rationalised and rest on a division between the internal and external aspects of marriage.

(ii) Trilemma

As a result of the hybridity inherent in the Israeli *millet* system of family law, this relationship poses serious difficulties from a systems theoretical perspective. The consequence is that a ‘historically’ formed ‘patriarchal hierarchy’ becomes embedded in religious decision making which remains in tension with the secular court’s aim to implement democratic values.²⁷³ As explained above, the distinct coding within

²⁷⁰ *ibid* [44]

²⁷¹ *ibid* [29].

²⁷² *ibid* [3]

²⁷³ Kollontai (n 250) 158.

systems necessarily overlaps as a result of the constitutional and statutory regime, which generates opportunities for ‘translation’ error. Thus, where the secular courts have attempted to impose reforms, these have been met with resistance from within the communities and non-state religious tribunals. As Shifman remarks, ‘the civil judge by way of interpretation,’ has created a ‘secular, territorial regime’ in resistance to perceived injustices within the religious regime.²⁷⁴ Likewise, despite secular judicial interventions, Trigger argues that religious courts have resisted the rulings in *Plonit v Ploni* (2003) and *X v Regional Rabbinical Court* (2006) by continuing to determine issues relating to financial affairs through a religious framework.²⁷⁵ Trigger notes that the Supreme Court decision ruled that where parties enter a civil marriage, the religious courts retain ‘formal jurisdiction’ but that a full *get* ceremony will not be required.²⁷⁶ In fact, ‘while some judges in the rabbinical court system follow the 2006 ruling, it seems that the majority do not and require a full religious *get*’.²⁷⁷

This dynamic can likewise be analysed through the prism of the regulatory trilemma: exposing not just the well observed conflict between religious law and secular law. Shifman rightly observed that Israeli family law is caught between ‘two juridical systems’ that are ‘struggling and pulling in opposite directions.’²⁷⁸ Three examples illustrate this trilemma: the issue of *get* refusal, recognition of status of reputed spouses and the conflict between Islamic tribunals and state law. The result is

²⁷⁴ Shifman (n 246) 538.

²⁷⁵ *Plonit v Ploni* (n 253); *X v Regional Rabbinical Court* (n 254); Zvi Trigger, ‘Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts’, 27 ISR 1, 3 (2012)

²⁷⁶ *ibid* 2.

²⁷⁷ *ibid*.

²⁷⁸ Shifman (n 246) 537.

that religious law, as with the Indian example analysed above, is often reduced to a mere ‘supplier of normative raw-material with limited capacity, and bereft of religious spirit.’²⁷⁹ The outcome is further resistance and the re-assertion of functional differentiation.

Jewish Personal Law in Israel

In Israel, *get* refusal is a relatively common issue, extensively considered in both Rabbinical and secular courts.²⁸⁰ As explored in the discussion of *Bruker* and *Brett*, failure to obtain a *get* entails serious consequences for women: *get* refusal may amount to a form of ‘financial blackmail’ with large payments being made before a husband agrees to a divorce.²⁸¹ Yet, secular interventions have been resisted within the religious system. Coercive means are seen as undermining the *voluntary* religious basis of the *get*.²⁸² As Algrabli J of the Supreme Rabbinical Court remarks: ‘all petitions filed outside the rabbinic court ... that relate to *get* refusal, whose practical consequence is to accelerate the delivery of the *get* ... effectively preclude the possibility of the execution of a [kosher] *get*.’²⁸³ Moreover, the principal *religious* mechanisms rely on *communal* enforcement of sanctions – the distancing of the community and exclusion of recalcitrant men – which lies beyond judicial enforcement.²⁸⁴ Rubinstein J describes

²⁷⁹ *ibid* 539.

²⁸⁰ Weis (n 256); Yehiel Kaplan, ‘Enforcement of Divorce Judgments in Jewish Courts in Israel: The Interaction Between Religious and Constitutional Law’ (2012) 4 *Middle East Law and Governance* 1.

²⁸¹ Kollontai (n 250) 159.

²⁸² Weis (n 256).

²⁸³ Cited in De Blois (n 175) 105–6.

²⁸⁴ HCJ 5185/13 *Anonymous v Great Rabbinical Court in Jerusalem* (Feb. 28, 2017).

such sanctions handed down by Rabbinical courts as permissible albeit 'unenforceable'.²⁸⁵ Here, we have the final strand of the trilemma playing out. Teubner argues that interventions may be ineffective or lead to incoherence in the law, but also that these may destroy the system itself – preventing it from carrying on their functions. As Hacker concludes:

This is a striking example of the rabbinical courts' persistent resistance to relinquishing their exclusive authority to the civil courts through civil legal mechanisms that might overcome the often discriminatory consequences of their jurisprudence²⁸⁶

This is the risk in the instant case as suggested through a systems theoretical analysis, such that substantive interventions may ultimately be counterproductive.

Moreover, as illustrated in this discussion, the legal hybridity that characterises this model leads to misrecognition and distortion. According to the Supreme Court in *Sidis v Great Rabbinical Court* all secular and religious courts, are obligated to apply the provisions of the Women's Equal Rights Law 1951.²⁸⁷ Yefet notes that, in the concurrent jurisdictions of religious and secular courts, although the division of marital assets ought to be determined with reference to secular norms, religious courts 'in fact often resort instead to their own religious property regimes denying joint ownership.'²⁸⁸ For example, in *Bavli v Great Rabbinical Court* [1994], the plaintiff argued before the Rabbinical courts, in line with the civil law, for an equal share of family property.²⁸⁹

²⁸⁵ *ibid*, 11.

²⁸⁶ Hacker (n 15) 72.

²⁸⁷ H CJ 202/57 *Sidis v Great Rabbinical Court* 12 PD 1528.

²⁸⁸ Yefet (n 246) 1524.

²⁸⁹ H CJ 1000/92 *Bavli v Great Rabbinical Court*, 48(2) PD 221.

This conclusion was rejected both at first instance and on appeal because such a division was contrary to Jewish law. However, once this reached the Supreme Court, it was re-affirmed that the Rabbinical courts must implement the ‘principle of equal property rights in cases of divorce’.²⁹⁰ As Hacker argues, however, the Rabbinical courts are not ‘indifferent’ to these interventions but react with ‘ultra-conservative judgments’.²⁹¹ The religious courts – whether Jewish or Islamic – ‘regard themselves as unable to deviate from religious law.’²⁹² This conclusion is obvious from the systems theoretical perspective – externalities will always tend to be rationalised through the functions of the target system and liable to being ineffective in realising the intended objective.

On the other hand, the allocation of maintenance payments must be done according to religious norms – whether administered in religious or civil courts. In *Grinhouse v Grinhouse* (1981), the wife sued her husband for maintenance. Chief Justice Shamgar, whilst required to apply the *religious* regime nonetheless imbues it with secular human rights and equality norms in order to mitigate some of the bias that would otherwise persist against a wife.²⁹³ The court constructed a mutuality principle which bars husbands from relying on the infidelity of their wives as a reason to forfeit their claims to maintenance. The court determined that although the wife was seen as being in breach of Jewish religious law, the *get* could be granted if she consented and she would be due the sum due under the marriage contract discharging the husband’s

²⁹⁰ Hacker (n 15) 63–64.

²⁹¹ *ibid.*

²⁹² Anat Scolnicov, ‘Religious Law, Religious Courts and Human Rights within Israeli Constitutional Structure’ (2006) 4 *International Journal of Constitutional Law* 732, 732–733.

²⁹³ *ibid.*; Yefet (n 246) 1527–1528.

obligation to pay maintenance.²⁹⁴

Two further examples help to illuminate this argument: the development of a competing civil jurisdiction over reputed spouses and the legislative creation of covenant marriages for those without a religion. First, in response to the hybridity of Israeli family law and the resistance religious courts the civil courts have reinforced the status of cohabitates.²⁹⁵ Although the status of reputed spouses have been recognised since the establishment of the family law system, the civil courts have developed the law so as to mean cohabitates have almost the same status (in some cases, better rights) as those in marriages.²⁹⁶ Accepting the hardships experienced by women as a result of the religious jurisdiction over status, cases such as *Yager v Plavicz* (1966)²⁹⁷ evidence the civil court's 'spirit of circumvention' by extension of civil law remedies to those otherwise chained to a limping religious marriage.²⁹⁸ However, in other ways, civil interventions have made the consequences *get* refusal more serious: the husband is empowered to enter new quasi-marital relationships as a reputed spouse, leaving his wife 'chained' to the pre-existing religious marriage.²⁹⁹ As a result, although the status of reputed spouses is a judicial development aimed at addressing the shortcomings of the religious jurisdiction, the consequence of this intervention has been to establish an 'added weapon' for the *get*-refusing partner who now possesses a

²⁹⁴ CA 277/81 *Grinhouse v Grinhouse* (1981) 36(3) PD 197.

²⁹⁵ *Rosenberg v Stessel* (1973) 29(1) PD 505.

²⁹⁶ Yefet (n 246) 1513.

²⁹⁷ *Yager v Plavicz* (1966) 20(iii) PD 244.

²⁹⁸ Shifman (n 249) 542.

²⁹⁹ Yefet (n 246).

‘de facto remarriage licence’.³⁰⁰

Second, the legislature has developed the concept of ‘Civil Covenants’ as a way of providing an alternative status for the ‘religionless’. Yet, at the same time, this intervention is contingent on an extensive religious jurisdiction over questions of religious status. Under Article 6, religious courts may act to object to a non-religious partnership if it is of the view that the individual properly belongs to an official religion.³⁰¹ Equally, Article 10 preserves the ‘unique authority of the religious court over marriage and divorce’.³⁰² In this instance, the legislation allows religious authorities to determine the boundaries of their religious status – something that, from the systems theoretical perspective ought to be so.³⁰³ Yet, in doing so, the Partnership for those without a religion cedes significant control to religious authorities which are able to impose their exclusive conception of religious status.

Taken together, the trilemma helps explain that, faced with conflict between substantive norms imposed on a system there will either need to be some degree of reliance on the religious self-concept or face the ‘creative’ resistance of that system to the imposition of external norms. So, in relation to purported spouses, the courts are mandated to apply substantive religious norms that are perceived as conflicting with secular imperatives. The result is the creation of these ‘outlets for easing pressure’³⁰⁴

³⁰⁰ *ibid* 1517.

³⁰¹ Law on the marriage contract for those without religion, 577-2010.

³⁰² *ibid*.

³⁰³ Augsberg (n 81).

³⁰⁴ Shifman (n 246) 542.

alongside the attendant ‘disintegrating’ effects of direct, substantive interventions and its internal incoherence.³⁰⁵ So, the Rabbinical courts have even taken this further, to claim jurisdiction over reputed spouses, meaning remedial support remains partly dependent on religious norms.³⁰⁶

Muslim Personal Law in Israel

The Muslim personal law is also subject to significant constraints and pressures because of systematic interactions with further, ‘powerful if unintended effects.’³⁰⁷ These consequences also flow from the ‘hybridity’ of the communicative interactions between secular law and Islamic courts.³⁰⁸ Abou-Ramadan argues that this ‘legal hybridity’ generates rival ‘discourses’, with each deriving from different ‘normative systems’.³⁰⁹ Whilst not speaking expressly in terms of systems theory, what Yefet and Abou-Ramadan identify mirrors the expected relationship between systems and maps onto the regulatory trilemma that the systemic dimension suggests. Thus, Islamic family law is subject to numerous interacting layers of regulation from the equality provisions and Constitutional norms to the oversight of the Jewish majority legislature that endorses a particular form of Sharia that has actually led to ‘entrenchment of traditional and patriarchal values.’³¹⁰ Ultimately, this has led to resistance: Islamic

³⁰⁵ Teubner, ‘Juridification’ (n 5) 21.

³⁰⁶ HCJ 9734/03 *Plonit v The High Rabbinical Court*, 59 (2) PD 295 (2004) (Isr.); Yefet (n 246).

³⁰⁷ *ibid* 1518.

³⁰⁸ *ibid* 1518–19.

³⁰⁹ Moussa Abou-Ramadan, ‘Islamic Legal Hybridity and Patriarchal Liberalism in the Shari’a Courts in Israel’ (2015) 4 *Journal of Levantine Studies* 44.

³¹⁰ Yefet (n 246) 1519.

courts defy their legal obligation to apply civil law in areas where this is mandated in favour of applying religious norms.³¹¹

Moreover, because the Sharia courts are governed by the (majority Jewish) State and their judges appointed by secular processes, with oversight provided by the secular courts, there is a double-hybridity which goes beyond the dynamic between Jewish courts and secular courts but which nonetheless leads to each system ‘resisting and indeed subverting those laws in creative and disruptive ways.’³¹² For example, in *X v Sharia Court of Appeals* (2006), the Supreme Court held that the applicable law in the case of a dispute over Muslim children is the civil law, here requiring a welfare report prior to a decision over parental custody.³¹³ The Sharia court followed a religious rule that allocated custody to the father, in contravention of the Legal Capacity Law and Equal Rights for Women Law 1951.³¹⁴ Although the Supreme Court stated that ‘religious courts must respect the rule of the state’,³¹⁵ Yefet argues the subsequent decisions merely pay ‘lip service’ to the secular law, whilst nonetheless applying religious norms.³¹⁶ Here, the legislative, regulatory and judicial oversight of state courts over Islamic courts has led to ineffectiveness, as where the interventions have been ignored; ineffectiveness as where the courts, as in *X* merely purport to abide by

³¹¹ *ibid* 1526.

³¹² *ibid* 1523.

³¹³ HCJ 1129/06 *X v Shari'a Court of Appeals* (2006).

³¹⁴ *ibid*. It is important to note that the Equal Rights for Women Law 1951 is not considered constitutional, and formally it has been stated that it both excludes marriage and divorce from its scope but also has little effect on religious courts. See, Kollontai (n 250) 157.

³¹⁵ Haya Sandberg and Haim Sandberg, ‘Dilemmas of Civil Tribunals in Formulating Their Positions toward Religious Tribunals’ (2017) 5 JLRS 214.

³¹⁶ Yefet (n 246). *X v Sharia Tribunal* (n 313).

secular norms and, ultimately, leads to the undermining of the power of secular *law* to regulate these systems at all.

As explained by Hofri-Winogradow: 'Israel's grant of state jurisdiction over Muslims' personal status affairs to *Shari'a* tribunals as the creation of a semi-autonomous Muslim cultural enclave, recognized by the state, [is] to mollify Muslims' dissatisfaction with the Jewish state and provide them with a limited extent of self-government.'³¹⁷ However, Yefet argues that this delegation of responsibility and the interaction between dominant Jewish norms and minority Muslim ones has led to an entrenchment of traditional and patriarchal values by (almost) exclusively male judges.³¹⁸ The Sharia courts respond to these systems theoretical tensions by attempting to re-assert their distinctiveness from these other systems, to maintain their functional differentiation according to their *religious* status. Whilst a changing composition of courts may lead to greater understanding, it does not address the broader systemic dimensions by which the courts, religious groups and individual couples continue to construct and re-construct meaning within their own frames of reference.

Bringing this discussion back together, the analytical resources of systems theory and the regulatory trilemma can help to better understand the communications of religion and law in Israel and identify possible failures. Most fundamentally, this

³¹⁷ Adam Hofri-Winogradow, 'A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State' (2010) 26 JLR 57, 84.

³¹⁸ Yefet (n 246) 1519. Note: in 2017, the first woman Qadi was appointed to the Islamic courts and the President of the Israeli Supreme Court has been a woman, with three other women judges and an Israeli Arab (Christian) judge also having been appointed to the Court. See: Judy Malz, 'Israel Appoints First Female Judge to Muslim Religious Court' (*Haaretz*, 25/04/17) <<https://www.haaretz.com/israel-news/israel-appoints-first-female-judge-to-muslim-religious-court-1.5464773>> [Accessed 21/11/18].

compulsory and comprehensive system removes valuable options outside of a religious family law framework and, as it is codified and applied, the law continues to distort and diverge from that practiced by individuals and groups. In fact, the emergence of alternative dispute resolution processes in Israel, as in the other jurisdictions examined in this Chapter, demonstrates the organic means of ‘creating’ regulatory space outside the formal decision making institutions – with the potential, that such spaces could form the locus for greater flexibility and more progressive outcomes for women.³¹⁹ As argued by Kollonai, the need for citizens to behave not just as ‘law abiding’ but as ‘law inventing’ agents may be one of the key drivers for reform.³²⁰ This analysis drives us towards seeking a different path: a reflexive approach to family law and religion.

4 Conclusion

Turning back to the preceding sections, we can see that the various means of recognising and regulating aspects of religious family life have led to different challenges. In all these cases, what emerges are recurring themes from the systems theoretical perspective. Whilst this Chapter does not empirically test these hypotheses, it does seek to draw broad conclusions around how a systems theoretical perspective generates new insights into these debates or re-frames existing notions around regulatory interventions in a descriptive framework.

Two principal conclusions and a further normative contention can be drawn at this point. First, these examples illustrate how the construction and re-construction of

³¹⁹ Susan Weiss, ‘Civil marriage for the sake of the agunot’, *The Jerusalem Post*, (12th March 2014) <<http://www.jpost.com/Opinion/Op-Ed-Contributors/Civil-marriage-for-the-sake-of-agunot-345204>> [Accessed 14th June 2022].

³²⁰ Kollontai (n 250) 161; Martha-Marie Kleinhans and Roderick A Macdonald, ‘What Is a “Critical” Legal Pluralism?’ (1997) 12 *Canadian journal of law and society* 25.

religious norms within law – and the reaction to legal interventions within religious systems – are liable to error and distortion. This is the underlying rationale behind systems theory, in that social systems must construct meaning within their own epistemological worlds. Second, evaluating these examples through the lens of the regulatory trilemma, we see that some of the predicted failures of these regulatory models become apparent. Attempts to regulate through command and control seem to lead to, ineffectiveness, unresponsiveness or legal incoherence.³²¹

So, in Ontario legal reforms have led to informal and privatised forms of religious arbitration rather than a diminution of the practice. In *Kaddoura* and *Bruker*, the courts struggle to keep the systems of law and religion distinct and sufficiently *functionally differentiated*. That is to say, from the systems theoretical perspective, these demonstrate how law should not be *socialised* and religion should not be *legalised*.

In England, whilst reform to *get* refusal have led to important improvements for Jewish women, they nonetheless risk the same issues that have arisen in Israel, whereby the system responds defensively. As each system employs its own ‘language and mode of function’, the concept of *mahr* (or the *get*) cannot be simply ‘translated’³²² with the attendant risks of legal and religious concepts being shorn from their contexts.

In India judicial and legislative interventions to reform religious maintenance and divorce have had some important successes, but also led to the proliferation of non-state tribunals as a form of resistance to state interference and so as to re-assert

³²¹ Parker and Braithwaite (n 20) Section 4.

³²² Fredman (n 66) 152.

functional differentiation of religion as a system. This starts to undermine law *as law* and these functionally differentiated systems of law and religion are *both* threatened. Likewise, in Israel, we observe systems acting defensively, by re-configuring norms in order to avoid external impositions. Here, the religious courts resist legal interventions and the secular courts imbue their construction of religious norms with secular values.

This Chapter carries forward the existing literature in the field of family law and religion by applying the analytical device of the trilemma and examining these claims in the context of law and religion. Two examples— the distribution of resources on divorce and the rules on granting religious divorce – are used to explore these dimensions across the jurisdictions studied. So, if this Chapter provides a tentative answer to the question of why these existing models of regulating religious family laws fail from the systems theoretical point of view, the rest of this Thesis examines how we might enhance reflexivity and promote human rights values through law to better negotiate this communicative interaction of law and religion. The normative dimension of systems theory is developed through the reflexive paradigm. The examples in this Chapter are taken forward into the rest of this Thesis where the general theoretical planks of reflexive law are laid down and then the practical manifestations of these are developed.

So, as explained in Part 2 of this Chapter, the theoretical analysis in Chapter 1 and the pre-existing practice are put into conversation through a process of reflective equilibrium whereby theoretical insights are refined in light of the practical reality of the jurisdictional examples. The product of this analysis is two-fold: first, the deconstruction of these cases is suggestive of the ‘crisis in law’ that Teubner identifies and the corresponding ‘demand’ to transition away from orthodoxy and towards new

legal forms.³²³ Second, this exercise demonstrates the analytical insight that the systems theoretical frame offers and allows us to draw normative conclusions: that a more effective and desirable approach could be achieved through enhancing reflexivity (not just dialogue) within systems. The concept of reflexivity will be examined in Chapter 4 and developed into a model of reflexive secularity. The main contribution of this theory is to add the criterion of reflexivity as a means of resolving the question of when the State ought to be involved in regulating religious family life, and the manner in which it should do so. The analysis in this Chapter also pre-figures a further contribution: in all these examples, the element of *power* is a persistent theme, whether this is institutional power or interpersonal power imbalances between partners. As a result, this analysis also suggests a further criterion, which is analysed in Chapters 5 and 6: that interventions must not only be justified according to the criterion of reflexivity, but also on the basis of human rights norms, geared towards addressing these power structures.

The reflexive model that arises from the analysis in this Chapter and its interaction with theoretical insights has three principal advantages: it is less intrusive in the lives of religious individuals, preserving more of their freedoms than direct interventions; it preserves the integrity of the legal system by avoiding the tendency to incorporate religious norms directly in law; and it ensures a more effective protection of human rights values by avoiding the regulatory trilemma.³²⁴

³²³ Teubner, 'Substantive and Reflexive Elements' (n 12) 244.

³²⁴ Andrew Arato, 'Procedural Law and Civil Society' in Michel Rosenfeld and Andrew Arato *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998) 35. See also, Cohen (n 8) 393-397.

CHAPTER 4

REFLEXIVE SECULARITY*

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Introduction

Chapters 2 and 3 established three core principles that form the basis of a reflexive model of regulating the family law and religious laws.¹ This modified account emphasises the idea of functional differentiation whilst considering the autopoietic quality of systems to be only one factor when understanding the relationship between systems. It therefore concludes that systems share a multi-functional but differentiated language, making reflexive communication between systems possible.² This rejects the ‘strong’ notion that systems are entirely closed and impermeable to externalities – what Teubner related as the ‘fragile symmetry’ of translation.³ Instead, their boundaries are more indistinct and shifting, with systems overlap and ‘coupling’ in complex ways – including the systems of family, law and religion. Communication between systems is possible – albeit faint - and may be enhanced over time. The second touchstone was the regulatory trilemma as a conceptual and analytical tool for deconstructing this inter-systemic dynamic.⁴ Third, reflexivity can be enhanced within systems by creating structures that better allow individuals and groups to reflect on their reasons through indirect interventions or ‘perturbations’.⁵ These prevailing norms and power structures

* The ideas and concepts in this Chapter are developed from: Tristan Cummings, ‘Utilizing Systems Theory Insights and Reflexive Law to Negotiate the “Collision Between... Un-connecting Worlds” in Family Law’ (2021) 9(2) *Journal of Law, Religion and State* 212, Part VI.

¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Reprinted, Polity Press 2010).

² *ibid* section 2.1; Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 154–155.

³ Gunther Teubner, ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51 *Current Legal Problems* 393, 410.

⁴ Niklas Luhmann, *Religious Dogmatics and the Evolution of Societies* (E Mellen Press 1984); Rudi Laermans and Gert Verschraegen, “The Late Niklas Luhmann” on Religion: An Overview’ (2001) 48 7, 9.

⁵ Andrew Dunsire, ‘Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention’, *MPIFG Discussion Paper* 93/7 (1993) 10.

can be challenged.

Taken together, these insights suggest that traditional approaches to regulating religious family life might be flawed to the extent that these assume the utility of formal and substantive regulation. In Chapter 3, the theoretical insights and the practice of the courts in England, Canada, India and Israel were brought into conversation with each other. This analysis elicited three conclusions. First, the systems theoretical approach offers analytic insight into the communicative relationship between systems. Second, examination of that relationship suggests that the direct interventions in religious family life are ‘either irrelevant or produce disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself.’⁶ Third, this analysis supports a *normative* argument that points towards a different model of regulation: reflexive law. Applied to the context of law and religion, this model is termed ‘reflexive secularity’ and this insight is termed the ‘reflexive criterion’.

Reflexive secularity provides a meta-framework that could be utilised in conjunction with existing solutions to the challenges of negotiating religious family life, state laws and human rights.⁷ Reflexivity will be explained further in Part 3 of this Chapter. At this juncture, reflexivity refers to the application of a concept to itself such as the *regulation of self-regulation*, the norms of norm selection or procedures for

⁶ Gunther Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’, *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter 1989) 21; Christine Parker and John Braithwaite, *Regulation* (OUP 2005) s 4.

⁷ Ino Augsberg, ‘Religious Freedom as “Reflexive Law”’ in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging* (OUP 2014). Augsberg has defended a concept of ‘Reflexive Secularism’ which, in some key respects, is put to different purposes to those envisaged in this Chapter. Augsberg’s theory and contributions are discussed at Part 2(b), below.

ascribing procedures.⁸ More specifically, the principles of reflexive law include indirect steering of behaviour, the involvement of State, community, and individuals in the regulatory project and procedural (and normative) experimentalism.⁹ Reflexive law is not merely synonymous with *reflection* – meaning, scrutiny of one’s position or ideas. Reflexive *law* is the substantiation of applying a reflexive attitude to legal questions which rejects the dichotomy between formal and substantive regulation. In this Thesis, the concept of ‘secularity’ follows from the normative commitment to freedom *to* and *from* religions and therefore relates to both social stability between systems of religion and law but also the communicative freedoms needed for individual participation in social life.¹⁰ Therefore, ‘reflexive secularity’ captures the idea of applying the principles of reflexive law to the relationship between law and religion.

Chapter 4 carries this analysis forward through an institutional argument about effectiveness of regulation and a normative argument: reflexive secularity is about responding to the need to maintain structural stability and individual freedom *and* to ensure the most effective model of regulating religious family life. From the institutional perspective, the debate around secularity and the role of the State can be re-framed as a debate about inter-systemic dynamics and avoiding the regulatory trilemma. The reason for a secularity principle relates to the limits of law as a means

⁸ Andrew Arato, ‘Procedural Law and Civil Society’ in Michel Rosenfeld and Andrew Arato *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998) 35.

⁹ Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103, 111, 122. Note, however, that reflexive law does not generally envisage normative experimentation but rather envisages that regulatory goals are implemented within systems. This modification of the orthodoxy is justified in Chapter 5.

¹⁰ Gert Verschraegen, ‘Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory’ (2002) 29 *Journal of Law and Society* 258, 275.

of effecting change in religious life and the risk of damage to religious systems (and law) which might result. The normative dimension explains that reflexive secularity provides the best framework for structuring the relationship between law and religious systems. This is because reflexive secularity helps dissolve some of the traditional objections against State interventions in religious life: it justifies the functional differentiation of law and religion, the need for structural stability and the promotion of rights values through across the bounds of a shared, multifunctional language.¹¹

This Chapter is structured in five parts. The first part explains the connections between systems theoretical insights, reflexive law and the underlying assumptions that structure the law-religion-state relationship. It explains that reflexive law emerges from the limitations of traditional forms of regulation as a result of the relative communicative closure of different systems. The second part relates these ideas to traditional accounts of law and religion. The third part examines the dichotomy that underlines some of the existing models of law and religion based on formal and substantive law (or, when applied in relation to religions, secularity). Reflexive secularity allows for a third category of interventions. The fourth part defines reflexive secularity, justifies its normative basis on the ground of its democratic contribution and addresses two potential arguments. The final part summarises the argument so far and lays the groundwork for Chapter 5.

1 Individual Freedom and Systemic Stability

¹¹ The 'boundedness' of this model will be addressed in Chapter 5 and 6. At this stage, it is necessary to recall the discussion in Chapter 2, Part 2(a) and (c) where the assumption of communicative closure is challenged, relying on analysis from Fredman, *Human Rights Transformed* (n 2) 154; Habermas (n 1) Section 2.1.

Religions are, have been and are likely to remain – pervasive, important and contentious – and disagreements over values ought to give us pause before seeking to impose any particular conception of the good life. It is not unreasonable to think that such moral disagreement will not disappear in the medium or even the long-term.¹² Pluralism is ‘not a mere historical condition that will soon pass away... [but] a permanent feature of the public culture of modern democracies.’¹³ In systems theoretical terms, this persistent pluralism reflects the proliferation of increasingly specialised sub-systems of social life, each with their fragmented and diverse modes of function and codes.¹⁴

As a result, all societies have had to develop ways of navigating and demarcating the relative spheres of religion and the State.¹⁵ This part justifies a reflexive model of secularity based on systems theoretical reasoning, drawing on the theoretical account in Chapter 2 and the applied analysis in Chapter 3. This part is structured into three sections. The first section argues that secularity ensures social stability by maintaining a complex, differentiated society from regression into de-differentiation and simplification.¹⁶ The second section relates this insight in order to argue that individuals remain free from the absolute claims of any one system – whether

¹² John Rawls, *Political Liberalism* (Columbia University Press 1993) 56-57.

¹³ John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7 OJLS 1, 4.

¹⁴ Russell Sandberg, ‘Religious Law as a Social System’ in Russell Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015).

¹⁵ Phil Zuckerman and John R Shook (eds), *The Oxford Handbook of Secularism*, vol 1 (Oxford University Press 2017) pt 2
<<http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199988457.001.0001/oxfordhb-9780199988457>> accessed 9 February 2021.

¹⁶ For further elaboration of the problem of de-differentiation, refer to Parts 1 and 2(b) of Chapter 2.

that system be law or religion. The third section relates this discussion to the models of law and religion so far examined in this Thesis. It argues that not only is the systemic justification persuasive on its own terms but it also adheres with, and better explains, the traditional models of secularity.

(a) Systemic Stability

As society has become more complex, diverse and functionally differentiated, the systems of social life have become increasingly specialised and differentiated, self-reproducing and relatively communicatively closed.¹⁷ Communication between systems becomes complex – or, even impossible – as communications must be deconstructed within the bounds of the internal language and logic of each system. A parallel development is the emergence of basic rights, the role of which is to stabilise and protect the functional differentiation of society.¹⁸ Secularity and the rights to freedom of religion and expression, stabilise the dynamic between, amongst other systems, law, politics, family and religion.

To avoid the totalising tendency of law, incapable as this is of satisfying the infinite complexity of human needs without unacceptable coercion, the law-religion distinction preserves the self-limitation of these systems. Rights and systems have a deep and interconnected relationship¹⁹ which disrupts the ‘triad’ of ‘individual-power-

¹⁷ Niklas Luhmann, Dirk Baecker and Peter Gilgen, *Introduction to Systems Theory* (Polity 2013) 2-6; 43-63.

¹⁸ Verschraegen (n 10) 262.

¹⁹ Christoph Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) 18 OJLS 61, 65.

State' in favour of an approach to the power structures within all systems of social life.²⁰ Therefore, reflexive secularity goes beyond regulating State law because all media of communication can, in principle, destabilise systems and diminish freedoms. By preventing any system from 'absolutizing its own perspective... fundamental rights protect both the freedom and interests of the individual and the differentiation between different function system.'²¹ In simple terms: secularity performs the necessary function of maintaining stability as between systems - and with this – the maintenance of social order and individual freedoms.²²

So, the first contention of this Chapter is that the principle of reflexive secularity must mitigate the risk of de-differentiation and the complete erasure of the 'boundaries' between social systems. This principle is not for *preserving* any particular system: in fact, this Thesis is premised on the need to stimulate self-regulatory potential within systems to realise change. Although communicative freedom is realised through other systems²³ this does not mean that any given system must be immune to change. Instead, the importance of maintaining the functionally differentiated society is linked with and justified by its impact on *individual freedoms*. What a person does as a believer can have 'serious consequences' for his legal status. This, in turn, might undermine the relatively flexible and differentiated mechanisms of inclusion within modern society.²⁴

²⁰ *ibid* 63.

²¹ Verschraegen (n 10) 272.

²² For a discussion of secularity within systems theory, see Part 1 of Chapter 2.

²³ Graber and Teubner (n 19) 65.

²⁴ Verschraegen (n 10) 277.

The next section examines this link between structural stability and individual religious freedoms through the concept of structural coupling.

(b) Structural Coupling

Because family law systems have, in all jurisdictions, developed in light of prevailing religious norms as well as social and economic changes, the requirements and values that underpin these systems are influenced by those externalities. This is a process of co-evolution or structural coupling: systems relate with one another and the environment in which they are situated through these media of communication and over time these may form more or less tightly structurally coupled relationships.²⁵ The concept of structural coupling is a core rationale that underpins the concept of secularity – by relatively loosely coupling religion and State power, the degree of mutual perturbations can be reduced or managed so as to ensure that developments in law or politics and religion and family life have a loose relationship with one another.²⁶ In the alternative, where there is a tightly coupled system of law and religion, significant doctrinal changes in one system will have deep and unpredictable effects in the other. Take, for example, the structural coupling of law and the economy where changes to the economic conditions have far reaching impact in society because of the tight structural coupling of law, politics and the economy. Changes in the economic system create dramatic effects on the political and legal systems and *vice versa*.

²⁵ Luhmann (n 17) 83–100.

²⁶ *ibid.*

Thus, over time, a more or less tightly construed structural coupling of law and religion emerges across jurisdictions such that family law systems come to be indirectly affected by their proximity to religions. In the context of English marriage law, Christianity has had an ‘embedded regulatory role.’²⁷ The structural coupling in might reflect English law’s traditional emphasis on *place* as the pre-eminent concept of validity for a marriage and – in fact – whether a ‘marriage’ like ceremony is even a purported marriage at all.²⁸ Equally, concerns about the structural coupling of law and the Christian religion motivated the early developments in Canadian family arbitration and mediation reforms.²⁹ In this way, many ‘practices, institutions and processes’ in Canada were said to ‘fall far short’ of the democratic and multicultural ideals enshrined in its Charter.³⁰ This general lack of recognition for minority religious groups not only has undesirable impact on individual citizens but also means a historic and enduring lack of power over the rules by which family law is governed – leaving some excluded from the full promise of participating in society. To this end, in England and Canada, the movement towards greater private or communal ordering over the ‘formation and structure’ of the family has been perceived to extend ‘opportunities for personal choice’³¹ and create the regulatory space for religious communities, for whom the default legal rules around the regulation of family life feel discordant, to exercise

²⁷ Suhraiya Jivraj, *The Religion of Law* (Macmillan Education UK 2013) 10-12. See further: Vishal Vora, ‘Unregistered Muslim Marriages in the UK’ in Norbert Oberauer, Yvonne Prief and Ulrike Qubaja (eds), *Legal Pluralism in Muslim Contexts* (Brill, 2019), 45-47.

²⁸ *Hudson v Leigh* [2009] EWHC 1306 (Fam) [76]-[78].

²⁹ Syed Mumtaz Ali and Anab Whitehouse, ‘Oh! Canada: Whose Land, Whose Dream? Sovereignty, Social Contracts and Participatory Democracy: An Exploration Into Constitutional Arrangements’ (The Canadian Society of Muslims 1991), 2. Although Ali and Whitehouse do not employ the language of structural coupling, their concern with the coevolution of systems is implicit in their critique of Canadian family law.

³⁰ *ibid.*

³¹ Jana Singer, ‘The Privatisation of Family Law’ (1992) *Wisconsin Law Review* 1444, 1518.

greater influence.³² Yet, the greater the degree of structural coupling, the higher the risk of more far reaching perturbations between systems and their environments as well as a greater risk of incoherent, ineffective and destructive interventions.

(c) Autonomy, Equality and Care

The section addresses three key ideas: the interface between systemic stability and individual freedom; the necessity of rights to secure those ends; and, the role of rights in relation to conditions for entry and exit. This discussion also lays the groundwork for the analysis in Chapter 6: it shows how the values of relational autonomy, substantive equality and care are presupposed by the systems theoretical account of religious family life.

First, the secularity principle entails a commitment to freedom both *to* and *from* religious systems.³³ Secularity, therefore, provides the safeguards for *individual* free participation in social intercourse with others.³⁴ Reflexive secularity seeks to secure the safeguards needed in relation to all ‘media of communication’ reflexively: including the intrusions from communications from all parts of our social lives which may seek to make absolute claims on our allegiance in ways that impinge on our religious freedoms and in circumstances where religious communications seek to impinge on our other legal and political freedoms.³⁵ This conception of rights secures

³² Farrah Ahmed, ‘Religious Norms in Family Law: Implications for Group and Personal Autonomy’ in Maclean and Eekelaar, *Managing Family Justice in Diverse Societies* (Hart 2015) 38-41.

³³ Although this is not a principle embodied in all democratic societies, it nonetheless represents the systems theoretical position and is therefore the basis for the analysis in this Thesis. See, for example, the dissenting opinion of Justice Sinha in *Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962 SCR (2) 496.

³⁴ Verschraegen (n 10) 275. Note, however, that the conception of freedom must be relational and situates the individual within the web of caring relationships which matter to them.

³⁵ Graber and Teubner (n 19) 69–70.

communicative freedoms - the basic unit of analysis for this theory of society – and so views *all* ‘expansive social forms’, like the family and religions, as of potential concern to the ‘sphere of the self-realizing individual.’³⁶ The secularity principle responds to the tendency of *all* systems to ‘colonise’ others and thereby diminish the range of available options that make up the social life of society: this directly links the system with the individual’s freedoms. This imperative to resist the colonisation of any one system means attention to the juridification and/or socialisation of other areas of social life.³⁷ The integration of legal and religious functions, either in State law or non-state religious tribunals, has the potential to affect *autonomy* and social stability.

Second, all systems have functional criteria of inclusion. This implies a background conception of *equality* as a necessary feature of reflexive secularity. Where the differentiation between systems begins to break down, the consequence is that access to other systems of social life becomes more limited and the criteria of inclusion and exclusion become more arbitrarily determined. Consequently, the life-world shrinks as individuals retreat into ‘small and relatively undifferentiated enclaves’ rather than taking risks, creating new relationships or exploring different identities.³⁸ In the family context, the pre-eminent social project which cuts across different systems is the family *relationships* which form between individuals. This is to recognise, as Shachar argues, that individuals belong ‘jointly’ to multiple communities and ‘accordingly bear rights and obligations’ that derive from these different systems.³⁹ So, threats to the stability and functional differentiation of systems is a risk to both systemic stability *and* individual rights, including the ability to establish and maintain relationships with others. The harm is that of regression from this complex,

³⁶ Graber and Teubner (n 19) 64.

³⁷ Augsberg (n 7) 88.

³⁸ Verschraegen (n 10) 277.

³⁹ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001) 41, 13.

differentiated order to being instead constrained by a single identity, no longer able to enjoy the autonomy to participate in a variety of areas of social life.⁴⁰

(d) Rights

If the risk expressed here is to communicative freedom, rights are not only necessary to protect social systems from political interference but also to protect all ‘structures of social differentiation against [the] colonizing tendencies of [other] social systems.’⁴¹ Rights emerge in tandem with functional differentiation because they are necessary to preserve the stability of the social order. Although rights themselves may become embedded as features of the system of law and risk becoming part of the law’s colonising tendency, rights must therefore be seen to be positivised *within social systems* so as to cohere with the internal logic of each system rather than to dominate as an externality. Equally, this means that the norms that rights embody must be open to scrutiny and change over time. These arguments will be developed in Chapter 5, Parts 3(c) and (d). Although individual freedom within the socially differentiated society implies rights, this does not mean that access to (and exit from) systems is cost free nor that there might not be legitimate conditions of entry (or exit).⁴² A commitment to communicative freedom does not mean that all such conditions be eradicated. At the same time, this does not necessitate the conclusion that individuals must ‘accept all group practices’ or leave.⁴³ As Shachar argues, from a different theoretical perspective, individuals do not ‘relinquish’ their civil rights by belonging to religious and cultural groups.⁴⁴

⁴⁰ Verschraegen (n 10) 270–271.

⁴¹ Graber and Teubner (n 19) 69.

⁴² Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert and Fatima Kastner trs, Oxford University Press 2004) 132–135.

⁴³ Shachar (n 39) 41.

⁴⁴ *ibid.*

Quite the opposite: the notion of the right to ‘exit’ from some social system belies the fact that individual identity is mediated through multiple systems – such that, by necessity in the functionally differentiated State, the individual must be envisaged as belonging to, and navigating between, numerous systems. It would be antithetical to the value of a socially differentiated society that the primary remedy to rights violations is exit – this would be to abdicate responsibility to maintain social life from de-differentiation as the main threats to social complexity come from violations of individual freedoms. In Chapter 3 the breakdown of these ‘inherent limits’ was analysed, as religious and legal communications become intertwined and strong, all-inclusive demands were articulated by both courts, families and religious institutions. As a result, State interventions are necessary to safeguard rights of access and participation in religious life (and freedom from religious life) not just to facilitate exit from group obligations. Moreover, as will be discussed in Chapter 6, the best conception of reflexive secularity is underpinned by the relational and contextual values of autonomy, equality and care which recognise that some attachments are not ‘chosen’ and cannot be ‘exited’ without loss. This argument taken as a whole will be termed the ‘normative criteria’ because it supplements the reflexive criterion as a justification for state involvement in religious life.

Bringing this discussion back together, the systems theoretical perspective views the role of secularity as a means to balance respect for one or more of these features of religious life with the State’s positive duties to protect vulnerable individuals within religious communities and promote human rights values in family life, namely autonomy, equality and care. These rights act as stabilising forces and

limitations on the propensity for law *and* religion to exert absolutist claims on individuals.⁴⁵

2 Traditional Justifications for Secularity

The preceding part established the normative justification for secularity from the systems theoretical perspective: it stabilises functional differentiation and thereby protects individual freedoms. This section re-frames the traditional justifications for the models of law and religion as, in fact, emanations of the same concerns with individual freedoms, communicative closure and the functional differentiation of systems.⁴⁶ There are a number of justifications provided for the special treatment of religious groups in society: the next three sections examine the arguments for secularity from minority rights, the special nature of religious norms and the protection of a democratic public sphere within the systems theoretical paradigm. Ultimately, this demonstrates that these conceptualisation of secularity are best understood as negotiating the same systems theoretical tensions – and as a result, the best response is to enhance the *reflexivity* of religious and legal systems.

(a) Minority Rights

⁴⁵ Verschraegen (n 10) 271.

⁴⁶ Article 9, ECHR; Section 2(a), Part I Canadian Charter of Rights and Freedoms; Section 25(1) Constitution of India. In Israel, there is no express right to religious liberty, however, the Courts have interpreted Article 83 of the Palestine Order in Council of 1922 alongside general principles of ‘enlightened democracy’ and the right to ‘dignity’ under Section 2 of the Basic Law: Human Dignity and Liberty as protecting a right to freedom of conscience and belief (see, HCJ 501/96 *Horev v Minister of Transportation* (1997), [48]). Moreover, these jurisdictions also protect religious individuals as a ground of discrimination under Article 14 ECHR; Section 10 Equality Act 2010; Section 15(1) Canadian Charter of Rights and Freedoms; Sections 14-15(1) Constitution of India; *Bavli v Rabbinical Court of Appeals*, 48[2] P.D. [1994].

The first justification for secularity and the separation of law and religion is based on equality and liberty.⁴⁷ Religious liberty and the separation of religion and law flows from the need to protect religious minorities from persecution –and ensure no single moral code is enshrined in law. Minority religious communities have been, and remain, vulnerable to persecution on the basis of their faith.⁴⁸ The State, by not interfering in minority religious life creates negative freedom to profess minority viewpoints and ways of living. Freedom of religion protects *believers*, not beliefs and facilitates the ‘free search and development of faith-related identities in the broadest sense of the word’.⁴⁹ This freedom is underpinned by respect for human dignity, defined as the potential of responsible agency.

Systems theory provides useful explanatory resources to reconceptualise the question of minority rights within the language of systemic differentiation and communicative closure. The regulatory trilemma maps onto the need to protect minorities. First, this approach urges caution when evaluating ‘harm’ and value because those norms may be internally rationalised in ways that are not *perceived* as harmful from the internal point of view. Or, in other words, an external conceptualisation of the ostensibly harmful practice may be inaccurate or based on incomplete information. As Malik argues, practices such as ‘voluntary veiling or gender segregation’ may be *internally rationalised* but considered irrational and

⁴⁷ Raymon Plant, ‘Religion, Identity and Freedom of Expression (2011) 17 Res Publica 7–20, 15; Wintermute, ‘Accommodating Religious Beliefs’ (2014) 77 MLR 223.

⁴⁸ Katayoun Alidadi, ‘Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union’s Anti-Discrimination Approach to Employment?’ (2012) 37 European Law Review 693

⁴⁹ Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2013) 164.

harmful to women from the external point of view.⁵⁰ So, as long as a given way of life – captured through systemic communications – is considered valuable overall, Raz argues that⁵¹:

... imperfect ways of life may be the best which is possible for people, given the society to which they belong and the course of their life to date.... It recognizes the value of many incompatible ways of life, but also the value of many rival ways of life.

Secularity, from this account, prevents the destruction of the system itself, undermining otherwise valuable social practices and leading to a more socially simplified society. For, although Eekelaar is correct when he argues that no way of life has a right to reproduce itself perpetually when that system is no longer conducive to welfare⁵² the State ought not to damage ways of life that are otherwise valuable to those within the system *as a whole*, whether this be deliberately or through unintended regulatory failure. The risk then, is not *just* deliberate acts of repression but the unintentional damage that substantive interventions in religious life might cause. Even if we identify practices that appear externally harmful, the *design* of any intervention must be both effective in negotiating the trilemma and avoid unjustifiable damage to the system's ability to reproduce. This insight is simply a restatement of the reflexive criterion explicated above: interventions are generally only justified when they are aligned with reflexive principles and, therefore, ought generally to be geared towards harnessing latent self-regulatory potential.

⁵⁰ Maleiha Malik, 'The Branch on Which We Sit' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 229.

⁵¹ Joseph Raz, *Ethics in the Public Domain* (Oxford University Press 1994) 166-167.

⁵² John Eekelaar, 'Laws, Values, Cultures' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill | Nijhoff 2015).

(b) Special Quality of Religious Norms

The second broad rationale for the secularity principle is based on the perceived special quality of religious norms. Religions make certain pre-legal claims to immunity from state interference because of the nature of their supposed special quality.⁵³ This may flow from the special claims religious norms make on their adherents or their grounding in transcendent reasons.⁵⁴ As Fredman explains, religious norms are perceived by religious adherents to operate on a ‘higher’ plane than State laws.⁵⁵ Another way of putting this same issue is that religious identities are intertwined with civic and political identities – with the former assuming a ‘prior’ and superior position.⁵⁶ On the other hand, the rejection of the imposition of laws based on reasons derived from any particular moral code is justified so as to defend freedom the individual’s freedom *from* religious norms. As Habermas contends, public reasons ought to be non-transcendental and open to robust scrutiny.⁵⁷ Likewise, for Rawls, the best political conception of justice is one that applies to the ‘basic structure’ of society – its fundamental institutions – and is not ‘seen as derived from any general and comprehensive doctrine’, whether religious or otherwise.⁵⁸ Both these objections respond to the same reasoning as relates to the special quality of religious norms but from the opposite perspective.

⁵³ Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011) 73.

⁵⁴ Sem de Maagt, ‘Reflective Equilibrium and Moral Objectivity’ (2017) 60(5) *Inquiry* 443, Part 6.

⁵⁵ Fredman, *Discrimination Law* (n 53) 73.

⁵⁶ Amartya Sen, ‘Secularism and its Discontents’ in R Bhargava, *Secularism and its Critics* (OUP 2000), 458-459.

⁵⁷ Jürgen Habermas, ‘Religion in the Public Sphere’ (2006) 14 *European Journal of Philosophy* 1.

⁵⁸ Rawls (n 13) 5.

However, from the systems theoretical point of view this challenge can be answered in two ways. First, systems theory situates religion as a functionally differentiated *social system* – where transcendental concepts– are rendered in terms of the system’s coding. As Luhmann explains, religion’s distinctive function is to negotiate the ‘paradox’ of ‘the unity of the distinction observable/unobservable’.⁵⁹ Religious norms are therefore communications and although these communications are articulated as being transcendent and absolute, with their validity dependent on their own internal frame of reference, we ought to understand *all* systems in terms of their self-referential and functionally differentiated natures. Religions are securely *part of the social* and are marked by their function and coding.⁶⁰ Therefore, the reasons that underpin religious communications are just as open to change as other communications, albeit where a system is more complex, its ability to modify may be reduced.⁶¹ Religious communications are constructed by individuals, liable to develop and change and are socially determined: religious norms are ‘born and die every day’.⁶²

Therefore, systems theory maintains that religious communications are not external to, or outside of, the social realm of communications: they sit alongside other forms of communication, albeit differentiated by their functional specificity. In other words, religious communications are comparable to communications made in the course of other systemic interactions. Nonetheless, even if religious communications

⁵⁹ Laermans and Verschraegen (n 4) 3.

⁶⁰ Luhmann (n 4); Laermans and Verschraegen (n 4); Niklas Luhmann and André Kieserling, *A Systems Theory of Religion* (Stanford University Press 2013).

⁶¹ Jürgen Habermas, *Theory of Communicative Action* (Polity Press 2015) 25.

⁶² Silvio Ferrari, ‘Religious Law: A Discussion’ in Andrew Huxley (ed), *Religion, Law and Tradition: Comparative Studies in Religious Law* (1st edn, Routledge 2012) 155.

are treated the same as other forms of communication this account still necessitates the careful treatment of religious norms. As with all systemic communications, religious communications are constructed within the language and logic of the religious group—and therefore, as explained in Chapter 2, cannot be easily understood externally to that system. As a result, we need not accept that religious claims are outside the scope of analysis: quite the opposite, this framework provides useful concepts for better understanding and deconstructing the ways in which religion and law interact. Moreover, reflexive secularity, because it is grounded on indirect regulation, can avoid the need for deep communicative engagement between law and religions as it also seeks other, strategic forms of regulation.⁶³

(c) Inter-Independence of Law and Religion

The best way to understand the autonomy of State and religious groups is not through their independence but their *inter-independence*. McCrudden and Scharffs argues that this conception is based around encouraging interaction where ‘mutually supportive.’⁶⁴ That is to say, ‘meaningful autonomy’ requires the exercise of social roles that are complementary. The question is: ‘whether the involvement of the intervening institution creates a meaningful constraint upon the ability of the receiving institution to exercise its autonomy.’⁶⁵ Some such constraints are necessary, as explained in Part 1 of this Chapter, to preserve individual freedom and systemic stability. Likewise, the reflexive criterion explains that the preservation of functional differentiation is central

⁶³ The strategic mode of regulation is explained in Chapter 7.

⁶⁴ Christopher McCrudden and Brett Scharffs, ‘The Intersection of Religious Autonomy and Religious Symbols’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds.), *Reasoning Rights* (Hart 2014) 214.

⁶⁵ *ibid* 215.

to individual wellbeing. So, intrusions that diminish the functional differentiation of systems or result in the regulatory trilemma are liable to reduce access to other systems and lead to social simplification. On the other hand, interventions that are grounded on reflexive principles are liable to *facilitate* individual freedoms by maintaining functional separation where needed.

Reflexive secularity envisages an inter-independent and complimentary relationship: this model contrasts with the establishment of secularity that requires independence and or dependence, which requires a high degree of mutual reliance and structural coupling between law and religion. Both models are flawed in that they either do too little to challenge the pre-existing distributions of social power or have the capacity to result in the regulatory trilemma. Although writing from the perspective of the US Constitutional law Cohen argues, that we must ‘abandon the “wall of separation” metaphor’ because the regulation of religion is ‘unavoidable and desirable.’⁶⁶ So, the reflexive idea of *inter*-independence requires recognition of the necessary relationship of regulated autonomy between social systems.

Equally, the religious system is not who autonomous and independent of the State. Over time, through the process of co-evolution and structural coupling, religious systems adapt and respond to changes in the law.⁶⁷ This is the ‘development of autonomous evolutionary mechanisms in [partially] closed systems.’⁶⁸ Religious

⁶⁶ Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 IJCL 380, 393.

⁶⁷ The idea of structural coupling was explained in Chapter 2, Part 2(a) where the basic systems theoretical concepts were introduced.

⁶⁸ Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 52–53.

systems must relate to the State in complex ways, even in instances where religious groups (purport) to hold State laws at arms-length.⁶⁹ Therefore, inter-independence is a reflexive concept itself and offers the best safeguard for promoting reflexivity. The regulation of self-regulation provides a meta-scheme to structures the relationship between systems and resolve the question of when state law and religious norms ought to interact. Law is the system primarily tasked with ‘coordinating [the] recursively determined forms of social cooperation’ of semi-autonomous systems, such as religion.⁷⁰ This proposed model creates the framework to respect religious autonomy and recognise the legitimate State interest in upholding rights by connecting systems without collapsing into a model where one wholly relies on – or dominates – the other. This argument is developed and substantiated further in Part 3 of this Chapter.

3 Deficiencies of Traditional Models

So, what is the implication of these conclusions for our conception of the legitimate role of the State in religious life or of religious norms in law? In Part 5 of Chapter 1 three ‘ideal types’ of models were introduced: delegation, authorisation and purposive abstention or cultural voluntarism. In Chapter 3, as part of an exercise in reflective equilibrium, these models were situated in relation to jurisdictional examples in order to trace the contours of the regulatory trilemma. This analysis demonstrated the utility of a systems theoretical deconstruction of law and religion as well as identifying limitations inherent in traditional regulation in family life. However, these models of

⁶⁹ Shachar (n 39) 37.

⁷⁰ Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) *Law & Society Review* 239, 242-254.

law and religion can be further understood in terms of a common assumption, to a greater or lesser extent, that is grounded in the false dichotomy of *formal* and *substantive* law.⁷¹ Traditional assumptions around legal regulation, the centrality of the State and the dichotomy of formal and substantive regulation are the common threads which were shown to have contributed to the trilemma in Chapter 3. Shachar identifies a similar dichotomy, which she too seeks to transcend: the dichotomy between the ‘secular absolutist’ and ‘particularist’ models.⁷² This distinction does not map neatly onto the labels of formal or substantive regulation because Shachar’s categorisation is not predominantly concerned with the *regulatory* dimension that, this Chapter argues, ought to underpin the debate over secularity. However, in Part 2(b), below, her model of joint-governance is analysed and its reflexive potential is explored.

Reflexive secularity reaches beyond the limitations of formal and substantive regulation of religious life. Unlike formal regulation, the prior distributions of rights and resources are not assumed to be justified in the reflexive model. It does this by de-centring the task of regulation: the State, acting in partnership with other systems both *steers* the substance of regulations and *creates space* for localised problem solving. However, unlike substantive interventions, reflexive secularity ‘affects the quality of outcomes’ without ‘determining’ results.⁷³ Thus, reflexive secularity might be defined as the application of the principles of reflexive law to the relationship between legal and religious systems. Whilst the principles of a reflexive solution are examined in Chapter 7, this Chapter begins by justifying this normative position in relation to

⁷¹ *ibid* 241.

⁷² Shachar (n 39) 71-78.

⁷³ Teubner (n 70) 256.

traditional approaches to law and religion in family life. This Part, therefore, examines the assumption of law as formal or substantive regulation. In so doing, it lays the groundwork for Part three, which responds to the deficiencies of these models by defending a model of reflexive secularity that neither assumes the acceptability of existing distributions of power *nor* seeks to impose its own solutions to these complex social and religious problems – within the bounds of a human rights based meta-regulatory scheme.⁷⁴

(a) The dichotomy of formal and substantive secularity

State neutrality as between religions is at the heart of a formal conception of secularism: this is a secular state that is not affiliated to any one religion and sees itself as creating the space for pluralism. This model of secularity relies on ‘strong’ principles of freedom of religion or conscience and non-discrimination. It allows significant scope for individuals to decide matters of religion and conscience for themselves and the principle of separation between religions and the state. Individuals and groups ‘maintain their institutional and legal infrastructure, parallel to that of the state, and are mostly allowed to do so as part of their freedom of religion’.⁷⁵ The model of purposive abstention or cultural voluntarism envisages a default position whereby moral and social obligations are not generally given force of law: ‘demands based *solely*’ on moral and religious considerations should ‘generally not be reinforced by legal sanction’.⁷⁶

⁷⁴ The question of the extent to which substantive outcomes are *open to self-regulation* through reflexive means on the one hand and authoritatively determined by the State on the other will be answered in Chapter 5.

⁷⁵ Maurits Berger, ‘Understanding Sharia in the West’ (2018) 6 JLRS 236, 257.

⁷⁶ *ibid.* English and Canadian family laws impose limitations on the bindingness of religious norms – which may only be given effect if they conform to existing legal mechanisms, such as contract.

As Malik explains the concept, ‘Unlike transformative accommodation, however, it does not put into place a complex institutional system of joint governance that requires a clear and static delineation of group membership or group norms in advance.’⁷⁷ However, Eekelaar maintains that the State remains responsible for the realisation of human rights, meaning religious norms may be recognised if ‘failure threatens community interests’ or ‘to achieve justice when families fall apart.’⁷⁸ Both of these caveats, however, suggest space for regulated interactions between state law and religion when justified on the grounds of individual wellbeing, public policy and distributional justice.

Recall the discussion in Chapter 3 regarding the Canadian Supreme Court decision of *Bruker v Markovitz* [2007], a case that considered the enforceability of a divorce settlement based on Jewish principles.⁷⁹ As part of a binding legal divorce settlement, the husband promised to grant a religious divorce (*get*). In fact, the husband never gave effect to this promise and the wife remained religiously married for over twenty years – preventing her from re-entering into religiously sanctioned marriages if she so wished and exposing their children to religious ostracization. The minority, at least facially in line with the model of cultural voluntarism, asserted the principle of non-intervention based on state neutrality. A second example, *Kaddoura*, concerned a religious marriage contract. The judge held that this was a moral claim and not a legally enforceable domestic contract. In both instances, the Canadian courts conceptualised

⁷⁷ Maleiha Malik, *Minority Legal Orders in the UK: Minorities, Pluralism and the Law* (British Academy 2012) 39.

⁷⁸ Eekelaar, ‘Law and Community Practices’ in Maclean and Eekelaar, *Managing Family Justice in Diverse Societies* (Hart 2015) 16, 21-22.

⁷⁹ *Bruker v Marcovitz*, 2007 SCC 54 [2007] 3 SCR 607, discussed in Chapter 3, Part 3(a)(i).

these agreements as religious issues which fell outside the institutional and constitutional role of the courts.⁸⁰ The *get* in *Bruker* and the *Mahr* agreement in *Kaddoura* formed part of a *moral or religious* promise that could not, the courts held, be rendered a contractual purpose capable of judicial enforcement. Eekelaar's approach, however, is more nuanced than the courts' application in these cases because it envisages the possibility that where religious demands are *also* supported by otherwise valid, legal mechanisms and public policy, there is no reason not to enforce such agreements in law.⁸¹ This, in fact, encapsulates the majority decision in *Bruker* which resolved the case on contractual principles.⁸²

Both systems – state law and religious law - are differentiated and distinct, and the blurring of these demarcations or interferences in these systems from external sources are liable to lead to the regulatory trilemma. The challenge, however, is that the pre-supposed distinction between state and religion is the very thing in question.⁸³ The development of non-State actors exercising, from the systems theoretical perspective, a blurred position within social life – as both religious and legal at the same time – raises a formidable challenge to the possibility of separating law and religion in line with the cultural voluntarist model. Some religions reject this separation⁸⁴, as do some State models of personal law.⁸⁵ Purposive abstention means

⁸⁰ *ibid* [102]; *Kaddoura v. Hammoud* (1998) O.J. No. 5054, 168 D.L.R. (4th) 503, 510-511.

⁸¹ Eekelaar (n 78) 21-22.

⁸² *Bruker* (n 79) [41]-[42], [47] and the analysis in Part B.

⁸³ Augsberg (n 7) 85.

⁸⁴ *ibid*.

⁸⁵ See, Chapter 1 and 3 for a summary of the Indian and Israeli models of personal law.

accepting a state of affairs in which individuals may choose – or be coerced into – norms that expose them to harm. Whilst Eekelaar is correct to see this as potentially part of a chosen identity and respect for individual autonomy, the State also has an obligation to protect and has an interest in the promotion of other values besides individual autonomy that are better promoted through other forms of recognition and regulation.⁸⁶

Secondly, this formal model fails to problematize autonomy and privacy nor to recognise the gender and race dimensions that could impinge upon the genuine exercise of free choice. Shachar argues that when we acknowledge the ‘centrality of women, gender and the family’ we can ‘inject new meanings into the traditional categories of ‘private’ and ‘public’ which underpin the absolutist models.’⁸⁷ Shachar rightly identified that formal regulation – based around State inactivity in religious affairs – has the potential to leave harmful practices unchallenged.⁸⁸ Thus, autonomy needs to be understood not abstractly but as exercised within a relational and cultural context, and not as a negative value but as a positive one in which the State has a role.⁸⁹ This is because the relationship between group and individual is connected with internal and external power structures. The key insight from Shachar’s work, discussed further below, is that greater autonomy for the group can further marginalise and disempower

⁸⁶ Chapters 3 and 4 outline particular values including substantive equality and the value of caring relationships as further considerations.

⁸⁷ Ayelet Shachar, ‘Faith in Law? Diffusing Tensions Between Diversity and Equality’ in Seyla Benhabib and Volker Kaul (eds), *Toward New Democratic Imaginaries - Istanbul Seminars on Islam, Culture and Politics*, vol 2 (Springer International Publishing 2016) 396.

⁸⁸ Shachar (n 39) 593.

⁸⁹ Chapter 6, Part 2(a). See, Farrah Ahmed, *Religious Autonomy under the Personal Law System* (OUP 2017) Chapter 3.

the most vulnerable members of those groups.⁹⁰ For a similar reason, exit cannot be conceived of as the only remedy to internal pressures as it presents an unnecessary and undesirable choice between an individual's culture or their civil rights.⁹¹

A strict principle of formal secularity based on state neutrality fails to remedy the distributional injustice that might result from the *status quo*. Yet, cultural voluntarism only takes our analysis so far because it does not resolve the decision as to when and in what manner state law should regulate religious norms. Eekelaar's caveats based on welfare and public policy assume, instead, a *substantive* mode of regulation. There are two principal models other than the voluntarist model examined in this Thesis: authorisation and delegation. The authorisation model is where the State gives express or tacit force of law to *religious family norms*, as administered by religious authorities.⁹² This is sometimes referred to as a *particularist* or *millet* system.⁹³ However, it is important to complicate this picture because this is not (or, need not be) a 'top down' model where the State authorises religious groups directly. Instead, authorisation models can employ elements of institutional diversity and religious self-governance.⁹⁴ Some of these features will form part of the proposed solution in Chapter 7. The second model is based on delegation as where 'the state prescribes and gives legal force to the norms to be followed within families so that families can be seen as

⁹⁰ Shachar (n 39) 40-42.

⁹¹ *ibid* 2-3.

⁹² *ibid*, 17-18; Daphna Hacker, 'Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts' (2012) 27 JLR 59.

⁹³ Farrah Ahmed, 'Personal Autonomy and the Option of Religious Law' (2010) 24 IJLPF 222, 223–224.

⁹⁴ Prakesh Shah, 'Shadow Boxing with Community Practices: A Response to Eekelaar' in Maclean and Eekelaar (n 32).

delegates through which state law and policy is applied.’⁹⁵ These models are both animated by different underlying principles and assumptions about the role of the community and the State and the degree to which the State is justified in interfering in individual and communal decisions relating to family life and religion.

The challenge, then, for the cultural voluntarist model is two-fold: *below* the welfare threshold for intervention, Eekelaar does not envisage the law as an appropriate mechanism for interrogating the legitimacy of the existing distribution of rights and resources. This position is developed in the shadow of the assumption that legal norms, usually backed by command and control, would be the means of giving effect to religious demands. However, this assumption takes insufficient account of the reflexive paradigm and the potential to re-configure the regulatory tools available: in fact, cultural voluntarism is compatible with a broader view of interventions whilst maintaining a space to religious authorities to apply their norms independently of any state involvement (unless, the welfare threshold is met). Equally, concerns that the law might be too blunt or too coercive an instrument in the realm of religious family affairs⁹⁶ can be mitigated through the indirect quality of reflexive regulation, preserving space for the operation of religious norms through more contextual manifestations of legal doctrine.⁹⁷

⁹⁵ Eekelaar (n 78) 18-19.

⁹⁶ *ibid* 16.

⁹⁷ See, Chapter 6, Part 2(a)(ii) for discussion of relational contract norms as a means of capturing reflexive principles and the normative criteria for intervention based on relational autonomy, substantive equality and care.

However, *above* the threshold for intervention, cultural voluntarism does not resolve the *manner* of any intervention, apart from a preference for delegation over authorisation.⁹⁸ By which, Eekelaar means that a religious norm may be ‘mainstreamed’ within the general law.⁹⁹ Yet, even to this extent, Eekelaar’s model is resolute that religious norms ought not generally be given legal weight but only State legal norms applied within religious contexts or towards a religious purpose, as was the case in *Braker*. In this respect, substantive regulatory interventions are liable to the same communicative distortions as are illustrated in Chapter 3. The reflexive model seeks to address these shortcomings by maintaining functional differentiation and individual freedoms whilst also offering a mechanism – other than formal or substantive regulation - that avoids the regulatory trilemma. The reflexive, therefore, is not to be seen as a rejection of Eekelaar’s proposal but an extension and development of its premises from the systems theoretical perspective. By abandoning the misleading dichotomy of formal and substantive regulation which underpins cultural voluntarism, law is able to better uphold a sphere of religious liberty and more effectively safeguard human rights. Where the reflexive model further parts with Eekelaar’s model is in its conceptualisation of religious systems as contributors to the regulatory project and not, at most, delegates of State regulations. A de-centred model of regulated autonomy maintains functional differentiation because it does not recognise religious norms as *state* law but harnesses the self-regulatory potential latent in religious groups.

(b) Transcending the dichotomy

⁹⁸ Eekelaar (n 78) 22.

⁹⁹ Malik (n 77) 44-50.

If on one side of this tension, we have formal conceptions of law and secularity that seek to preserve law's internal rationality, on the other hand we have substantive laws that seek to directly regulate religious affairs. As seen above, Eekelaar's voluntarist model operates against the background of the general law, and therefore responds to instrumental reasons in deciding whether law should mainstream religious or cultural norms. So, in a sense, cultural voluntarism relies upon different modes of regulation depending on whether the conditions for *legal* involvement are met, and is open to the reflexive insight being realised. This substantive dimension seeks to address the problems of justice and equality (and, for Eekelaar, welfare) but in doing so, risks the incoherence and regulatory failure that formal models seek to avoid. This section discusses attempts to transcend this dichotomy of formal and substantive regulation.¹⁰⁰ The contribution of the remainder of this Chapter is to examine how framing the secularity principle as a *regulatory challenge* based on avoiding the trilemma, negotiating communicative closure and maintaining functional differentiation can enrich the literature and direct us towards the development of these models towards new solutions.

One example of an attempt to transcend the formal and substantive modes is based on Shachar's accommodationist conception of 'transformative accommodation'.¹⁰¹ Proceeding from a similar – albeit different – underlying sociological basis¹⁰² Shachar's analysis illuminates many of the insights developed from systems theoretical

¹⁰⁰ Shachar (n 39); Cohen (n 66); Farrah Ahmed and Senwung Luk, 'How Religious Arbitration Could Enhance Personal Autonomy' (2012) 1(2) OJLR 424. Malik (n 77) 39-40: 'It recognises that individuals want to be members of both the state legal system and the minority legal order.'

¹⁰¹ Shachar (n 39).

¹⁰² *ibid* 2.

theories. However, her proposed solution is more constrained by traditional assumptions around law. Although her model is transformative and experimental,¹⁰³ once it is situated within the reflexive paradigm it is possible to expand her solutions to incorporate a broader range of strategies. Shachar reasons that religious family norms assume a central role in demarcating and perpetuating group identity. Given the unequal distribution of power in society, the State should share its authoritative law-making authority with religious groups jointly.¹⁰⁴ As with the model of reflexive secularity developed in this Chapter, Shachar is alert to the risks posed to women and other vulnerable groups through authorising power to religious authorities in respect of marriage and divorce.¹⁰⁵

To that end, she argues in favour of a model of accommodation that also rejects the ‘secular absolutist’ and the religious particularist models. Instead, in exchange for recognising the legal status of religious groups, certain ‘reverse points’ are agreed that allow for the exit from religious processes in favour of secular ones.¹⁰⁶ Shachar envisages the friction between ‘nomoi’ groups and the State as an occasion for transformation and greater responsiveness.¹⁰⁷ Her model relies on strategic competition between state and religious groups to ‘bid’ for the loyalty of their members based on the principles of non-monopoly, allocation by subject-matter and ‘delineated choice

¹⁰³ *ibid* 93,126.

¹⁰⁴ *ibid* 73–76.

¹⁰⁵ Shachar (n 87).

¹⁰⁶ Shachar (n 39) ch 6.

¹⁰⁷ *ibid* 117. For how Shachar’s sociological theory relates with the others discussed in this thesis, see Chapter 2, Part 2(b).

options’.¹⁰⁸ There is much to accept about this model from the systems theoretical perspective, including Shachar’s outline of a reflexive mechanism based on competition¹⁰⁹ and the no-monopoly principle¹¹⁰, which seeks to resist what this Chapter identifies as the tendency towards absolutism which is latent in all social systems. The ‘credible threat’ of exit generated by these reversal points, Shachar reasons, will generate transformation within both *nomoi* and state bodies as these can no longer take for granted their monopolies of power.¹¹¹

Transformative accommodation as explicated by Shachar presents a credible model of joint governance, but it does not resolve all the challenges identified from systems theoretical analysis. First, although Shachar relies on Cover’s model of socio-legal relations,¹¹² as explained in Chapter 2, the further insights identified by systems theory are largely neglected – namely, the challenge of partial communicative closure and the three-fold risk of regulatory failure. One of the main contributions of this Thesis is to re-frame the challenge of negotiating the boundaries between law and religion as primarily a *regulatory* project. The second challenge is that Shachar’s model seeks to enhance responsiveness through the inadequate mechanisms of *choice*, *competition* and *exit* – the very same obstacles she identifies as problematic in respect to absolutist models.¹¹³ Thus, although she envisages a form of ‘regulated interaction’ of religious

¹⁰⁸ *ibid* 18. For discussion of the strategic limb of reflexive law, see Chapter 7, Part 2(c).

¹⁰⁹ See also, Anver Emon, ‘Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation’ (2009) 87 Canadian Bar Review 391.

¹¹⁰ Shachar (n 39) 127.

¹¹¹ *ibid* 124.

¹¹² Robert Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 HLR 4.

¹¹³ Eekelaar (n 78) 26.

institutions, when the regulatory possibilities are still conceived of as based on a limited pallet of mechanisms, the possibility for transformative change is reduced and the risk of entrenched patriarchal power increases.¹¹⁴

Third, there is no basis to assume that the availability of reversal points will engender the sort of transformation Shachar envisages – at the cost of exposing vulnerable members of groups to increased religious authority.¹¹⁵ Cohen’s concern is that groups might ‘accede as a formal matter’ these partial exit options in exchange for its ‘piece of the regulative pie’ whilst nonetheless ‘continuing to make exit very unattractive’.¹¹⁶ Without referring to the trilemma, Cohen’s critique embodies the same notion of creative resistance that Teubner describes, where the system remains unresponsive to external regulatory intervention. Although Cohen’s objection runs deeper than this, we might instead conclude that the problem with Shachar’s model is not in its proposal for joint governance but in its limited strategies for enhancing reflexivity and challenging power structures.

Shachar’s model attempts to promote justice both *between* and *within* groups.¹¹⁷ However, by utilising only strategic mechanisms to enhance responsiveness her account of transformative accommodation is unable to address the power imbalances ‘inherent in the gendered division of hierocratic authority’ that diminish

¹¹⁴ Cohen (n 66) 382.

¹¹⁵ *ibid* 387; Eekelaar, (n 78) 18-19.

¹¹⁶ Cohen (n 66) 387–388.

¹¹⁷ Shachar (n 39) 4.

the effectiveness of her proposals.¹¹⁸ The reflexive model self-consciously seeks to destabilise power structures not by directly intervening in religious social life through command and control *nor* through incorporating religious laws (or endowing them with unqualified legal effect) but instead by introducing indirect interventions that steer systems by altering the environment in which they operate.¹¹⁹

4 Reflexive Secularity

How should a regulatory scheme reconcile the competing imperatives of respecting religious autonomy, recognising religious identity and ensuring human rights are upheld? This Chapter has argued that these are interconnected issues: the stability of the functionally differentiated society is at the heart of the freedoms that allow individuals to access a range of social projects and assume different identities within liberal democracies. The secularity principle safeguards this stability by preventing any system from dominating another.¹²⁰ This background theory of society implies that some regulatory arrangements will be better at securing these objectives than others. Chapter 3 brought these theoretical insights into relation with established practice through the bridging role of jurisdictional examples. That analysis, and the discussion in this Chapter, demonstrates the misleading and undesirable distinction between formal and substantive regulation that has led to this ineffectiveness, unresponsiveness or incoherence. Basing the concept of reflexive secularity on these two insights – the imperative to avoid the *regulatory trilemma* and the *positive* case for a model that

¹¹⁸ Cohen (n 66) 388.

¹¹⁹ Fredman, *Human Rights Transformed* (n 2) 159–164.

¹²⁰ Verschraegen (n 10) 266–267.

preserves functional differentiation – this Chapter now fleshes out a reflexive solution of meta-norms as a means of negotiating the inter-systemic relationship.

(a) Reflexive Secularity: a response to central assumptions

Reflexive law is based on a challenge to three central assumptions that influenced the development of law and regulation: that regulation is ‘instrumental’; that the State is necessarily central to regulation; and, that State law is the principal means of regulating behaviour.¹²¹ Reflexive law responds to these assumptions by relying on a ‘wider range’ of non-State mechanisms.¹²² As pre-figured in Part 1 of this Chapter, reflexive law is best captured by the idea of ‘indirect regulation of self-regulation.’¹²³ Therefore, the concept of reflexive secularity defended in this Chapter entails the application of these principles of reflexive law to the relationship between law and religion. It is argued that this model provides both the most *effective* means of realising human rights objectives but also is the most *normatively* attractive framework for structuring this debate.

What does reflexivity mean? Reflexive secularity promotes the principle of *reflexivity* within systems by devising particularised regulatory schemes, responsive to the context, prompted, incentivised and indirectly steered by the State in pursuit of its policy and human rights objectives:

[Regulation] has to harness that self-regulatory capacity but ensure that it is

¹²¹ Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145.

¹²² *ibid* 145-6.

¹²³ Cohen (n 66) 394.

used for public policy ends, by adjusting, balancing, structuring, facilitating, enabling, negotiating, but never directly telling and never directly trying to control¹²⁴.

So, ‘the task of regulation’ is to ‘regulate self-regulation’ and trigger the desired changes indirectly.¹²⁵ In the context of law and religion, the task of reflexive secularity is to regulate the self-regulation of religious systems within the bounds of certain normative and reflexive criteria. As Cohen remarks, in devising a reflexive scheme, one must adopt ‘a reflective attitude toward the legal medium itself’.¹²⁶ Because reflexive law is both a *type* of law and an *attitude* within a pluricentric and de-centred model¹²⁷ this approach calls for reflection upon the norms of norm selection. This means when ‘necessary and appropriate’ more direct means of command and control can be justified within an overarchingly reflexive regime.¹²⁸ In fact, as Fredman argues, the background of direct interventions is useful.¹²⁹ The objective is ‘to find a way to establish a relationship between internal deliberation and external incentive or deterrent structures’ whilst recognising the unique organisational structure of a particular system.¹³⁰ The normative criteria are derived from the joint imperatives to promote communicative freedom within the context of family life and to maintain systemic stability. As such, reflexive secularity is underpinned by a relational conception of

¹²⁴ Black (n 9) 126.

¹²⁵ Bowen (n 16).

¹²⁶ Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (2nd print., 1st paperback print, Princeton 2004) 176.

¹²⁷ Arato (n 8) 34-36.

¹²⁸ Cohen (n 126) 176.

¹²⁹ Fredman, *Human Rights Transformed* (n 2) 169-172.

¹³⁰ *ibid* 157.

autonomy, substantive equality and the value of caring relationships. These normative values are developed in Chapter 6.

(b) Principles of Reflexive Law

Reflexive secularity ought not to be value neutral nor unconstrained in the context of religious family law: human rights values play a dual role. They act as part of the form and design of the regulatory process: human rights must be front and centre when conceiving of how the scheme is to be designed and which mechanisms ought to be used. As will be argued below, proceduralisation and other formally (or purportedly) neutral concepts involve value commitments: the processes, mechanism and regulatory design must be animated by human rights values to allow for free and equal deliberation. The second function is to act as substantive constraints on the process of deliberation itself.¹³¹ This justifies certain interventions that tip the scales in favour of those forces within systems that will best achieve human rights goals – effectively, to identify and destabilise power structures through the operation of social, procedural, informational and other levers. As Dunsire states, ‘social conflict situations are dynamic’ and in ‘constant flux’.¹³² Systems are held together by a range of factors that change these dynamics over time, and lead to the creation, development and destruction of social norms. Thus, a crucial, dimension within reflexive secularity is the *progressive* achievement of human rights values: ‘the systemic approach includes the time factor; it looks at the changes in complex systems over time, how they evolve,

¹³¹ Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013). This is explored in more detail in Chapter 3.

¹³² Dunsire (n 5) 10.

how they modify their environment, and how feedback from their environment influences them.’¹³³ These sources of perturbation may emanate from the State or from other organisations but must be hemmed by human rights values and not the State’s strategic objectives. Issues around intrusion into religious autonomy on the one hand and the integrity of law on the other can be mitigated through enhancing reflexivity and this conceptualization of law as a system amongst others.

Reflexive secularity is also justified normatively because of its ability to promote democratic engagement within the bounds of partially communicatively closed systems and a fragmented polity. Therefore, the proposed model must also to be democratic and experimental: it is decentralised, collaborative regulation that refines the *normative standards* that negotiate this relationship and the *regulatory mechanisms* to achieve these human rights objectives.¹³⁴ Reflexive law seeks to redefine and redistribute rights through ‘shaping both [systems’] procedures of internal discourse and their methods of coordination with other social systems.’¹³⁵ Although building on the models examined in the preceding Chapters, the reflexive turn is a ‘paradigm’ shift because it re-frames these models as meta-rules and places the institutional and normative limitations of command and control at the centre.¹³⁶ By recognising and responding to complexity

¹³³ Joël de Rosnay, ‘Symbionomic Evolution: From Complexity and Systems Theory, to Chaos Theory and Coevolution’ (2011) 67 *World Futures* 304, 307.

¹³⁴ Michael Dorf and Charles Sabel, ‘A Constitution of Democratic Experimentalism’, *Columbia Law Review*, 98 (1998) 267–473; Charles Sabel and William Simon, ‘Democratic Experimentalism’ in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017).

¹³⁵ Teubner (n 70) 255.

¹³⁶ Cohen (n 126); Cohen (n 66).

through the modified systems theoretical lens, reflexive secularity harnesses social diversity within and outside systems through enhancing their self-regulatory capacity.

(c) Regulatory interventions

Up to this stage, the precise qualities and nature of these interventions have not been developed in detail in this context.¹³⁷ The main contribution of this Thesis is to add the reflexive criterion to the question of how best to regulate the relationship between law and religious life. Reflexive secularity is grounded on the analysis of functional differentiation and partial communicative closure – so it is inextricably linked with the systems theoretical account of human rights. As a further extension of these ideas this requires a concept of secularity to preserve a sphere of religious and non-religious life outside the over-bearing demands of any single system to its full allegiance for the projects and identities that should be open to each individual. As such as identified in some of the examples in Chapter 3, interventions based on command and control ought to be minimised. Instead, to best secure this freedom it is necessary to *primarily* focus on indirect means of regulation and regulatory partnerships between communities, individuals and State bodies.

Reflexive secularity proposes a model of law and religion is one of regulated, bounded autonomy. However, the idea of bounded self-regulation is open to a range of possibilities¹³⁸: it could be that regulation is mandated to ‘formulate and enforce norms’ within a broader framework. In this context, mandating reform ought to be the strategy

¹³⁷ For examples where these arguments have been developed: Cohen (n 126); Cohen (n 66); Augsberg (n 7).

¹³⁸ Black (n 9) 118-119.

of last resort. On the other hand, a voluntary or sanctioned reform project could leave open too much risk of disengagement on the part of religious groups and may not be sufficiently sensitive to addressing the power structures involved. As Fredman argues, the most effective regulatory regimes in human rights contexts tend to assume a background role for ‘external triggers’ which can take the form of ‘incentives or sanctions.’¹³⁹ This could amount to circumstances where groups formulate their own solutions in the ‘shadow of the law’ as where the State threatens to impose a regulatory scheme in default. The bounds of this regulatory autonomy should emerge from the reflexive criterion and the normative criteria developed in Chapters 5 and 6.

This concept of secularity, grounded on the inter-independence of religious groups and the State, is the best means of respecting and preserving space for religious freedom whilst safeguarding the vulnerable. Although this Thesis does not *mandate* regulation, it does argue that contingent legal recognition and financial support can be used as incentives to encourage self-regulatory behaviour. Within these meta-regulatory schemes, religious institutions may be permitted to have contingent legal authority to resolve certain issues, such as those relating to status or to arbitrate distributional questions. This proposal involves neither ‘sharing the coercive law-making power of the state’ nor the ‘abolition of their [normative and institutional] autonomy.’¹⁴⁰ This model, to be developed in Chapter 7, enables the recognition of ‘contextual differences and ethical multiplicity’ alongside a ‘plurality’ of legal mechanisms.¹⁴¹ Yet, at this point it is also important not to overstate the contrast of

¹³⁹ Fredman, *Human Rights Transformed* (n 2) 157.

¹⁴⁰ Cohen (n 66) 394.

¹⁴¹ Cohen (126) 151.

reflexive law with more traditional regulatory models, which may incorporate a variety of strategies and capture some of the reflexive insights described in the following sections. This means we must not parody command and control regulation as uniquely unfit for purpose.¹⁴² Instead, these more direct interventions ought to play a subsidiary and background role once communicative and strategic levers have been exhausted.

(d) Response to Criticisms

As explained in Chapter 2 and the Parts above, the existing solutions to resolving the tension between law and religion face the three-fold challenge of the trilemma: ‘law risks losing its general or universalist character either by directly delegating legal and regulatory functions to private instances or by serving particularistic purposes.’¹⁴³ The reflexive model of secularity seeks to navigate this bind by rejecting the misleading dichotomy of formal and substantive models of law and religion.

There are two justifications for the reflexive model. The first has been well addressed in the preceding Chapters and in Parts 1 and 2 of this Chapter. Reflexive secularity flows from the insights established from the systems theoretical perspective that substantive and formal models of secularity (and the substantive and formal modes of regulation that are assumed) are more likely to either leave prior distributions of power unchallenged or result in the regulatory trilemma. Reflexive law provides an institutional means of avoiding these outcomes through more effective mechanisms. Because one of the principal reasons for regulatory failure, from the perspective of

¹⁴² Black (n 9) 105-106.

¹⁴³ Cohen (n 126) 154.

systems theoretical analysis, is inadequate attention to the autonomy and internal complexity of systems¹⁴⁴ reflexive secularity responds to the imperatives of differentiated societies by maintaining functional differentiation and communicative freedoms. This means our model avoids the risk of de-differentiation, or the regression of society into simpler social forms in which individuals surrender their autonomy to engage fruitfully across a broad range of social pursuits. This model must preserve individual autonomy by structuring the law-religion relationship in such a way as to avoid the absolute domination of any one system— be that the absolute claims of the religious system or law. In so doing, reflexive secularity also serves the objective of encouraging more *effective* solutions to human rights challenges in ways that go beyond deliberative models:

[Reflexive law] ... fosters internal reflection to force the organization to internalise outside conflicts in its own decision structure, to become socially sensitive to the externalities caused by its own behaviours and so “to develop effective internal control structures”.¹⁴⁵

This design to enhance the responsiveness of systems is also at the centre of Shachar’s project, which seeks transformation through competition as leveraged by dividing issues into sub-questions and creating opportunities to exercise choice.¹⁴⁶ However, as explained above, this is only a partial answer to this question because it remains reliant on more limited mechanisms to secure responsiveness.

Second, although we ought not to make a ‘virtue’ from strategic necessity, reflexive secularity is also normatively justified on the basis that it provides a better

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid* 155.

¹⁴⁶ Shachar (n 39) ch 6.

framework for addressing questions about the role of law and religion in society. This is an argument to be developed in Chapters 5 and 6. However, because the reflexive model is premised on indirectness, being sensitive to the systemic dynamic and the need to maintain functional differentiation and communicative freedoms, concerns about the appropriateness of *legal* solutions to challenges in private and family life¹⁴⁷ can be mitigated. The concern, for example, that Eekelaar raises is that because of law's blunt and argumentative structure there are questions ill-suited to direct interventions. Whilst not speaking in terms of systems, Eekelaar captures the insight in Part 1 that direct regulation through the system of law is liable to result in the trilemma. However, because the reflexive paradigm transcends some of the limitations of traditional regulation, more particularised solutions can be realised so as to avoid these difficulties. Law continues to operate in the background, providing a structuring force rather than a direct presence. Taken together, therefore, reflexive secularity naturally flows from the conclusions we observed from Chapter 3 and from the theoretical account of law and society in Part 1 of Chapter 4. This model adheres to the secularity criterion because it secures functional differentiation, systemic stability and individual freedoms through the reflexive concept of the inter-independence of law and religion.

There also remain three challenges to be addressed. The first is how reflexive secularity remains compatible with the democratic principle and the rule of law. Instead of laws being made by accountable legislatures this authority is perceived to be given to unrepresentative and unresponsive religious groups.¹⁴⁸ Second, does the promise of a human rights compliant regime, if the reflexive mode is accepted to be effective,

¹⁴⁷ Eekelaar (n 78) 16-17.

¹⁴⁸ Cohen (n 66) 392-393.

remain illusory and too far into the future for the real and present harms faced by vulnerable groups? Third, reflexive regulation might be misconstrued as merely *dialogic* and therefore open to the criticism that this model adds little value to the existing models. Certainly, there is nothing novel about the use of cross-cultural dialogue as a strategy for advancing human rights. However, reflexive secularity provides a distinctive structural framework for resolving questions about the relative roles of community and the state and resolves into more concrete proposals for securing human rights.

(i) Dignity and Justice

The second challenge is temporal: reflexive regulation leaves open the possibility that those within systems may have limited recourse to remedies in the present, with a view that human rights values are internalised over time and mechanisms are developed that are eventually effective in vindicating those rights. As Sabel and Dorf argue:

For rightholders denied relief during the pendency of an experiment, justice is, for that time, denied. For them, and others who may come into their situation, it would seem that experimentalism substitutes utilitarian projects for fundamental rights.¹⁴⁹

Would a reflexive approach allow such a state of affairs to subsist?¹⁵⁰ And if the reflexive solution is to *utilise* individuals within systems as the instrument for achieving transformation, does this offend the dignity of the individuals that make up such systems? This moral concern – the contention that reflexive solutions may not provide immediate relief but seek gradual change – is challenging because

¹⁴⁹ Sabel and Simon (134) 469.

¹⁵⁰ Tristan Cummings, ‘Utilizing Systems Theory Insights and Reflexive Law to Negotiate the “Collision Between... Un-connecting Worlds” in Family Law’ (2021) 9(2) Journal of Law, Religion and State 212, 241.

communities are the means of enabling or actualising human rights values. There are two responses to this objection. First, the assumption that an alternative, direct form of intervention could be more effective and bring about a result in a way that is less affronting to dignity is unfounded. Systems theory suggests that the direct imposition of external substantive norms by way of command-and-control interventions is liable to fail and also compromise the autonomy of individuals within such groups as well as the coherency of the law itself. This was the conclusion of Chapter 3. Second, reflexive law may be *more* dignity-respecting because it promotes self-determination within a system, in response to a changed environment. Although the family and community are ‘utilised’ to this end, they are never used *merely* or *only* as a means and not also as an end: rights, welfare, and equality remain at the heart. This discussion prefigures the analysis in Chapters 5 and 6, where *in addition* to the reflexive criterion it is argued that interventions in religious family life must also be justified according to human rights based normative criteria. Once this is understood, and the central role of human rights values is defended, the concern that reflexive law promotes a utilitarian solution can be mitigated.

(ii) Transformative and Reflexive: Not Dialogic

Reflexive law recognises that regulation is not carried out by the State alone but through a network of regulators – including the ‘citizen insider’.¹⁵¹ The insider represents the voice of the internal perspective of individuals – recognising their complex status as both citizens and bearers of rights and as religious individuals.¹⁵²

¹⁵¹ Shachar (n 39) 6.

¹⁵² *ibid*, Introduction and Chapter 1; Malik (n 50) and (77).

From the systems theoretical perspective this encapsulates the differentiated nature of social life – whereby the individual necessarily must access and engage within different systems in order to flourish as systems mediate the relationship between the individual and the lifeworld. Moreover, the totalitarising nature of law and religion is addressed because the regulatory project is de-centred and distributed amongst actors. Reflexive law challenges the ‘presumed constitutive omnipresence and omnicompetence of the political [system].’¹⁵³ However, just as Malik calls on feminists to engage in a process of reasoning by moving from our ‘home’ understanding to that of the ‘other’¹⁵⁴ in what An-Naim calls ‘internal dialogue’ and ‘cross-cultural dialogue’, differences between groups can be better understood in light of these insights into the communicative barriers between systems¹⁵⁵ with its necessary inclusion of other systems within the regulatory process.

As Eekelaar, rightly points out, however, deliberation across cultures (or between systems, to the extent that is possible) is insufficient.¹⁵⁶ What exactly is the purpose or aim of these deliberations and according to what terms ought they to be conducted? There is, moreover, a second level of deliberation which occurs within a community. Eekelaar contends that such communications usually arise in response to harms – however these are to be defined – as experienced by individuals within that

¹⁵³ Cohen (n 126) 153.

¹⁵⁴ Malik (n 50) 223-230.

¹⁵⁵ Abdullahi Ahmed An-Naim, ‘State Responsibility under International Human Rights Law to Change Religious and Customary Laws’, in Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 128-129.

¹⁵⁶ Eekelaar (n 52) 32–33.

group.¹⁵⁷ For Eekelaar, the concepts of liberty and equality seem to emerge across cultures and individuals therefore make decisions around the continued value of different cultural practices by reference welfare. For Eekelaar, therefore, welfare forms a common language which can be used to transcend communicative closures. The ideas around the appropriateness of welfare as a guiding principle are addressed in Chapters 5 and 6. However, at this stage, although welfare may align with certain values, its lack of internal limitation should offer pause for thought before forming the basis for State interventions. Reflexive secularity engages with both these forms of communications as a means of structuring the law-religion relationship and devising solutions that go beyond enhancing dialogue.

So, because this project pertains to some of the most vital rights, freedoms and relationships it is important that the regulatory scheme is not only reflexive, but also *effective*. The insight from systems theory is that these imperatives are inextricably connected: we cannot secure high human rights standards without harnessing the self-regulatory potential of systems. Reflexive secularity must be characterised by indirectness, boundedness and systemic inter-dependence. This means the application of human rights standards are essential whilst still recognising that the sources of regulation are dispersed and need not emanate from the State alone. It becomes incumbent on individuals within systems to particularise human rights objectives in the process of devising solutions that meet the needs of all members of their communities.

¹⁵⁷ *ibid* 33.

5 Conclusion

Common to each of the traditional models which seek to address the appropriate relationship between the systems of law and religion is an assumption, to a greater or lesser extent, about the role of command-and-control regulation, whether through assertion of law's formal rationality and its functional differentiation or in substantive interventions, which raise similar such challenges based on the communicative failures of inter-systemic interaction. Within Eekelaar's model of cultural voluntarism, concerns about the appropriateness of law as a medium for resolving religious and cultural disputes looms large as part of his concern about legal recognition and regulation of religious norms.

The propensity for communicative complexity cannot be established through theoretical or conceptual analysis alone but requires both applied analysis of the cases and – in further research and policy making, empirical verification. This is why in Chapter 3, our hypothesis was tested through sustained, applied, normative theory in relation to real-world example jurisdictions. The jurisdictions studied in Chapter 3 acted as a bridge between the theoretical claims in Chapter 2 and the empirical predictions around the regulatory trilemma and the normative implications of this model for law and religion, in the form of the reflexive paradigm. The product of this analysis was synthesised in this Chapter.

Through the reflexive paradigm we can reframe the concept of secularity in terms of a society as marked by functional differentiation and the risk of de-differentiation (and simplification) – and thus, the risk to individual autonomy. Because

social differentiation underpins modern society and systems mediate the individual's access to social goods and the development of personality and identity, it is the role of the state to stabilise these functional distinctions and ensure flexibility. De-differentiation reverts us back to the total domination of any single system or axis of social life: the risk that a single system whether law, politics or religion exerts absolute control over the individual.¹⁵⁸ So, the account of reflexive secularity developed in this Chapter responds to this central concern and the regulatory failures that were examined in Chapter 3.

As discussed in the first Section of this Chapter, a range of models of secularity are possible by taking different views on the relative roles of religions in public life and of the State in the regulation of religious groups. These were examined from a systems theoretical perspective and shows that systems theory can help explain and enrich these theories – but also adds the insights of the regulatory trilemma as an analytical guide. Chapter 5, therefore, will take us forwards to resolve a further question: if a reflexive scheme must be hemmed by values, which values? And more importantly, to what extent are these values contestable and open to change? Chapters 5 and 6 examine how reflexive law mediates between conceptions of the role of the State and religion and how it may offer a better way of navigating the challenges of religious family life, whilst arguing that such an approach might better enhance reflexivity and promote relational autonomy, substantive equality and relationships of care.

¹⁵⁸ Verschraegen (n 10) 270.

CHAPTER 5

VALUES, DEMOCRACY AND THE EXPERIMENTAL CONSTITUTION

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Introduction

The challenge identified at the end of Chapter 4 was how to strike the balance between stability and experimentalism with regards to the meta-framework of values that ought to underpin the regulation of religious family laws. These values were termed the ‘normative criteria’ for justifying State involvement in religious family life. As such, these values are particular to the context of family life and emanate from an analysis of the communicative interaction between religious, legal and family systems.

Orthodox models of reflexive regulation are pragmatic and respond to the imperative to devise *effective* means of coordinating systems in light of their supposed communicative closure. So, the first justification offered in Chapter 4 was that this model could best ensure the *effective* realisation of policy objectives: or, in other words, reflexive secularity is justified because it might better overcome the regulatory limitations inherent in law, avoid the regulatory trilemma, and thereby maintain functional differentiation and individual freedoms. However, at its heart, this is a necessary response to the functionally differentiated society. Cohen warns that we ‘should not make a normative virtue out of strategic necessity.’¹ Traditionally, reflexive law is predominantly based on *form and procedure*.² It offers both a *form of law* and a *meta-framework* for justifying the ‘norms of organisation and procedure’ as opposed to substantive laws that ‘directly regulate behaviour by defining substantive prescriptions.’³ Reflexive secularity, therefore, does not accept the pre-existing distribution of rights and the prevailing ‘social orders’ as acceptable but seeks predominantly to affect these indirectly.⁴ In this way, the proposed model of secularity safeguards a sphere of religious autonomy that is bounded by substantive human rights values.

¹ Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 IJCL 380, 383.

² Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 Law & Society Review 239.

³ *ibid* 253-254.

⁴ *ibid* 254.

Teubner's preference for procedural interventions in order to enhance reflexivity flows from his emphasis on communicative closure, where 'interdiscursive translation is impossible' and only ever a 'fragile symmetry' of communication is achievable.⁵ On this view, the primary mechanisms available are those that create and protect a creative, discursive space within systems.⁶ Devising processes *in relation to* processes is the main driver of reform: processes create the conditions, environment and perturbations against which positive outcomes might be reached. More concretely, the aim is to re-structure systems by affecting both their procedures and internal discourse.

Yet, the 'strategic' necessity that we re-think the regulatory model around religious family laws in light of the regulatory trilemma must *also* be justified according to good normative reasons – and, in this way, has the radical potential for re-imagining the democratic landscape in relation to religious family life. Luhmann's and Teubner's limited conception of systemic communication ought not to foreclose the possibility of more communicative interventions. As such, a *normative* dimension was identified within Chapter 4: reflexive secularity is not just an answer to a *strategic* necessity but is also a means of realising societal *transformation* along human rights grounds by promoting democratic engagement. Therefore, the 'reflexive criterion' in Chapter 4 must be supplemented by a further set of *normative criteria* in order to determine under what circumstances and in what manner, if at all, religious family life should be regulated by State laws. These normative criteria must act as constraints on

⁵ Gunther Teubner, 'After Privatization? The Many Autonomies of Private Law' (1998) 51 *Current Legal Problems* 393, 410.

⁶ Teubner (n 2) 273–275.

the process of self-regulation. However, it will be argued in this Chapter that the same normative basis for recognising reflexive secularity also implies that these values be open to normative experimentation over time, so long as the meaning of those values remains compatible with the reflexive criterion.

This Chapter starts the work of exploring what these values ought to be and from where they ought to be derived. As Eekelaar explains, the question of *values* is persistent and controversial and the issue with seeking universal values that underpin all moral claims (or particular claims, such as the basis of rights) appears to require ‘one perspective [to] be foisted on everyone else, which would be difficult to defend, especially against those on whom they were foisted.’⁷ The first Part of this Chapter addresses this issue and examines the role and importance of values in the reflexive model. It rejects the idea of establishing a ‘neutral’ framework.

The second Part considers the sources of these values. It constructs this tension from a systems theoretical standpoint – that disagreement over values reflects functional differences between systems and the limitations of inter-systemic communications. Specifically, it is argued that neither values external to religious systems nor those which are internal to them can provide the basis for reflexive secularity. The final part then explores the role of democratic experimentation. Thus, although deliberations must be *bounded*, it is by applying the reflexive attitude to itself

⁷ John Eekelaar, ‘Laws, Values, Cultures’ in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill | Nijhoff 2015) 32.

that the tension between internal and external perspectives can be resolved.⁸ Ultimately, this suggests two key ideas: first, the values must *flow from* the particular systemic dynamic in question. Second, the conception of those values might also be open to experimentation, so long as this is also constrained by adequate procedures and the conceptions remain compatible with the reflexive criterion.

The final Part develops the experimental quality of reflexive secularity in how we re-construct these values over time. This forms part of the normative justification for reflexive secularity: a conception of democratic engagement based on participation, networks and experimentation both as to the basic norms applied and the means of realising them. This idea goes beyond dialogic solutions⁹ which are valuable possibility but only where dialogue is geared towards practical problem solving.¹⁰ This Thesis takes this forward through consideration of the institutional relationships needed to promote *reflexivity* and proposes a range of regulatory strategies. The contribution of this Chapter, therefore, is to connect the idea of reflexivity with the normative values and to offer a robust democratic justification for reflexive secularity. This Chapter concludes that this modified conception of reflexivity provides the basis for a dynamic, collaborative and on-going process of norm re-creation. It is the project of Chapters 6 and 7 to explicate the normative values that should underpin reflexive secularity and propose some initial strategies as the basis for future reforms.

⁸ Andrew Arato, 'Procedural Law and Civil Society' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998) 30-31.

⁹ Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy* (Princeton University Press 2004) 23-26.

¹⁰ Eekelaar (n 7) 32-33.

1 Neutrality as an Inadequate Framework

The apparent benefit of form and process is said to be that we can avoid engagement with direct, perceived or actual, clashes between value systems. Such an approach is premised on the principle that law must avoid value judgements over the merit of difference ways of living.¹¹ Family laws in diverse societies face numerous, pluralistic value systems in areas of immense personal and communal importance. Identifying this tension was one of the contributions of the applied analysis in Chapter 3. Recall some of the examples. The cases of *Kaddoura* and *Bruker* evidenced the interconnectedness of systems and the disagreements over *values* in relation to the status of marriage and the respective roles of private, informal and state regulation. Likewise, the Indian example of *Shah Bano* demonstrates disagreement over basic precepts – including the appropriateness of judicial interpretation of religious norms and the role, status and equality of women in society. The rationale behind neutrality is, then, seemingly compelling: it creates the space in which individuals (and the groups they form) can make their own decisions as to the good life.

When applied in the context of religion and family life, this principle of neutrality may take its form in the principle of formal secularity – and this can be justified and explained in terms of systems theoretical concerns. The State, in respect of its duty to uphold the right to communicative liberty must, the argument goes, observe duties of restraint.¹² As a result, the State ought *generally* not to recognise as

¹¹ Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (2nd ed, Blackwell 1996) 30.

¹² Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 19.

law those norms that derive from particularist conceptions of the good in favour of norms that can (also) be justified on a broad, neutral footing.¹³

Yet, this formal model comes up against three important problems: first, communicative closure makes communications between systems difficult; second, neutrality always ‘disguises particular value commitments.’¹⁴ The notion that the State must remain impartial amongst options reflects a certain arrangement of values, for example, that are really based around individualism, liberty, privacy and self-responsibility.¹⁵ Third, the commitment to the values that underpin a ‘neutral’ state tend to be disadvantageous towards the most vulnerable within society. Consequently, this Part concludes that it is necessary to locate certain further values as the basis of the proposals in this Thesis.

(a) Knowledge Fragmentation

Chapter 2 explained that through reliance on Habermas’ theory of communication, we could supplement Luhmann and Teubner’s account so as to recognise *both* the strategic challenges that result from the systems theoretical perspective but also the possibility of meaningful communication across a shared, multi-functional yet differentiated language.¹⁶ As such, this Thesis has developed a modified account of systems that

¹³ John Eekelaar, ‘Law and Community Practice’ in Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Hart Publishing 2015) 21-22.

¹⁴ John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7 *Oxford Journal of Legal Studies* 1, 4.

¹⁵ Fredman (n 12) Chapter 1.

¹⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Reprinted, Polity Press 2010). See discussion in Chapter 2, especially at

envisages both indirect means of regulating systems alongside more direct human rights based interventions. The ways these interventions work out in practice are explained in Chapter 7 and the Conclusion to this Thesis. There are two distinct but connected issues in play. First, there is the contention that ‘knowledge is *fragmented*.’¹⁷ Second, there is a more profound question: that ‘information is socially constructed’ such that there are no such things as ‘objective’ social truths.¹⁸

The first issue is a challenge primarily concerned with access to and evaluation of evidence.¹⁹ Thus, some disagreements flow from the epistemological challenge: these are differences in what evidence is appropriate, how much weight ought to be given to the evidence where it can be agreed upon, and how priorities and choices should be made among the vast range of possible values.²⁰ Reflexive law has the unique potential to mitigate these issues through indirect interventions: law seeks to adjust the weight attached to certain reasons and arrange options in ways that promote human rights outcomes through strategic levers such as collibration (the manipulation of

Part 2(c)(ii). See also, Cohen (n 1) 174-175 and Fredman (n 12) 154-155 for a justification for combining the insights of Luhmann and Habermas, despite significant theoretical disagreements.

¹⁷ Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103

¹⁸ *ibid* 107.

¹⁹ In this respect, epistemic and heuristic injustice may mean that some forms of evidence are considered less valuable. Within systems, this may manifest in the form that the contributions of women are given less weight. See: Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (OUP 2009).

²⁰ John Stanton-Ife, ‘The Limits of Law’, *Stanford Encyclopedia of Philosophy* (2006) <<https://plato.stanford.edu/entries/law-limits/#neut>> accessed 7 October 2022].

power structures).²¹ These ideas will be picked up in detail and elaborated upon in practice, in later Chapters.

As society becomes more complex, so too do sources of knowledge become increasingly specialised.²² Moreover, this complexity is linked with increasing ‘cultural diversity, cultural ethos, and cultural ethnocentrism [which] engender fragmentation.’²³ The very features that construct a differentiated, modern society also mean that no single institution, body or agency can have a monopoly of knowledge, with expertise shared and distributed more broadly.²⁴ Knowledge, on this account, is pluralistic and mediated by human experiences.²⁵ This conception of society stands in stark contrast with the account Parsons provides, which is not only ‘centred’ but is also universalised. Parsons contends that there must be ‘shared symbols’ and an objective ‘ultimate reality’ which individuals are powerless to control and which remains the same from any point of reference.²⁶ Parsons, therefore, rejects the fundamental claim that there is no common frame of reference. If Luhmann’s account is correct, the State through its laws, or any other system of social life, cannot obtain sufficient information about the complex symbolic and practical consequences of religious norms in order to

²¹ This strategy is examined in Chapter 7. See further: Andrew Dunsire, ‘Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention’, MPIFG Discussion Paper 93/7 (1993) 10.

²² Robert Beam, ‘Fragmentation of Knowledge: An Obstacle to its Full Realisation’ in Kenneth E Boulding and Lawrence Senesh, *The Optimum Utilization of Knowledge: Making Knowledge Serve Human Betterment* (Routledge 2019) 160–161.

²³ *ibid* 161.

²⁴ Black (n 17) 107.

²⁵ Niklas Luhmann, *Trust and Power* (Wiley 1979) 18.

²⁶ Talcott Parsons, *The Social System* (The Free Press 1951) 6–7.

deconstruct meanings about those systems nor can it be assumed that there exist universal, objective values beyond human interpretation and construction.²⁷ Our roles and freedoms are, on Parson's account, significantly constrained such that person is reduced to being a carrier of norms in order to achieve social order.²⁸ In contrast, the de-centred account of modernity allows for this radical freedom explored in Chapter 4 and the possibility to construct meanings within and between systems.

Mediating between the Parsonian and Habermasian conceptions of society and Luhmann's and Teubner's systems theoretical account, Cohen reasons that it is possible to envisage the sorts of modified conception that was defended in Chapter 2.²⁹ This was the central take-away of the first half of this Thesis which deconstructs the communicative limitations of inter-systemic dynamics through applied, normative analysis of the law of religious marriage and divorce. In concrete terms, this insight allows for a 'plurality' of legal forms and a choice between communicative, strategic and coercive interventions.³⁰

The second issue is a connected, and deeper claim: that normative worlds exist which may be incompatible and impermeable.³¹ This difficulty was one of the insights

²⁷ *ibid.*

²⁸ John Murphy, 'Niklas Luhmann: His Contribution to the Sociology of Religion' (1987) 2(2) *International Sociology* 205, 207.

²⁹ Arato (n 8) 35; Cohen (n 1) 176.

³⁰ See, Chapter 7, Part 1(b)-(d).

³¹ In both Shachar's work and in Cohen's work references are made to '*nomos*' groups which capture some of the same issues: see, Chapter 1 for a brief discussion of the value added through systems theory.

developed in Chapter 2. This approach conceptualises systems as existing within their own epistemological worlds, constructing and reproducing meaning within their own self-referential language and logic. Use of a functionally specialised language means that attempts to communicate knowledge or to understand the knowledge possessed by others will always be constrained:

Reliable communication requires sender and receiver to possess the same linguistic code, so those who do not have the code cannot extract meaning from their communications.³²

If this understanding were to be true, this degree of closure would have significant impact on the enterprise of constructing and understanding theories about different systems: ‘the systems approach self-referentially subsumes the sociological observer, who views himself and his science as just one subsystem among others.’³³ To put it another way: if we accept this strong view, our own theorising must also be flawed because we are labouring under the same communicative limitations as we observe between systems.

Tying these two issues together, this Thesis rejects the idea that systems are entirely communicatively *closed* and instead argues these *can* be influenced through reflexive law although the more direct the intervention, the more careful we must be to avoid the trilemma. In essence, this Thesis concludes that self-referentiality is just *one* axes in considering regulatory interventions – and instead, we should emphasise the

³² Beam (n 22) 161.

³³ Habermas (n 16) 47.

functional differentiation of systems instead of an excessive focus on distinct coding.³⁴ As a result, a synthesis is possible which relies on the reflexive turn and the Habermasian conception of a multi-functional but shared language can ensure that – on the one hand, the abstract and de-personalised account of objective, ‘ultimate reality’ endorsed by Parsons is rejected but, on the other, the supposed impossibility of any such basis of meaningful communication, as supported by Luhmann – can also be understood as providing an incomplete pictures of knowledge creation and interpretation.

(b) Underlying Values

Reliance on purported ‘neutrality’ cannot justify reflexive secularity nor can it be concluded that because of the functional differentiation of society there can be no common values that can be communicated as between systems. This vision of State neutrality is neither possible nor desirable and the notion that there is a radical and irredeemable communicative closure is best understood in the more pragmatic terms. So, as a matter of principle, neutrality is not possible once it is recognised that law inhabits its own normative ‘world’ and cannot avoid becoming implicated in questions about values when it intervenes (or purposively elects not to intervene) in religious and family life.

As a consequence, reflexive secularity can and should be grounded in certain democratic values. Neutrality is not possible, because the decision to favour a ‘neutral’ framework is itself a normative choice that disguises underlying values. Instead, the

³⁴ Jan Kooiman, ‘Social-Political Governance: Overview, Reflections and Design’ (1999) 1 *Public Management: An International Journal of Research and Theory* 67, 72; Renate Mayntz, ‘Governing failures and the problem of governability: Some comments on a theoretical paradigm’ in Jan Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage 1993) 14.

normative justification for any particular relationship between individual, community and the State must be articulated and defended.³⁵ Neutrality is not desirable, because a normative framework based on negative liberty and formal equality undermines the rights of vulnerable individuals within systems. For example, a commitment to broad normative pluralism and State non-interventionism does not mean the State *must* be neutral on all accounts. Eekelaar argues that only where rules seek to uphold the ‘welfare’ of the individual, the State is justified in regulating religious family life through the delegation model.³⁶ Malik, taking this model forward argues that some conduct must be ‘severed’ whilst other religious norms could be ‘mainstreamed’ but that both decisions should be underpinned by a commitment to freedom and welfare.³⁷ In most other instances, the State ought to leave the space for individuals and groups to plan their own lives but this decision is to be made on a case-by-case basis.³⁸

But whilst accepting this principle that the State has an interest in interventions that uphold welfare whilst also preserving some scope for religious family life outside of legal regulations, the *basis* upon which such decisions about interventions are made must be grounded in principle not on the basis of aggregate welfare and public policy. This is because, welfare lacks internal conceptual limitations and as such could be employed in ways that are both contentious and expansive. This criterion would also generate uncertainty in private and family life, undermining individual autonomy. It is,

³⁵ Fredman (n 12) Chapter 1, Part A.

³⁶ Eekelaar (n 7) 36.

³⁷ *ibid*; Maleiha Malik, ‘Minority Legal Orders in the UK: Minorities, Pluralism and the Law’ (British Academy 2012) 40.

³⁸ *ibid* 40-42.

moreover, important to articulate human rights-based values as the grounds for reflexive secularity to mitigate its otherwise ‘Machiavellian’ connotations through the ‘manipulation’ of social tensions.³⁹ The potentially harmful aspects of reflexive law must be curtailed as a result of this commitment to human rights values.

(c) Power Structures

Social systems are constituted through their communications and these communications are mediated by power structures: the prevailing norms are supported by the existing distribution of power within that system.⁴⁰ The assumption that ‘neutral’ values are not ‘socially constructed, culturally defined, and the site of power relations, including oppression and gendered violence’⁴¹ creates the potential for disadvantage. Indeed, as social life is constituted by *communications* reflecting the power structures that prevail from time to time an expressly value-laden concept of reflexivity must be employed to address the prior distribution and conception of rights and social and economic power in these systems. Furthermore, because religious values are fundamentally, ‘lived, experienced, and interpreted’ not immutable and ‘given’⁴² all ‘complex’ religious groups contain ‘a plurality of ideas and arguments’.⁴³ However,

³⁹ Dunsire (n 21) 5-6.

⁴⁰ Amartya Sen, ‘Secularism and its Discontents’ in Rajeev Bhargava (ed), *Secularism and Its Critics* (OUP 1998).

⁴¹ Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton 2004) 23.

⁴² Cecelia Lynch, ‘A Neo-Weberian Approach to Religion in International Politics’ (2009) 1 *International Theory* 381, 401.

⁴³ Maleiha Malik, “‘The Branch on Which We Sit’: Multiculturalism, Minority Women and Family Law’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 217-218.

some voices within groups are ‘backed by existing power structures’ whilst others are ‘relatively silent and do not have access to public space.’⁴⁴ Consequently, the State in its positive interactions with or purposive abstentions from religious life can amplify or side-line these voices.⁴⁵ This is the framing question for reflexive secularity: we have identified that interventions are most effective and most *justified* when they are designed to be reflexive, but interventions must also satisfy and pursue justified normative criteria as well.

It is sometimes said that reflexive law is neutral in this way through reliance on proceduralisation.⁴⁶ This is because, as explained in more detail in Chapter 7, reflexive law relies on ‘procedural norms regulating processes, organization, and the distribution of rights and competencies.’⁴⁷ However, proceduralisation is not a neutral solution: these procedures are still geared at securing substantive ends and the design of these procedures may (and *should*) make certain choices that are not value-neutral between regulatory options. Moreover, procedural interventions may not be sufficient in destabilising the power structures within systems.⁴⁸ Rights are an important means of empowering individuals and ensuring their interests are not subordinated by communal and group claims and as such, substantive interventions must underpin our regulatory

⁴⁴ *ibid.*

⁴⁵ Eekelaar (n 13) 22-24.

⁴⁶ Teubner (n 2); Teubner (n 5).

⁴⁷ Cohen (n 41) 149.

⁴⁸ Fredman (n 12) 154–155.

solutions.⁴⁹ It is *through* destabilising these structures in favour of human rights values that the most effective steering will occur.⁵⁰ Therefore, as was prefigured in the discussion in Parts 1(a)-(b) of Chapter 4 and will be further examined in Chapter 6, rights are integral to modern society because they provide the safeguards for free participation in communication and social intercourse and underpin functional differentiation.⁵¹ So, the concept of reflexivity ought to serve this purpose: the end of promoting and securing human rights-based values.

Taken together, the reflexive model of secularity could not – and ought not – be grounded on neutrality but must be animated by human rights values within the context of family life. The concern to avoid interventions in the private life of religious groups is underpinned by normative assumptions about the role of the State – and cannot be absolute objections to intervention, in that the State cannot abstain from making normative choices in cases where rights values (or, welfare) are threatened.⁵² What values *ought to* animate this model and in which ways should they inform the structure of the regulatory model being described in this Thesis? This is the principal focus of the remainder of this Chapter. The answer, in brief, is that the values of relational autonomy, care and substantive equality form the underpinnings of reflexive secularity. These values play a multifaceted role: they justify interventions into religious systems; they constrain the ‘bounds’ in which deliberation around the design

⁴⁹ *ibid.*

⁵⁰ Dunsire (n 21) 10-11, 16.

⁵¹ Gert Verschraegen, ‘Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory’ (2002) 29 *Journal of Law and Society* 258, 262.

⁵² See discussion in Part 1(b), above.

of these interventions are to be conducted. This Chapter addresses these prior questions whilst Chapter 6 develops the substantive content of these values and relates them both to the systems theoretical conception of society and the model of reflexive secularity.

2 Values: Internal, External or Reflexive?

Under this reflexive conception of secularity, systems are both regulated by, and participants in, a broader dialogue over substantive values. In this way, reflexive law aims to enhance mutual (self-)understanding so both religious and legal systems ought to be open in the long run to the new meanings that may emerge from this process. This Part attempts to resolve a difficult tension: on the one hand, it defends certain substantive constraints as being necessary for the functioning of a reflexive model. On the other hand, it recognises that these constraints are themselves open to re-interpretation and development over time. Put more concretely: as groups develop solutions to these regulatory problems in family law, they will experiment not only with the means of realising those norms *but also* from these diverse solutions, new meanings may emerge that provide good reasons to re-imagine these substantive norms over time.⁵³ Nonetheless, these constraints must be respected, such that these diverse applications of human rights values cannot compromise on their core meanings.

Reflexive law is not value free but, *as a framework*, it does not *prescribe* particular outcomes either.⁵⁴ The idea of regulated autonomy means this model ‘does

⁵³ Michael Dorf, ‘The Domain of Reflexive Law’ (2003) 103(2) Columbia Law Review 384, 399.

⁵⁴ Teubner (n 2) 257.

not determine specific outcome [but] steers self-regulation in the right direction.’⁵⁵ In fact, Teubner goes to significant lengths to contrast his model of reflexive law from both ‘formal’ and ‘substantive’ modes of regulation: the former, underpinned by the establishment of private spheres of activity; the latter entailing the direct regulation of social life in the public interest.⁵⁶ Chapter 4 applied this framework and related it to formal and substantive models of secularity: the former, focusing on the need for neutrality and a general legal abstention of state involvement in religious affairs; the latter entailing a conception of secularity whereby the State takes an active role in religious life.⁵⁷

In another sense, despite its potential democratic enhancing dimensions, reflexive secularity must always remain hemmed by human rights values. This is because the State cannot absolve itself of responsibility in potentially rights infringing situations, where procedural interventions must operate within the context of existing power structures.⁵⁸ Thus, as Fredman argues, such approaches require procedures that not only create discursive space, but also *deliberative space*, characterised by debate of a certain quality, accessible to a wide range of voices on equal footing and ‘bounded’ by human rights values.⁵⁹ What is more, Fredman takes an avowedly value laden

⁵⁵ Cohen (n 41) 178.

⁵⁶ Teubner (n 2) 270–275.

⁵⁷ *ibid.*

⁵⁸ Dunsire (n 21) 38.

⁵⁹ Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote’ (2013) Public Law 292. In one of the jurisdictions examined in this Thesis, the Indian Supreme Court has explicitly endorsed Fredman’s bounded conception of deliberation: In *Re: Distribution of*

approach to reflexive law, articulating and defending particular normative values.⁶⁰

Likewise, Habermas proceeds in his theorising with a normative slant: he concerns himself with the promotion of autonomy and rational communication.⁶¹

So, although the case for neutrality is not sustained, the legitimacy and suitability of substantive limits must also be engaged with and defended. The project of undertaking that justification is addressed across this Chapter and Chapter 6. The models of reflexive law examined in this Thesis tend to combine *pre-determined* objectives with a *collaborative and experimental* design to their implementation. That is to say, the self-regulatory autonomy afforded through reflexive law pertains to the means of *securing* set outcomes and not autonomy in establishing those substantive objectives themselves. However, this Chapter makes the case for a richer, multi-directional conception of reflexive secularity at both the procedural and substantive levels.⁶²

If values must and should play a role in the regulation of religious family laws, then a subsequent question arises: whose values ought these to be? Or, more precisely: how ought we to determine which values to select or how should conflict over the interpretations of these values be negotiated? Three principal options arise: first, that

Essential Supplies and Services During Pandemic SMW (C) No 3/2021 (27 April 2021, Supreme Court of India) [6].

⁶⁰ Fredman (n 12) 19-23, 25.

⁶¹ Habermas (n 16) 392-409.

⁶² Dorf (n 53) 396-400; Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267; Charles Sabel and William Simon, 'Democratic Experimentalism' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (1st edn, Cambridge University Press 2017).

the values be derived from sources external to religious systems, such as from domestic or international human rights laws. Second, that the values be derived from the internal norms that constitute the religious system, such that any solution is justified and rational from that perspective. Neither of these possibilities ought to be accepted. Rather, third, these norms ought to be constituted and refined through a reflexive, collaborative process.

(a) The problem with external values

There are two principal challenges in relation to the enforcement of *external* values: first, those challenges flowing from the modified systems theoretical account outlined above and in Chapter 2, which suggests that the direct imposition of substantive norms is liable to result in the regulatory trilemma. This is notwithstanding the fact that, unlike Teubner, communicative interactions between systems are still envisaged as being possible through a shared, but differentiated, multi-functional language. The second challenge is a matter of principle: external interventions in religious family life could be seen to offend the religious liberty of believers and threaten the functional differentiation of the systems of law and religion. These two challenges will be addressed in turn.

The religious ‘insider’ has ‘intimate knowledge and experience of their own community’ that can be drawn upon both as a means of contesting substantive norms.⁶³ This is logical, because the religious system has its own internal logic which can best be accessed by members of that community. However, the value of the insider

⁶³ Malik (n 43) 222-223.

perspective also goes to expose the challenges faced by an external participant. This is part of the challenge of directly imposing external human rights values: increasing complexity as between various actors and systems maintains the equilibrium of ‘stability and change’ within a system and is not easily susceptible to external understanding and regulation.⁶⁴ However, as explained in Part 1(a), the ‘fragmentation’ of knowledge means ‘no single actor’ is capable of solving the ‘complex, diverse, and dynamic problems’ faced within society. The State is unable to insist on its normative superiority because to do so could result in the trilemma – ineffectiveness, unresponsiveness and incoherence – and nor would a single external authority have the overview necessary to employ and monitor the instruments needed to make regulation effective.⁶⁵ As Augsburg argues when analysing the idea of religious self-concepts, an external regulator is unlikely to be able to capture and respond to the concepts as understood from within religious systems and must – to some extent – rely on that internal perspective in order to realise effective change.⁶⁶

The second challenge holds that respect for religious autonomy demands a degree of freedom from external interventions in religious life. This objection has already been addressed in Chapter 4 which explained that reflexive secularity mitigates the concern over intrusions into religious affairs because of the necessary participation of insiders. Yet, as Nussbaum explains, the ‘foreign’ or outsider voice is still crucial.

⁶⁴ Black (n 17) 107.

⁶⁵ *ibid.*

⁶⁶ Ino Augsburg, ‘Religious Freedom as “Reflexive Law”’ in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging* (OUP 2014); Ino Augsburg, ‘Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts’ (2012) 1 *Journal of Law, Religion and State* 291.

It is often by ‘pointing to examples of respect’ in other contexts that the necessary materials for internal reform can be constructed.⁶⁷ This sort of strategy underlines the communicative mode of enhancing reflexivity, examined in Part 2 of Chapter 7. This means, although vulnerable individuals within religious groups may look to external values, these complement the idea that their traditions contain ‘the resources to allow them to challenge injustice and oppression.’⁶⁸ Reflexive law seeks to empower the marginalised voices through use of particularised interventions – which may include providing the materials and platform for making use of external concepts, re-purposed within the internal rationality of the group.⁶⁹

One possibility is that internal norms are subjected to an external value such as ‘reasonableness’.⁷⁰ There are a number of difficulties with such an approach. First, because norms are deconstructed within functionally differentiated systems, it is the internal logic of each system that conditions what is reasonable or not. An attempt to impose a reasonableness condition could distort that system, made ‘tepid’ in light of these necessary compromises.⁷¹ Rawls argues that in conditions of persistent moral disagreement, a reasonable consensus may be reached based on equality, liberty and fairness through a process of public reason.⁷² Yet, as Schaeffer puts it: ‘religious

⁶⁷ Martha Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 8.

⁶⁸ Malik (n 43) 218.

⁶⁹ *ibid.*

⁷⁰ Rawls (n 14).

⁷¹ Alexander Schaeffer, ‘The Lukewarm Religions of Rawls’ Overlapping Consensus’ (2014) 24 *Aporia* 1.

⁷² Rawls, *Political Liberalism* (Columbia 2015) 54.

doctrine tends towards absolutism. It often demands that its values take priority over all others.’⁷³ Rawls suggests religious norms should be subordinated to reasonableness or excluded in reaching an overlapping consensus: the religious observer must instead ‘prioritize values external to their religions’ or ‘use their respective religions to rationalize their other, more secular values’.⁷⁴ As explained in Chapter 4, the reflexive paradigm aims to resist the colonisation of the life world by any one system – the risk of filtering religious norms through a ‘reasonable’, secular lens is that this will result in the legalisation of religious values, a loss of coherence within that system and the possibility of its disintegration. It is the latter approach, therefore, which is more promising from the systems theoretical perspective because of our normative pre-commitment to communicative freedom – the idea that no one system of social life demand exclusive obedience.

Yet, we cannot escape the fact that the values must be re-constructed within the bounds of the language and logic of the religious group: the risk that ‘legally structured communications’ fail to connect with the ‘self-understanding’ of religious individuals means that the direct overlay of external values ‘neither seeks nor gains an entry into the intuitive knowledge of participants’.⁷⁵ Reasonableness must be understood as a broad constraint, in need of being particularised within the systems themselves, such that religious individuals become participants in the regulatory process, not merely its subject, and are involved in the development of the meta-scheme of regulation and the

⁷³ Schaeffer (n 71) 11.

⁷⁴ *ibid* 14.

⁷⁵ Habermas (n 16) 48.

particularised solutions envisaged under it. Nonetheless, to ask religious individuals to leave their religious motivations and reasoning aside in favour of a single language, arranged in formal, rational terms, is neither realistic nor compatible with the systems theoretical conception of the differentiated society.⁷⁶

(b) The problem with internal values

Malik explains the role of the insider as being a ‘critic’ with the role of penetrating the ‘hidden assumptions’ within groups. The insider can ‘identify and separate’ the questions that are important and articulate how a practice might be ‘defined or interpreted differently.’⁷⁷ The internal perspective can then rend ‘conscious’ the ‘emotions, beliefs and experiences’ that are hidden, embedded and which have previously ‘defied analytical description’.⁷⁸ So, a second approach to determining the substantive limits of religious family laws is to rely on internal justifications, resulting from a process of internal discourse. In regulatory terms, this might be the outcome of a voluntary regulatory arrangement devised within a system as part of a new, ‘created’ space for decision making.⁷⁹ We could also envisage a model of sanctioned regulation, where the internal solution is authorised by the State – without much significant external involvement in its creation and implementation.⁸⁰ These proposals flow from

⁷⁶ Verschraegen (n 51).

⁷⁷ Malik (n 43) 223-225.

⁷⁸ *ibid.*

⁷⁹ Black (n 17) 118–119.

⁸⁰ *ibid* 119–20.

the recognition that religious groups are diverse and contain a plurality of ideas and traditions which provide the resources for progressive reforms.⁸¹ This plurality forms the space for resistance and for challenges to be mounted against the dominant conceptions of religious norms.⁸² As Malik puts it, albeit not drawing on systems theory, insiders ‘speak the language of the group’ in a way that gives their voices especial power.⁸³ This is what might be expected, given that systems are partially self-reproducing and self-referential, with norms deconstructed and re-constructed within those bounds. Arguing from a different tradition, Denise Réaume makes much the same point: group decision making is socially determined and contextual, where developments arise from ‘debate and reflection’ within a group in much the way that an individual reflects on their own ‘life plan.’⁸⁴

The challenge presented in respect of the adoption of internal solutions and internal values is two-fold: first, the internal voice cannot be assumed to be free from coercion and manipulation. To say that a norm ought to be acceptable if and only if it can be justified internal to that system neglects the risk that the circumstances in which that justification is offered may constrain deliberative freedoms. As Ahmed argues, group autonomy pre-supposes a minimum degree of representivity and deliberation.⁸⁵ Once

⁸¹ Malik (n 43) 223-228.

⁸² *ibid.*

⁸³ *ibid* 219.

⁸⁴ Denise Réaume, ‘Justice between Cultures: Autonomy and the Protection of Cultural Affiliation’ (1995) 29 *University of British Columbia Law Review* 117, 133.

⁸⁵ Farrah Ahmed, ‘Religious Norms in Family Law: Implications for Group and Personal Autonomy’ in Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Hart Publishing 2015) 36.

it is recognised that ‘control of women is ... a recurring feature of traditional cultural and religious communities’ then it becomes difficult to base legitimacy on internal justification alone.⁸⁶ There is, thus, a logical leap between the sensible recognition of the need for local responsiveness to concrete circumstances and the claim to normative relativism, whereby what is ‘right’ must derive from the culture and traditions of that group.⁸⁷ Women and other vulnerable members of religious communities may lack the power to engage in this process on a basis of equality. This means there is a presupposition of *at least* one normative value – the value of substantive equality. If this is correct, internal justifications can only form *part* of the grounds for legitimate exercise of power within a democratic society in the domain of religious family life because these internal justifications must be based on at least one value – participatory equality - which *may* not be shared by all participants.

Because groups contain relatively powerful voices, alongside those with less power, the model of establishing the substantive constraints must actively disrupt and interrogate existing structures of power.⁸⁸ Otherwise, it would remain that those who are presently disempowered not only remain unheard, but their disadvantage would be magnified.⁸⁹ Moreover, as Malik notes, the ‘internalization of harmful practices ... exacerbates women’s vulnerability in these contexts’⁹⁰ as – within the internal

⁸⁶ Malik (n 43) 215.

⁸⁷ Nussbaum (n 67) 8.

⁸⁸ Dunsire (n 21).

⁸⁹ Nussbaum (n 67) 8.

⁹⁰ Malik (n 43) 216.

rationality of that system – practices perceived to be harmful from the external point of view may become rationalizable from the internal perspective over time. The appeal to ‘local knowledge’ cannot determine these questions⁹¹ – but it also cannot be ignored. In fact, from the systems theoretical standpoint, ‘local knowledge’ is the cornerstone for effective legal interventions and is fundamental to the experimentalist concept of constitutionalism which this Thesis expounds.

(c) Social Positivation of Rights

Building on the discussion in the preceding Sections, the systems theoretical paradigm understands rights as ultimately positivised within social systems. In other words, rights obtain their meaning and exist through *communications*– they cannot be wholly captured and described abstractly nor do they exist in some objective form beyond our communications about rights. This insight means that rights must be conceived of as they relate to a broader range of sources across social systems. The principal challenge for those committed to rights-based democracy is how to realise generalised human rights values *within* functionally differentiated systems. The important theoretical linkage between the conclusions in the first part of this Chapter and the partial resolution in reflexive secularity is in the idea of social constitutionalism.⁹² This framework helps analyse the development of *constitutional* qualities within society beyond State institutions.

⁹¹ Nussbaum (n 67) 8-9.

⁹² Angelo Golia and Gunther Teubner, ‘Societal Constitutionalism: background, Theory, Debates’ MPIL Research Paper Series No 2021-08, 1.

This theory of rights explains how the State ‘lives by prerequisites which it cannot guarantee itself.’⁹³ The State is reliant on other constitutional actors to realise human rights norms in practice. Thus, contrary to Cohen’s argument that we must resist any drift towards abandoning *State* control over constitutional norms,⁹⁴ Golia and Teubner’s contention is that such an aspiration in the absolute is impossible.⁹⁵ This conception of constitutionalism, allied with the model of reflexive secularity developed in Chapter 4, exposes the ‘excessive’ reliance on organised political communications as the best (or only legitimate) source of steering.⁹⁶ Moreover, as explained in Chapters 2 and 4, it cannot be the case that any one systems imposes its norms on another – both, because of its possibility of regulatory failure and because of its disintegrative effects on social complexity.⁹⁷

So, the basis of the norms examined in this Chapter must be the product of this process of positivising them within social systems – avoiding either the legalisation of religious norms or the socialisation of legal norms. This is so as to resist the ‘colonisation of the life-world’⁹⁸ by any given system and the risks that entails.⁹⁹ In its

⁹³ Ernst-Wolfgang Böckenförde, ‘Staat, Gesellschaft, Freiheit – Studien zur Staatstheorie und zuym Verfassungsgescht (Surkhamp: 1976), 60 translated in Golia and Teubner (n 92) 1.

⁹⁴ Cohen (n 1) 391–392.

⁹⁵ Golia and Teubner (n 92) 2-3.

⁹⁶ *ibid* 1.

⁹⁷ Gunther Teubner, ‘After Legal Instrumentalism? Strategic Models of Post-Regulatory Law’ in Teubner (ed), *Dilemmas of Law in the Welfare State* (De Gruyter: 1985).

⁹⁸ Jürgen Habermas, ‘Law as Medium’ in Gunther Teubner (ed) *Dilemmas of Law in the Welfare State* (De Gruyter 1985) 211.

⁹⁹ Chapter 3 and Chapter 4, Parts 1(a)-(b).

most radical explication, this is to reject the idea that the State constitution exerts a ‘monopoly on all constitutionality’.¹⁰⁰ Instead, the constitutional order aims to *formalise* and protect the autonomy of different systems, integrate different systems within society and impose limitations on the ‘expansive’ dynamic that emerges from systems.¹⁰¹ If this is the case, the reflexive model of secularity becomes the most effective manifestation of this purpose and the best means of promoting human rights values in a complex, religiously and culturally diverse society.

3 Partial Resolution through Reflexivity

What do these conclusions mean in respect of law and religion— and how *should* the foundational norms that govern their regulation be devised? How might this moral disagreement around the basis of the values to inform the reflexive scheme in the first instance be mitigated through the concept of reflexivity itself? Notably, whilst there is agreement that the sorts of reasons that might be permitted in *public reasoning* should be subject to scrutiny, our *private reasons* may be subject to significant latitude. However, religious family life does not confine itself to the private sphere and such a conception of privacy that would exclude scrutiny is unsupportable.¹⁰² This is because

¹⁰⁰ Golia and Teubner (n 92) 9.

¹⁰¹ Mark Patrick Hanna, ‘Barking Up the Wrong Tree? Systems Theory and the ‘Social Positivation’ of Human Rights’ in Luca Siliquini-Cinelli (ed), *Legal Positivism in a Global and Transnational Age* (Springer: 2019), 160-161. Hanna discusses Teubner’s development of the concept of societal constitutionalism which has taken root in the debate around globalisation. However, these same conceptual frameworks may help explain the constitutional role in the functionally differentiated nation state too. They are discussed in the context of religious and family laws within States throughout this Chapter, unless otherwise indicated.

¹⁰² Cohen (n 41). Cohen rejects the notion that we must decide between a conception of privacy that requires individual subject to be let alone, risking that vulnerable individuals are neglected to private abuses nor a conception that collapses any sense of the intimate sphere, free from State interventions.

decisions about family life are not truly private choices – what occurs within one system will have effects within others - and implicate the State and wider community.

The key idea of this Part is that the *construction* of rights-based bounds should itself be a collaborative project, determined around reflexive principles. The role of law must be to address the different rationalisations for these values that exist within the systems of a functionally differentiated society as part of a multi-functional but differentiated language. The need to understand this dilemma in terms of the functionally differentiated society is both a necessary implication of a fragmented social landscape and central, in principle, to reflexive secularity, which deconstructs the sharp divisions between regulator and the regulated.¹⁰³ Society, from this perspective, is without base or apex and this fact alone requires us to re-configure existing solutions for negotiating the boundaries between systems in law, religion and family in radically new ways.¹⁰⁴ Yet, this approach goes too far because the apparent horizontality underplays the differences in power that is located, for example, in State law and politics as compared with other systems.¹⁰⁵ Therefore, it is better to understand law as a system with a ‘crucial mediating role’ in the process of realising human rights values.¹⁰⁶ Reflexive secularity has the purpose of structuring this mediating role in such a way as to promote critical self-reflection within systems and the realisation of human rights objectives.

¹⁰³ Black (n 17) 126-128.

¹⁰⁴ *ibid* 104.

¹⁰⁵ Fredman (n 12) 153-154.

¹⁰⁶ Gert Verschraegen, ‘Hybrid Constitutionalism, Fundamental Rights and the State: a Response to Gunther Teubner’ (2011) 40(3) *Rechtsphilosophie & Rechtstheorie* 216, 218.

The concept of ‘medial reflexivity’ tells us to apply this mode of communication *to itself* so as to ensure its autonomy, expand its range of applications, promote its adaptiveness and enhance its capacity to guide and control behaviour.¹⁰⁷ Reflexive secularity, therefore, requires that the *quality* of decision making is both procedurally protected but also that the process also be hemmed by *substantive* values. As argued in Part 2, above, the *reflexive* paradigm neither relies on the direct imposition of values nor the direct imposition of external or internal bases for substantive constraints. The solutions that are devised by groups under a meta-scheme are less objectionable to those groups because these solutions amount to the ‘self-legislation by citizens’ with the possibility of re-opening these questions in the future.¹⁰⁸

Rights address the ‘endangerment of individuals’ integrity of body and mind by a multiplicity of anonymous, autonomized and today globalised communicative processes.’¹⁰⁹ The human rights solutions are not expressed as universalistic and unchanging, but just as the religious systems being regulated are expected to change, so too is there space for change within the regulatory scheme and general law.¹¹⁰ However, at the same time, this conception must be committed to some degree of

¹⁰⁷ Hanna (n 101) 161-162.

¹⁰⁸ Habermas (n 16) 120.

¹⁰⁹ Gunther Teubner, ‘Constitutionalising Polycontextuality’ (2011) 20 Social and Legal Studies 209, 211.

¹¹⁰ *ibid.*

boundedness to the process of experimentation over values.¹¹¹ As Fredman explains, deliberation entails an ‘open ended’ quality which seems to belie the normative priority of rights.¹¹² Rights based values are neither ‘fully determined’ because they are contestable but nor are they open to ‘thoroughgoing’, open-ended re-imagining.¹¹³ Reflexive secularity offers a way of maintaining a balance between the *stability* required for norm generation in the functionally differentiated society and the potential to experiment with how these norms are realised *and* the particularised conceptions of those norms themselves. These two aspects of experimentation are inherent in this model: externalities must be rationalised within each system or they will fail to be internalised. At the same time, the now rationalised conception of that value must share a ‘family resemblance’ with the values as initially understood.¹¹⁴ It is fundamental to the analysis in this Chapter that participants will modify norms over time, but if it became the case that those internal conceptions are fully rationalised so as no longer to resemble its initial substance, such an interpretation would no longer be compatible with the ‘bounded’ quality of reflexive secularity.¹¹⁵

¹¹¹ Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 116–117.

¹¹² *ibid* 117.

¹¹³ *ibid*.

¹¹⁴ Ludwig Wittgenstein, *Philosophical Investigations* (Anscombe, Hacker and Schulte trs, Revised 4th edition, Wiley-Blackwell 2009), §66.

¹¹⁵ Fredman (n 111) 116; Fredman (n 12) 72-73.

4 Democratic Experimentalism

In order for a model of reflexive secularity to be effective in realising human rights objectives, the ways in which these substantive values are developed and implemented must be open to deliberative engagement: the bounds of reflexivity ought to be themselves open to *reflexive scrutiny*. In this way, the concept of reflexive law can be partnered with democratic experimentalism.¹¹⁶ This conceptualisation marks a partial disjuncture with Cohen's model of reflexivity.¹¹⁷ Cohen argues that reflexive law is a 'metaparadigm' for selecting between different modes of regulation (forms)¹¹⁸ but nonetheless is a *tool* for effectively achieving State interests. However, as Fredman illustrates, rights-based values are not fully determined¹¹⁹ and within the paradigm of the social constitution, rights must still be realised locally, meaning that they will be re-constructed within the frames of reference of each system. Cohen's model is not directed at *resolving* disputes over contested *values*, only the means of realising objectives effectively.¹²⁰ Her model of reflexive law offers little to negotiate disputes over the appropriateness and legitimacy of the ends *themselves*. So, the problem faced by Cohen is that, without more, we still cannot resolve the challenge of *moral disagreement* over these basic framework norms. Those pre-existing goals (or values) must be separately justified – the fact these are realised *via* the reflexive 'paradigm' does not negate that those same values are *external* to the target systems. Dorf's

¹¹⁶ Dorf and Sabel (n 62).

¹¹⁷ Cohen (n 41).

¹¹⁸ *ibid* 5, 176–178.

¹¹⁹ Fredman (n 111) 117.

¹²⁰ Dorf (n 53) 397–398.

suggested clarification of the reflexive paradigm goes some way to mitigating this challenge in the face of pervasive and deep disagreement.¹²¹ The resolution is to go beyond localised and experimental *implementation* of human rights values to make the case for *normative* experimentalism.¹²² The result of this is that there can be ‘transformation of ends’ upon ‘multidirectional terms’.¹²³ This model reflects the same sentiment as expressed by Macklin, who argues against establishing a once-and-for-all settlement of issues around religious family life in favour of the articulation of principles that adapt over time.¹²⁴ In fact, this connection between values and the implementation of these ends is inherently unstable such that it is a logical extension of the experimental attitude towards *actualising* solutions and *refining the ends* themselves. Fredman reasons that the ‘means to achieving the right bears closely on the meaning of the right itself’ setting up an inter-dependent relationship between the rights based ‘bounds’ and the experimental and localised implementation of solutions.¹²⁵

This Part makes the case that these normative values *should* be open to refinement in light of the ways in which systems actualise them, not just that there is a conceptual slippage between these two projects. The reason for this is to increase the *democratic* dimensions of reflexive law, ensuring community input over the norms and

¹²¹ Dorf and Sabel (n 62); Dorf (n 53) 398–400.

¹²² Dorf and Sabel (n 62) 464.

¹²³ Dorf (n 53) 399.

¹²⁴ Audrey Macklin, ‘Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration’ (2013) 9 International Journal of Law in Context 343, 363–364.

¹²⁵ Fredman (n 12) 157.

goals that relate to religious family life, such that they may transform over time in light of the diversity of experiences in multicultural societies and the new information that will emerge from the process of engaging with religious communities.¹²⁶ Thus, ‘continuous’ deliberation and reflection ought to be built into the institutional realisation of these norms through the concept of democratic experimentalism.¹²⁷ As with the reflexive model outlined in the preceding Chapters, social change is achieved by focusing on the intervention of certain ‘inducements’ to re-examine norms by emphasising the ‘provisionality and experimentalism’ inherent in regulatory arrangements.¹²⁸ As with the reflexive model, democratic experimentalism also seeks to ‘exploit’ encounters between systems: ‘norms should be provisional so that they can be re-examined in the light of experience.’¹²⁹ It is inherent in this model of democracy that departures from pre-existing norms is a consequence social actualisation of human rights norms. However, in deviating from provisional values, the law must build in feedback loops, triggering further reflexivity.¹³⁰ Nonetheless, any deviation must remain bounded by and consistent with underlying *purpose* of that norm.¹³¹ Democratic experimentalism, thus, is a development of the reflexive model which seeks to institutionalise the ‘confrontation between the inherited stock of operating rules and

¹²⁶ Dorf and Sabel (n 62).

¹²⁷ Sabel and Simon (n 62) Part III.

¹²⁸ *ibid* 478–479.

¹²⁹ *ibid* 480.

¹³⁰ *ibid* 481.

¹³¹ *ibid*.

the “irritations” of dissonant experience’.¹³² In this way, democratic experimentalism enriches our conception of reflexive secularity whilst aligning with our insights into religious reform movements being driven by the ‘insider’.¹³³

A model of secularity grounded on these two principles – secularity and experimentalism – could support the regulation of self-regulation by religious groups and make space for their involvement in the development of the broader meta-scheme of norms as well.¹³⁴ Participants in this process are called to consider their positions in light of ‘relevant deliberations and experiences of others’¹³⁵ *as well as* by responding to the more indirect, strategic interventions in these systems that seek to steer that process of deliberation. This synthesis ‘combines the advantages of local learning and self-government’ with the ‘heightened political accountability’ that results from ‘public scrutiny’ of effectiveness¹³⁶ of these strategies *and* their compatibility with the normative underlying values. This proposed model ‘disrupts’ the categories of state, community, religion and family through a more nuanced conception of the democratic ideal.¹³⁷ There are four further aspects of this proposed synthesis that require further elaboration.

¹³² *ibid* 482.

¹³³ Malik (n 43) 115-120.

¹³⁴ Joshua Cohen and Charles Sabel, ‘Directly-Deliberative Polyarchy’ (1997) 3 *European Law Journal* 313.

¹³⁵ *ibid* 314.

¹³⁶ *ibid*.

¹³⁷ *ibid* 315.

First, because we have rejected the strong view that systems are completely communicatively closed, this model is compatible with the sorts of deliberative strategies envisaged by democratic experimentalism. Moreover, even if we accept the idea that the communicative closure makes communication less effective, combining deliberative and strategic interventions experimentally exploits that systems are always normatively ‘open’ to new information.¹³⁸

Second, this experimentalism must not be incompatible with the underlying commitment to rights within reflexive secularity. As explained above, although the communicative relationship that underlines this model is multi-directional between religious groups, regulators and the State, innovations must remain compatible with the underlying purpose of these norms.¹³⁹ However, when infused with appropriate normative values and in taking account of the power structures within systems, a reflexive approach need not risk harm to individual rights but may actually enhance and promote these interests.¹⁴⁰ Likewise, Fredman relies on insights from reflexive law and democratic experimentation to support a model of enforcement better suited to internalising these values within organisations.¹⁴¹ There is no necessary incompatibility between an experimental attitude to regulating family life and the promotion of rights.

¹³⁸ Inger-Johanne Sand, ‘The Interaction of Society, Politics and Law: The Legal and Communicative Theories of Habermas, Luhmann and Teubner’ in Christopher Thornhill, *Luhmann and Law* (1st edn, Routledge 2021) 50-51.

¹³⁹ Sabel and Simon (n 62) 481.

¹⁴⁰ Dorf and Sabel (n 62) Part VIII.

¹⁴¹ Fredman (n 12) 156–157.

Third, concerns about the more evolutionary approach envisaged by the reflexive model in response to real and present potential harms can also be addressed: reflexive law does not suggest there cannot be *any* direct forms of regulation. The choice of legal norms *and whether to intervene at all* ought to be informed by the same *reflexive attitude*. Moreover, the thrust of this Thesis as a whole is that indirect modes of steering religious groups may be more effective in precipitating reform: there is no assumption that a more direct mode of regulation will always provide a solution.

Fourth, it is still possible, and in fact, logical to point out that a reflexive system is ultimately still unable to transcend the intractable conflict of norms – does it still mean that, ultimately, *some* value system takes priority? Without some normative priority in terms of meta-norms, we would be left with an infinite regression seeking out ever more ‘prior’ values.¹⁴² Ultimately, although the meta-norms are open to experimentation over time, they must assume priority as constraints on the process of reflexivity and must remain relatively stable over time. This is why the modification of these norms must be triggered by established processes, monitored and evaluated in a ‘rolling’ fashion. However, this ultimate normative priority which arises as a result of the fact that State law – albeit not being assumed to take a hierarchically superior position over other systems – is nonetheless still a highly powerful means of realising rights. The ‘sting’ of this conclusion can be lessened if we accept that these values are constructed; open to contestation and interpretation; implemented more indirectly and locally that is assumed in formal law; and that the *purpose* of these normative values is to uphold functional differentiation and individual freedoms, rather than to expand

¹⁴² *ibid* 72.

the system of law into private and family life. Because of the collaborative, dynamic and experimental nature of this proposed model the values that emerge over time can be viewed from within religious systems as the product of a more collaborative process. Finally, this quality of legal systems to regard themselves as neutral and superior¹⁴³ may exacerbate the risk of legal expansionism within a model of formal or substantive law, resulting in the intrusion of *legal* values in religious family life. The additional value of this proposed model based on reflexivity and democratic experimentalism is that this introduces a further safeguard against the colonising tendency of law to be all-encompassing (in the ways that religious identity can also become all-encompassing). In other words, the experimentalist dimension of this proposal is essential to prevent *law* (including the *legal* conception of human rights) from dominating other systems, *exposing* legal conceptions of rights to ‘open and informed scrutiny’, both internally and externally.

(a) The Normative basis for Reflexive Secularity

How democratic is reflexive secularity? As Cohen argues, particularised legal systems (those in which law is differentiated according to religious group membership) often entail delegating power from a democratic State to un-democratic groups which do not abide by the same human rights standards.¹⁴⁴ In practice, therefore, this proposal requires us to consider two further points: first, how could a democratic network be constructed in relation to the regulation of religious family life? Cohen criticises the

¹⁴³ Robert Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 HLR 4.

¹⁴⁴ Cohen (n 41) 386, 390.

proposition that religious groups could have a *democratic* role in regulating family life if the norms applied by those groups do not reflect liberal democratic principles like freedom of equality.¹⁴⁵ Second, how can we refute the critique that in relying on a network of actors, we are either *privatising* questions of societal importance such as the question of ascertaining financial matters upon divorce or uncritically reifying prevailing religious positions through any form of qualified or contingent legal recognition? To put this criticism at its strongest, is it correct to say that even contingent legal recognition of religious groups ‘cedes public control’ to ‘*non-public, and publically unaccountable, private authorities*’ with exemptions from the ‘general laws of the polity ([including] civil codes and human rights).’¹⁴⁶ There are three principal responses to this critique.

First, the recognition of functionally differentiated systems and the normative implication that these are best regulated through a network of actors need not mean the abandonment of any conception of a political community: we can envisage a broader community based on ‘a multitude of overlapping collective identities’¹⁴⁷ which is characterised by a commitment to equal participation. Although the concept of a representative body of ‘people’ is fragmented where society is understood systemically in terms of communications¹⁴⁸ the functionally differentiated account of society upon which reflexive secularity is based can be *democracy enhancing*. The increased

¹⁴⁵ *ibid* 382, 387-389.

¹⁴⁶ *ibid* 390.

¹⁴⁷ *ibid* 705.

¹⁴⁸ Eva Sørensen, ‘Democratic Theory and Network Governance’ (2002) 24 *Administrative Theory & Praxis* 693.

complexity of social problems characterised by ‘blurred and contextual understandings’ of the nature of the problem and the contours of the solutions makes it difficult for the State alone to act effectively.¹⁴⁹ This challenge is acute in relation to religious family law: no single system holds a monopoly on insight into the complex and overlapping relationship between religions, family and law. What is therefore required is not merely more information – or greater representivity within the existing paradigm - but radical re-consideration of the *locations* of power. Reflexive secularity spreads power across a network committed to shared, fundamental values where these values adapt to the experimentation within these groups. So, as Balchin remarks, the most successful reforms offer ‘something for everybody’, incorporating multiple frames of reference through a network of state and non-state actors.¹⁵⁰

Sørensen reasons that the multiplicity of systems – and the multiplicity of identities assumed by individuals – means there is less likely to be the ‘political closure’ which leads to exclusion and antagonism between groups.¹⁵¹ Sørensen and Torfing argue that involving a range of affected groups helps overcome fragmentation and resistance to change and *enhances* democratic legitimacy.¹⁵² Functional differentiation and communicative closure challenge the assumption of a single political community

¹⁴⁹ Eva Sørensen and Jacob Torfing, 'Introduction Governance Network Research: Towards a Second Generation' in Eva Sørensen and Jacob Torfing (eds), *Theories of Democratic Network Governance* (Palgrave Macmillan 2007) 5.

¹⁵⁰ Cassandra Balchin, 'Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change' (WLUML 2010) 216–217, 222–224
<<http://www.wluml.org/ru/bibliography/wrrc/content/“family-law-contemporary-muslim-contexts-triggers-and-strategies-change”>>.

¹⁵¹ Eva Sørensen and Jacob Torfing, 'Theoretical Approaches to Democratic Network Governance' in Eva Sørensen and Jacob Torfing, *Theories of Democratic Network Governance* (Springer 2007) 233. See, Chapter 4 Part 3(b) for a broader discussion of the democratic quality of reflexive secularity.

¹⁵² *ibid* 4.

and a single regulatory unit but do not mean that reflexive secularity must be anti-democratic.

Second, a reflexive solution focuses on a meta-framework under which groups devise their own regulatory schemes and the conditions under which these processes must occur which thereby enhances participatory democracy. Whilst decision making is not wholly *devolved* to groups, reflexive secularity relies on their participation. Because of the increased functional differentiation of semi-autonomous systems these networks are able to respond to the ‘proliferation of relatively independent public and private organisations’ with competing and (potentially) incompatible objectives.¹⁵³ Reflexive secularity thus forms part of this new ‘societal dynamic’, characterised by the contested boundaries between levels of governance.¹⁵⁴ A conception of democracy as a relationship between semi-autonomous units of political governance challenges Cohen’s concern that a hybridity is a threat to democratic principles.¹⁵⁵ Instead, however, it is the *democratic regulation* of self-regulation which underpins the normative legitimacy of reflexive secularity and counters the notion that network governance (or joint governance) is democracy diminishing.¹⁵⁶ Although the State sets the normative and procedural bounds in which this process occurs, the community applies those norms and processes in devising their own norms and processes in family life.

¹⁵³ *ibid* 5.

¹⁵⁴ *ibid* 5–6.

¹⁵⁵ Cohen (n 1).

¹⁵⁶ Sørensen (n 148) 696.

This approach maximises group autonomy, minimises misrecognition and promotes group participation in this exercise of democratic experimentalism.¹⁵⁷ Sørensen argues that the State takes on the role of ‘meta-governor’ or the institution that coordinates and distributes democratic functions which in fulfilling this task is guided by human rights values.¹⁵⁸ As Dreyer-Hansen argues, there are still questions about how governance networks might enhance or challenge our perceptions of democracy and participation but there are distinct ways in which these may enhance these goals. Rather than to generalise about the democratic legitimacy of reflexive models, we should evaluate regulatory solutions to religious family challenges against the ‘participatory norm’ in pursuit of the common good.¹⁵⁹ So long as sufficient processes are in place to ensure equal and genuine participation, this approach to religious institutions could be democracy enhancing. Re-framing this within the systems theoretical perspective, the participatory norm should be understood as embodying the idea of promoting communicative freedom within a functionally differentiation life-world. Chapter 6 then takes this idea further, to argue that participation, forms an aspect of substantive equality, and is a necessary component of reflexive secularity.

Third, the reflexive model increases representation because many democratic systems poorly represent their religious minorities as a result of a deficit in access and

¹⁵⁷ Sabel and Simon (n 62); Sørensen (n 148).

¹⁵⁸ Sørensen (n 148) 704–705.

¹⁵⁹ Allan Dreyer-Hansen, ‘Governance Networks and Participation’ in Eva Sørensen and Jacob Torfing (eds), *Theories of Democratic Network Governance* (Springer 2007) 256–258.

influence within the political sphere.¹⁶⁰ Ahmed argues that religious institutions, such as religious tribunals, may thereby be democracy enhancing because they can form a locus for decision making.¹⁶¹ A reflexive solution might increase representivity – by ensuring that those affected are intimately concerned with the creation, development and revision of the norms that govern religious tribunals. Fourth, this approach promotes subsidiarity.¹⁶² It devolves decision making to those closest to being affected, increasing legitimacy and reducing the risk of error and misrecognition. However, what remains in each case is the need for appropriate safeguards and procedural and substantive limits to ensure fairness. Because, whilst groups may be better recognised in this manner, there remains a risk that vulnerable individuals will not be. As Sørensen and Torfing argue, this opens the door to a ‘complex and radical’ discussion about the ‘future of democracy’.¹⁶³

The present reality for religious family law is characterised by its ‘dispersal’¹⁶⁴ of power: from the State through its constitutional position its formal laws and its attitude towards religious family law and alternative dispute resolution; organised religious institutions, which may establish their own tribunals; and ultimately, to communities, families and individuals that spontaneously develop informal means of resolving disputes. The normative underpinning of reflexive secularity is that it not

¹⁶⁰ Ahmed (n 85) 40-45.

¹⁶¹ *ibid.*

¹⁶² Nick Barber, *The Principles of Constitutionalism* (OUP 2018), Chapters 5, 7.

¹⁶³ Sørensen and Torfing, (n 151) 233.

¹⁶⁴ Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145.

only navigates the ‘strategic’ necessity to seek different regulatory solutions, but because it actively enhances the democratic quality of a functionally differentiated society.

5 Conclusion

This Chapter makes the case that reflexive secularity cannot avoid assuming a normative stance in relation to other systems and that there are necessary reasons why a reflexive model ought to be underpinned by substantive human rights values. Moreover, a ‘reflexive’ attitude should apply in relation to determining the normative bounds within which the reflexive model operates which are ‘broad enough’ to leave the space for ‘particular’ solutions’ and ‘local, contextual development of the content of these norms’.¹⁶⁵ The introduction of democratic experimentalism enriches this conception of secularity: this openness to *normative* experimentalism has the potential to create a dynamic, multi-directional process of norm creation which is nonetheless stabilised by procedural limits and the concept of family resemblance. Although these norms must be particularised within religious systems, these values must also retain sufficient resemblance to their initial elaboration. So, in answer to Eekelaar’s challenge about the risk of ‘foisting’ value commitments on others – without resorting to empty commitments to on-going cross-cultural dialogue¹⁶⁶ – the next Chapter will apply the framework developed here in support of three particular values: relational autonomy, substantive equality and care. These will then be utilised as the normative criteria for justifying state intervention in religious family alongside the criterion of reflexivity already defended in Chapter 4.

¹⁶⁵ Cohen (n 41) 178.

¹⁶⁶ Eekelaar (n 7) 32-33.

CHAPTER 6

AUTONOMY, EQUALITY AND CARE IN RELIGIOUS FAMILY LIFE

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Introduction

This Thesis has sought to establish three central ideas: first, that a modified systems theoretical conception of society should form the basis for understanding the relationship between law and religion and for developing regulatory solutions; second, that the best conception of secularity ought to be rooted in the concept of reflexivity; and third, that this model of secularity must also be underpinned by human rights values. The systems theoretical conception of society directs our attention to maintaining systematic stability *and* individual communicative freedoms through an

indirect mode of regulation. Reflexive secularity highlights that the most effective means of securing human rights in cases where the pre-existing distribution of power is unequal is through indirect interventions that modify the environment in which systems are situated. This is the reflexive criterion. However, effectiveness from the systems theoretical perspective cannot be the sole basis for mediating this relationship because it lacks any internal limitations. Instead, the contribution of Chapter 5 was that we must look to some normative constraints to structure the *circumstances* under which interactions between law and religion are to take place and *to what extent* any such interventions are justified.

If reflexive secularity is embodied by values, then which values ought these to be? As discussed in Chapters 4 and 5, secularity is not synonymous with neutrality nor does it prescribe the best or only way in which the law-religion relationship should be structured in the context of family life. Eekelaar argues that the fundamental touchstone for intervention ought to be welfare.¹ Although welfare does provide a framework for decision making, it remains open whether it is right to judge welfare from an internal or external perspective or whether welfare offers a sufficiently robust and principled limitation against State overreach. Sen, for example, argues that we must look to other values such as ‘fairness and justice’ to choose between different legal and social ‘forms.’² Yet, without further specification these values remain too indeterminate.

¹ John Eekelaar, ‘Laws, Values, Cultures’ in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill | Nijhoff 2015) 35-36; John Eekelaar, ‘Law and Community Practices’ in Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Hart Publishing 2015) 22.

² Amartya Sen, ‘Secularism and its Discontents’ in Rajeev Bhargava (ed), *Secularism and Its Critics* (OUP 1998) 468.

Both Eekelaar and Sen attempt to resolve these questions about the right basis for the relationship between State law and religion. It is the project of this Chapter to articulate three normative values to respond to this challenge: relational autonomy, substantive equality and care. The first Part of this Chapter explains the relationship between human rights and systems theory in family life: that individual and systematic freedoms are closely related but, in agreement with Eekelaar, the protection of systematic stability is justified only on the basis of individual rights and not as part of some group right to exist in perpetuity.³ In explaining this relationship, a line of cases concerning transgender identity within the Jewish faith are examined as an example.⁴

The second Part introduces the three values and relates them to the preceding Chapters by situating them within the reflexive paradigm. The third Part synthesises these values and concludes that institutional support for religious family norms need not necessarily be a threat to relational autonomy, relationships of care, or substantive equality but could have the *potential* to promote these ends. The argument of Chapter 5 was that we should adopt an experimentalist and participatory conception of society subject to sufficient boundedness and stability at a normative level. It was argued that the concept of ‘family resemblances’ could help offer this stability.⁵ The loss of these family resemblances to the values justified in this Chapter would mean deviation from the underlying purpose of these norms as stabilising the functional differentiation of society and promoting communicative freedoms. Loss of their compatibility with the

³ John Eekelaar, ‘Law and Community Practices’ (n 1) 28–29.

⁴ *J v B (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4; *Re M (Children)* [2017] EWCA Civ 2164.

⁵ Ludwig Wittgenstein, *Philosophical Investigations* (Anscombe, Hacker and Schulte trs, Revised 4th edition, Wiley-Blackwell 2009), §66.

reflexive criterion would therefore necessitate new reasons to be provided in support or rejection of those developments. This Chapter, therefore, articulates the broad normative values that animate reflexive secularity. In Chapter 7, these threads will be drawn together: State law ought only to regulate religious family norms where this is effective from the systems theoretical perspective *and* normatively justified on the basis of relational autonomy, substantive equality and care. In such cases, regulation ought primarily to be indirect: regulating the bounded self-regulatory potential of groups through their institutions to experiment in terms of both substantive rules and procedures.

1 Communicative Freedoms in Religious Family Life: Relationality and Context

In Chapter 4 it was argued that reflexive secularity has both a reflexive dimension and a normative dimension.⁶ Underpinning both of these dimensions is a commitment to rights, which are protective of *communicative freedoms* and *systemic stability*⁷ and emerge as part of an *institutional* analysis⁸ of the functionally differentiated, democratic society. Rights *protect and stabilise* functional differentiation, which in turn maintains individual ‘spheres of action.’⁹ However, as argued in Chapter 5, rights are *positivised* within systems, including the systems of family life. As such, certain qualities about the family *as sub-systems* ought to be explained and brought into

⁶ For a full discussion of the role of rights within systems theory, see: Chapter 4 Part 1(a)-(b).

⁷ Gert Verschraegen, ‘Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory’ (2002) 29 *Journal of Law and Society* 258.

⁸ Niklas Luhmann, *Grundrechte als Institution (Fundamental Rights as an Institution)* (Duncker & Humblot 1958).

⁹ Verschraegen (n 7) 262.

relation with this conception of rights. It is the argument of this Part that family life is unique, in that its coding is relational, intimate and interpersonal.¹⁰ From a different theoretical background, Eekelaar makes the same essential argument: ‘if personal law is to be respectful, it must be informed throughout by recognition of the value of the intimate.’¹¹ As such, the conception of rights which safeguard the communicative freedoms and systemic stability which concern reflexive secularity within the family must likewise be relational and sensitive to context.

What does it mean for a communication to be *intimate*? Intimacy must be understood by reference to the function of the family: recognising the individual in the wholeness.¹² Therefore, intimacy occurs when ‘a person’s world becomes relevant for another person, and when this is reciprocated.’¹³ What this implies is that for the concept of reflexive secularity to be particularised within family life, the values that underpin it ought to be brought into relation with the intimate. There is a two-fold answer to the question of when and to what extent law and religion ought to interact: the reflexive criterion and the normative criteria. However, both of these dimensions ought to be understood in light of the unique qualities of the family.

An example assists with demonstrating this link in the argument between communicative freedom and the specific values of relational autonomy, substantive equality and care. The High Court decision of *J v B* [2017] and the decision of the Court

¹⁰ Claudio Baraldi and others, Catharine Walker (trs), *Unlocking Luhmann* (Bielefeld University Press 2021) 240.

¹¹ John Eekelaar, *Family Law and Personal Life* (OUP 2017) 69.

¹² Baraldi (n 10) 239.

¹³ *ibid* 240.

of Appeal in *Re M (Children)* [2017] concern a transgender woman who was excluded from her Charedi community and denied access to her children.¹⁴ Here, the all-inclusive demands of the group are self-evident threats to her interests, including her ability to access a range of social systems and to experience herself in her wholeness within the context of her family life. The decisive concern of the judge was the impact of community rejection on the children, which naturally flows from the legislative priority given to their interests.¹⁵ The ‘worst outcome’ was said to be that in permitting a meaningful relationship between the transgender parent and her children, ‘the mother and children [would] be excluded from the community.’¹⁶ The individuals in this case are embedded in their social context through these relationships of care, where the form of communication employed is both relational and contextual as a transgender woman and as a member of a religious group.

Jackson J reasoned that maintaining these connections would ultimately entail ‘a negative impact on how they function in the widest possible sense both now and in the future.’¹⁷ The Court of Appeal criticised way that Jackson J became mired in this ‘constellation of cultural and religious concerns’ but, in fact, such considerations are necessary in order to evaluate the welfare of the children from the systems theoretical perspective. The dynamic between autonomy, interpersonal relationships and community demonstrates the deep interrelation of these concepts: the latter two being

¹⁴ This discussion draws from: Tristan Cummings, ‘Utilizing Systems Theory Insights and Reflexive Law to Negotiate the “Collision Between... Un-Connecting Worlds” in Family Law’ (2021) 9 *Journal of Law, Religion and State* 212.

¹⁵ Children Act 1989, Section 1.

¹⁶ *J v B* (n 4) [65]: ‘mother’ refers to the biological mother and not the transgender parent.

¹⁷ *ibid* [183]-[185].

the sites in which autonomous decisions are realised and given meaning. These insights show that the normative criteria required to justify State interventions in religious family life ought to embody reflect the unique relationships which develop within the family: or, in other words, the form of communicative freedoms protected in the *family* context require the values of autonomy, equality and care to be construed relationally and contextually.

2 Reflexive Values: Autonomy, Equality and Care

The account of rights developed in this Thesis is based on certain empirical observations about society¹⁸ and certain normative preconditions around liberal democracies. So, this conception of rights can be applied as the basis for the limitations on the reflexive process. The three substantive values align with the systems theoretical framework through the distinctively intimate, contextual and relational quality of family life.¹⁹ However, as made clear in Chapter 5, the reflexive project is dynamic and multi-directional as it neither reinforces the values of religious communities *nor* crystalises an inflexible attitude on the part of the State.²⁰ A systems theory account of rights secures the possibility of participation across multiple systems, allowing individuals to develop their identities and personality and to create and develop

¹⁸ Niklas Luhmann, *Social Systems* (Stanford University Press 1995); Verschraegen (n 7) 262.

¹⁹ Sandra Fredman, *Women and the Law* (Clarendon Press ; Oxford University Press 1997) 35–37.

²⁰ The dynamic quality differentiates this project from that of Cohen, as explained in Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (2nd print., 1st paperback print, Princeton 2004). It also addresses the concern that any form of ‘particularist’ model of religion and law must lead to a static or uncritical attitude to prevailing religious (or legal) values: see, Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 IJCL 380.

relationships and life projects. These imperatives derive directly from the systems theoretical account of modern society embody the values of relational autonomy, substantive equality and care. In this way, these values support systemic stability as the medium through which social projects are accessed and protect a sphere of individual autonomy within those systems.

This Part introduces the substantive values that underpin reflexive secularity. As part of a constructivist conception of rights these values are outlined and justified in relation to the context of religious family life, recognising that these values must be realised within systems as part as part of a democratic and experimentalist constitutionalism – in which individuals, networks and groups play important roles as constitutional actors.²¹ The process of norm development is on-going and collaborative, and is open to new meanings and interpretations emerging over time so long as these remain compatible with the underlying meta-framework offered by the systems theoretical account of rights presented, namely, adherence to the reflexive criterion.

(a) Relational Autonomy

The question of whether religious family laws - whether manifested as the recognition of religious institutions by the state legal system or as a more institutionalised form of religious laws - promote or harm the personal autonomy of vulnerable individuals is central to the supposed (il)legitimacy of these regimes.²² For example, Ahmed puts the

²¹ Martha-Marie Kleinhans and Roderick Macdonald, 'What Is a "Critical" Legal Pluralism?' (1997) 12 Canadian journal of law and society 25. Cohen, *Regulating Intimacy* (n 20) 52.

²² Susan Moller Okin and others, *Is Multiculturalism Bad for Women?* (Princeton University Press 2011).

question of ‘personal autonomy’ at the very heart of her analysis of religious personal laws in India.²³ Relying on Raz’s conception of positive autonomy, Ahmed argues that religious autonomy is ‘the ideal of shaping one’s own religious life.’²⁴ From this perspective, Ahmed argues that the personal law system in India is generally autonomy reducing²⁵ whilst access to religious tribunals with appropriate safeguards can be autonomy expanding because this provides valuable options for shaping a person’s religious life and communal identity.²⁶ Autonomy is also central to the systems theoretical account of society, as explained in Part 1 of this Chapter, because it secures communicative freedoms and systemic stability. It is through ‘free choice’ that a ‘varied and contradictory multitude of norms, roles and institutions’ are developed and experienced.²⁷ In fact, as explained in Chapters 2 and 4, the freedom of the individual from the hegemony of any single system is fundamental to a functionally differentiated society and the protection of that autonomy is fundamental to the social order.

This section examines the concept of personal autonomy and highlights two issues: first, the role that private agreements and exit play in the law as means of promoting autonomy. The second sub-section introduces the relational insight which not only better aligns with the systems theoretical account of society and the specific

²³ Farrah Ahmed, *Religious Freedom under the Personal Law System* (OUP 2016).

²⁴ *ibid* 54, 57–58.

²⁵ *ibid* chapters 6 and 7.

²⁶ Farrah Ahmed and Senwung Luk, ‘How Religious Arbitration Could Enhance Personal Autonomy’ (2012) 1 *Oxford Journal of Law and Religion* 424.

²⁷ Verschraegen (n 7) 276.

context of the family but also provides the additional normative content to fashion an effective regulatory solution through relational contract law.

(i) Contract, private agreement and exit

Law is capable of facilitating individual freedom by creating the space for private agreement, whether this relates to the decision to enter a marriage or the terms on which that marriage is to be ended.²⁸ In some respects, this facility might advance the ‘decisional autonomy’ of individuals and groups that have been disfavoured by law.²⁹ The use of pre-existing legal mechanisms such as contract and arbitration frameworks in Canada and England, for example, facilitated the emergence of religious alternative dispute resolution.³⁰ Such mechanisms have the *potential* (although, recognising that this potential may not be realised) to promote autonomy and equality as it allows individuals to shape the form of their family life through ‘inherently egalitarian’ contractual norms.³¹ In a similar fashion, Ahmed argues that ‘contractual norms’ governing process could be decided ‘privately by the parties’ or be determined by religious institutions through their standard forms³² but in either way, she reasons this arrangement can expand autonomy.³³ On the other hand, broader social factors that constrain autonomy mean that this emphasis on private ordering cannot be a ‘panacea’

²⁸ For example: Stephen Cretney, ‘Private Ordering and Divorce: How Far Can We Go?’ [2003] *Family Law* 399.

²⁹ *ibid* 399; Jana Singer, ‘The Privatisation of Family Law’ [1992] *Wisconsin Law Review* 1444, 1518.

³⁰ See, Chapter 3, Part 1(c).

³¹ Singer (n 29) 1518–1519.

³² Ahmed (n 23) 172–173.

³³ Ahmed and Luk (n 26).

to the flaws of a ‘public’ system of ordering³⁴ whether as part of the specific issue of religious family life or more broadly.³⁵ Moreover, as argued in Part 3(c)(i) of Chapter 4, the model of regulation envisaged by reflexive secularity transcends the distinctions between public and private regulation and formal and substantive law. Instead, it directs us to rely on a form of regulated autonomy, regulatory partnerships and a rejection of the pre-existing distribution of social power. The relational insight explained in Part 1 allows for a more radical and accommodating conception of autonomy as the basis for examining regulatory solutions.

The concept of cultural voluntarism is undergirded by respect for individual autonomy and the State’s duty to promote welfare and is reliant in the first instance on standard legal doctrines like contract.³⁶ The traditional liberal solution to the question of multicultural vulnerability has been that so long as the decision to be subject to religious norms is free and informed and the individual has the right to ‘exit’ that system, then the State ought to respect those choices unless public policy considerations intervene.³⁷ Reliance on the remedy of *exit* is ‘ad hoc and extreme’ – with this option assuming such prominence in this model as a result of its focus on a liberal legal framework.³⁸ Because communal acceptance satisfies a significant ‘social

³⁴ Singer (n 29) 1540–1556. Audrey Macklin, ‘Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration’ (2013) 9 *International Journal of Law in Context* 343.

³⁵ See, for examples: *Radmacher v Granatino* [2010] UKSC 42 and *V v V* [2011] EWHC (Fam) 3230, [36]. For a criticism of this emphasis on autonomy in family law, see: Alison Diduck, ‘Autonomy and Family Justice’ (2016) 28(2) *Child and Family Law Quarterly* 133. Such arguments against private ordering on the basis of pre-existing inequality of bargaining power have been long recognised: David MacLellan, ‘Contract Marriage – The Way Forward?’ (1996) 23 *Journal of Law and Society* 234; Macklin (n 34).

³⁶ Eekelaar, ‘Law and Community Practices’ (n 1) 22–23.

³⁷ *ibid.*

³⁸ Prakash Shah, ‘Shadow Boxing with Community Practices: A Response to Eekelaar’ in Mavis Maclean and John Eekelaar (n 1) 49.

need', with the exercise of the right to exit resulting in 'harms'³⁹ State law may intervene to remedy these injustices if they cross some threshold of severity. The voluntarist model does, however, reflect two aspect of the systems theoretical account: first, that the law *re-constructs* religious norms within its own coding, and in doing so imparts assumptions that may not account for the particularities of religious membership. Second, albeit not expressed in these terms, voluntarism seeks to maintain the functional differentiation of religious and communal life from the colonising tendency of State law. Eekelaar explains that law is bureaucratic and blunt and has a logic that sits uncomfortably with the reality of family life.⁴⁰

However, the conception of freedom that animates this model also embeds unrealistic assumptions about behaviour, autonomy and the possibility of exit within groups.⁴¹ The voluntariness of entry to and exit from cultural norms ought to be scrutinised, requiring 'vigilance' in respect the further questions about 'which' women have given their consent; 'when'; 'how' and 'under what personal, social, economic or political conditions?'⁴² The liberal framework of autonomy is insufficiently developed to capture these questions. Herring explains that 'privileging individualist autonomy' puts the 'autonomy of the parties to leave their relationship and pursue their own life

³⁹ Farrah Ahmed, 'Personal Autonomy and the Option of Religious Law' (2010) 24 IJLPF 222, 229-230.

⁴⁰ Eekelaar, 'Law and Community Practices' (n 1) 16.

⁴¹ Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9 Theoretical Inquiries in Law.

⁴² Maleiha Malik, "'The Branch on Which We Sit': Multiculturalism, Minority Women and Family Law' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 214.

goal’ at the centre of the debate, when such a decision can be catastrophic.⁴³ Once a relational understanding of autonomy is adopted, it is possible to enrich the strategies promoted by Eekelaar to address some of these limitations.⁴⁴ Moreover, the right of exit from voluntary religious obligations does not address how state norms and community practices ought to be reconciled nor does it—without recourse to some other concepts—provide guidance about State interventions. Drawing these threads back together, we can see how the voluntarist insight— that religious norms ought generally not to be legally enforceable *unless* it justified on the basis of welfare – can provide a valuable starting point. Instead, this insight should be re-formulated to say that religious norms ought not to be legally enforceable except so as to *promote reflexivity* and *secure the values* expounded in this Chapter.

(ii) Relational autonomy

Although arguments from autonomy are important, the conception of autonomy as self-authorship misses crucial dimensions— instead, autonomy must be recognised as a contested concept⁴⁵ that can be re-fashioned in light of the lived reality of religious individuals in the context of the family.⁴⁶ This sub-section examines the ways in which the relational insight can counter-balance and enrich this analysis of autonomy.⁴⁷ As explained in Part 1(c), the form of communicative freedom within the family is unique

⁴³ Jonathan Herring, *Relational Autonomy and Family Law* (Springer 2014) 17.

⁴⁴ Russell Sandberg and Sharon Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) 6 OJLS 137.

⁴⁵ Ahmed (n 39) 224.

⁴⁶ Maleiha Malik, ‘Feminism and its “Other”: Female Autonomy in an Age of “Difference”’ (2009) Cardozo Law Review, 101-102.

⁴⁷ Sandberg and Thompson (n 44).

due to the special quality of the family as a system in which individuals communicate intimately. This intimate mode of communication is therefore relational because it facilitates the recognition of the individual as a whole person in relation to another.

Two examples help concretise this link between communicative freedom, autonomy and the family. First, the English case of *AI v MT* [2013], concerning an Orthodox Jewish couple's decision to submit their dispute to the New York Beth Din. The arbitration to which the couple agreed to enter was intended to resolve all aspects arising from the breakdown of their marriage, including custody, contact, financial issues and the religious divorce. The dispute in this case centred on the country in which the children would live. The father, a Canadian citizen, sought for his children to join him in Canada from the UK. He made a claim under the Hague Convention 1980 for the return of his children whilst the mother initiated proceedings under the Children Act 1989 to prevent the father and the paternal grandfather from removing the children from the UK.⁴⁸

Baker J remarks that the 'support of their extended families' was of fundamental importance and identifies the 'emotional support' was not only 'beneficial to the parties' but that also 'served to underline the strength of the parties' family identity as a component of their faith'.⁴⁹ The judge recognised that this dimension of interconnectedness and relationality was not only illustrative of a close family connection. For many religious individuals, relationality aligns with their religious faith through *connections* with others. In *AI v MT* the court was able to reconcile the religious

⁴⁸ *AI v MT* [2013] EWHC 100 (Fam) [3]-[10].

⁴⁹ *ibid* [34].

imperatives of the parties' and their relational perspective to decision making with the general legal provisions relating to family breakdown. The impact of this on the outcome of the case meant that the High Court gave effect to the outcome of a rabbinical authority's arbitration decision reached in New York. Despite this not being a binding process, both the financial element and the decision in relation to the children were upheld.

Second, in Shah-Kazemi's early empirical work on Islamic tribunals in the UK, a similar insight is present.⁵⁰ Shah-Kazemi argues that the establishment of the Muslim Law Sharia Council (MLSC) could be seen as part of the general religious duty to develop the Sharia in the 'public interest' for the promotion of five core Islamic principles - the protection of 'religion, life, intellect, lineage and property.'⁵¹ These principles encompass a relationality which would be ignored by a singular focus on personal autonomy. For example, 'protecting religion' includes 'social and familial tenets'. Likewise, 'life' is understood as promoting 'safe relationships... that are free from abuse and harm.'⁵² Moreover, the close role of family (sometimes positive, other times negative) is present in the formation of marriages (both arranged and forced) and in their dissolution.⁵³ This common thread of relationality exists across the jurisdictions

⁵⁰ Sonia Nûrîn Shah-Kazemi, 'Untying the Knot: Muslim Women, Divorce and the Shariah' (The Nuffield Foundation 2001).

⁵¹ *ibid* 9.

⁵² *ibid*.

⁵³ *ibid*, 63-64.

studied⁵⁴ such that adult relations are not always understood as individualistic projects but as knitting together intergenerational family ties.⁵⁵

Therefore, family relationships and responsibilities modify the ways autonomy can be exercised. The discussion of *AI v MT* and Shah-Kazemi's research show the relationality inherent in family life and as an aspect of religions.⁵⁶ Thus, relational autonomy elevates community to form part of our context of choice, situating the individual within 'a community of inter-relationships, which constrains as well as facilitates ... choices and opportunities.'⁵⁷

(iii) The meaning of relational autonomy

Family relationships and responsibilities modify the ways autonomy can be exercised. Relational autonomy recognises both the agency and subjectivity of the individual in light of our interconnectedness. Brown explains the concept of relational autonomy as about 'situating the 'autonomy' of individuals more explicitly within the social context of lived reality.'⁵⁸ This is an 'umbrella' concept, capturing the key ideas that 'persons are socially embedded, that agents' identities are formed in the context of social

⁵⁴ Julie MacFarlane, 'Practicing an 'Islamic imagination': Islamic divorce in North America' in Anna Korteweg and Jennifer Selby (eds), *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto Press 2012) 41.

⁵⁵ *ibid.*

⁵⁶ Sylvie Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' *IJCR* 16 (2008) 475, 477-478 but especially, the studies cited at fn9.

⁵⁷ Fredman (n 19) 36.

⁵⁸ Alan Brown, *What is the Family of Law* (Bloomsbury 2019) 191, but see also 175-180.

relationships and shaped by a complex of intersecting social determinants.’⁵⁹ Although Brown critiques the concept of relational autonomy as being vague, this conception of autonomy ‘derives’ directly from the systems theoretical insights. Because individuals mediate their experiences through systems, ‘genuine autonomy and self-determination [cannot] be realized by an isolated individual’.⁶⁰ As Verschraegen explains:

... rights are at the same time communicative or social rights, [because] they enable the individual to participate in the different communicative subsystems of society... *to become a person*⁶¹

The functionally differentiated society provides valuable options to afford individuals the ability to develop a ‘social identity’. It is only through our relationships that individuals are able to exercise and realise their autonomy because individual freedom presumes the existence of a social community.⁶² Thus, the relational insight not only captures a feature of the cases but is also grounded on and necessitated by a proper understanding of the interconnectedness between individuals and systems as captured by the reflexive criterion.

This is reinforced by the fact that some religious individuals consider this interconnectedness to be an intrusion.⁶³ ‘Family pressure’, ‘coercion’ and ‘traditional

⁵⁹ Catriona Mackenzie and Natalie Stoljar, ‘Introduction’ in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Essays on Autonomy, Agency and Social Self* (OUP 2000) 4.

⁶⁰ Verschraegen (n 7) 274. Brown (n 58) 192: relational autonomy ‘derives from the normative values of “care” and “relationality”’. Once the family is understood in terms of its unique function and intimate communication, a relational account of autonomy can follow.

⁶¹ Verschraegen (n 7) 275.

⁶² Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 16–18.

⁶³ MacFarlane (n 54) 41.

and patriarchal assumptions'⁶⁴ are also aspects of relationality, that can harm a person's ability to pursue valuable options, undermine gender equality and interfere with a person's choice to sustain, end and re-enter relationships of care. However, the foregoing analysis challenges the assumption that relationships can *only* be a source of pressure or coercion – although this may often be true – because relationality also gives meaning to our choices, and therefore enhances our lives.⁶⁵ The risk to be resisted, therefore, is that individual subjectivity is lost. This is because rights are 'guarantees for the individual sphere of action outwith the large collectives'⁶⁶ and exist to counter the totalising tendency of the systems of family or community and law. The individual's rights are never merely instrumentally important to protect collectives but instead rights seek to address the fact that we experience the life-world through 'intersecting social determinants, such as race, class, gender and ethnicity.'⁶⁷ This means that whilst the individual must be situated within her family context, she can never 'wither' from the analysis.⁶⁸ Consequently, we must reject the strong formulation⁶⁹ of relationality under which the *self* is constructed as being essentially relational and *constituted* through our relationships with others. The weak form situates the individual within their relational context – as *self-in-relationships* with others⁷⁰

⁶⁴ *ibid.*

⁶⁵ Fredman, *Women and the Law* (n 19). See also, Maleiha Malik, 'Minority Legal Orders in the UK: Minorities, Pluralism and the Law' (British Academy 2012) 6, 27-28.

⁶⁶ Graber and Teubner (n 10) 66.

⁶⁷ Catriona Mackenzie and Natalie Stoljar, 'Autonomy Refigured' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000) 4.

⁶⁸ Graber and Teubner (n 10) 66.

⁶⁹ Herring (n 43) Chapter 3.

⁷⁰ Eva Feder Kittay, 'Searching for an Overlapping Consensus: A Secular Care Ethics Feminist Responds to Religious Feminists' (2007) 4 *University of St. Thomas Law Journal* 468.

which much better aligns with the theoretical underpinnings adopted in this Thesis. Distilled to its basic premises, we can recognise that the individual is ‘relational, interconnected and interdependent’⁷¹ but retains a separate identity as the normative unit of analysis.⁷² At the heart of this conception is the notion that identity is re-shaped in light of our context and a multi-lateral and complex web of intergenerational connections.

From this perspective, a reflexive regulatory scheme not only resolves the practical challenges associated with inter-systemic communicative closure but also promotes autonomy because it is the individual in community with others that becomes co-regulator of religious family norms, steered by State interventions that destabilise power structures and uplift marginalised voices. Relational autonomy situates the subject as being embedded in community and in relationships with others. These connections help form, as Kymlicka explains, our ‘societal cultures’ and are part of our context of choice.⁷³ These include institutions such as law and religion, and more specifically, those internal mechanisms within religions to resolve disputes and confirm status.⁷⁴ For Kymlicka, ‘...freedom of choice has certain cultural preconditions, and hence issues of cultural membership must be incorporated into liberal principles’.⁷⁵ That is to say, our societal cultures, including institutions such as religious tribunals

⁷¹ Jonathan Herring, ‘Forging a relational approach: Best interests or human rights?’ (2013) 13(1) *Medical Law International* 32, 34.

⁷² Kittay (n 70) 478–479.

⁷³ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1996) 75–76.

⁷⁴ Ahmed (n 23) chs 6 and 7.

⁷⁵ Kymlicka (n 73) 76, 81–82.

both *provide* options and makes those options *meaningful for us*.⁷⁶ They *provide* options because, between systems, only those internal mechanisms can satisfy whatever internal requirements are needed. For example, without such cultural institutions, some exercises of autonomy may simply not be possible for the religious observer at all: without access to religious institutions, the believer may not be able to enter or leave (religious) marriage. Second, we simply cannot understand *why* a choice is valuable or important if it is divorced from the cultural or religious background in which it was made. For a believer, this background is essential context: the choices made reflect and are influenced by these wider assumptions. Now, the State may not be best placed (or have the legitimacy) to create and maintain such religio-cultural institutions, yet it does have an obligation to create and promote valuable options, which can include the exercise of religious belief and entering into relationships according to those beliefs. Understanding Kymlicka's conception of social institutions as necessary conditions for the exercise of religious autonomy suggests a positive role for the State through this model of Reflexive secularity.

Relational autonomy helps justify interventions within social systems and provides *an* end to which that intervention ought to be directed. Further, the conception of freedom as being relational and *social* coheres with the virtue of participation by promoting communal responsibility for the resolution of regulatory challenges. This relational insight, perhaps, makes this link more precisely and points to the shared roles of community and the State in safeguarding and facilitating functional differentiation and individual autonomy.

⁷⁶ *ibid* 83–84.

(iv) Relational Contract Law

Sandberg and Thompson argue, relying on Herring, that *relational* autonomy can address some of the perceived gaps in other models of law and religion.⁷⁷ Second, relational autonomy recognises that ‘those who use religious tribunals’ have a relationship with the religious group but ‘also have a relationship with the State’.⁷⁸ This insight merely restates the systems theoretical idea that individuals have multiple social identities and that systems mediate our relations with the life-world. However, the relational insight alone cannot resolve the interaction between individual, group, society and the State because it is not the *fact* of the differentiated society that matters here but *the division* of the respective roles of each system. Nonetheless, Sandberg and Thompson are correct that the commitment to relational autonomy can lead to a form of joint-governance, under which the State and the group take some responsibility for the individuals within these systems.⁷⁹

In particular, their reliance on a *relational* form of contractual agreement illustrates the transformative potential of the relational insight.⁸⁰ Thompson states that relational norms offer better ‘recognition of power imbalance, challenge binary notions of consent/non-consent and appreciate the context and (gendered) material realities of

⁷⁷ *ibid*, 146-150. Herring (n 43) 17-18.

⁷⁸ Sandberg and Thompson (n 44) 147.

⁷⁹ *ibid*.

⁸⁰ Sharon Thompson, ‘Feminist relational contract theory: A new model for family property agreements’ (2018) 45(4) JLS 617.

[the] parties to agreements.’⁸¹ Thompson argues that relationality can be incorporated in the evaluation of whether an arbitral award ought to be binding by taking a broader view of the factors that may be considered.⁸² This permits us to ‘look beyond the circumstances prevailing *at the time the agreement was made*’ to consider the longer-term view of a relationship.⁸³ In fact, this relational insight can permeate beyond contractual interpretation and vitiation to also relate to questions of *status*.⁸⁴ Where contract can be re-invigorated through these substantive values and the reflexivity criterion, its potential to structurally couple different systems within the medium of a multifunctional legal language could have profound and radical potential. However, in Chapter 3, it was shown that difficulties persist especially where the priority of judges, as with the minority in *Bruker*, is to resist externalities to preserve its internal rationality.

(b) Caring Relationships

Autonomy – whether conceptualised as personal or relational - does not exhaust the universe of values.⁸⁵ Additionally, because family life is stitched together by our relationships and these relationships may at times impose impediments to autonomous

⁸¹ *ibid* 637.

⁸² Sandberg and Thompson (n 44). Contrast Thompson’s contention that recognising the relational element is necessary to capture this dynamic from those who believe the legal medium has sufficient resources already to address these concerns: Katherine Spencer, ‘Mahr as Contract: internal pluralism and external perspectives’ (2011) 1(2) *Oñati Socio-Legal Series* 3 and Michael Helfand, ‘Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders’ (2011) 86(5) *NYU Law Journal* 1231; John Bowen, ‘How Could English Courts Recognize Shariah?’ (2010) 7 *University of St. Thomas Law Journal* 411.

⁸³ *ibid* 633-634.

⁸⁴ Tristan Cummings, ‘Gendered dimensions and missed opportunities in *Akhter v Khan* (Attorney-General and others intervening)’ (2021) 239 *CFLQ*, 255-256.

⁸⁵ Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014).

life that not even a relational reconceptualization of autonomy can fully encompass.⁸⁶ At its best, family relationships are created, nurtured and sustained through the practice of care – they may not be *chosen* but they have vital positive and negative effects.⁸⁷ The system of family life is complex because it cannot be resolved into a single code, however, the form of intimate communication which characterises the family might essentially be describing communications about *care*.⁸⁸ Although by no means are all family relationships caring, we must nonetheless recognise ‘the key role, both positive and negative, of emotionality, care and responsibility for others’⁸⁹ in family life. Care informs our understanding of relational autonomy because it is pre-eminently caring relationships that ought to be valued and promoted in family life, whether religious or not.⁹⁰ Acknowledging care opens the space to understand the family as a source of important connections, of ‘energy and restraint,’⁹¹ in which the individual can be understood in their fulness *and* as a site of oppression.

These insights are reflected in the prominence given to care in this Chapter as co-constitutive of reflexive secularity in the context of the family:

... before democracy can work well or legal systems of rights and obligations function adequately, the connections and interactions of civil society must be sufficiently developed. Social bonds are needed to hold the foundations of law and political institutions together. For law to uphold rights and assure the

⁸⁶ Diduck (n 35); Jonathan Herring, ‘Why Financial Orders on Divorce Should Be Unfair’ (2005) 19 IJLPF 218; Herring (n 43).

⁸⁷ Yet, adoption of care does not require us to subscribe to the empirical claims of gendered differences from which the ethic of care was first developed: see, Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press 1993).

⁸⁸ Baraldi (n 10) 240.

⁸⁹ Fredman, *Women and the Law* (n 19) 36.

⁹⁰ Jonathan Herring, ‘Compassion, Ethics of Care and Legal Rights’ (2017) 13 International Journal of Law in Context 158.

⁹¹ Fredman, *Women and the Law* (n 19) 36.

fulfillment of obligations, civil society must provide sufficient trust and practice at cooperative interactions for there to be functioning legal institutions.⁹²

Therefore, as care provides the emotional and practical basis for the development of trusting, co-operative relationships in common with others, the value of care must be re-centred as a universal importance.⁹³ Caring relationships provide the necessary background conditions for individuals to make autonomous choices, a fact recognised in English law, for example, in the division of family assets upon separation which can be understood as a rare instance of attaching financial value to care work.⁹⁴ What is more, care has value *independent* of autonomy: caring relationships are not always those of which we choose to enter but may nonetheless be valuable whilst our caring obligations may from time to time impede the possibility to pursue autonomous ends. Nor, does the autonomy to leave a relationship mean an end to our caring responsibilities in respect of it. This idea of responsibility, both that as between persons and by the State for its citizens, requires a further normative element beyond autonomy to explain.⁹⁵

The role of care, and the ways it affects family life, will vary significantly within and between jurisdictions and religions. In particular, the caring obligations undertaken or imposed within some cultures may be vastly different from another. Yet, this does not undermine the core value of care as an important and universal end in

⁹² Virginia Held, 'Care and Human Rights' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 641.

⁹³ Tristan Cummings, 'The Central Importance of the Value of Care under the ECHR' (The Value(s) of the ECHR, University of Birmingham, 8th-9th September 2022), Part 1.

⁹⁴ Herring, 'Why Financial Orders on Divorce Should Be Unfair' (n 86).

⁹⁵ Fredman, *Women and the Law* (n 19) 35–36.

itself: care is a versatile and powerful value which arises from the lived reality of all persons, embedded within relationships and owing duties and responsibilities to one another that flow from the very nature of these relationships. This allows us to address ‘the compelling moral salience of attending to and meeting the needs of the particular others for whom we take responsibility.’⁹⁶ Our caring relationships are the foundation upon which human development and progress is based, as *dependence* on others – usually women⁹⁷ - is the essential precondition for the realisation of all other goals.⁹⁸

Reflexive secularity encapsulates these qualities of care because it places responsibility on the individual, the group and the State to work together in devising an appropriate regulatory scheme to regulate family life. Care also justifies State interference to protect vulnerable parties but also to promote reflexivity itself.⁹⁹ Although Fineman argues that a care-centred State ought to do away with the institutional recognition of marriage in favour of supporting caring relationships more broadly, the value of care in this context is to re-focuses our attention on human dependency and vulnerability, which helps form a normative boundary as well as a justification for state intervention.¹⁰⁰ Second, care ethics tends to avoid generalisation and abstraction in favour of particularised moral reasoning: this re-enforces the reflexive approach to regulation, which also avoids imposition of general norms backed by command and control. Solutions are to be worked out collaboratively both at the

⁹⁶ Virginia Held, *The Ethics of Care* (OUP 2005) 10.

⁹⁷ Jacques Charmes, ‘The Unpaid Care Work and the Labour Market. An Analysis of Time Use Data Based on the Latest World Compilation of Time Use Surveys’ (ILO 2019).

⁹⁸ Held (n 96) 10.

⁹⁹ Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) Chapter 1 and Chapter 3.

¹⁰⁰ *ibid* 123-124.

local level and the general level. Locally, through institutions such as mediation and arbitration the ethics of care emphasises a form of contextual reasoning that privileges dialogue and communication to resolve disputes rather than a more combative form of analysis, wholly disaggregating our rights and interests.¹⁰¹ Carol Smart explains the risk of legalism which can arise where relationality and care are not appreciated: ‘the rights approach takes and translates personal and private matters into legal language. In so doing, it reformulates them into issues relevant to law rather than to the lives of ordinary people.’¹⁰² At the general level, collaboration is required between communities and the State. Where the value of care is emphasised, we must ask whether religious norms promote or harm *caring relationships*. In fact, the relationship between law and religion could and should be designed to promote the *creation* of caring relations and the *termination* of harmful ones.

(i) Creating caring relations and terminating un-caring ones

Applying this focus on the value of care to religious tribunals, for example, it is possible to understand how the option of religious family laws or institutions may enhance the value of care. This not only reflects the practice of religious tribunals when they operate well, but a justification for their existence and a limit on their operation.¹⁰³ Whether a relationship is marked by *care* will itself be contentious and difficult to describe – and may also flow from cultural differences around the roles of individuals in family life. This is why a reflexive scheme has additional merit because the regulation of self-

¹⁰¹ Herring (n 90) 162.

¹⁰² Carol Smart, ‘Children and the Transformation of Family Law’ in John Dewar and Steven Parker (eds) *Family Law Processes, Practices, Pressures* (Oxford 2003) 238.

¹⁰³ Much of the analysis by Ahmed and Luk (n 26) can be understood not just about promoting autonomy, but instead could be configured as being about care.

regulation allows for differences to emerge between practices, so long as these are justified and align with the ideas of a functionally differentiated society based on rights.

In the first place, religious institutions may promote the creation of caring relationships by providing the means of entering them suitable to the religious sensibilities of the parties. Herring argues that the law should not respect *all* relationships individuals decide to enter: instead, it should only be *just* and *caring* relationships.¹⁰⁴ Yet, the question of justice is more than a negative freedom from abuse – it is a positive and substantive concept, which relies on other rights based values.¹⁰⁵ The relational insight discussed in the previous section and the independent value of care explored here, points towards certain qualities that mark the relationship out as caring and deserving of respect. Certain institutional arrangements are needed for some religious individuals in order to create and sustain new caring relationships. This is because for many people, there is value in the recognition of their relationships – whether being created or ended - within their community and according to their religion. This recognition *might* not be possible through civil law alone if there are communicative distortions as a result of the partial closure of systems to external interventions. Again, we turn to the example in Chapters 2 and 3 of *Akhter v Khan*, a case concerning an invalid and non-qualifying marriage ceremony following a religious marriage between a Muslim couple. In this case, these individuals were ‘married’ according to their faith – and lived together for almost twenty years – in the eyes of the law, they were treated as legal strangers. The systems of law and religion pull in

¹⁰⁴ Herring (n 43) 22.

¹⁰⁵ Held (n 96).

different directions, ‘encoding’ different meaning across a shared language.¹⁰⁶ The existence of religious institutions is necessary for individuals to enter caring relationships and to manage their termination, and in appropriate circumstances, the value of care might justify State contingent recognition of such institutions.

The second and perhaps more fundamental dimension is the way that law might facilitate exit from harmful relationships and vindicate the implications of a relationship once it ends. Across all the jurisdictions studied the primary users of religious tribunals tend to be women seeking divorce – this is often because the consequence of not receiving a religious divorce can be severe for religious women *and* because traditional forms of these religions are either resistant to recognising divorce or because it is the unilateral right of the husband to grant a divorce.¹⁰⁷ Religious institutions allow women to escape ‘limping marriages’ and to leave situations that expose them to violence.¹⁰⁸ As Ahmed and Luk remark, this function of religious tribunals can be *autonomy enhancing*.¹⁰⁹ Yet, we don’t need to rely on autonomy to justify this line of argument. Reference to the value of caring relationships may more accurately explain the importance of accessing religious tribunals in the

¹⁰⁶ *Akhter v Khan* [2018] EWFC 54, [2019] Fam 247. For further discussion: Cummings (n 84).

¹⁰⁷ Bernard Jackson, ‘Philosophy of Law: Secular and Religious (With Some Reference to Jewish Family Law)’ in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill | Nijhoff 2015) 50–51; Karin Carmit Yefet, ‘Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction’ [2016] *University of Illinois Law Review*; Zakia Soman and Noorjehan Safia Niaz, ‘No More “Talaq, Talaq, Talaq”’: Muslim Women Call for a Ban on an UnIslamic Practice’ (BMMA 2015).

¹⁰⁸ Home Affairs Committee, ‘Home Affairs Committee Oral Evidence: Sharia Councils’, HC 389 Tuesday 1 November 2016.

¹⁰⁹ Ahmed and Luk (n 26); Farrah Ahmed, ‘Religious Norms in Family Law: Implications for Group and Personal Autonomy’ in Mavis Maclean and John Eekelaar (eds), *Managing Family Justice in Diverse Societies* (Hart Publishing 2015); Ahmed (n 23).

context of family disputes.¹¹⁰ For example, Hussain's study of Indian tribunals shows that the vast majority were initiated by women seeking Islamic divorces, which facilitates their ability to end harmful relationships and enter into new ones.¹¹¹ Likewise, Solanki shows that religious law and alternative dispute resolution can have the potential to synthesise 'feminist collective action' and interventions in family law to 'facilitate autonomy'¹¹² – but, just as much, to promote and facilitate the creation of new caring relationships and termination of those which are harmful.

Connected to the ability to grant *religious* divorces (or to recognise or witness the end of a religious marriage)¹¹³ are the arrangements concerning the parties *after* the end of a marriage. This may include allocation of family assets and payment of maintenance and child-care, something that can either stand-alone as where there is no civil recognition of a marriage or feed into the state system through domestic contracts under the Canadian Family Law Act 2006 (noting *Kaddoura*) or the English Arbitration Act 1996 (although, noting that religious arbitrations are not treated in the same manner as secular ones: *S v S* [2014] EWHC 7 (Fam)). As Herring argues, the ordinary court's power to redistribute property upon divorce is a fundamental and unique way of recognising the *value* of care within law because the distribution of family assets tends to redress the ways in which un-paid care work within the home – usually performed

¹¹⁰ Sabiha Hussain, 'Shariat Courts and Women's Rights in India' (2006) for Women's Movement's Engagement with law: existing contradictions and emerging challenges', Centre for Women's Development Studies, New Delhi, March 2006.

¹¹¹ *ibid* 17–18.

¹¹² Gopika Solanki, 'A Court of Her Own: Autonomy, Gender, and Women's Courts in India' in Samia Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017) 216.

¹¹³ By which, for clarity, this refers to the termination of a religious only marriage and not the legal status that attaches to religious marriage, if at all.

by women - is recognised and rewarded.¹¹⁴ In this way, divorce is not primarily a *private* matter but one in which the State has compelling interests, including a strong state interest in promoting gender equality, by addressing the role of divorce (or rather, the way divorce exposes prior inequalities that develop during the course of marriage) in contributing to sex discrimination in the couples' new, separated state, which the courts seek to address this through financial orders.¹¹⁵ Because this jurisdiction provides a unique opportunity to emphasise the value of care work, Herring is sceptical of the role of alternative dispute resolution which may not adequately take account of these factors. Herring thus states: 'an understanding of the power relationships between the parties mean that we have to acknowledge the vulnerabilities of the parties to manipulation and exploitation within the mediation process'.¹¹⁶ Whilst he refers here to mediation, the same may be true of other forms of informal and alternative dispute resolution (or State systems that do not appreciate the risks to autonomy). Yet, this should not be reason to prohibit alternative forms of dispute resolution – including religious tribunals – but instead points to the need to emphasise protections, not just in respect of a party's autonomy, but also to ensure these institutions promote the value of care within society too.

Focus on the value of care has been subjected to a range of criticisms from feminist perspectives- particularly its conflict with autonomy and whether it cedes in some ways

¹¹⁴ Herring (n 86).

¹¹⁵ It is also important to recognise that Eekelaar considers justice upon the breakdown of a religious marriage to trigger a State obligation to intervene, albeit not necessarily by recognising the outcome of religious processes: Eekelaar, 'Law and Community Practice' (n 1) 22.

¹¹⁶ *ibid.*

too much ground to the patriarchal division of labour in the family.¹¹⁷ It has been argued that care ‘valorises the oppression of women’ rather than providing a transformative moral framework and turns a subservient quality into a virtue.¹¹⁸ These potential objections can be answered in three ways. First, as explored in the previous section, autonomy need not be understood in a detached, abstract and individualistic sense, but can be enriched through embedding individuals within their relational context. This reduces the potential for conflict between autonomy and care, because care is a valuable quality *in those relationships*. Second, care is a pre-condition for autonomy: before individuals are capable of pursuing the goals that they value, a person’s material and other needs must be met through acts of care: ‘without care there would be no persons to respect and no families to improve.’¹¹⁹ Third, the criticisms of care are mitigated through the reinforcing values of autonomy and equality. In other words, to the extent that a focus on care undermines the freedom of women in the family, care must be understood alongside the importance of relational autonomy and substantive equality within reflexive secularity. It is caring, just and equal relationships which form the basis of this normative account of family life.

Therefore, care as a value does not entail self-sacrifice or ‘the annihilation of the self in favour of the cared for.’¹²⁰ A relationship needs ‘two selves’ to function.¹²¹ Thus, reliance on the value of care does not mean the destruction of other values or

¹¹⁷ Maureen Sander-Staudt, ‘Care Ethics’, IEP, < <https://iep.utm.edu/care-ethics/#H3> > [Accessed 19/06/2022].

¹¹⁸ *ibid*, Part 3A.

¹¹⁹ Held (n 96) 71-72.

¹²⁰ Kittay (n 70) 478.

¹²¹ *ibid*.

recognition of the importance of autonomy and self-reliance. Instead, this value ‘tempers individualism by insisting that the relationships in which we stand help to constitute the individual we have become, are now and will be in the future’.¹²² With this in mind, care cannot be the only value engaged but must be complemented by our understanding of autonomy and equality. Relational autonomy situates the self as an autonomous being within its context. Equality both provides the other conditions for the exercise of autonomy and valuable, caring relationships but also forms its own substantive, normative value. It is to this that we now turn.

(c) Substantive Equality

Conflicts around the role and meaning of equality run deep. It is often asserted that religious family laws and religious tribunals can operate in such a way as to discriminate against women.¹²³ There is a body of empirical research to this effect, and a growing understanding that religious tribunals in England and Canada may undermine women’s equality.¹²⁴ Similarly, in India and Israel there are serious warnings to be observed about the impact on realising equality by institutionalising religious norms.¹²⁵ Yet need this be the case, or might it also be possible that through

¹²² *ibid.*

¹²³ Gopika Solanki, ‘Beyond the Limitations of the Impasse: Feminism, Multiculturalism, and Legal Reforms in Religious Family Laws in India’ (2013) 40 *Politikon* 83.

¹²⁴ Hussain (n 110); Natasha Bakht, ‘Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and Its Impact on Women’ (2004) 1 *Muslim World Journal of Human Rights*; Great Britain, Home Office, and Office for Security & Counter-Terrorism, *The Independent Review into the Application of Sharia Law in England and Wales*. (2018); Solanki (n 112).

¹²⁵ Daphna Hacker, ‘Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts.’ (2012) 27 *JLR* 59; Kalindi Kokal, ‘Turning to the State: Between Processing Disputes and Protecting Autonomy’ in Tanja Herklotz and Siddharth Peter de Souza (eds), *Mutinies for Equality* (1st edn, Cambridge University Press 2021). Ahmed (n 39).

reflexive secularity regulation can play a role in promoting equality? Whilst these sections relate the dimensions of substantive equality with the systems theoretical perspective – the main contrast is that, unlike Luhmann, who commits to a ‘formal’ conception of equality, Fredman’s conception of equality is substantive and multidimensional.¹²⁶ The concept of substantive equality entails four dimensions: redistribution, transformation, recognition and participation.¹²⁷ Although Fredman’s conception of equality offers a widely endorsed and analytically sound frame – it is also possible to enrich this notion with reference to other conceptions of equality. In particular, this could be supplemented by drawing more explicit links with the relational insights explored above.¹²⁸ This is a natural development of Fredman’s framework, given the importance she accords to feminist jurisprudential theory more broadly.¹²⁹ Through reliance on substantive equality, reflexive regulation takes on a transformative project and grounds those relationships that are so central to this project in a basis of equality and mutual recognition.

(i) Inclusion, Exclusion and the Four Dimensions

¹²⁶ Fredman, *Women and the Law* (n 19) Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16 Human Rights Law Review 273.

¹²⁷ Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011).

¹²⁸ John Baker and others, ‘Dimensions of Equality: A Framework for Theory and Action’ in John Baker and others, *Equality* (Palgrave Macmillan UK 2009).

¹²⁹ Fredman, *Women and the Law* (n 19).

Within Luhmann's conception of systems¹³⁰ it is the 'meta-code' of inclusion and exclusion that forms the fundamental basis for all systems.¹³¹ As Held argues, writing from the ethics of care perspective, *prior* to any hypothetical or real agreement upon the principles that underly our legal institutions, we 'need to understand who are included among those between whom agreement is to be imagined or sought.'¹³² In other words, the '*boundaries* of membership' are relational and must be articulated and described.¹³³ This notion of social inclusion and exclusion is important in another sense: these concepts also relate to 'systems of consciousness'. Systems do not couple evenly with all individuals, which is clearly true of the religious sub-systems – because these systems do not couple with the consciousness of non-believers, nor do not couple as strongly with those with less religiosity nor do they couple *in the same way* with women and other more vulnerable individuals within religious groups. Thus, because systems like law and religion are internalised in the consciousness of participants – it is necessary to examine the questions of social inclusion, including the mechanisms that may be employed to modify the degree of structural coupling with consciousness systems.¹³⁴

This section is divided into these four dimensions of equality and then related to the systems theoretical concepts of inclusion and exclusion. Reflexive secularity implies a broad and expansive conception of democracy, as based on semi-autonomous

¹³⁰ Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert and Fatima Kastner trs, Oxford University Press 2004) 489.

¹³¹ *ibid* 489–490.

¹³² Held (n 92) 641–642.

¹³³ *ibid*.

¹³⁴ Luhmann (n 130) 413.

governance units subject to the regulation of self-regulation which allows for a radically re-envisioned pattern of inclusion than in the traditional conceptions of liberal democracy, unitary state and people.¹³⁵ The redistributive dimension itself has two primary aspects: it explores the re-allocation of family resources upon divorce, and how this can and should be harnessed to ensure women are placed on an equal footing. Second, through reflexive law, it seeks to increase communication between systems and points towards a radical new democratic ideal which is itself transformative, involving a redistribution of decision-making power to the group – and with safeguards in place to ensure the voices of the most vulnerable are uplifted. The recognition dimension explores institutional and interpersonal qualities and the recognition of certain institutions such as religious tribunals because these cultural institutions may be necessary for the individual to obtain the recognition – from the State, society or from others in their community – that they need to affirm their identity. Third, reflecting the past (and continuing) political exclusion of minority religious groups (*and* the most marginalised within them) means transformation of the processes through which these laws are created and understood- which is a matter of re-examining the structural coupling between laws and participants. Finally, participation includes full participation in the life of the community, and the State, through reflexive law can help promote this: creating a powerful mechanism by which religious groups may self-regulate in conjunction with the State, *and* through reflexive tools that empower minorities within religious groups to perform leading roles in this process of contestation and development.

¹³⁵ Eva Sørensen, 'Democratic Theory and Network Governance' (2002) 24 *Administrative Theory & Praxis* 693, 696.

(ii) Redistribution

Equality ought to break the cycle of disadvantage associated with difference.¹³⁶ As a result, substantive equality is asymmetric rather than formal and symmetric. What is more, Fredman argues that it is the *disadvantage* attached to group membership which is the problem, not status or identity *per se*. This is important, because identity and group membership are of high importance for many religious individuals and – in systems theoretical terms – questions of inclusion and exclusion are the meta-scheme for the functionally differentiated society. The struggle for equality ought not to be in opposition to religious identity but *within* religious groups to re-define questions of inclusion and exclusion for themselves.¹³⁷ Equally, it is primarily through structural coupling between the functional systems of law, religion and the economy that it is possible to realise redistributive objectives. Fredman’s conception of equality targets disadvantage by focusing on the ‘out groups’ and does not purport to neutrality as between individuals. The ‘out group’ in this sense is the minority women and LGBTQ people within religious communities and equality in this context, requires their differential treatment.¹³⁸

However, might religious family laws have redistributive potential? In the discussion in relation to the promotion of care and relational autonomy, it was contended that there could be mechanisms by which these ends are promoted –

¹³⁶ Fredman, *Discrimination Law* (n 127) 25–26.

¹³⁷ For a detailed examples of such radical struggles within religious groups, resulting in transformative outcomes, see: Beth Singler and Eileen Barker (eds), *Radical Transformations in Minority Religions* (2022, Routledge).

¹³⁸ *ibid.*

principally in the re-allocation of family resources upon separation. In the jurisdictions examined, questions of redistribution of assets upon separation are of vital importance to this equality objective. In English law, for example, Section 23-25 of the Matrimonial Causes Act 1972 as interpreted in *White v White* [2001] establishes a clear principle based on fairness as equality.¹³⁹ It is, moreover, the case that a range of reasonable outcomes may be reached based on the assessment of all relevant factors in the Act, as well as factors not listed in the legislation.¹⁴⁰ As Lord Hoffmann makes clear in *Piglowska*, this process is a ‘values’ based discretion:

These are value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973. The appellate court must be willing to permit a degree of pluralism in these matters.¹⁴¹

In *Miller; McFarlane* [2006] the House of Lords once again examined the question of ‘fairness’ in this context, with Lady Hale being most explicit about the redistributive purpose of the jurisdiction: describing the aim as establishing ‘an equal start on the road to independent living.’¹⁴²

The law in Ontario is much the same in these respects – Part 1 of the Family Law Act sets out the default rules for the division of matrimonial property.¹⁴³ The central principle of the FLA is the ‘equalization’ of net family proceeds.¹⁴⁴ Thus, the

¹³⁹ *White v White* [2000] UKHL 54.

¹⁴⁰ *Piglowska v Piglowski* [1999] UKHL 27; see also, *Co v Co* [2004] EWHC 287 (Fam) where a lengthy period of cohabitation was a relevant factor in exercising the court’s discretion.

¹⁴¹ *Piglowska v Piglowski*, per Lord Hoffmann.

¹⁴² *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [144].

¹⁴³ Family Law Act, R.S.O. 1990, c. F.3.

¹⁴⁴ FLA 1990, Section 5(1).

starting point is equality – which is to recognise the ‘joint responsibilities’ of couples to the management of their households¹⁴⁵ - unless it can be shown that this would be ‘unconscionable’ and variation is ordered under Section 5(6). These provisions, therefore, embody a more formulaic basis for re-distribution but nonetheless represent a mechanism for equalising the financial circumstances of the parties upon separation.

The rules in India, as explained in the Introduction to this Thesis, are based on a scheme of personal laws – supplemented by laws of more general application relating to the distribution of family assets.¹⁴⁶ Unlike in England or Canada, there is no general redistributive jurisdiction relating to family property – instead, the law focuses on the payment of maintenance and, where there is evidence of domestic violence or in other circumstances, an individual may have a right to reside in the matrimonial home.¹⁴⁷ As a result, the concept of ‘maintenance’ is often broadly construed by the courts to redress distributive disadvantages and the sources of this power come from a range of laws – including under the relevant personal law regime and the criminal law, principally through s125 of the Criminal Procedure Code 1973.¹⁴⁸ For example, in respect of Hindu personal law, the Supreme Court explained in *Jasbir Kaur Sehgal v District Judge*,

¹⁴⁵ *ibid* Section 5(7).

¹⁴⁶ Marriages and divorces may be regulated under the mostly codified bodies of religious personal law, such as the Hindu Marriage Act 1955 or under the secular Special Marriage Act 1954.

¹⁴⁷ Protection of Women from Domestic Violence Act 2005, Act No. 43 of 2006. See also: *Aishwarya Atul Pusalkar v Maharashtra Housing & Area Development Authority and Others* (Civil Appeal No 7231 of 2012).

¹⁴⁸ Criminal Procedure Code 1973, Act No.2 of 1974. Further, Section 20 of the ¹⁴⁸ Protection of Women from Domestic Violence Act 2005 includes additional provisions for the payment of monetary relief for, amongst other things, loss of earnings, damage of property or a maintenance order ‘under or in addition to’ an order made under s125 of the Criminal Procedure Code 1973.

Dehradun and others (1997) that a reasonable sum should be paid, taking account of the quality of life enjoyed by the wife during the marriage.¹⁴⁹

Finally, with respect to the law in Israel, there is also a mixture of religious personal law systems and laws of general application. As was examined in Chapter 3, this creates tensions between these systems that result in friction as between religious and secular norms. This concurrent jurisdiction of religious and secular courts means that, for marriages that took place after 1974, the Spouses Property Relations Law, 5733-1973 applies, as amended. Importantly, the Property Relations Act introduces an equality driven analysis that seeks to ‘balance’ assets before or after divorce – with the possibility of redistribution prior to obtaining a divorce being important given the difficulties with obtaining a *Get*. Although there is concurrent jurisdiction, *formally*, it is this equitable division of assets which should be applied by both civil and religious courts, as confirmed in *Bavli v High Rabbinical Court*.¹⁵⁰

This brief summary of the default regimes demonstrate that – at least in principle – the courts have significant redistributive powers that can be exercised to redress disadvantage or achieve equitable outcomes in the new, post-married positions. The difficulty in all these instances, comes from a tension between the default redistributive powers of the courts with potentially less advantageous religious norms about the resolution of financial matters or, the facility extended in these cases for resolution of financial matters outside the legislative framework. From the systems theoretical perspective, these areas of law demonstrate a close structural coupling

¹⁴⁹ *Jasbir Kaur Sehgal v District Judge, Dehradun and others* (1997).

¹⁵⁰ *Bavli v High Rabbinical Court, et. al.*, Bagatz 1000/92, P.D.(2) 221.

between legal systems, religious systems and the systems of the economy and property. It is predominantly through affecting this dynamic that the necessary friction can be created, such that the environment against which financial decisions made by couples during marriage and upon separation can be steered towards overreaching equality goals. So, whilst these laws form the background environment against which financial matters are resolved, in many instances it will be for the parties –by negotiation, mediation or arbitration – to resolve financial disputes, subject to judicial approval. The redistributive imperative that underpins equality requires regulations to ensure that the power, in general, which men have over granting divorces allows them to extract concessions on the division of assets or the return of dowries. To the extent that religious family laws can be regulated to ensure a just re-distribution of assets, this has the potential to promote autonomy in the parties’ new separated positions and reward the value of care within relationships, recognising the persisting responsibilities generated by those relational links. However, at the least, the potential for an unjust allocation of resources requires State intervention to regulate accordingly.

(iii) Transformation

All systems are constructed against the backdrop of certain power structures.¹⁵¹ It is the fact that ‘the quality of democracy and equality in such decision-making’ within systems is affected by the distribution of power within that system which means that the conception of equality which underpins reflexive secularity must be transformative of these structures. The specific mechanics of that process – envisaged as partially

¹⁵¹ Fredman, *Human Rights Transformed* (n 62) 154.

communicative and partially through the manipulation and alteration of social dynamics within groups are described in Chapter 7. At this stage, the main question is how – and in which ways – can the transformative dimension of equality support reflexivity?

As argued in Part 1, rights can simultaneously aim to *stabilise* the functional differentiation of systems but – it is contended – must also be to *destabilise* these same systems in ways that promote individual and social communicative freedoms. As such, power structures need to be harnessed and transformed to those ends.¹⁵² Systems of power present the ‘colonising’ tendencies that can result in de-differentiation and the consequent reductions in welfare. The transformative dimension of equality ensures the *equal* accessibility of functional systems to individuals, subject to the legitimate inclusion criteria expounded by those systems.¹⁵³ This comports with Fredman’s account of equality as being concerned with *unjustifiable* differences and not differences *per se* – permitting, in systems theoretical language, ‘structurally relevant’ distinctions.¹⁵⁴ Substantive equality ‘respect[s] and accommodate[s] difference, [by] removing the detriment’ that attaches to differences.¹⁵⁵ The idea of ‘selective indifference’ means that only those features as are relevant to inclusion might be considered – but what comprise ‘relevant and non-relevant inequalities can only be determined by the subsystem in question’.¹⁵⁶ In short, systems ‘cannot import’ its

¹⁵² Fredman, *Discrimination Law* (n 127) 49.

¹⁵³ Luhmann (n 130) 132–135.

¹⁵⁴ Verschraegen (n 7) 279.

¹⁵⁵ Fredman, *Discrimination Law* (n 127) 35.

¹⁵⁶ Verschraegen (n 7) 278.

structure from outside – and this was the key observation about the limitation of prevailing approaches to law and religion in Chapters 2 and 3.¹⁵⁷ Instead, systems must ‘establish, vary or forget’ the criteria of inclusion according to their own operations.¹⁵⁸ This is very much at the heart of the challenge identified in this Thesis – and the reflexive model of regulation that seeks to negotiate this relative closure through predominantly indirect means of communication

Reflexive secularity implies the transformation of social norms, although there may be good reasons based on other reflexive and normative criteria not to accommodate *all* religious norms. It may be wrong to accept all practices uncritically and without qualification.¹⁵⁹ However, the inequalities that result from relevant differences, as determined by systems, should be accepted if these do not threaten to undermine the stability of the functionally differentiated system itself. In other words, if destruction of that condition of social inclusion or exclusion results in the destruction of an otherwise valuable system of social life, we ought to avoid the tendency towards simplification. So, for example, religious initiation can justifiably distinguish differences, defined according to religious self-concepts¹⁶⁰, so long as these criteria of exclusion do not otherwise threaten the reflexive and normative principles described in this Chapter. So, as will be examined under the ‘recognitional’ dimension, practices which – albeit relevant to structural stability – nonetheless compromise the basic dignity and humanity of individuals cannot be accommodated and ought to be modified

¹⁵⁷ Luhmann (n 130) 132–133.

¹⁵⁸ *ibid* 135.

¹⁵⁹ *ibid*.

¹⁶⁰ Ino Augsberg, ‘Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts’ (2012) 1 *Journal of Law, Religion and State* 291, 294–295.

through the indirect regulation of the system. However, at this stage, focus is on the ways in which recognition of the role of religious tribunals might lead to transformations in favour of those currently excluded or side-lined by virtue of their faith, gender, sexuality or other characteristics.¹⁶¹

(iv) Participation

A reflexive scheme also has transformative potential because it is underpinned by a radically participatory model and because it rejects many traditional assumed dichotomies between the regulator and regulated actors.¹⁶² As Shachar and Cohen recognised early on, different models of governance can and should lead to transformative outcomes – both in respect of the regulated religious systems, but also in respect of the State’s attitude and understanding of religious groups too in circumstances where the State is also expected to compromise.¹⁶³ Shachar introduces the idea of ‘multi-cultural vulnerability’ to capture this tension.¹⁶⁴ First, minorities within minority groups may face harm within their communities but where State solutions are relied upon, communities may exert social ostracization and coercion. Shachar’s project of transformative accommodation builds in some of the ‘friction’ that is required under systems theory to steer systemic changes, but her project is only partially resolved with more explicit engagement in the whole range of concepts within reflexive law needed.¹⁶⁵ The main limitation, as mentioned in Chapter 4, is that

¹⁶¹ Solanki (n 112) 90-93.

¹⁶² Chapter 5, Parts 3 and 4.

¹⁶³ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001) 128-129.

¹⁶⁴ *ibid* 3, 63-70.

¹⁶⁵ *ibid* 122, 143; Cohen, ‘The Politics and Risks of the New Legal Pluralism’ (n 20) 287-289.

Shachar's mechanisms of *choice*, *competition* and *exit* are the same underpinnings that govern the 'secular absolutist' or particularist models.¹⁶⁶ By supplementing these options, reflexive secularity seeks to steer behaviour through a broader range of perturbations and structural couplings as well as enhancing reflexivity, when possible, through communicative interventions.

A second feature of the model of secularity defended in this Thesis is its engagement with a radical democratic ideal which is itself transformative, involving a redistribution of decision-making power to – and crucially within - the group, subject to sufficient safeguards in place to ensure the voices of the most vulnerable are uplifted. Young argues that transformation must not ignore social structures such as decision-making power, the division of labour, and cultural and symbolic meanings.¹⁶⁷ It is through the manipulation of social tensions through a changed environment and structural coupling with other systems that the 'excluded' or disempowered within a group can have greater involvement in decision making. Our focus through enhancing reflexivity should be on addressing domination, and power structures that exclude people from determining their actions.¹⁶⁸ As Ahmed argues, there are a number of ways in which religious tribunals may promote both group *and* therefore also *personal* autonomy, but these may also speak to the *transformative* dimension of substantive equality.¹⁶⁹ This is because religious institutions can act to addresses problems with

¹⁶⁶ Shachar, *Multicultural Jurisdictions* (n 163) 124.

¹⁶⁷ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2012) 33-38.

¹⁶⁸ *ibid* 16.

¹⁶⁹ Ahmed, 'Religious Norms in Family Law' (n 109) 37-44.

representation of religious minorities in the decision making processes and enhances deliberation within groups¹⁷⁰ as part of this ‘exciting and radical’ future for democracy.¹⁷¹

(v) Recognition

Recognition is the positive affirmation of personal identity.¹⁷² This sub-section will begin by outlining the concept of recognition, drawing on the insights of systems theory. It will then argue that there is a link between individual recognition and the recognition of certain institutions such as religious tribunals because these cultural institutions may be necessary for the individual to obtain the recognition – from the State, society or from others in their community – that they need to affirm their identity. This point forms a bridge between the moral case for recognition, and the institutional case for recognising religious tribunals in some way. It disaggregates the concept of recognition into three senses: *institutional* recognition; institutional *facilitation* of recognition and *interpersonal* and communal recognition. Institutional recognition is the positive affirmation of identity *through* the expressive function of law.¹⁷³ The State may enact law with a primary purpose of expressing a particular attitude towards religious family law – which may be positive or negative. The *facilitation* of recognition is through fostering a social and political environment characterised by interpersonal recognition. This connects closely to the discussion of both systems

¹⁷⁰ *ibid* 35-37.

¹⁷¹ Russell Sandberg, ‘A Systems Theory Re-Construction of Law and Religion’ (2019) 8 OJLS 447, 472.

¹⁷² Mattias Iser, ‘Recognition (Stanford Encyclopedia of Philosophy)’ (Summer Edition 2019) <<https://plato.stanford.edu/entries/recognition/#Rel>> accessed 17 July 2019.

¹⁷³ Cass Sunstein, ‘On the Expressive Function of Law’ (1996) 5(12) University of Pennsylvania Law Review 144.

theory and reflexive law, as the systems theoretical analysis identifies the ways in which those within systems attempt to re-conceptualise meaning within their own epistemological worlds. It connects to reflexive law, because one of its primary drivers is to enhance mutual understanding so as to make these dialogues more fruitful. Finally, the State may facilitate and foster these interpersonal dimensions through reflexive law, which, if we accept the link between the nature of personhood and the role of mutual affirmation of identity in promoting wellbeing explained below, has the potential to indirectly promote the welfare of minorities within religious groups.

Institutional and Interpersonal Recognition and Reflexive Law

As Shachar argues, denying legal recognition to religious minorities erodes the ‘power to preserve their cultural distinctiveness through formal and autonomous demarcation of their membership boundaries.’¹⁷⁴ First, the notion of ‘recognition’ in the institutional sense is complicated by the systems theoretical underpinnings of modern society. The key insight here being that any form of ‘recognition’ as between systems must be constructed within the bounds of each individual system. Such recognition is about the affirmation of religious identity, as expressed through religious institutions and norms – including through non-State tribunals which create, interpret and reproduce norms – and, therefore, a particular religious culture.¹⁷⁵ The idea of recognition by the outsider must account for the diversity and plurality of views and avoid essentialising complex groups around a limited range of dominant perspectives. However, although the State

¹⁷⁴ Shachar, *Multicultural Jurisdictions* (n 163) 72.

¹⁷⁵ Ahmed (n 109) 40, 42-43.

must recognise diversity within systems, it also must avoid the harm of misrecognition.¹⁷⁶

In order to address this challenge, the State must construct an understanding of the *subject* of regulation by the *regulator* and consider the limits of the regulator or regulatory scheme to accurately understand that subject. Both of these ends can be promoted through the reflexive paradigm. Macklin suggests that ‘the state and its legal system simultaneously configure and reflect the social meaning and political implications of culture, liberty and equality.’¹⁷⁷ That is to say, the State both reflects and helps construct the subject. However, whilst this must be true – it is also incomplete. This is because Macklin’s concern is overly concerned with *State* power and the ability for *law* to construct meaning which privileges *one* communicative medium – when, in fact, we ought to engage with and consider a broader range of ways in which meaning is constructed within the functionally differentiated society.

For the State to recognise religious norms in law, it must avoid the regulatory trilemma: destruction of that system, failure or illegitimacy. At the same time, this very notion of cultural ‘accuracy’ is fallible as it envisages the existence of a ‘true’ or objective meaning that can be discovered instead of a meaning that, by necessity, is always constructed and de-constructed between systems through communicative interactions. Systems theory informs us that the difficulties – albeit not *impossibilities* – of inter-systemic communications pose a serious threat *if* recognition is to form a core part of the value of substantive equality: how can a system and its norms be

¹⁷⁶ Malik (n 42) 230.

¹⁷⁷ Macklin (n 34) 347.

‘recognised’ when this entails the re-construction of norms generated by one system (religion) by another, where the latter does not share the same empirical and normative assumptions? Equally, might such recognition – if possible – necessarily entail the pathologies identified along Teubner’s trilemma? Moreover, such recognition could also risk – through close structural coupling – a relationship by which religious or legal considerations assume excessive or intrusive qualities within the other system. In fact, all of these questions require us to ask: can *and should* any one system ever ‘recognise’ another, in the sense of recognising it authentically and accurately? The second dimension to this question, however, is that even if *recognition* is not possible at the systemic or institutional level, the ability of one system to connect with the internal language and logic employed in another through the reflexive paradigm will likely be more effective in achieving whatever goals we seek to achieve.

So, how ought we to delineate between recognition and intrusion: both between the State and religion and in both directions? This will rely on a normative boundary, around the appropriate role of the State in relation to religion and manifested through reflexive law. The reflexive criterion is based on functional differences, so intrusive interventions are those that threaten this differentiated function. On the other hand, interventions that *increase* functional specificity can be seen as further advancing autonomy and social complexity. This boundary can, therefore, be resolved by close attention to these functional differentiations and, to a lesser extent, by considering the distinct ‘codes’ employed within systems.¹⁷⁸ So, part of the reason why the State/religion boundary is (and should be) maintained is because of the risk of

¹⁷⁸ Ino Augsberg, ‘Religious Freedom as “Reflexive Law”’ in Rene Provost (ed), *Mapping the Legal Boundaries of Belonging* (OUP 2014) 91-92.

destruction to these systems, the risk of regulatory *failure* and concern that it could subvert the normativity and authority of *law*. Systems theory sheds a different light, as shown in Chapter 3, on this perennial question of negotiating the boundary between systems and adds explanatory power to the case law considering this boundary as decisions can be framed in terms of the trilemma.

Thus, our solution is itself found in the reflexive attitude: *recognition* must be conceptualised as a reflexive concept itself. So, rather than State *recognition* of individual identities, norms or values – something that is both difficult and a potential source of social damage – we must look to the *recognition of interpersonal recognition*. Or, put differently, we must seek to create a meta-framework in which interpersonal and inter-systematic recognition can take place. That could mean, for example, the indirect recognition of religious norms through the conditional acceptance of institutions like religious tribunals, if these were to enhance recognition between individuals.

The concept of interpersonal recognition is based around the positive affirmation of personal identity. As explained above, inter-systemic recognition of religious identities or norms is of limited use. Instead, through *reflexive recognition* of such identities the State's role is to promote an environment which *fosters such attitudes*, as is necessary for both individual welfare and effective deliberations within a reflexive scheme. This reflexive approach to recognition embodies the fact that our personhood is connected to others. From our recognition of others, obligations flow: that is to say, to recognise someone as an autonomous religious agent may entail some commitment from others to treat them in a certain way. As explained by Mattias Iser,

‘those who are depicted by the surrounding others or the societal norms and values in a one-sided or negative way, will find it much harder to embrace themselves and their projects as valuable.’¹⁷⁹ Nussbaum, likewise, makes such a claim: she argues that a person’s identification with a particular culture or religion is central to a large proportion of people, and reasons that this means the need for protection individual rights to so identify.¹⁸⁰ As a result, recognition carries a negative dimension: misrecognition harms individuals by undermining their ability to embrace their identity, and the aims, goals and relationships in life they have reason to value. As Taylor explains, this harm is not simply ‘lack of due respect’.¹⁸¹ In certain cases, especially in respect of minority groups, misrecognition can ‘inflict a grievous wound’ through denial of a ‘vital human need.’¹⁸²

Finally, as explained in the discussions, above, the analysis of the *recognitional* dimension of substantive equality demonstrates a strong rejection of the individual as ‘atomistic’ and ‘set against’ one another.¹⁸³ Instead, there is no conceptual need to envisage rights in such a limited (and limiting way) and, in fact, *because* rights form part of the ‘legal order’ then this ‘presupposes collaboration among subjects who *recognize* one another, in their reciprocally related rights and duties, as free and equal citizens.’¹⁸⁴ Fredman, carries this foundational principal forward to argue that we best

¹⁷⁹ Iser (n 172).

¹⁸⁰ Martha Nussbaum, *The New Religious Intolerance: Overcoming the politics of fear in an anxious age* (Harvard University Press 2012).

¹⁸¹ Charles Taylor, ‘The Politics of Recognition’ in Amy Grutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994).

¹⁸² *ibid* 26.

¹⁸³ Jürgen Habermas (William Rehg tr), *Between Facts and Norms* (MIT 1996) 88.

¹⁸⁴ *ibid*.

understand *freedom* when it is exercised as part of a community,¹⁸⁵ whether this is understood as a larger community, as in the community of citizens of the State, or as smaller ones, such as those of religious groups themselves, because humans are essentially social beings. We develop our identity with and through recognising others and being recognised by them which means this dimension must be interwoven into this conception of equality. So, the way people develop and sustain their sense of self *as being free* flows from a process of mutual recognition,¹⁸⁶ reassurance and affirmation of a way of life. Within the context of religious family life, this interpersonal dimensions directly flows from the unique quality of the family as a system in which persons are viewed as wholly themselves. This recognition, in turn, is likely to also contribute to well-being by affirming personal and group identity and create valuable opportunities.

3 Synthesis and Reflexivity

The values examined in this Chapter are intended as co-constitutive of this model of reflexive secularity – and should provide both the analytic tools for criticising existing regulatory solutions as well as normative justifications for the design of other possibilities. Moreover, these values are envisaged as the meta-framework from which self-regulation is governed, flowing as they do from necessary implications of the systems theoretical account of society described in Part 1. As such, it is important to contextualise these values and explore the synergy and tensions between them. Ultimately, as Fredman suggests, these values ought to be treated as broad but

¹⁸⁵ Fredman, *Human Rights Transformed* (n 62) 16–17.

¹⁸⁶ Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003) 180.

nonetheless stable bounds in which the reflexive processes are conducted. They also should be reconciled as *principles* to be ‘optimised’ given the constraints in place¹⁸⁷ – and, ultimately, these must be positivised and optimised *within systems*. Thus, groups will realise *conceptions* of these values which can be realised as constructed according to the internal logic of each system.

Nonetheless, any such conception must be recognisable as an instance of this broader concept of rights – in other words, although reflexive law envisages a model of broad values to be implemented at a local level, and ought to be open to new meanings emerging over time, this cannot create a mechanism under which the particular conception bears no ‘family resemblance’ to the concepts agreed upon at the meta-level.¹⁸⁸ Although we may not be able to pre-define necessary and sufficient criteria that map the precise limits of each concept, when translating these concepts as between systems – attempting to formulate these in such a way as to be suitable to a range of systems simultaneously – there must remain certain overlapping resemblances without which the conception would cease to bear relation to the concept. The reason for this is that the meta-scheme established by the dual imperatives of functional differentiation and communicative freedom presuppose certain rights, and if the conception of these values shifts beyond those initially described, they may no longer satisfy the criterion of reflexivity. Nor, in fact, would they satisfy the criteria of normativity. If over time these values were to contort so much that, although those

¹⁸⁷ Fredman, *Human Rights Transformed* (n 62) 71–73. Fredman relies for this point on the distinctions drawn between rules and principles by Robert Alexy, *A Theory of Constitutional Rights* (OUP Oxford 2004) 45–57. A similar conceptual framework could be supported by Ronald Dworkin’s similar thesis concerning the nature of principles: ‘The Model of Rules I’ (Autumn 1967) 35(1) *University of Chicago Law Review* 14.

¹⁸⁸ Wittgenstein (n 5) §66.

conceptions would be perfectly rationalised within the systems in question, it would no longer represent a true conception of that self-same value, such an interpretation would no longer be compatible with the ‘bounded’ quality of reflexive secularity. The loss of family resemblances would mean new justifications would have to be provided to support or reject those values. It is, therefore, also necessary – as examined in Chapter 7, that there are feedback loops which allow for development in a consistent manner – where any proposed changes to underlying normative values can be scrutinised.

The values espoused in this Chapter are complimentary. For example, although *relationality* can be a source of harm this value must be optimised in light of our simultaneous commitment to substantive equality and care. Likewise, the value of substantive equality must also relate to ‘equality of love, care and solidarity.’¹⁸⁹ Once we recognise the cardinal importance of care as a value of equal weight to autonomy and equality, it then becomes imperative that the realisation and experience of love, care and connection is also equally accessible as a valuable option.¹⁹⁰ The value of caring relationships and the costs imposed on breaking these remain just as relevant in cases such as our initial example of *J v B*, where we should refute the notion that vulnerable individuals must decide between their culture and their rights.¹⁹¹ We might say, then: under an ethic of care, minorities within religious groups (such as the transgender parent) ought not have to choose between their valuable and just, caring relationships and their rights. So, as Held makes clear, all these values are deeply

¹⁸⁹ Baker and others (n 128) 37.

¹⁹⁰ John Eekelaar, ‘Family Law and Love’ (2016) 28 *Child and Family Law Quarterly* 289, 290-293.

¹⁹¹ Shachar, *Multicultural Jurisdictions* (n 163); Ayelet Shachar, ‘Faith in Law? Diffusing Tensions Between Diversity and Equality’ in Seyla Benhabib and Volker Kaul (eds), *Toward New Democratic Imaginaries - Istanbul Seminars on Islam, Culture and Politics*, vol 2 (Springer International Publishing 2016).

interwoven and connected because ‘there cannot be care without justice.’¹⁹² As these values are construed as principles to be maximised, tensions should be resolved by reference – again – to the reflexive criterion. Where there is tension, the arrangement that best promotes functional differentiation and communicative freedoms should be preferred.

4 Conclusion

This Chapter sought to achieve three aims: first, to identify particular values that are reasonably defensible in the context of religious family life with a focus on the values of relational autonomy, substantive equality and care. As noted throughout this Chapter, these values entail certain synergies: autonomy is best understood when the individual is situated in their relational context, and in the context of the individuals they care for – and who cares for them. Caring relationships have independent value – not merely because they represent choices individuals might make. And whilst caring responsibilities may curtail certain possibilities, the value of care must be buttressed by respect for autonomy and an attitude of mutual respect and equality. Second, this Chapter defended these in light of two meta-criteria which flow from the systems theoretical concept of society: the promotion of functional differentiation and communicative freedoms. Third, this Chapter elaborated these values and related them to the broader reflexive project as constituting one of the two criteria this Thesis proposes to use to decide when to depart from the voluntarist default position of not recognising religious norms. The main contribution of this Thesis to the literature is by

¹⁹² Held (96) 17.

identify the reflexive criterion and these normative criteria as the best way to structure decisions about the respective roles of law and religion in society.

Reflexive secularity sets the broad human rights values as part of a framework of regulation, under which more particularised solutions can be fashioned. If this Chapter has explicated the normative criteria for intervention in religious family life, Chapter 7 now brings together all the threads of this Thesis. It does so by setting out the reflexive criterion for intervention: namely, that interventions should be indirect, regulation should be hybrid and particular attention must be placed on modifying the systems of power within society towards the normative values of autonomy, equality and care.

CHAPTER 7

CONCLUSION:

ENHANCING REFLEXIVITY AND PROMOTING HUMAN RIGHTS

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Introduction

The preceding Chapters sought to make the case that traditional approaches to conceptualising the communicative interaction of religious family norms and secular state laws could be better understood with reference to systems theoretical insights and the concept of reflexive secularity. Chapter 3 took this framework further, to deconstruct the relationship between law and religions across a range of jurisdictions and mapped these across the horns of the regulatory trilemma. For example, in India,

despite ostensibly incorporating religious law within the state legal system, non-state religious tribunals have nonetheless widely been established and both courts and religious systems have sought to affirm their power over individual believers. Likewise, in Ontario, reforms to Religious Alternative Dispute Resolution (RADR) have failed to ensure the safeguards needed in respect of legal and informal forms of religious dispute resolution. In England, whilst religious principles have only been given limited ‘legal effect’ in the cases examined, the result has nonetheless been the development of an extensive non-State systems of religious tribunals that goes alongside a model of religious and secular norms recognised in state law. In Israel, the complex interaction between state courts and religious courts and the fusion and duplication of religious and civil jurisdictions have led to resistance and friction in both directions. The challenge identified in Chapter 3, then, is that these models seem to result in ineffectiveness, disintegration or legal incoherence. Particularist models result in the risk of law losing its ‘general or universalist character’¹ through authorisation or over-particularisation whilst the strategies that seek to affirm law’s uniqueness as a mode of regulating religious family law have tended towards ineffectiveness.

At the heart of these jurisdictional examples are two insights: first, that we should seek to preserve social complexity through functional differentiation and second, that there are communicative limitations that arise when systems construct an understanding of other systems. These insights suggest the need for a radically re-imagined approach to regulating religious family life based on reflexive law. As

¹ Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton 2004) 154.

Teubner explains:²

the ... crisis in law results from the inadequacies of the received system of positive law, given the complexities of a functionally differentiated society...

If the question this Thesis seeks to answer is how best to structure the relationship between laws and religious norms, the ultimate contribution of Chapters 2, 3 and 4 is to add the ‘criterion of reflexivity’ to the literature. In other words: interventions in religious family life ought, as a general principle, to promote reflexivity if these are to be justified. This criterion ensures both *effective* regulation and the protection for a *sphere of religious liberty*. Although Teubner justifies reflexive law on the basis of its ability to coordinate systems and avoid the regulatory trilemma, the reflexive model is also normatively desirable because it promotes human rights through democratic experimentalism³ and ensures equal participation⁴ in decision making for those most affected by the inter-independence of law and religion.

So, Chapter 3 sought to demonstrate both that the law-religion nexus is one example of Teubner’s societal complexity and that the ‘received’ systems of law tasked with negotiating this boundary are unsuitable for regulating substantive, religio-legal obligations. In light of this the ‘normative universe’ in which religious minority groups are situated must be accommodated within a multicultural society, committed to

² Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239, 244.

³ Charles Sabel and William Simon, ‘Democratic Experimentalism’ in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017).

⁴ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 10, 25.

equality and human rights.⁵ Because human rights must serve to ‘keep the future open’ for functional differentiation and the self-reproduction of meaning within systems⁶ rights are central to reflexive secularity. Thus, the contribution of Chapters 5 and 6 is to add the second criterion for resolving the tension between law and religion: interventions ought not only to promote reflexivity, but also should promote relational autonomy, substantive equality and caring relationships.

Chapter 7 now sketches out the principles of a reflexive solution which might better accommodate the systemic qualities of law and religious family life. As Luhmann argues, future developments are always the result of the dual forces of ‘autopoiesis and structural drift’.⁷ Although these ideas need not be endorsed in their orthodox forms as the sole consideration of systems theory, attention to the different functions of systems and the need to maintain social complexity are central to the reflexive solutions proposed in this Thesis. Reflexive secularity engages with these processes to alter the environment in such ways as to guide this ‘drift’ in the direction of our human rights goals. In other words, the proposal in this Chapter is primarily but not exclusively for law to ‘present itself to other systems as an altered environment to which these in turn can “react” in the same indirect fashion.’⁸ This reflexive model seeks to create the space for critical self-reflection under conditions of equality; to

⁵ Ayelet Shachar, ‘On Citizenship and Multicultural Vulnerability’ (2000) 28(1) *Political Theory* 64, 65. This is not to suggest that religious groups are *not* committed to human rights values, but that the interpretation or application of these may be divergent with secular conceptions. In fact, the opposite is presumed to be true: the basis of this Thesis is that religious individuals are recognised as constitutional actors whose participation in the regulatory process ought to inform the development of rights-based values.

⁶ Niklas Luhmann, *Law as a Social System* (Klaus Ziegert and Fatima Kastner trs, Oxford University Press 2004) 135–136.

⁷ *ibid.*

⁸ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Reprinted, Polity Press 2010) 49.

stimulate self-regulatory behaviour so as to promote individual autonomy, democracy and rights; and finally, to guide and constrain these processes to ensure human rights objectives are being met.

The reflexive paradigm itself is not novel within the *regulation* literature – reflexive principles have been widely discussed in areas such as environmental law⁹, employment law¹⁰ and more broadly in the theoretical literature.¹¹ However, the potential for reflexive law as described in Chapter 4, to mediate the role and function of laws and religion, the legitimate boundaries between state and community and, the proper use of direct state interventions and communal practices remains fundamentally underexamined in this area. As such, it is ripe for creative and radical solutions that cast-off some of the traditional assumptions on which existing models of religious family law are based.¹² Reflexive law can reinvigorate these models of joint-governance, critiqued in Chapters 3 and 4, with ‘ideas about pluricentric governance ... interdependence, negotiation and trust.’¹³

This Chapter is divided into four Parts. Parts 1 and 2 argue that whilst the *reflexive mode* of analysis may be applied to a range of regulatory solutions – in the context of religious family laws it ought to be that the institutions that govern decision

⁹ Rónán Kennedy, ‘Rethinking Reflexive Law for the Information Age: Hybrid and Flexible Regulation by Disclosure’ (2016) 7(2) *Journal of Energy and Environmental Law* 124-139.

¹⁰ Simon Deakin, Colm McLaughlin, and Dominic Heesang Chai, ‘Gender Inequality and Reflexive Law : The Potential of Different Regulatory Mechanisms for Making Employment Rights Effective’. Working Paper No 46 (Centre for Business Research (University of Cambridge).

¹¹ Jean Cohen, ‘The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy’ (2012) 10 *IJCL* 380.

¹² Russell Sandberg, ‘A Systems Theory Re-Construction of Law and Religion’ (2019) 8 *OJLS* 447.

¹³ Eva Sørensen and Jacob Torfing, ‘Introduction Governance Network Research: Towards a Second Generation’ in Eva Sørensen and Jacob Torfing, (eds), *Theories of Democratic Network Governance* (Palgrave Macmillan 2007) 3.

making within systems be distinct from State power. Yet, their creation as a ‘locus’ for that religious group must be determined within the bounds of a State determined meta scheme which imposes certain procedural and normative constraints. Moreover, the relationship between the ‘local’ level of decision making and the State’s oversight of those institutions should be dynamic and multi-directional, open to and responsive to the creative friction that emerges from this form of structural coupling. Part 3 outlines some of these principles in action, developing a multi-faceted toolbox for enhancing reflexivity and promoting human rights before applying these in a worked example. This provides the contours and basic design of a reflexive regulatory solution. Part 4 then explicates a proposed model, within English law, as to how this reflexive approach might be realised.

1 Principles of Reflexive Regulation

The first Part of this Chapter outlined the *qualities* of a reflexive and de-centred regulatory scheme which forms a meta-scheme for selecting which norms ought to be employed in practice. It argues that reflexive regulation tends to rely on hybridity, variety and indirectness and requires pro-active engagement with religious communities to secure human rights goals. The second Part examines structures that might illuminate and exemplify these qualities as part of a proposed solution.

(a) Communicative and coercive mechanisms

Reflexive interventions focus on overcoming systems theoretical challenges whereby the principal solution is to enhance reflexivity *within groups* through targeted

interventions in the discourse.¹⁴ Reflexivity in this respect has two aspects. First, the possibility of reflexivity *within* groups in light of certain external interventions. Second, reflexive law refers to the institutional means of enhancing this possibility, through particularised, indirect interventions such as regulation of self-regulation, the construction of procedures in order to govern the design of group procedures and norms of norm selection. Reflexive secularity aims to indirectly regulate behaviour and enhance *reflexivity* in the former sense. It should also seek to enhance reflexivity *within* state bodies¹⁵ – seeking the sort of progressive development in understanding that Shachar has defended and advanced in her work on transformative accommodation.¹⁶

This Chapter proceeds on the basis of two claims as pre-requisites to a democratic and reflexive model. First, reflexive regulation is grounded on the possibility of some degree of communicative engagement with and within systems. Second, deliberations depend on their social context and the reasons that emerge from deliberation are fallible, open to refinement through an on-going process of democratic experimentalism.

(b) Persuasive, Strategic and Coercive Interventions

Communicative interventions may be sub-divided into persuasive, strategic and coercive communications. In the first instance, regulation ought to be based on the

¹⁴ Cohen (n 11).

¹⁵ Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267.

¹⁶ Ayelet Shachar, *Multicultural Jurisdictions* (CUP 2001); Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9 Theoretical Inquiries in Law; Ayelet Shachar, 'Faith in Law? Diffusing Tensions Between Diversity and Equality' in Seyla Benhabib and Volker Kaul (eds), *Toward New Democratic Imaginaries - Istanbul Seminars on Islam, Culture and Politics*, vol 2 (Springer International Publishing 2016).

former and then progress based on the reflexive *attitude* to regulation.¹⁷

First, some interventions seek to justify themselves to the other by attempting to convince through force of reason to generate understanding.¹⁸ In a reflexive scheme, the regulator and the regulated begin to blur as groups and the state operate through a network based on trust and cooperation, where the *State* seeks to regulate the regulatory efforts of the *group* through the exchange of reasons.¹⁹ This process seeks to enhance understanding on both sides through the exchange of justifications, leading to changes in both state and group attitudes where the reasons are sufficiently persuasive.

The second intervention is 'strategic' and geared not at enhancing mutual understanding but at successfully achieving regulatory goals.²⁰ Strategic interventions seek to alter the environment and induce modifications based on good pragmatic and strategic reasons for the group to accept. An example is the use of financial levers, such as through charitable regulation of religious institutions. The objective is not primarily to persuade of the correctness of the public interest and benefit limbs but to nonetheless result in a reflexive attitude, whereby the outcome still more closely aligned with these charitable aims within religious groups. Strategic interventions are not *coercive*, however, and ought themselves to be justifiable in light of human rights values.

The third form of intervention is coercive but are still aimed at promoting reflexivity. For example, where a group disengages or resists communicative and

¹⁷ See, Part 3(a).

¹⁸ Jürgen Habermas and Maeve Cooke, *On the Pragmatics of Communication* (Polity Press 2003) 220–223, 239–246.

¹⁹ Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post- Regulatory" World' (2001) 54(1) *Current Legal Problems* 103.

²⁰ Habermas (n 18) 322.

strategic methods, the State may turn to coerced involvement in the project of regulation.²¹ This was part of the discussion of the Independent Review of Sharia Tribunals, which sought to evaluate whether participation in any proposed reform of religious dispute resolution should be mandatory or voluntary. If participation were to be mandated, then this would still be geared at promoting critical reflection within that group and not the imposition of an external solution. The decision to move to more coercive means should, itself, be informed through reflexive mechanisms and be justified in light of the same human rights values – if not *more so* due to the greater intrusion of the State in that group’s affairs.²²

Habermas argues that the communicative attitude is incompatible with the strategic. This is part of a duality that Habermas upholds, separating the (shared) life-worlds we inhabit and the social systems that *emerge* from the interaction of these systems, through strategic behaviour.²³ Yet, this neat division strikes as unrealistic with Habermas recognising that both forms of interaction might coincide in practice.²⁴ It is therefore important that the State has the possibility of operating along both these planes: starting with indirect communicative interventions, moving to strategic ones and only resorting to coercive interventions when necessary. Importantly, these all remain indirect (albeit, influenced by the State’s own regulatory objectives) forms of regulation geared at promoting reflexivity in order to modify behaviour. As Fredman

²¹ Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar Publishing 2004) 22–23.

²² Chapter 5 outlines the tension between the imposition of substantive values and a relativist position, under which groups would be permitted to develop their own values. This Thesis then proposes relational autonomy, substantive equality and the value of caring relationships in Chapter 6 as substantive constraints.

²³ Habermas (n 18) 220.

²⁴ *ibid.*

summarises: ‘This affects the quality of outcomes but not their precise content.’²⁵ These interventions all primarily seek to ‘present a modified environment’ as an ‘irritant’ to which other sub-systems ‘react according to their internal logic’.²⁶ This is part of the State’s *formalising* role: by bringing systems together, locating the areas of divergence, determining the parameters and process for debate and seeking to ensure a level playing field.²⁷

Other *direct* forms of regulation are not reflexive but fall under the categories of traditional command and control regulation. Due to the analysis resulting from Chapter 2 and Chapter 4, such interventions are the last choice for two reasons: first, because they are most likely to fall into the regulatory trilemma and lead to ineffective outcomes. Thus, failing the strategic dimension of the reflexive criterion. Second, because these involve the greatest and most direct form of interference in group autonomy and religious liberty and thus potentially undermine the functional differentiation of systems and the normative criteria that legal interventions in religious life ought to *promote* autonomy, equality and caring relationships.

2 Enhancing Reflexivity – Promoting Human Rights

This Part identifies the qualities of reflexive law and how these qualities might be concretely realised. It explores when and under what circumstances the different modes of intervention, as explained the preceding Part, might be justified with reference to the dual (and interrelated) criteria of normativity and reflexivity. The reflexive criterion is to promote functional differentiation and communicative freedoms. The normative

²⁵ Fredman (n 4) 153.

²⁶ *ibid* 152.

²⁷ The formalising role of law is discussed in Part 4(c)(i).

criteria expands upon the nature of these freedoms within religious family life, deriving the three values of autonomy, equality and care as the justification for State interventions. So, this proposed model has three goals: first, to create the space for critical self-reflection under conditions of genuinely equal participation. This is the embodiment of the value of substantive equality, outlined in Chapter 6, and flows from the reflexive criterion too, which presupposes free and equal engagement with a range of social systems. Second, reflexive secularity aims to encourage self-regulatory behaviour within systems, promoting autonomy, equality and care within the family; and finally, this project seeks to guide and constrain these processes to ensure human rights values and the reflexive criterion are being met.

What should be dealt with through reflexive law and what should (if anything) be dealt with through traditional, direct, command and control? As explained in the previous sections of this Chapter, reflexive regulation is about variety and calls upon a range of strategies to be deployed with roles distributed along a network of actors, governed by a meta-framework of human rights values. However, in some contexts or in respect of some questions, an indirect response may not be justified. For example, where there is evidence of violence and coercion, indirect regulation may be perceived as unlikely to adequately protect the rights of the individuals affected nor to promote human rights goals. Yet, application of the reflexive and normative criteria require all decisions about State interventions seek to respond to the internal language and logic of that system.

In order to determine when direct means are apposite, if ever, we must ask what does reflexive law require of us? One answer is to turn to established models such as

Braithwaite's and Ayres' pyramid of regulation.²⁸ The basic principle of their model being that regulations ought to be presumed to begin with the least coercive means of modifying behaviour.²⁹ We simply move *up* the ladder of enforcement according to context, with command and control playing a subsidiary, background function. Yet this prescriptive conception of a regulatory pyramid cannot be the solution alone owing to the need for 'a more radical reconceptualization of the task of regulating itself...' ³⁰ The solution is to adopt a reflexive attitude to norm selection. As Cohen suggests, 'the reflexive procedural paradigm' can also be construed as a 'meta-paradigm' allowing for a 'flexible use or combination of the various forms of law in the appropriate circumstances.'³¹ This calls on us in this Chapter to draw the distinction between reflexive law *as a specific* form of law and a reflexive *attitude* to laws as grounded on a number of principles of pluricentric and de-centred regulation.³² When this is examined, we can establish a meta-framework which describes the principles of reflexivity before concretising these principles in more specific proposals.

The project of this section is, therefore, to explore what this meta-paradigm might look like and what mechanisms may be employed within it. The following sections lay out the broad qualities of reflexivity, with examples as to how they might function in this context. Taken together, the following three meta-principles of norm selection

²⁸ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford 1992).

²⁹ Robert Baldwin and Julia Black, 'Really Responsive Regulation: Really Responsive Regulation' (2008) 71 *The Modern Law Review* 59.

³⁰ Black (n 19) 113–114.

³¹ Cohen (n 1) 15.

³² Andrew Arato, 'Procedural Law and Civil Society' in Andrew Arato, *Habermas on Law and Democracy: Critical Exchanges* (1998 University of California).

should be used to determine what form of interventions should be employed.³³ The first principle includes the idea of hybridity, which is the combining state and non-state actors in regulation.³⁴ This recognises the normative and institutional limits of the State and is determined by the organs most effective at regulating the conduct or subject matter in question, respecting a degree of group religious autonomy and minimising the potential for institutional misrecognition and distortion. Second, reflexive regulation is multi-faceted and does not rely on one strand, one mechanism or one approach.³⁵ Instead, we are to take a broader view and, as indicated above, should engage with a range of economic, administrative, legal and political levers. Finally, and perhaps most crucially, for the reasons explored in Chapters 3 and 4, reflexive regulation is indirect. This quality of indirectness can include ‘... proceduralization, collibration, feedback loops, redundancy, and above all, countering variety with variety.’³⁶ It is, however, also relevant that this approach envisages a significantly effective State administration. As not all jurisdictions share the same resources and capacities it is important that these principles be applied in context. For example, in its Reservation to the full implementation to CEDAW, the Government of India identifies two objections to further State interference in religious community life: first, a normative commitment to group autonomy and second, a practical concern about governance failure. Whilst reflexive law is no panacea, it can help address both these concerns. Reflexive regulation is *indirect* and opens up scope for *self-regulation* within a constitutional framework. It also addresses concerns over governance failures

³³ Black (n 19).

³⁴ *ibid* 122.

³⁵ *ibid* 111.

³⁶ *ibid*.

through a decentred approach to regulation in which the individual, community and State work in partnership to achieve their goals. A variety of strategies should be employed, such as the charitable regulation of religious institutions; communicative interventions through information and training and the creation of a charter of governance for religious tribunals, subject to an safeguards for consent based on the principles of relational autonomy, care and substantive equality. The next part offers a proposal based on these principles.

3 A Proposal

The reflexive mode of regulation is, therefore, based on the principles of hybridity, variety, indirectness and experimentalism. The next four sections outline a proposal that synthesises these principles and elaborates upon them with reference to the examples studied in this Thesis. In summary, the State ought not to rely on either direct regulation of religious family life by incorporating religious norms directly in state law. As such, a personal law model such as employed in India ought to be rejected for two connected reasons: first, it fails to adhere to the criterion of reflexivity, as it lacks the qualities of reflexive law that allow for a more effective relationship between laws and religions. Second, the personal law system is unlikely to therefore promote the human rights values espoused in Chapters 5 and 6 of expanding relational autonomy, substantive equality and care. For similar reasons, a model of authorisation such as in Israel also fails to satisfy the criterion of reflexivity, with the overlapping and parallel jurisdictions of religious and secular authorities resulting in aspects of the trilemma. Thus, the starting point ought to be that the functional differentiation of laws and religious norms ought to be preserved *unless* doing so is aligned with reflexive principles and justified by good normative reasons. Of course, these strategies

presuppose a functionally differentiated society and thus means that absolutist theocratic (or secularist) states which deny any such functional differentiation. The best arrangement is that of a religious governance network whereby religious institutions operate within a sphere of regulated autonomy. This could be in the form of religious tribunals and a bespoke code of conduct to which each institution ought to subscribe in exchange for access to financial and legal recognition. Financial recognition could be secured through charitable status whilst legal recognition can arise through contingent acceptance of religious institutional decisions within state courts.

The following sections will examine these ideas in further detail, elaborating how they satisfy the dual criteria of promoting reflexivity and human rights with a particular emphasis on the core strategies of manipulating social tensions, State support and encouragement, information provision and training, rolling best practice and feedback loops. However, whilst this sort of meta-process of reflexivity can be articulated, its workings must be open to creative development over time. The same principle of democratic experimentalism must apply to the norms of norm selection too. This is another reason why more static accounts such as the regulatory ladder need revitalisation in light of the reflexive attitude to law.

(a) Hybridity

Reflexive regulation calls upon hybrid solutions: bringing together State, community, and individuals to devise a regulatory solution in which each plays a role. Thus, hybridity refers to the idea of regulation through networks and partnerships and abandons the assumption that the State is the source of all regulations. The State

remains one powerful source of ‘change and occasional perturbation’ that is ‘conventionally endowed by the prevailing belief-system with special responsibilities’ for maintaining social integrity in the pursuit of ‘electorally ratified goals.’³⁷ In other words, it is important to both de-centre the concept of reflexive secularity such that, in the first instance, it need not be assumed that *state* institutions must resolve religious family disputes. On the other hand, failure to acknowledge that state law plays a unique role within the regulatory model would be to ignore its transformative potential to steer the self-regulatory capacities of religious groups. One understanding of this relationship between the state and the ‘network’ of governance that is envisaged here is that we are ‘networking in the shadow of hierarchy.’³⁸

This hybridity has deep implications for the role of religious institutions and the State. Chapter 4 made the case that a strict and formal division of religious and legal systems cannot be maintained because systems are *inter*-independent.³⁹ Instead, the concept of reflexive secularities favours a de-centred, democratic, and reflexive network. Moreover, this hybrid quality recognises the argument made in Chapter 5, part 3(c) that rights values are socially positivised through their actualisation in systems by a range of actors. Therefore, the de-centred State may better be understood as comprising a network of state and non-state actors.⁴⁰ The content and identification of laws flows from this interactive process of ‘information gathering, problem

³⁷ Andrew Dunsire, ‘Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention’ (1993) MPIFG Discussion Paper 93/7 10.

³⁸ Fritz Scharpf, ‘Games Real Actors Could Play: Positive and Negative Coordination’ (1994) 6 *Journal of Theoretical Politics* 27, 37.

³⁹ Chapter 3, Part 1(c)(iii).

⁴⁰ Dunsire (n 37) 10.

identification, remediation, and evaluation.’⁴¹ In line with this feature of hybridity, *all* bodies are treated as potential ‘law-making bodies, rather than simply ... objects of state ... regulation.’⁴² Our focus ought to be on the communications that constitute systems and seeking to ensure a reflexive attitude on the part of different actors – both legal and religious. Thus, the assumed centrality of the State – and State *law* – to resolving issues about religious family life is fundamentally challenged by the ‘post-regulatory state’ which invites us to make full use of a ‘wider range of norms, institutions and processes.’⁴³

For example, Solanki has argued that although some ‘women’s courts’ have reproduced patriarchal norms, there is also evidence that some arrive at ‘ethically particular and context-sensitive solutions that privilege women’s autonomy and subvert the content of ethno-religious patriarchal norms.’¹²³ These groups represent ‘offshoots of state-led, decentralized dispute resolution systems [and] peer led all-women’s courts affiliated with NGOs.’¹²⁴ Such systems, if supported and steered through reflexive regulatory schemes could potentially become a useful model for reform without fixing in time particular conceptions of religion or rights that may be contentious. In the UK, we can observe a similar institutional arrangement through the creation of the Muslim Arbitration Tribunal system, which operates under the Arbitration Act 1996 subject to certain procedural constraints on decision making. Although the MAT operates within a statutory framework of private ordering, as discussed in *S v S* [2014] EWHC 7 (Fam) the outcome of religious tribunals are not treated in the same manner as family

⁴¹ Susan Sturm, ‘Second Generation Employment Discrimination: A Structural Approach’ (2001) 101 Columbia Law Review 458, 463.

⁴² *ibid.*

⁴³ Scott (n 21): For an example, collective agreements as norms that are generated in this hybrid way.

arbitration more broadly.⁴⁴ Because of the complex inter-systemic qualities of religion and law, it is right that a bespoke scheme of regulation be devised which – in particular – embodies the relational contract insights developed in Chapter 6 to ensure a more nuanced and responsive use of the legal medium of contract law as a means of enhancing reflexivity. In this manner, institutions such as religious tribunals can form the locus for bounded self-regulation and democratic experimentalism within the reflexive model.

(i) Privatisation or Institutionalisation

The hybridity principle does not mean the *privatisation* of dispute resolution nor the authorisation of religious institutions with law making powers. A key objection to reflexive law is the perception that it entails *privatised* solutions.⁴⁵ In other words, in response to the limitations identified in Chapter 3, reflexive law places too much authority with religious groups to devise their own norms outside of direct state control. State oversight and involvement is inherent in reflexive law, whilst at the same time recognising that the State is not central to all forms of regulation and that state interventions are liable to be ineffective, lead to unresponsiveness or result in destruction.⁴⁶ A privatised solution of resolving disputes where the state plays a limited role in influencing the content or process of religious institutions, as is the case under a cultural voluntarist model (so long as the welfare principle does not compel the state

⁴⁴ *S v S* [2014] EWHC 7 (Fam) is discussed further in Chapter 3, Part 1(c).

⁴⁵ Although Cohen (n 11) 382 endorses a form of reflexive solution, she also states: ‘Given the disastrous privatization of so much of the state, locally and globally, and the dangers of the religious revival to democratic legitimacy and women’s equality, now is not the time to get on the bandwagon of religious status-based legal pluralism.’

⁴⁶ Chapter 4 examined this boundary between the legitimate State regulation of religious family law through the reflexive paradigm.

to intervene through direct regulation), could lead to a permissive attitude to injustice or to excessive and ineffective direct regulations.

One example can help illustrate this idea of privatisation and competition. Stark and Bainbridge argue that religious individuals can be conceptualised as religious ‘choosers’ who can select the forum that maximises positive outcomes in their case.⁴⁷ This is not entirely unrealistic. As Fournier argues in the Canadian context, individuals will often seek the forums that provide them with the best chances of success and will emphasise their religious identities strategically in courts to maximise their ability to realise their goals.⁴⁸ As demonstrated in Chapter 3, this sort of strategic decision making on the part of individuals is evident across our jurisdictional examples.

Returning to Habermas’s framing of communicative and coercive interventions, described in Part 2(b), above, individuals make strategic decisions – and these strategic choices lead to systems theoretical consequences. So, turning to the discussion of *Kaddoura* and *Bruker* in Chapter 3, we see the parties seeking to select the norms and forum – whether religious or civil – that best suits their objectives. The parties here stress their religiosity strategically to obtain certain benefits, as in *Bruker*, or to avoid certain responsibilities, as in *Kaddoura*.⁴⁹ The insight we might take from this is that religious individuals are actors within these systems, with their own

⁴⁷ Rodney Stark and William Bainbridge, *A Theory of Religion* (1st ed, Rutgers University Press 1996). See, for a European perspective: Eva Hamberg and Thorleif Pettersson, ‘The Religious Market: Denominational Competition and Religious Participation in Contemporary Sweden’ (1994) 33(3) *Journal of the Scientific Study of Religion* 205, 213-215.

⁴⁸ Pascale Fournier, ‘Flirting with God in Western Secular Courts: Mahr in the West’ (2010) 24 *IJLPF* 67, 78–84.

⁴⁹ *ibid* 147.

motivations and interests – and in some cases, they instrumentalise their identities to extract the best outcomes.⁵⁰ This also means their choices are amenable to ‘market’ pressures, although the reference to the ‘market’ here is not to be construed in an economic sense. Instead, it is the argument that a ‘market’ analysis can explain the ways rational, self-interested religious choosers will make decisions in order to enhance their welfare. In the contest of religious ‘markets’, competition between institutions to ‘buy’ the allegiance of religious believers is suggested to result in a range of offerings, with the most popular out-competing those least able to adapt.⁵¹ Is reflexive secularity, then, premised on a privatised model of religious and legal competition that, perhaps naively, presumes that believers will select better regulated forums with higher human rights standards, and exert pressures on other groups to respond to these changes?⁵² This would be to fall back into the dichotomy of formal and substantive law: that because reflexive law does not seek to impose solutions, it is agnostic on the outcomes. A model based on competition need not be assumed to reach the optimal outcome because reflexive law intervenes within that ‘market’ of options to steer developments in the direction of human rights values.

In practical terms, for example, if an arbitral decision is human rights compliant or subject to an authorised scheme, it could be rendered legally enforceable – this would increase the utility of that option to individuals over non-compliant awards that

⁵⁰ See, for a discussion of the individual within the system: Chapter 2, Part 3(c).

⁵¹ Further discussion of the role of competition within the religious ‘market’ is located in the analysis of charitable laws as an additional lever alongside the possible utility advantage that comes from contingent legal recognition. See, Part 4(c)(iii), below. The role of competition is also discussed from the theoretical perspective in Chapter 4, Part

⁵² Stark and Bainbridge (n 47).

would not be enforceable.⁵³ However, a ‘marketized’ solution is unacceptable and, moreover, the adoption of a set of rules based around the Arbitration Act 1996 and the ordinary rules of family arbitration would be unacceptable in the context of religious dispute resolution.⁵⁴ Recall the discussion in Chapter 6, Part 2(a)(ii) which examined the concept of relational contract theory.⁵⁵ Here, the medium of contract law is adapted to the internal logic of family life by recognising a more nuanced and evolutive notion of consent. The values of relational autonomy, substantive equality and care must permeate the institutional arrangements such that a longer term, relational analysis of any agreements which result from arbitration should be employed in the religious context or, indeed other matters that religious institutions could resolve such as those around status.⁵⁶ Although such an approach reduces the finality and bindingness of any decisions made by religious institutions this is justified because the law ought not lend through authorisation, the power to bind individuals on the basis of religious and cultural norms *alone*.

This conception of regulated autonomy instead of privatisation and legal authorisation is justified for four reasons. First, privatising disputes does not, in practice, necessarily entail reduced state involvement but may in fact *increase* the role

⁵³ For an example of how a civil system of family arbitration can result in a effectively legally recognised award under the IFLA scheme, see *S v S* [2014] EWHC 7 (Fam). More recently, see *Haley v Haley* [2020] EWCA Civ 1639. IFLA refers to the Institute of Family Arbitrators, which has established a set of rules and procedures for arbitration: IFLA, ‘A Guide to the Family Law Arbitration Scheme’ (Fourth Edition) < <http://ifla.org.uk/divi/wp-content/uploads/Arbitrators.pdf> > [Accessed 26/09/2022].

⁵⁴ *DB v DLJ* [2016] EWHC 324 (Fam).

⁵⁵ Sharon Thompson, ‘Feminist relational contract theory: A new model for family property agreements’ (2018) 45(4) JLS 617.

⁵⁶ Rebecca Leckey, ‘Relational Contract and other models of marriage’ (2002) 40 OHLJ 1, 4.

of the State through creating inequalities that then necessitate further interventions.⁵⁷ If religious arbitration were to result in further material inequality, the State would be required to supplement the private financial and personal agreements of the parties. Second, nor is there any basis to assume that increased competition would principally revolve around *higher* procedural and human rights standards rather than decreased cost, privacy, choice of venue or perceived religious expertise. The opposite assumption may just as easily be true: competition may result in lower standards. As such, the utility of structurally coupling religion, law and the economy without the necessary accompanying regulation could result in a compounding of religious, economic and legal oppression rather than the inverse. The private model is simply inappropriate for securing human rights values whilst reflexive law and democratic experimentalism build in processes and levers which might lead to more progressive outcomes. Third, human rights values ought not be left to competitive bargaining but ought instead to be subjected to deliberative reasoning where the State plays a key facilitative role in channelling and prescribing the boundaries of deliberation.⁵⁸ Fourth, an approach that gives binding effect to religious arbitration without regulated oversight crucially does not promote critical self-reflection. Reflexive law fosters *reflexivity* and internalises responses to a changed environment: systems adapt to perturbations from the environment. So, whilst competitive forces may play a role in our proposed solution, this cannot offer a sustainable and legitimate solution without further regulatory oversight.

Ultimately, there are also strong reasons for a hybrid approach based on core human

⁵⁷ Sørensen and Torfing (n 13) 1.

⁵⁸ Fredman (n 4) 155.

rights and constitutional values. First, the principle of subsidiarity suggests decisions be made as close to the individual as possible. Second, the involvement of civil society enhances democracy and promotes deliberative solutions. As explained by Mayntz, ‘self-organization and the capacity for horizontal coordination with other similarly organized societal subsystems should not necessarily diminish political governability, but, quite on the contrary, could enhance it.’⁵⁹ Horizontal coordination between non-state groups combined with targeted State interventions, therefore, may enhance governance and promote democratic values. This is realised through a process of ‘publicly articulated general legal norms whose content, however, is developed on the local level through (substantive and procedural) innovation oriented toward effective, fair, problem solving’.⁶⁰ Finally, involvement of actors from across systems reduces the potential for misrecognition, because it allows them to play a role in defining and enforcing regulatory norms.

(b) Multifaceted

Reflexive regulation also relies on *variety* as well as hybridity. Therefore, our proposed solution ought not to rely on a *single* strategy for altering behaviour in favour of multiple strands of regulatory interventions which must include both communicative interventions in the discourse of religious systems but also indirect and strategic alterations where these might better promote reflexivity and human rights. Thus, the recognition and regulation of religious norms might be achieved through political and legal means, through charity law and judicial mechanisms. A multifaceted approach

⁵⁹ Renate Mayntz, ‘Governance Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm’ in Jan Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage 1993) 18.

⁶⁰ Cohen (n 11).

avoids the downfalls that plague each of these individually, such as was demonstrated in the discussion of religious arbitration in Part 3(a)(ii), above, and increases the chances for successfully realising our human rights values.

We should not think of the State's interaction with religion merely through its *legal* dimensions but also through the concept of 'quasi-law', which Pocklington adopts from earlier administrative law and regulatory literature.⁶¹ Such sources of soft law may also be used to regulate the internal workings of State bodies with corresponding external effect or may be expressly directed at external bodies, including religious institutions.⁶² An example of the former may be the creation of new guidelines directed at a State institution that has implications for how it relates to non-state bodies. In respect of the latter, these norms speak to non-state groups directly. The aim of soft law is (usually) not to *compel* results.⁶³ In fact soft law may be legally binding if derived from statute and intended to be so.⁶⁴ But whether or not soft law and political recognition has binding force, it has significant potential for opening up creative, reflexive means of interacting with religious tribunals. The State may recognise the role of religious tribunals as a religious, civic institution or as a charitable project or may in fact, 'recognise' religious tribunals through purposive abstention from interference in their operation. A reflexive law solution to regulation takes a broad look at the levers that can be used to regulate systems, including by destabilising the internal

⁶¹ David Pocklington, 'Quasi-Law and Religion' in Russell Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015).

⁶² *ibid* 133.

⁶³ *ibid* 135.

⁶⁴ *ibid* 136–137. An example might include, from the UK, the statutory guidance provided by the Charity Commission under Section 17(5) of the Charities Act 2011. Such guidance could, therefore, play into the regulation of religious institutions in a more indirect and reflexive manner.

power dynamics of a system through the provision of information, creative non-judicial forms of regulation and attention to the allocation of resources and tax relief.

In some circumstances, the State may endorse and encourage politically the development of religious tribunals. In this way, the tribunals perform a state recognised function without having legal recognition. In India, state personal law applies a religio-legal construction of religious personal law in state courts, but after Independence, the legal system was overburdened and at the time people's courts called *lok adalat* were established to perform informal justice, act as mediators and alternative forums for dispute resolution for those unable to access the courts.⁶⁵ The State encouraged the setting up of forums for ADR under the Arbitration Act 1940 and attempted to 'revive – or to reinvent – supposedly indigenous methods of dispute resolution'.⁶⁶ The State attempted in the 1950s to support local democratically elected councils applying state law called *nyaya panchayats* but this system became 'moribund' by the 1970s.⁶⁷ Today, various forms of informal courts – including 'women's courts' – perform similar functions, with varying degrees of State support and intervention.⁶⁸ However, as Hussain evidences, these represent what systems theory would predict – internal resistance against external efforts to impose substantive reform.⁶⁹ The *Darul Qazas* are Muslim community tribunals – their exact characterisation is contested, as evident in

⁶⁵ Sylvia Vatuk, 'The 'Women's Court' in India: An Alternative Dispute Resolution Body for Women in Distress' (2013) 45 *The Journal of Legal Pluralism and Unofficial Law* 76.

⁶⁶ *ibid* 78.

⁶⁷ *ibid*.

⁶⁸ Gopika Solanki, 'A Court of Her Own: Autonomy, Gender, and Women's Courts in India' in Samia Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017) 216.

⁶⁹ Sabiha Hussain, 'Shariat Courts and Women's Rights in India' (2006) Centre for Women's Development Studies; 2007, Occasional Paper No. 47, 1-2.

Vishwa Lochan Madan where the degree to which they form a judicial function as opposed to a mediatory or voluntary service was in question. Nonetheless, it is clear that the *Darul Qazas* are a means of asserting control within Muslim Indian communities over religious matters and exert significant social influence over those who use them. The reason for them is in part the idea amongst some Muslims that religious law is distorted by the State, with Muslims leveraging less political and legal power to affect it, and because the court's attempts at interpretation are found lacking. Systems theory predicts that substantive interventions will be met with defensive responses or be ignored by the system being regulated. In attempting to occupy the same space, religious courts have created a contending force in these non-state tribunals.

In *Vishwa Lochan Madan* the Supreme Court attempted to neatly delineate between State courts and non-state religious tribunals, yet this analysis failed to note the ways the State encourages religious tribunals to perform community functions and the ways these also represent – from a systems theory analysis – part of the problem with institutionalising religious law through state courts *at all*. At the most institutionalised end of this spectrum, the State may incorporate religious tribunals into its own legal system as in Israel. Unlike the Indian personal law model, where religious norms are applied *by state courts* these other models give religious tribunals State backing as part of its system of courts – it becomes a specialist religious court, led by religious judges and applying religious norms. This goes far beyond merely State funding or State encouragement of non-state civil entities, because it fully aligns the power and resources of the State behind religious tribunals with exclusive (or co-extensive) jurisdiction.

Whilst the Indian Constitution places a high degree of importance on the principle of equality and non-discrimination on the basis of sex, including gender stereotype, sexual orientations and gender identity, it also places high value on religious institutional autonomy under Article 26(b).⁷⁰ In essence, the State seeks to balance its commitments to equality with a strong commitment to community development over religious and cultural norms. India also is a large, multicultural society with infrastructural challenges.⁷¹ In the UK and Canada, the State has actively encouraged the privatisation of family justice in a number of ways. This has opened the normative and practical space for religious tribunals. Whilst the State has certainly not *encouraged* religious tribunals, nor does it actively support them outside the limited ways to be discussed below, the State has provided the arguments and justification for religious tribunals. Likewise, Macklin argues that the prevailing Canadian norms created the conditions for religious tribunals to emerge and make claims for further recognition.⁷²

Nonetheless, as explained in Chapter 3, ultimately the Ontarian authorities sought to express an attitude against the use of religious arbitration through its reform of the Family Law Act 2006. Despite this eventual outcome, the Boyd Report

⁷⁰ Article 26(b): a 'religious denomination' has the right to 'manage its own affairs in matters of religion.' For an exposition of the tension between individual and group rights under the Indian Constitution, see: Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority, and Religious Freedom Under the Indian Constitution' (2016) 5(3) *Global Constitutionalism* 351.

⁷¹ United Nations, 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' 23 June 2006, 14.

⁷² Audrey Macklin, 'Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration' (2013) 9 *International Journal of Law in Context* 343.

commissioned by the government of Ontario would have instituted a form of hybrid governance through the enhanced regulation of religious arbitration. Boyd concluded, after consultation with a range of groups, including Muslim groups such as the Muslim Canadian Congress that was opposed to religious tribunals in a series of public hearings,⁷³ that multiculturalism is not ‘to be an unlimited concept, but rather one that must be balanced against individual freedoms’ and made recommendations which permitted religious arbitration, whilst subjecting it to closer regulation.⁷⁴ Boyd concluded that there was no evidence of ‘systematic discrimination’ but did understand the possible risks to minority women.⁷⁵ Her recommendations included a variety of mechanisms that would work in tandem to reduce exposure to these risks.

In all, her proposals were comprehensive, but also divisive and were rejected by Ontario’s Premier who proclaimed that there would be ‘one law’ applied to all.⁷⁶ This result is to be regretted. From the systems theoretical point of view the abandonment of a form of regulated autonomy is unlikely to result in the State’s human rights objectives being achieved.⁷⁷ It fails to harness and channel the self-regulatory potential of religious communities and leaves vulnerable individuals without the enhanced regulatory protections envisioned in the Boyd Report. Notably, for example,

⁷³ *ibid* 346. Macklin: ‘Boyd received submissions in person, by phone and in writing from over fifty groups, as well as many private individuals. She met with women’s organisations, religious bodies, immigrant settlement organisations, family lawyers, arbitrators, mediators and concerned citizens’.

⁷⁴ Marion Boyd, ‘Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion-Executive Summary’
<<<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html>>>.

⁷⁵ *ibid*.

⁷⁶ Harvey Simmons, ‘One Law for All’, *The Toronto Star*, 14/09/2010
https://www.thestar.com/opinion/editorialopinion/2010/09/14/one_law_for_all_ontarians.html
[Accessed 28/09/22].

⁷⁷ Boyd (74).

the proposals for Islamic tribunals were accompanied by commitments that women could act arbitrators as well as a proposed role for non-Muslims as well as the obligation that women would have access to independent legal advice.⁷⁸ Many of Boyd's proposed mechanisms had the potential to enhance reflexivity and promote human rights. She argued that with additional safeguards, such as new provisions for setting aside decisions for unconscionability, more protection of children's rights and guarantees of 'fair and equal treatment' a balance could be struck between religious minorities that wished to plan their family lives around religious norms, with state recognition of these agreements.⁷⁹ First, Boyd argued that parties were to be required to sign a declaration prior to entering the arbitration that it is voluntary, independent legal advice to be offered, and that the parties understood it was still ultimately subject to secular law.⁸⁰ This sought to enhance autonomy and ensure basic information was provided.

However, it was the further reforms that had the real transformative potential. Boyd argued for proactive regulation through accreditation of arbitrators and community legal education and engagement.⁸¹ This accreditation would provide legal recognition of practitioners who met certain standards, increasing the utility for parties in selecting an accredited arbitrator as this ensures the benefits of contingently binding decisions could be realised. The community engagement and education were aimed at raising consciousness – and enhancing reflexivity *within* religious communities

⁷⁸ *ibid.*

⁷⁹ *ibid* Recommendations 3-9, 12 and 15.

⁸⁰ *ibid* Recommendations 12-20.

⁸¹ *ibid* Recommendations 14 and 25-35.

through persuasion in relation to the interaction of religion and civil rights. Thus, Recommendation 25 suggests that the State:

...develop, in collaboration with community organizations and experts, a series of public education initiatives, aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions.⁸²

Importantly any such endeavours must be genuinely accessible in light of the value of substantive equality as a pre-requisite for a reflexive scheme. Boyd took steps to acknowledge this in Recommendation 26 which stated any such community engagement must 'be linguistically and culturally designed to suit the diverse needs of different communities, as well as any communications challenges faced by members of the community.'⁸³ A reflexive scheme goes further than the provision of information to actively seek to steer the debate and promote human rights objectives beyond the provision of consultation and information to entail a partnership for devising and implementing the regulatory scheme itself. Some of these features appear in Recommendations 43 and 44 which seek to develop a collaborative attitude between community groups and public bodies in providing information and devising materials. Finally, Boyd also argued for methods of ensuring high standards and oversight of religious arbitration, through ensuring transparency over agreements and codes of practice designed to prioritise the needs of vulnerable parties, such as children.⁸⁴

Taken together, the Boyd Report is an example of a pro-active and tailored regulatory approach, including legal mechanisms, enhanced formalities, information

⁸² *ibid* Recommendation 25.

⁸³ *ibid* Recommendation 26.

⁸⁴ *ibid* Recommendations 36-42.

and oversight. These mechanisms in their variety and multiplicity and in the ways in which regulation relies on hybridity demonstrate a core feature of reflexive law. And in some of the procedural and informational recommendations, further qualities of more specific reflexive laws are evident.

(c) Indirectness

The most effective means of steering behaviour from the systems theoretical perspective is through changing the external environment in which these systems exist.⁸⁵ This means the State should focus on providing the right ‘external perturbations’ to trigger the ‘development of new rules’ within sub-systems.⁸⁶ Reflexive law directs us not to *impose* substantive duties but to alter the environment more broadly to encourage change.⁸⁷ This is the same notion as expressed by Christian Joerges and Renaud Dehousse, who argue for ‘co-ordination across systems’ based on ‘social integrity’ and a ‘process of reciprocal irritation.’⁸⁸ On this view, interventions ought to be indirect and focused – avoiding the problem that communication as between systems is limited.

There are two interconnected manifestations of this principle of indirect regulation.

⁸⁵ Gunther Teubner, ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51(1) *Current Legal Problems* 393, 422.

⁸⁶ *ibid.*

⁸⁷ Fredman (n 4) 152.

⁸⁸ Oliver Gerstenberg and Charles Sabel, ‘Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?’ in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe’s Integrated Market* (Oxford University Press 2002) 339
<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199246083.001.0001/acprof-9780199246083-chapter-10>> accessed 16 June 2020.

First, rather than imposing substantive rules, the use of procedural rules should be preferred which allows for localised decision making according to a set of pre-assigned safeguards which ensure equal participation. The second principle is the concept of collibration.⁸⁹ Or, more simply, this is the manipulation of existing tensions within a system to promote the prescribed goals. This reinforces the notion of procedural intervention because it directly seeks to destabilise power structures which disadvantage women within systems.

(i) Proceduralisation

Proceduralisation relies on the creation of procedural mechanisms rather than the imposition of substantive norms to drive behaviour. These procedural solutions are aimed at promoting human rights values *and* promoting discourse within systems. As Balchin notes, procedural reforms have led to significant improvements in contexts where ‘substantial legislative reform’ is not possible. Procedural reform, she argues, is often ‘more manageable’ and can bring ‘immediate relief’.⁹⁰ Yet, the sorts of procedures Balchin envisages go to the more granular levels of reform.⁹¹ Procedural law is *not* synonymous with reflexive law: reflexivity refers to ‘the application of procedures to procedures’ or the establishment of new procedures under a meta-framework.⁹²

This raises two important questions: is there some stable division between

⁸⁹ To ‘librate’ means to oscillate (or disturb).

⁹⁰ Cassandra Balchin, ‘Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change’ (2010) *Musawah: Equality in the Family*, Background Papers 218–219.

⁹¹ *ibid.*

⁹² Arato (n 32) 35–36.

process and substance? And if so, is the proceduralisation of rich moral, religious, legal and political disputes beneficial – or by stripping away the substance does it leave the debate hollow? The first point is based on the notion that, in shifting from a substantive debate to a procedural one, issues around conflicting norms, secularism and pluralism can be avoided. Yet, all process norms are connected to underlying substantive values: for example, procedural rules aimed at promoting legal certainty are underpinned by respect for autonomy. So, in speaking of *proceduralisation* this Chapter does not purport to dodge this debate nor contend that procedure avoids forming substantive conclusions on deeper values. In fact, reflexive law in the context of family and human rights law is premised on underlying human rights values as argued in Chapters 5 and 6.

A second difficulty is that even when tasking a group to devise their own regulatory norms according to certain procedural requirements to ensure equal participation and deliberation,⁹³ a proceduralised response could still result in norms that seem to violate human rights values. However, this criticism is overstated for four reasons. First, substantive equality requires that the State be required to step in to challenge those power structures which might create this disadvantage. Second, whilst respect for pluralism requires acceptance of difference it does not require neutrality. Thus, within this process the State is both entitled and required to ensure these procedures promote human rights outcomes. Third, and relatedly, the procedural restrictions must be geared at securing the ‘boundedness’ of deliberation, as described in Chapter 5. Fourth, proceduralisation forms only one part of a broader strategy. The next section, in particular, demonstrates how the State must use the procedural and

⁹³ Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011) 30–32.

other communicative and strategic interventions to shape the social tensions within systems towards human rights compliant ends.

(ii) Manipulating Power Structures

In the context of family and religion, this form of regulatory control is geared at stimulating the sub-systems to change the operative dynamics within the group, with a view of furthering human rights values. Dunsire explains that:

... [collibration means] to identify in any area what antagonistic forces already operate, what configuration of them provides the current stability, and what intervention would help to change that stability to an alternative one which is more in line with the policy makers' objectives, not by laying down a standard, but by giving that degree of ad hoc support to the side that needs it to do the trick⁹⁴

This approach relies on the fact that groups are not homogenous, that they are made up of sub-systems and actors with different conceptions of the good and that the status quo is held together by existing power structures in a 'state of balance' or 'point of equilibrium'⁹⁵ which can be altered in pursuit of substantive equality to empower marginalised voices. It is worth noting that many positive changes have '...been actively instigated by women' within religious communities and women are 'also leading a demand for the re-conceptualisation of family relationships based on clearly articulated concepts of equality and justice'.⁹⁶ This account of law and religion relies on the insight that these systems are developed over time by *people* through communications and in light of the prevailing cultural and ethical norms of other

⁹⁴ Andrew Dunsire, 'Modes of Governance' in Jan Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage 1993) 34.

⁹⁵ Dunsire (n 37) 9–10.

⁹⁶ Balchin (n 90) 209.

systems. The struggle for justice is *within* religions rather than *against* them such that for many religious women, demands for reforms come from ‘within a religious framework.’⁹⁷ This proposal is fundamentally one based on empowerment such that the strands of religious conceptions of human rights can be utilised to challenge pre-existing distributions of material and symbolic power. Because there is ‘no reason’ to assume that the ‘configuration of social forces’ at any time is ‘the most desirable’ or ‘the best obtainable’ arrangement, collibration has the radical, transformative potential to re-configure power structures as a means of regulation.⁹⁸

Collibration, therefore, not only helps address concerns raised in respect of proceduralisation as it promotes an equal playing field but also seeks to remodel power structures to further equality, autonomy and promote caring relations. This also means that the use of such regulatory strategies must also be hemmed by these values. For example, Afsahi notes that in the context of the Ontario debate over religious arbitration, ‘opinions and biases regarding Islam created the conditions that systematically left out, ignored, or dismissed views of those who needed to express them.’⁹⁹ Likewise, Balchin notes that minority women tend to be ‘marginalised from the power structures that determine processes of legislative reform and community identity formation.’¹⁰⁰ What these observations indicate is that there must be strategic interventions to ensure the equal participation of the most vulnerable voices.

This strategy also forms part of a regulatory solution that does not rely on

⁹⁷ *ibid* 220.

⁹⁸ Dunsire (n 37) 9.

⁹⁹ Afsoun Afsahi, ‘Deliberating Across Difference: Religious Accommodation and Deliberative Democracy’ (2020) 8 *JLRS* 34, 44.

¹⁰⁰ Balchin (n 90) 212.

imposing substantive norms but seeks to adjust the balance in favour of those regulatory goals indirectly.¹⁰¹ Self-governance within groups occurs through ‘social processes’ in which groups ‘necessarily check and balance’ one-another.¹⁰² Dunsire argues that this mode of regulation ‘reaps benefit from other’s conflicts.’¹⁰³ This is likely the case in respect of religious systems: these systems are composed of competing sub-systems held up through a power dynamic, and have the potential to develop and change over time as this power dynamic changes. Religious norms today reflect centuries of *human* development and interpretation, through a process that has taken for granted patriarchal power. Such development, as starkly demonstrated in India, has not been the pure unfolding of divine revelation, but the interventions of colonial power with its own distorting effects.¹⁰⁴ Likewise, in Ontario, the debate over reforming faith based arbitration was ‘dominated by a few groups that often deliberately failed to include the voices of others, thus expressing and highlighting limited perspectives’.¹⁰⁵ The State, through empowering progressive voices and disincentivising regressive ones can indirectly regulate systems by managing social antagonism in ways that may be more likely to succeed.¹⁰⁶

¹⁰¹ Dunsire (n 37).

¹⁰² *ibid* 6.

¹⁰³ *ibid* 5.

¹⁰⁴ Marc Galanter and Jayanth Krishnan, ‘Personal Law and Human Rights in India and Israel’ (2000) 34 *Israel Law Review* 101; Chandra Mallampalli, ‘Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-Ness’ (2010) 28 *Law and History Review* 1043.

¹⁰⁵ Afsahi (n 99) 43.

¹⁰⁶ Dunsire (n 37) 11.

A range of possibilities remain open to how this ‘invited’, created space is structured and designed.¹⁰⁷ The UK’s Independent Review examined a range of possibilities, including the encouragement of the creation of a self-regulatory scheme through invitation; that the State establish a body that performs this regulatory function, with input from religious and non-religious experts; or the State can impose a regulatory model that is externally enforced.¹⁰⁸ Likewise, the Boyd Report envisaged a State-centred but wide ranging, cooperative model of addressing religious family law questions.¹⁰⁹ Importantly, the UK Review was focused on Islamic religious tribunals – but the suggestion in this Thesis is that similar such schemes ought to exist in any area where religious and legal demands overlap, with the potential to cause harm to the most vulnerable individuals. The reflexive model of regulation aligns with the creation of a ‘new’, democratic and collaborative space for the development of a broad, uniform code of practice that governs the conduct of religious family disputes. In this way, much can be learnt from and incorporated from the Boyd Report, with the main recommendation entailing more proactive regulation of religious tribunals, requiring accreditation of arbitrators and community legal education and engagement.¹¹⁰ The notion of a broad, meta-framework for the development of a more precise code of conduct was also endorsed by the Independent Review in England.¹¹¹

¹⁰⁷ Andrea Cornwall, ‘Making spaces, changing places: situating participation in development’, Working paper series, 170 Brighton: IDS (2002).

¹⁰⁸ Great Britain, Home Office, and Office for Security & Counter-Terrorism, *The Independent Review into the Application of Sharia Law in England and Wales* (2018) 19.

¹⁰⁹ Boyd (n 111).

¹¹⁰ *ibid* at Recommendations 14 and 25-35.

¹¹¹ Independent Review (n 108) 19.

In this domain, the question is then *whose* voices and under *which* *circumstances* are these to be heard?¹¹² Three strategies in particular are relevant.¹¹³ First, once the area of conflict is identified, this conflict can be ‘formalised’ so as to turn it into a self-conscious area of discourse and ‘intercommunication’. Thus, a reflexive scheme that regulates religious family law would need to identify and formalise areas of contention or ostensibly conflicting positions both within a system and as between systems. It involves the State bringing together actors within relevant systems. An example explored in Chapter 3 related to religious divorce, such as in *Bruker*. In these cases, the husband has the unilateral right to issue a divorce, which provides the husband with powerful leverage in divorce proceedings. Identifying and formalising the principal areas of conflict over this practice, therefore, becomes the first step. These include differing conceptions of equality and different regimes for the division of family property. Second, to ‘move the goal posts’ by changing the rules (‘canalising’) of the game so as to allow conflict to continue but towards a different objective or in changed circumstances. Once these areas have been formalised, and the rules have been set, the State relies on self-regulation through the division of substantive and procedural rules within a system in response to the various internal and external stimuli. However, the State’s role remains active in three senses. The state ought to monitor the discourse by requiring accountability for its progress; second, it ought to reflect on both its reasons and values as well as the dynamics of the group itself; third, it needs to respond to these interim-outcomes through altering the

¹¹² Maleiha Malik, “‘The Branch on Which We Sit’: Multiculturalism, Minority Women and Family Law’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006).

¹¹³ Dunsire (n 37) 10-11.

parameters dynamically in order to steer the debate in the direction of its human rights objectives.¹¹⁴

The third stage is therefore State efforts to alter the balance of forces within a system, that can be destabilised in order put a different spin on the social conflict better in line with human rights goals.¹¹⁵ This may include *biasing*. To put this differently: this harnessing of existing social forces for regulatory goals can mean ‘changing its variables, changing its values, [and/or] changing its relationships.’¹¹⁶ This operates in a separate dimension to other regulatory *tools* which can be employed in order to affect changes in any one of these areas. The variables in any one of these settings might be changed through information, regulation, or monetary incentives.¹¹⁷ For example, certain tax and charitable benefits could be extended for religious groups that self-regulate according to human rights principles; certain information about the registration of marriages and the legal situation upon divorce for religious couples could be provided; and certain regulations may be enacted that alter the procedures through which intra-systemic discourse is carried out.

(iii) Charitable Status

Reflexive law looks at altering the external environment in such ways as to bring about the intended policy and human rights objectives, accepting the failure of traditional

¹¹⁴ This connects with the discussion, below, on democratic experimentalism in Part 4(d) and for the theoretical basis, in Chapter 5, Part 3(e).

¹¹⁵ Dunsire (n 37) 10.

¹¹⁶ *ibid* 12.

¹¹⁷ *ibid*.

command and control as a means of imposing substantive duties. It also rejects the strategy of free competition as an appropriate solution.¹¹⁸ One further form of steering comes from the structural coupling of social norms with legal norms. This form of recognition would be contingent regulated autonomy– subject to the availability and efficiency of that architecture of experimentalism discussed below. Reflexive law mediates between non-interventionist models and command and control regulation. The former fails to protect vulnerable groups. The latter risks the regulatory trilemma: these interventions being ignored or only facially internalised; the destruction of that system; or the undermining of law as a system of regulation itself. Financial levers such as charitable status and funding arrangements are *one aspect* of this broader regulatory scheme that seeks to destabilise power structures and modify behaviour. As Emon argues, ‘the state can provide incentives to facilitate the development of non-profit and charitable organizations’¹¹⁹ in exchange for compliance with an imposed regulatory scheme. Emon envisages a ‘market’ of religious forums (alongside the State courts) from which believers may pick and choose. Those options that are backed by state law become more ‘efficient’ and, Emon suggests, would out-compete those that do not comply with these norms.¹²⁰

Such an approach on its own is flawed because competition is inadequate and inappropriate for the protection of fundamental rights. Further, the idea of believers – particularly those who are most vulnerable to coercion and pressure – making rational,

¹¹⁸ Cohen (n 1) 154-155.

¹¹⁹ Anver Emon, ‘Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation’ (2009) 87 Canadian Bar Review 391, 423–424.

¹²⁰ *ibid.*

market driven choices between venues seems counter to experience and unrealistically ignores the encumbered self, placed in a context of choice mediated by culture, family, socio-economic circumstances and other intersecting aspects of identity. Nonetheless, the core notion that the State may influence behaviour through charitable status and tax arrangements presents a real and tangible means of achieving human rights objectives.¹²¹ Utilising the ‘medium of money’ and administrative power in the pursuit of human rights goals – alongside other regulatory levers as part of a broader reflexive regulatory scheme – this could better engage with systems and obtain more effective results.

As such, charitable regulation can play a significant role in responding to these challenges, supplementing the use of invented spaces for reflexive engagement. Thus, for example, in line with the principles of hybridity and multiplicity, charitable regulation ought to play a supplemental role in delineating the bounds for self-regulation.¹²² More precisely, using the UK as an example, the Charity Act 2011 requires that for an organisation to have charitable status it must satisfy a charitable purpose and be for the public benefit.¹²³ As explained above, if an organisation is registered as charitable, it receives the benefits of preferential financial measures.¹²⁴ In the case of religious organisations providing alternative dispute resolution, these could fall within the charitable heads of ‘the advancement of religion’ or ‘the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or

¹²¹ *ibid.*

¹²² Black (n 19) 122.

¹²³ Charities Act 2011, s2(1)(a)-(b).

¹²⁴ *R (Independent Schools Council) v Charity Commission* [2012] Ch 14, [106].

racial harmony or equality and diversity’.¹²⁵ Although a charitable purpose is necessary, it is not sufficient: the organisation must also show that this is for the ‘public benefit’.¹²⁶ This requires proof both that there is ‘benefit’ and that this benefit is open to the ‘public’. Both aspects require clarification. The Charity Commission explains that ‘benefit’ is calculated as the aggregate good caused by a purpose set against any harms and this benefit must be ‘identifiable’ in the sense it must be provable by evidence.¹²⁷ It must then be shown to be of ‘public’ benefit, which means that it must be open to at least an ‘appreciably important class’ of the community.¹²⁸ Moreover, the Equality Act 2010 provides a further lens of regulatory oversight because, pursuant to s193(4) racial exclusions in respect of charitable purposes are to be set aside in favour of a purpose of general application. The implication of general equality principles was shown to be a powerful regulatory tool in *Catholic Care*, where the application of discriminatory treatment upon protected grounds would result in failure to achieve a charitable status.¹²⁹ Thus, by extending charitable status to religious tribunals, an important form of regulatory oversight can be introduced, which, by coupling economic, legal and religious systems engenders a certain creative friction which encourages good standards of governance, reporting and review.

¹²⁵ *ibid* s3(1)(c) and s3(1)(h).

¹²⁶ *ibid* s4.

¹²⁷ Charity Commission, ‘Guidance- Public benefit: rules for charities’, 14 February 2014 <<https://www.gov.uk/guidance/public-benefit-rules-for-charities>> [Accessed 29 June 2022]. See further, Charity Commission, ‘Guidance - Public benefit: the public benefit requirement (PB1)’ 16 September 2013.

¹²⁸ *Verge v Somerville* [1924]; *Dingle v Turner* [1972] AC 601, 624.

¹²⁹ *Catholic Care (Leeds) v Charity Commission* [2010] Ch 214, [178].

Some religious tribunals rely on fees, others seek and obtain charitable status¹³⁰ - and, in fact, the receipt of fees does not preclude an organisation from being considered charitable.¹³¹ This forms a source of political and legal recognition – noted by the UK’s Independent Review of Sharia councils¹³² - on the basis that the highly advantageous financial benefits in charity law marks religious tribunals with a degree of state support and affirmation. To maintain charitable status, these tribunals must satisfy a public benefit test.¹³³ Where the State recognises religious tribunals it also regulates them closely. The Charity Commission lists as ground for investigation examples such as potential ‘serious harm’ to vulnerable beneficiaries, ‘extremism’, significant private advantage or other ‘significant non-compliance’ that might ‘impact significantly’ on trust and confidence in charities.¹³⁴ This is the trade-off: in offering both legitimacy and financial incentives, a tribunal would be required to adhere to principles of good self-governance, determined within a broader meta-framework of regulation. These perturbations connect with the strategic decision making of individuals within systems by altering the environment in which tribunals operate, changing the balance of utility that comes from charitable exemptions. Therefore, charitable status could be used to promote human rights and equality goals *reflexively*

¹³⁰ Independent Review (n 108) 10.

¹³¹ *R (ISC) v Charity Commission* [2012] Ch 214.

¹³² Independent Review (n 108).

¹³³ The Charities Act 2011 consolidated the earlier Charities Act 2006 and associated case law on charitable trusts. The Charities (Protection and Social Investment) Act 2016 added new powers to the Charity Commission, including to issue official warnings, suspend trustees and even direct that certain actions be taken.

¹³⁴ Complaints About Charities (CC47).

to ensure tribunals perform their legal obligations, remain accountable, and ensure their effectiveness whilst maintaining public trust in their governance.¹³⁵

However, as Pocklington argues, charitable status is a key source of ‘quasi-law’ because it provides both powers of regulation but also *sanctions*.¹³⁶ Too blunt an application of this lever falls into the very same regulatory trilemma as other forms of ‘command and control’ regulation, as demonstrated by the *Catholic Care* case.¹³⁷ Here, the Charity Commission, supported by the EHRC, withdrew charitable status from a Catholic adoption agency because it refused to permit adoptions for same-sex couples.¹³⁸ The High Court held that the Commission was bound to take into account the HRA 1998 when deciding questions of charitable status.¹³⁹ By altering the external environment in which religious institutions operate, leveraging access to tax benefits, the State can employ powerful reflexive law mechanisms to help promote human rights objectives. The ultimate result was the destruction of this institutionalised practice of Catholic adoption altogether, followed by the development of new agencies that adhered to the equality standards required by charitable laws.¹⁴⁰

¹³⁵ *ibid.*

¹³⁶ Pocklington (n 61) 138.

¹³⁷ CA/2010/0007 UKUT (Tax & Chancery) (2 November 2012).

¹³⁸ *ibid.*

¹³⁹ *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales & Anor* [2010] EWHC 520 (Ch); *Catholic Care (Diocese of Leeds) v Charity Commission for England & Wales* [2012] UKUT 395 (TCC).

¹⁴⁰ Martin Beckford, ‘Last Catholic adoption agency faces closure after Charity Commission ruling’ (*The Telegraph*, 19 August 2010) < <https://www.telegraph.co.uk/news/religion/7952526/Last-Catholic-adoption-agency-faces-closure-after-Charity-Commission-ruling.html> > (accessed 25/01/2021).

(d) Experimental

The provision of information and mechanisms for enhancing transparency and accountability are central to the reflexive paradigm as understood as a democratically experimental model of constitutionalism. This idea has been generally explained in Chapters 3 and 4, however, in this section its experimentalist ‘architecture’ is fleshed out in more concrete terms. In other words, this section sets out the structure or template for implementing reflexive secularity. It also calls upon us to engage in the creation of new regulatory spaces – rather than merely introducing spaces for participation within existing structures, it is necessary to ‘invent’ new spaces too. The concept of space is a metaphorical device to describe ‘a dynamic, humanly constructed means of control and hence of domination and of power.’¹⁴¹ Participation is more than bringing existing spaces to ‘life’ but is also about creating ‘new social forms’¹⁴² and being alive to the power structures that underpin them. Thus, as Ahmed argues, religious institutions can become a locus of democratic engagement for minority groups which are more alive to the concerns and interests of that group.¹⁴³ Thus, we might pause to consider the distinction between the ‘radical’ potential for spaces ‘at the margins’ as well as invited (or induced) participation in spaces already in existence.¹⁴⁴

¹⁴¹ Henri Lefebvre, *The Social Production of Space* (Blackwell 1991) 24–26.

¹⁴² Cornwall (n 107) 2-3

¹⁴³ Farrah Ahmed, *Religious Freedom under the Personal Law System* (First edition, OUP 2016); Farrah Ahmed and Senwung Luk, ‘How Religious Arbitration Could Enhance Personal Autonomy’ (2012) 1 *Oxford Journal of Law and Religion* 424.

¹⁴⁴ Cornwall (n 107) 2-3

The most basic component of democratic experimentalism is expressed through the relationship between centre and ‘local’ units.¹⁴⁵ It is important, however, to recall that the ‘centre’ is relative – and that within this Thesis systems are construed non-hierarchically.¹⁴⁶ Thus, although we may term these local and central units, this does not commit us either to a competitive model of ‘bottom up’ regulation nor a collapse into centralised, command and control regulation.¹⁴⁷ These units all set and revise goals – and will do so on two levels: first, the development and refinement of the underlying values in light of new information; and second, the development of more effective means of implementation of those norms.¹⁴⁸ In the specific context of law and religion, the ‘goals’ are formed of high-level norms, as outlined in Chapter 6, with ‘provisional’ standards being devised in consultation between the centre and local units to monitor and review their actualisation within systems.¹⁴⁹ The experimentalist architecture, therefore, is formed from the bounded autonomy given to religious groups with the ‘condition’ attached that these must report back information and compare and justify results in light of other implementations.¹⁵⁰ Importantly, as argued in Chapters 4 and 5, reflexive regulation must balance experimentalism with stability: so, the broader framework norms are reviewed periodically in light of the *normative* products of this iterative process. As Sabel and Simon explain: the ‘framework goals, performance measures, and decision-making procedures’ must be ‘revised on the basis of

¹⁴⁵ Sabel and Simon (n 3) 8.

¹⁴⁶ Noting, however, the discussion of the special role of the state law in Part 4(a), above.

¹⁴⁷ Sabel and Simon (n 3) 9.

¹⁴⁸ *ibid* 8–9.

¹⁴⁹ *ibid* 9.

¹⁵⁰ *ibid*.

alternatives reported and evaluated'.¹⁵¹ In this way, the goal of reflexive secularity is to create an architecture of regulation that harnesses and facilitates local ingenuity and expertise.

Connected to these ideas is the regulatory concept of human rights 'due diligence': this is the norm that groups ought to be encouraged to 'critically, creatively and continually [reflect] about their influence on human rights'.¹⁵² As Balchin argues, the documentation and dissemination of information have been central to promoting equality in family law systems around the world.¹⁵³ The law, where possible, should facilitate this process and promote a reflexive attitude on all sides. As a result, the provision of information goes beyond the need to provide information to individuals so as to better inform people of their rights, as discussed in relation to the Boyd Report above. This may well be a useful regulatory strategy, that can be utilised in order to alter social tensions in such a way as to promote human rights values within the group. However, as Pathakji argues, it also entails the 'collection and dissemination of positive information ... [that] will encourage others to improve and follow the best practice.'¹⁵⁴

And this notion of collection and dissemination of information is essential within a decentralised model because it relies on democratic experimentalism. Cohen argues in favour of a model of reflexive law where 'publicly articulated general legal norms whose content, however, is developed on the local level through institutional

¹⁵¹ *ibid.*

¹⁵² Neha Pathakji, 'A Reflexive Law Approach and Accessibility Rights of Persons with Disabilities to the Virtual World: Seeking the Midas Touch of Corporations' (2015) 15 QUT Law Review 140, 156.

¹⁵³ Balchin (n 90) 215.

¹⁵⁴ *ibid* 156.

(substantive and procedural) innovation oriented toward effective, fair problem solving'.¹⁵⁵ Likewise, Michael Dorf and Charles Sabel defend a radical, democratic ideal that ought to be placed at the centre of a reflexive legal regime. They start from observations about the fractious and diverse nature of modern society and the failings of contemporary mechanisms to adapt.¹⁵⁶ This model of democratic engagement, hemmed by rights, is summed up as follows:

...experimental elaboration and revision to accommodate varied and changing circumstances, yet credibly limit the opportunities for self-dealing that this very openness of necessity seems to create¹⁵⁷

Dorf and Sabel set up a bargain or trade off: to enjoy this creative liberty, groups must '... provide individuals in their own and other jurisdictions with information to judge their performance' and vindicate rights.¹⁵⁸ This creates feedback loops that operate both horizontally and vertically, between different layers of government. A 'rolling' process is thus created, whereby 'best practice' is locally developed and disseminated, tested and then incorporated into future benchmark standards.¹⁵⁹ Future developments then must be at least as robust as those already established, and this process, they argue, encourages high standards. This radical model sees regulators and the regulated religious groups working in partnership: 'learning' by *doing, reporting and monitoring* within the scope of existing, broad, general and democratically constructed meta-framework.

¹⁵⁵ Cohen (n 1) 17.

¹⁵⁶ Dorf and Sabel (n 15) 271.

¹⁵⁷ *ibid* 283–284.

¹⁵⁸ *ibid* 288.

¹⁵⁹ *ibid* 350.

4 Conclusion: A Final Prayer

This Thesis has traced the ground of religion-State interactions within a systems theoretical framework, recognising that the best way to understand this dynamic is through close examination of the concept of functional differentiation and the communicative elements of systems theory. This Thesis began with a deep and abiding belief that law can have the radical and transformative potential to respect religious differences *and* to promote human rights values to recognise all persons as both religious individuals and as bearers of their full civil rights. Our starting point is to accept the basic premise of voluntarism: that the functional differentiation of society best protects the social order and advances individual freedoms.¹⁶⁰ However, the voluntarist model continues that in circumstances where the State is implicated in injustice and harms through its non-interventionism in religious life, it can use the strategies of severing and mainstreaming to advance individual welfare.¹⁶¹ This flexibility, however, generates uncertainty and further questions in need of resolution: under what circumstances is the State justified to intervene in family life, or for religious norms to play a regulatory role? The answer to this complex question is found in the idea of reflexivity. Reflexive law neither seeks to regulate behaviour directly, through the imposition of command-and-control measures aimed at resolving issues of deep personal, communal, and spiritual importance from the top-down. Nor, however, does it abdicate the State's responsibility to care for and support those who might be disadvantaged because of religious norms which command the full allegiance of their adherents. Reflexive law – developed in this Thesis as the concept of reflexive

¹⁶⁰ John Eekelaar, 'Laws, Values, Cultures' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill | Nijhoff 2015) 36.

¹⁶¹ Maleiha Malik, 'Minority Legal Orders in the UK: Minorities, Pluralism and the Law' (British Academy 2012) 40–42.

secularity – aims to build on and develop the existing literature, by emphasising the imperative for indirect and multifaceted regulatory solutions within the bounds of human rights values. This model *structures* the answer to Eekelaar’s question: interventions are justified if (and to the extent that) they adhere with the criterion of reflexivity and the normative criteria of autonomy, equality and care.

So, how do we get to this conclusion? Chapter 2 introduced the systems theoretical conception of law and society and made the case for a modified understanding of this framework in the context of law, religion and family life. Instead of focusing on the apparent communicative closure of systems and the concept of autopoiesis as the cardinal principle for understanding society, the communicative challenges associated with systems were cast as one axis of understanding. Moreover, this Thesis adopts Habermas’s understanding of a universal language with specific functions adapted to each system of social life. In this way, the strong objection to inter-systemic communicative interactions can be replaced with a more pragmatic argument: direct interventions remain liable to result in the regulatory trilemma of ineffectiveness, unresponsiveness or incoherence meaning an indirect mode of regulation is to be preferred, without wholly discarding the possibility of meaningful deliberation.

Chapter 3 engaged with the tentative conclusions of Chapter 2. Here, the analytical framework based on systems theoretical insight is applied to case law and statutory examples in a process of bringing theory and practice into relation with one another. Making use of the regulatory trilemma as an analytic lens, the cases in four jurisdictional examples are deconstructed to identify the outlines of the systems theoretical account of law and society. As such, Chapter 3 is an exercise in applied, normative theory and not an empirical study of the jurisdictional examples. The

contributions of Chapters 2 and 3 together demonstrate a convincing analytical methodology for both the analysis of other jurisdictions *and* a model that can be further tested by empirical study in future research. Moreover, the principal contribution of this analysis is to provide the bridge between the analytical framework, existing practice, and the *normative* implication of this analysis: direct attempts to regulate religious family life will tend not to result in the outcomes intended by the regulator. This suggests a model based on reflexive law – or the regulation of each system’s self-regulatory potential.

England has been described as a model of ‘joint governance’ of religious and civil institutions in practice. From the point of view of systems theory, this is both expected and desirable. It is expected for the reasons provided in Chapter 3. It is desirable for the reasons set out in Chapters 2 and 4. Likewise, the Canadian examples demonstrate the complexity inherent in the communicative interaction between laws and religion and the ways in which these systems construct meanings within their own terms of reference. The Israeli and Indian examples illustrate the challenges of the trilemma in acute terms: with institutionalised solutions of personal law and authorisation of religious institutions leading to undesirable consequences in terms of both regulatory failures and normatively unacceptable solutions. In short: reflexive regulation recognises the limits inherent within any one system to control and modify behaviour in another and requires of us a collaborative, de-centred model of resolving complex social issues.

Chapter 4 brings these normative arguments into clearer focus by developing the concept of reflexive secularity. It sets out the necessary pre-requisites for a reflexive approach to regulation have been explored as well as an outline of the qualities of such

a system, based on indirectness, variety and close engagement and attention to social tensions. The Chapter adopts a general description of reflexive law based on Black's qualities of de-centred regulation, and elaborates these as hybridity, multiplicity, indirectness and process. As Cohen recognises, 'many of the negative consequences and regulatory paradoxes in this domain [of regulating private life] stem from use of the wrong paradigmatic approach'.¹⁶² She calls for an approach rooted in a middle way between a liberal doctrine of privacy and an interventionist policy of religious particularism.¹⁶³ Chapter 4 relates the systems theoretical framework to the question of how the law, religions and society ought to relate and explains the systems theoretical conception of rights as a means of securing the functional differentiation of society – and thereby also securing systemic stability and individual freedoms. This Chapter, therefore, argues that a new criterion be considered central to the question of how law and religion ought to relate: an intervention ought to be judged on the basis of its ability to promote reflexivity both because this will best ensure its effectiveness and because it will best preserve a sphere of religious freedom outside the direct control of the State (or, any other system).

Chapters 5 and 6 brought these arguments further by engaging with the question of what normative values ought to underpin the concept of reflexive secularity. In Chapter 5, it was argued that values must be the ends to which any intervention ought to be judged and provide reasonably stable bounds within which self-regulatory potential is to be steered. It also grounds reflexive secularity on a normative principle based around an experimentalist democratic ideal. However, it was also argued that as

¹⁶² Cohen (n 1) 145.

¹⁶³ Cohen (n 11) 393.

well as there being experimentalism in terms of the *implementation* of broad human rights goals there will also be an experimental attitude to the development of these values too. This is because, over time, new meanings and interpretations of those values will emerge as systems gain greater self-understanding in light of targeted interventions. This openness to new meanings ensures that religious communities are placed as co-regulators of family life but contingent on a meta-scheme of norms which flows from the systems theoretical account of society and which lays down certain substantive limitations and processes.

Chapter 6 introduced the normative values of relational autonomy, substantive equality and care. As explained in Chapter 4, reflexive secularity is grounded on the systems theoretical conception of society. From this perspective, the risk of social de-differentiation and the consequent loss of communicative freedoms present the greatest threats to individuals. This conception of society implies both the reflexive criterion, which is a matter of ensuring the avoidance of the regulatory trilemma, and a commitment to rights as the normative underpinning of these communicative freedoms. The values of relational autonomy, substantive equality and care bound the reflexive scheme and safeguard the individual's interests within the web of social connections that makes their life meaningful.

Chapter 7 outlines the architecture of experimentalism of this reflexive model of regulating family life. It calls upon us to engage in the creation of new regulatory spaces – rather than merely introducing spaces for participation within existing structures.¹⁶⁴ Participation is more than bringing existing spaces to 'life' but is also about creating

¹⁶⁴ Cornwall (n 107).

‘new social forms’ with the ‘radical’ potential to empower those at the margins as well as to make space within those structures already in existence.¹⁶⁵ By combining Dorf and Sabel’s insights on democratic experimentalism and Cohen’s reflexive paradigm, this scheme might operate as follows: the State, in partnership with religious groups, would devise a meta-regulatory framework, assigning broad goals and reflexive procedures in order to meet and verify the implementation of such schemes. The State would delegate limited and contingent authority to religious groups to engage in an open process of deliberation to devise localised, specific and culturally sensitive solutions.

To say this exercise of power is ‘contingent’ is to argue that it is subject to this meta-scheme of norms that lays down certain limitations and processes, including the insights of relational contract theory as a means of evaluating consent over the course of a relationship. Shachar criticises such contingency on the basis that it envisages potentially wide-ranging ‘review powers’ on the part of the State.¹⁶⁶ Concerns with the development of a complex regulatory regime is not unfounded.¹⁶⁷ Yet, this decentred model of regulation need not – as Shachar suggests – revolve around State control. On the other hand, Cohen argues that the solution ought to entail no delegation of State power, and strongly contests the justification for any form of shared jurisdiction.¹⁶⁸ In fact, she argues that ‘enforceable family law’ must exist remain ‘exclusively in the hands of the state’ in order to secure and reconcile competing imperatives between

¹⁶⁵ *ibid* 2-3.

¹⁶⁶ Shachar, *Multicultural Jurisdictions* (n 16) 110.

¹⁶⁷ *ibid*.

¹⁶⁸ Cohen (n 11) 393–394.

religious norms and equality and human rights by democratic institutions.¹⁶⁹ However, as argued in Chapters 4 and 5, reflexive secularity is not a uni-directional process: it necessitates a dynamic process of constitutional experimentalism whereby new meanings and possibilities generated by groups are themselves incorporated into the refinement and re-imagining of these constraints.¹⁷⁰

The result of this process would be to create a set of rules at the local level and at the meta-regulatory level: similar to those envisaged by the IFLA rules in the UK and the Boyd Report in Canada. Self-regulatory schemes would then be monitored by a State regulatory body, including the possible additional oversight of the Charity Commission, and require ‘due diligence’ within the group as well as creating the space for accountability and feedback. Relational autonomy must be protected, so a broader range of factors that seek to uphold consent *over time* and in respect of a changing relationship. This feedback is used to monitor these schemes and ensure human rights compliant processes but also to re-invigorate the regulatory process itself, which will take on best practice standards as part of a long-term, ‘dynamic and multidirectional’ project.¹⁷¹ Where religious institutions participate within these schemes, the State could provide legitimisation through financial and contingent legal recognition – increasing the relative utility of these self-regulatory solutions. Where continued non-compliance is evident, the State will adopt the reflexive *attitude* in determining what norms justify regulatory escalation, with the key principle always remaining regulatory efficiency and the values of relational autonomy, equality and care. In this way, religious

¹⁶⁹ *ibid* 394.

¹⁷⁰ Sabel and Simon (n 3).

¹⁷¹ Dorf and Sabel (n 15).

institutions can play an important role in promoting autonomy, equality and relationships of care.

This Thesis is, therefore, a work of imagination. For as Shelly says, the greatest power for moral progress is imagination.¹⁷² It is, in another sense, a work of prayerfulness. As Simone Weil explained, *all* great works of attention are acts of prayer.¹⁷³ So, my prayer is not that this project be my own - instead, it is a prayer that others take forward the transformative potential of this reflexive paradigm as a source for imaginative solutions to ancient challenges. In fact, it must be so. The great, radical potentiality in this Thesis is to envisage a democratic, experimental and societal constitution whereby each and every one of us must work to realise those rights that liberate us from the life-limiting demands of any single system.

¹⁷² Percy Bysshe Shelley, 'A Defence of Poetry', *The Poetry Foundation*, <https://www.poetryfoundation.org/articles/69388/a-defence-of-poetry> [Accessed 26/09/2022].

¹⁷³ Simone Weil, 'Reflections on the Right Use of School Studies with a View to the Love of God' in Simone Weil, *Waiting for God* (Harper Perennial 2009) 34.

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