RELIGIOUS AUTONOMY AND THE PERSONAL LAW SYSTEM

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Abstract

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This thesis examines the Indian system of personal laws ('the PLS'), under which the state applies a version of religious doctrine to the family matters of citizens whom it identifies as belonging to different religious groups. There has been a lengthy and persistent debate over the PLS, particularly in relation to its discriminatory effects upon women. However, another problem with the PLS has been little commented-upon. Supporters of the PLS emphasise its positive impact on religious freedom to such an extent that there is a pervasive assumption that the PLS is, indeed, good for religious freedom. But there has been surprisingly little critical assessment of the truth of this claim in either academic or political debates. This thesis, a work of applied normative legal theory, attempts to fill this important gap in the literature on the PLS. The thesis addresses the question of how the PLS affects one conception of religious freedom, namely religious autonomy. Its principal findings are that the PLS interferes with the religious autonomy of those subject to it by affecting their religious options (by interfering with their freedom from religion and their freedom to practice religion) and by harming their self-respect (by discriminating on the grounds of sex and religion, and by misrecognising their religious identities). Furthermore, the thesis finds that the PLS cannot be defended in the name of religious autonomy based on the possibility of exit from the system, the advantage of having the 'option of personal law', the power it gives people to bind their future selves, the expressive potential of the personal laws, the contribution it makes to membership in a religious community, the contribution it makes to religious group autonomy, or the recognition or validation it provides for religious identities. These conclusions imply that concerns relating to religious autonomy constitute an important set of objections to the PLS. The thesis then considers several reform proposals, including certain modifications of the PLS, a move towards a *millet* system, 'internal' reform of individual personal laws and the introduction of a Uniform Civil Code. It particularly focusses on one reform possibility – religious alternative dispute resolution – which has not been considered closely in the Indian context.

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Abbreviations

ADR: Alternative Dispute Resolution

BJP: Bharatiya Janata Party

NRM: New Religious Movements

PLS: Indian Personal Law System

RADR: Religious Alternative Dispute Resolution

RR: Responsiveness to Reasons

VPPL: Voluntary Power-conferring Personal Laws

PART I

1. INTRODUCTION

The accommodation of religious norms in family law is fiercely debated in liberal states. The debate in Ontario, Canada was sparked off by the establishment of an 'Islamic Institute of Civil Justice' to conduct state-recognised arbitration according to *sharia*.[1] A similar debate played out in the UK between 1970 and 1990[2] and was was re-ignited by the more recent remarks of the Archbishop of Canterbury, Rowan Williams,[3] and Lord Chief Justice Phillips[4] on the place of religious alternative dispute settlement in the UK legal system. At the time of writing, a Private Members' Bill[5] motivated by concerns about religious tribunals[6] has been introduced in the House of Lords. In Australia, the controversy began earlier this year following a call from a Muslim group for greater recognition of *sharia*.[7] The debate has also spread to other countries in Europe[8] and to the

[1] M Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney-General, Ontario 2004) 3.

[2] S Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in C Mallat and J Connors (eds), *Islamic Family Law* (Graham and Trotman 1990) 147; see P Fournier, *Dossier 27: The Reception of Muslim Family Laws in Western Liberal States* (WLUML 2005) <www.wluml.org/node/504> accessed 9 November 2011 72–74 for an overview.

[3] Rowan Williams, 'Archbishop's Lecture – Civil and Religious Law in England: A Religious Perspective' (2008) <www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective#Lecture> accessed 9 November 2011.

[4] Lord Chief Justice Phillips, 'Equality before the Law' (East London Muslim Centre, 3 July 2008) <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equality_before_the_law_030708.pdf> accessed 9 October 2011.

[5] Arbitration and Mediation Services (Equality) HL Bill (2010–11).

[6] K McVeigh and A Hill, 'Bill Limiting Sharia Law is Motivated by "Concern for Muslim Women"' *The Guardian* (London, 8 June 2011) <www.guardian.co.uk/law/2011/jun/08/sharia-bill-lords-muslim-women> accessed 9 November 2011.

[7] See, eg, Australian Federation of Islamic Councils Inc, *Submission No 81 to Australian Parliament Joint Standing Committee on Migration* (Parliament of Australia 2011) <www.aph.gov.au/house/committee/mig/multiculturalism/subs/sub81.pdf>; Tim Soutphommasane, 'Avoid the Hysteria but Reject Sharia' *The Australian* (21 May 2011) <www.theaustralian.com.au/news/opinion/avoid-the-hysteria-but-reject-sharia/story-e6frg6zo-1226059621354> accessed 10 October 2011; Patricia Karvelas, 'Imam Wants Sharia Law Here, but A-G Says No Way' *The Australian* (18 May 2011) <www.theaustralian.com.au/national-affairs/imam-wants-sharia-law-here-but-a-g-says-no-way/story-fn59niix-1226057823890> accessed 10 October 2011; 'Even Muslim Jurists are Divided about what Sharia is' *The Australian* (23 May 2011)

US.[9] The debate over the accommodation of religious norms in family law is thus likely to remain potent for a while yet.

There is the temptation to think that questions raised by these debates are relatively new – the result of recent patterns of immigration. However, the Ottoman Empire governed with the *millet* system, where the family law of religious groups was determined by a religious leader recognised by the Imperial government.[10] In some British colonies, the family law of religious groups consisted of 'personal laws', in force through the authority of the state; these personal laws supposedly incorporated the norms of the religious groups. Variations of the *millet* and personal law systems are found in countries such as India, Pakistan, Bangladesh, Sri Lanka, Singapore, Malaysia, Israel and South Africa.[11] The extensive experience of these states holds lessons for the current

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<www.theaustralian.com.au/news/opinion/letters-to-the-editor/story-fn558imw-1226060688189> accessed 10 October 2011.

[8] Mathias Rohe, 'Alternative Dispute Resolution in Europe under the Auspices of Religious Norms' (January 2011) Religare Working Paper No 6 <www.religareproject.eu/content/alternative-dispute-resolution-europe-under-auspices-religious-norms> accessed 9 October 2011; Maurits Berger, 'Sharia Law in Canada – Also Possible in the Netherlands?' in P van der Grinten and T Heukels (eds), *Crossing Borders: Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden* (Kluwer 2006) 173.

[9] Eugene Volokh, 'May American Court Appoint Only Muslim Arbitrators, Pursuant to an Arbitration Agreement?' (*The Volokh Conspiracy*, 3 January 2011) <volokh.com/2011/01/03/may-american-court-appoint-only-muslim-arbitrators-pursuant-to-an-arbitration-agreement/> accessed 9 October 2011, outlining a debate in the US on the appointment of Muslim arbitrators as specified in a contract. In Oklahoma, a 2010 ballot initiative resulted in a constitutional amendment prohibiting the courts from 'look[ing] to the legal precepts of other nations or cultures' in their decisions, specifically prohibiting them from 'consider[ing] international law or Sharia law'. See Oklahoma Constitution art VII §1-C. See also Ann Laquer Estin, 'Embracing Tradition: Pluralism in American Family Law' (2004) 63 Md L Rev 540.

[10] Will Kymlicka, 'Two Models of Pluralism and Tolerance' (1992) 14 Analyse & Kritik 33; M Galanter and J Krishnan, 'Personal Law and Human Rights in India and Israel' [2000] 34 Israel L Rev 101, 120–21.

[11] For a more comprehensive list, see MJ Raisch, 'Religious Legal Systems: A Brief Guide to Research and Its Role in Comparative Law' (February 2006) <www.nyulawglobal.org/Globalex/Religious_Legal_Systems.htm#_Articles_5> accessed 9 November 2011.

debates in other liberal states. This thesis, a work of applied normative legal theory, contributes to these current debates by evaluating the Indian system of personal laws.

Different forms of accommodation of religious norms in family law raise similar issues, such that the evaluation of one form can indicate the likely problems with the others. The terminology relating to different forms is imprecise and the terms '*millet'*, 'religious alternative dispute settlement' and 'personal law system' are sometimes used interchangeably.[12] However, it is important to be clear about the differences between them and the way that these terms will be used in this thesis. As just mentioned, under a *millet* system, religious communities are governed in some matters by a religious leadership recognised by the state.[13] In many Western jurisdictions, the form of accommodation that is frequently proposed is *religious alternative dispute resolution*. By this is generally meant arbitration, mediation or conciliation conducted according to religious norms, agreed to by the parties in a contract and recognised and (if appropriate) enforced by the state.[14] In a *personal law system*, the state itself applies a version of religious doctrine to citizens who it identifies as belonging to different religious groups.[15] In this thesis, the laws so-applied to different religious groups are called 'personal laws' and the system under which all these laws operate is referred to as the personal law system.

[12] E.g. Galanter and Krishnan (n 10).

[13] Kymlicka (n 10).

[14] For more on this form of accommodation, see §7 on Reform Proposals.

[15] Galanter and Krishnan (n 10) 103.

In order to explain why the *Indian personal law system* ('PLS' or 'the system'), and more particularly this thesis question, is worth studying, it would be helpful to briefly describe the system. Although the British in India developed uniform territorial commercial and criminal laws,[16] from at least 1772, they used religious doctrine to decide questions of family law.[17] This practice stemmed from a variety of considerations including respect for the religious sentiments of the Hindus and Muslims, the social instability that they feared would result from offence to these sentiments[18] and the limited effect these laws were thought to have on commercial dealings.[19] Even today, Hindus, Buddhists, Sikhs, Jains, Muslims, Parsis,[20] Jews[21] and Christians in India continue to be governed not just by general family law[22] but by 'personal laws' which regulate matters

[16] For an account of this process, see M Galanter, 'The Displacement of Traditional Law in Modern India' (1968) J Social Issues 65.

[17] Bengal Regulation 1772 (Plan for the Administration of Justice) r 23. For text and history, see C Ilbert, *The Government of India: Being a Digest of the Statute Law Relating Thereto* (2nd edn, Clarendon 1907) 249–50; H Westra, 'Custom and Muslim Law in the Netherlands East Indies' (1939) 25 Trans Grotius Soc 151, 153–156; *State of Bombay v Narasu Appa Mali Appa Mali* AIR 1952 Bom 84 [23] (Gajendragadkar J); AAA Fyzee and T Mahmood, *Outlines of Muhammadan Law* (Law in India Series, 5th edn, OUP 2008) 43 (citing the Charter of George II 1753).

[18] Fyzee and Mahmood (n 17) 42.

[19] I Jaising, 'Gender Justice: a Constitutional Perspective' in I Jaising (ed), *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited 2005) 3.

[20] This thesis will use 'Zoroastrianism' to refer to the religion, and 'Parsi Zoroastrian' or simply 'Parsi' to refer to the ethnic-religious group governed by personal law in India. See Appendix B of this thesis and Mitra J Sharafi, 'Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925' (PhD dissertation, Princeton University 2006) for the difference.

[21] There is not much literature on Jewish personal law in India, but see Appendix A of this thesis for the outlines of Jewish personal law. Also see Duncan Derrett, 'Jewish Law in Southern Asia' (1964) 13 ICLQ 288 and Flavia Agnes, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP 2011).

[22] By which is meant those laws which are applicable to all those who reside within the territory of India regardless of religious affiliation.

relating to the family[23] including marriage, inheritance and adoption. The personal laws that apply to a person in India are at least partially determined by her presumed religious identity.[24] These laws are also, ostensibly at least, partially based on the religious doctrine and the norms of the religious community to which they apply.[25] So the term 'personal law' is thought to have been used to distinguish these laws, which apply to people based on their religious affiliation, from territorial laws.[26] It is also thought that the laws were 'personal' because they regulated the 'private' sphere of family life.[27]

The *Indian* personal law system, in particular, is worth studying. It is a long-standing attempt to accommodate religious norms in family law, in a constitutional

[23] The personal laws also regulate aspects of the law relating to property, religious trusts and other miscellaneous matters, but they primarily regulate family matters.

[24] I Jaising, 'From "Colonial" to "Constitutional" Gender Justice and Governance' in Jaising (n 19) 324; AM Bhattacharjee, *Muslim Law and the Constitution* (2nd edn, Eastern Law House 1994) 10; Galanter and Krishnan (n 10); JA Redding, 'Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law' (2006) 4 Nw U J Hum Rts 436; JA Redding, 'Slicing the American Pie: Federalism and Personal Law' (Yale Law School Faculty Scholarship Series Paper 10, 2007) <lsr.nellco.org/yale/fss/papers/10> accessed 15 November 2011; G Larson, 'Introduction the Secular State in a Religious Society' in G Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Social Science Press, Delhi 2001) 1.

[25] See §2.5; F Agnes, 'The Hidden Agenda Beneath the Rhetoric of Women's Rights' in M Dutta and others (eds), *The Nation, the State, and Indian Identity* (Popular Prakashan 1996). It is often argued that many of the personal laws that purport to be based on 'religious tradition' are often distorted versions of the 'religious tradition' that they seek legitimacy from. See, eg, MR Anderson, 'Islamic Law and the Colonial Encounter in British India' in D Arnold and P Robb (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press 1993) 165; T Mahmood, *Personal Laws in Crisis* (PB Gajendragadkar Endowment Lectures, 1st edn Metropolitan 1986) 49–94; *A Yousuf Rawther v Sowramma* MANU/KE/0059/1971 [7] (VR Krishna Iyer J); Duncan Derrett, 'The Administration of Hindu Law by the British' (1961) 4 Comp Stud Soc & Hist 10.

[26] Duncan Derrett, *Religion, Law and the State in India* (OUP 1999) 39; AM Bhattacharjee, *Muslim Law and the Constitution* (2nd edn, Eastern Law House 1994) 9; *Parbati Kumari v Jagadis Chunder* ILR 29 Cal 433 (PC) 452; Jaising, 'Gender Justice' (n 19) 2–3; A Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage, New Delhi 1992) 46.

[27] Agnes (n 25); Bhattacharjee (n 26) 6–8; Parashar (n 26) 46; Jaising, 'Gender Justice' (n 19) 3; CA MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects, and "Personal Laws"' (2006) 4 ICON 181, 196; DA Washbrook, 'Law, State and Agrarian Society in Colonial India' (1981) 15 Mod Asian Stud 649, 652.

democracy committed to values such as gender equality, individual freedom and religious freedom. Independent India has grappled with the tensions between the PLS and these values for almost sixty-five years. Thus there is already a substantial and well-developed literature on the tension between the Indian constitution's commitment to gender equality and the gender-based discrimination of the Indian personal laws.[28] There is also a body of writing on the compatibility of the PLS and secularism.[29] Since the debate on the Indian PLS, as a mode of accommodation of religious norms in family law, is more advanced than in many other jurisdictions, it is capable of contributing, as a case study, to the question of whether and how other states should make such accommodations.[30]

But why is further study on the Indian PLS needed? Is the current state of the literature not sufficient to answer our questions on the accommodation of religious norms in family law? The Indian PLS is in need of further study because of gaps in the internal Indian debate on the reform of the PLS. While the debate on whether and how the system should be reformed has been voluminous, our understanding of the system is still deficient along certain dimensions. The PLS discriminates on the basis of sex, often to the disadvantage of women. Under some of the personal laws, women are treated less favourably than men with respect to adoption, marriage, divorce and inheritance.[31] Much

[28] The literature on the gender implications of the laws is considerable. Some of the major works include: F Agnes, *Law and Gender Inequality*: *The Politics of Women's Rights in India* (Law in India Series, OUP 1999); Parashar (n 26) and Jaising (ed) (n 19).

[29] See, eg, Larson (n 24); Stanley Tambiah, 'The Crisis of Secularism in India' in Rajeev Bhargava (ed), *Secularism and its Critics* (OUP 1998).

[30] John Eekelaar, 'From Multiculturalism to Cultural Voluntarism: A Family-Based Approach' (2010) 81 The Political Quarterly 344, 349; Bas Tönissen and Jochem Gerritsen, 'The Road Not Taken – Islamic Shari'a Courts in the Netherlands' (14 December 2010) <www.scribd.com/doc/49194046/The-Road-Not-Taken-Islamic-Shari-a-Courts-in-the-Netherlands> accessed 10 October 2011.

[31] See table in Appendix A for an overview.

of the academic literature on the system has focused on concerns these features raise for gender equality and the welfare of women.[32] Especially following the *Shah Bano*[33] case, the academic literature to some degree, and the political debates to a large degree, have centred on the gender-related concerns that *Muslim* personal law raises.[34]

The debate is complicated by the fact that Hindu nationalists, including major political parties like the Bharatiya Janata Party ('the BJP'), want to see a uniform civil code (which would abrogate the personal laws) enacted. The stated aim of this call for reform is to rectify the gender-related problems of the personal laws[35] – especially Muslim personal law[36] – as well as to put an end to the system's (supposed) tendency to

[32] See note 28.

[33] *Mohammed Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945. This case has been discussed so extensively, not just in the legal, but also in the political theory literature, especially on multiculturalism, that its rather complex history will not be described here in detail. In brief, *Shah Bano* involved the question of whether a Muslim man was required to maintain his former wife beyond the period of *iddat* (the customary waiting period after divorce). The answer to this question turned on which set of rules applied: customary Muslim law or the uniformly-applicable Code of Criminal Procedure 1973. The Supreme Court held that the Code of Criminal Procedure applied and it ordered that the wife be given a level of maintenance in excess of what would have been granted under customary Muslim law. The judgement contained claims about Muslim personal law and Islam more generally that offended many Muslims. For a good account of the events surrounding the case, see R Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2007) 579–86 and Galanter and Krishnan (n 10) 111–15.

[34] Agnes (n 25).

[35] Bharatiya Janata Party, *Vision Document 2004* <www.bjp.org/index.php?option=com_content&view=article&id=136&Itemid=548> accessed 15 November 2011. Under its 'Basic Mission and Commitments' section, the *Vision Document* states: 'The BJP believes that all laws, including personal laws, must be in accordance with the guarantees available to all citizens under the Indian Constitution. The Constitution calls for the enactment of a Uniform Civil Code. The Supreme Court has reiterated this need. Therefore, this cannot be seen as an issue of any single political party. The BJP views Uniform Civil Code primarily as an instrument to promote gender justice. We believe that social and political consensus has to be evolved before its enactment.'

[36] Z Hasan, 'Gender Politics, Legal Reform and the Muslim Community in India' in P Jeffery and A Basu, *Appropriating Gender: Women's Agency, the State, and Politicized Religion in South Asia* (Routledge 1998) 78–87.

promote religious communalism[37] and undermine national unity.[38] However, these calls from Hindu nationalists for a uniform civil code are thought to carry a certain subtext.[39] This subtext supposedly conveys that Indian Muslims are 'obscurantist and fundamentalist',[40] 'barbaric',[41] not as committed as other groups to 'the cause of national unity and integration'[42] and appeased by the Congress Party.[43] There are also fears that a uniform civil code proposed by Hindu nationalists would really be a version of Hindu family law imposed on all groups in India.[44]

Further, (and perhaps not unpredictably) amongst some Muslims in particular,[45] the personal laws have become associated with group identity in such a way that their

[37] The term is meant pejoratively. See R Bajpai, 'The Conceptual Vocabularies of Secularism and Minority Rights in India' (2002) 7 J Pol Ideologies 179, 184. Larson (n 24) 7 defines it as 'the selfish and separatist efforts of a particular religious group to act in ways contrary to the larger community or nation'. Agnes (n 28) 117-118.

[38] See *Shah Bano* (n 33); Agnes (n 28) 117.

[39] Agnes (n 25). For the argument that the Hindu Right has appropriated the issue of reform of the personal laws, see R Kapur and B Crossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage, New Delhi 1996), especially ch 4. By way of qualification of the use of the word 'subtext', some of what is described here as subtext is sometimes also stated explicitly. See also Kumkum Sangari, 'Gender Lines: Personal Laws, Uniform Laws, Conversion' (1999) 27(5/6) Social Scientist 17.

[40] Z Hasan, 'Governance and Reform of Personal Laws in India' in Jaising (ed) (n 19) 363.

[41] See the comments in Agnes (n 28) 117 on the judgement of Kuldip Singh J in *Sarla Mudgal v Union of India* (1995) 3 SCC 635; Kapur and Crossman (n 39) 260.

[42] ibid.

[43] The Congress Party is a major political party. A Modi, 'The Shah Bano Legacy' *The Hindu* (Chennai, 10 August 2003) <hindu.com/2003/08/10/stories/2003081000221500.htm> accessed 15 November 2011; EA Gargan, 'Hindu Rage Against Muslims Transforming Indian Politics' *New York Times* (New York, 17 September 1993) <www.nytimes.com/1993/09/17/world/hindu-rage-against-muslims-transforming-indian-politics.html> accessed 15 November 2011.

[44] Galanter and Krishnan (n 10), 111–15; M Nussbaum, 'India Implementing Sex Equality Through Law' (2004) 2 Chi J Intl Law 35.

[45] For some background on Indian Muslims, see M Hasan, *Legacy of a Divided Nation: India's Muslims Since Independence* (OUP 2001).

reform would be perceived as an attack on the group and its identity.[46] Many Muslim organisations, notably the All India Muslim Personal Law Board (AIMPLB),[47] want to maintain the PLS. Women's groups have campaigned extensively for the abolition of the personal laws.[48] But many organisations and individuals who are not Hindu nationalists (including organisations concerned with women's rights) tread lightly on the subject of personal laws; they fear that their opposition to the system may be read as support for Hindu nationalism and an endorsement of the negative subtext relating to Indian Muslims described in the paragraph above.[49] Some even argue against state reform of Muslim personal law on the grounds that Indian Muslims are an oppressed community and that legal reform would be another instance of Hindu oppression.[50]

These problems – the effect of the personal laws on women, the appropriation of the cause of reform by Hindu nationalists, Muslim identification with Muslim personal law and the resulting deadlock – are undoubtedly pressing. But despite the persistence of

[46] 'When a group feels threatened, people's collective self-esteem becomes tightly woven to their group. When under threat, the group becomes more cohesive, puts up with little internal dissent while a centralized leadership becomes ever more powerful. People's allegiance to a threatened group that is important to their identity becomes very strong.' J Spinner-Halev, 'Autonomy, Association and Pluralism' in AI Eisenberg and J Spinner-Halev (eds), *Minorities Within Minorities: Equality, Rights and Diversity* (CUP 2004) 170. Ayelet Shachar calls this 'reactive culturalism': A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001) 60. Z Hasan 'Introduction: Contextualising Gender and Identity in Contemporary India' in Z Hasan (ed), *Forging Identities: Gender, Communities and the State in India* (Westview 1994) xiii; G Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India* (OUP 1998) 107–108. Other reasons for resistance to change among Muslims in India are the fact that the preservation of the personal laws are seen as a matter of 'honor', 'civic position', and a 'legitimate sense of exclusion': see Nussbaum (n 44).

[47] The stated aim of this organisation is to 'defend' and to 'protect' Muslim personal law and to subvert 'the conspiracy' against it: see All India Muslim Personal Law Board, 'Introduction' <www.aimplboard.org/introduction.html> accessed 15 November 2011. See Hasan (n 40) 367.

[48] For a list of some demonstrations, see Tambiah (n 29).

[49] Agnes (n 25); Redding (n 24); Kapur and Crossman (n 39) 260.

[50] See, eg, J Spinner-Halev, 'Feminism, Multiculturalism, Oppression and the State' (2001) 112 Ethics 84, 94–99.

the debate on the PLS over several decades and the depth of research in this area (in particular on gender-related issues), one problem has been little commented-upon. Supporters of the PLS emphasise its positive impact on religious freedom to such an extent that there is a pervasive assumption that the PLS is, indeed, good for religious freedom.[51] But there has been surprisingly little critical assessment of the truth of this claim in either academic or political debates.[52] This thesis attempts to help fill this important gap in the literature on the PLS, because this inadequacy in our understanding of the PLS leaves us with significant problems.

It is important that this inadequacy in our understanding is remedied because if the system indeed has a positive impact on religious freedom, until we have a comprehensive account of why this is so, we remain blind to an important defence of the system. On the other hand, if the PLS actually has an *adverse* impact on religious freedom, supporters of the system use the rhetorical and emotive power of the religious

[51] Zohra Moosa, 'Balancing Women's Rights with Freedom of Religion: The Case against Parallel Legal Systems for Muslim Women in the UK' in Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2010: Events of 2009* (Minority Rights Group International 2010); Bajpai (n 37) 188–89; Nussbaum (n 44); TP Wright, 'Universal Human Rights vs Muslim Personal Law: The Shah Bano Begum Case in India' (1999) 1 Stud Contemp Islam 44; RS Rajan, 'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India' (2000) 18 Social Text 55. These arguments are made despite the fact that 'a citizen cannot claim a fundamental right to follow the personal law of the group or the community to which he belongs or professes to belong': see R Pal, 'Religious Minorities and the Law' in Larson (ed) (n 24) 27. They also support it on the (possibly related) grounds that the system has a positive impact on secularism and on the preservation of group religious identity (Hasan (n 36) 76). See also Eleanor Newbigin, 'The Codification of Personal Law and Secular Citizenship: Revisiting the History of Law Reform in Late Colonial India' (2009) 46 Indian Economic and Social History Review 83; Partha Chatterjee, 'Secularism and Tolerance' in Bhargava (ed) (n 29) 359–60, arguing that the state reform of Hinduism including the PLS is contrary to religious freedom.

[52] For some discussion on whether religious freedom includes the freedom to be governed by religious laws, see D Sullivan, 'Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution' (1991–1992) 24 NYU J Intl L & Pol 795, 805–807; P Werbner, 'Divided Loyalties, Empowered Citizenship? Muslims in Britain' (2000) 4 Citizenship Studies 307, 310. See SA Ali and E Whitehouse, 'The Reconstruction of the Constitution and the Case for Muslim Personal Law' (1992) 13 Can J Muslim Minority Aff 156, 166–70 for the argument that the recognition of Muslim personal law would contribute to religious freedom in Canada. See also Redding (n 24) 467.

freedom 'card' speciously. In either case, without an understanding of the impact of the system on religious freedom, we will overlook factors that ought to be taken into consideration in the larger debates about what we ought to do about the PLS. This thesis, therefore, will consider the effect of the PLS on religious freedom.

This study of the Indian PLS's implications for religious freedom is not just significant for the internal Indian debate on the reform of the PLS. Religious freedom has been, and is likely to be, also called upon in defence of the accommodation of religious norms in family law in many other jurisdictions.[53] For instance, the former Turkish Prime Minister was reported to have defended a form of PLS with the words: '[t]he right to choose one's own legal system is an integral part of the freedom of religion.'[54] A similar argument was made in the recent Australian debates on the accommodation of *sharia.*[55] The conclusions of this thesis on how the Indian PLS affects religious freedom is therefore likely to have implications for other states contemplating accommodation of religious norms.

The conception of freedom that will be referred to in considering the system's effect on religious freedom is one that is sometimes thought of as positive freedom or *personal autonomy* in the sense of self-creation or self-authorship.[56] The conception of religious freedom used in this thesis is 'personal autonomy in the sphere of religion'. In

[53] See note 52; Karen Armstrong, 'The Curse of the Infidel' *The Guardian* (20 June 2002) <www.guardian.co.uk/world/2002/jun/20/religion.september11> accessed 15 November 2011.

[54] *Refah Partisi (The Welfare Party) v Turkey* App No 41340/98 (ECHR, 13 February 2003) [28].

[55] Australian Federation of Islamic Councils Inc (n 7) 4.

[56] See generally J Raz, *The Morality of Freedom* (Clarendon Press 1986) 370.

line with much contemporary literature on the topic,[57] this conception of religious freedom is referred to as 'religious autonomy'. Chapter 3 below will spell out in greater detail the contours of 'religious autonomy' as it will be used here. But at this point it is worth simply clarifying that 'religious autonomy' is used in this thesis in this sense of *personal* religious autonomy.[58]

There are, of course, conceptions of religious freedom besides the one used here. For instance, a communal conception of religious freedom might focus on religious groups, rather than the religious autonomy of individuals.[59] Yet another conception of religious freedom might focus on *negative*[60] freedom of religion, as opposed to religious *autonomy.*[61] The legal doctrine on religious freedom in different jurisdictions might indicate further conceptions of religious freedom at work.[62] While other conceptions of religious freedom might be important, a study based on every conceivable view of religious freedom would be unfeasible. Coherence and clarity demand that one conception of religious freedom be chosen for an evaluation of this breadth.

[57] See below §3.3.

[58] Rather than, e.g., group religious autonomy.

[59] Later, in §5.1, communal aspects of religious practice are discussed. It is important to note however that our concern with religious groups and communal practice is only insofar as they affect *personal* religious autonomy. Communal or group-based conceptions of religious freedom, unlike the one used in this thesis, might consider the good of the community as an end in itself.

[60] Roughly, negative freedom is used here to mean the absence of non-natural (particularly human) constraints external to the agent.

[61] Personal autonomy is often described as type of 'positive', as opposed to negative freedom. Ian Carter, 'Positive and Negative Liberty', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/archives/fall2008/entries/liberty-positive-negative/>.

[62] E.g. Christopher Eisgruber and Lawrence Sager, 'Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 U Chi L R 1245

There are advantages to using an autonomy-based conception of religious freedom. First, there is a well-developed literature on religious freedom that appeals to autonomy. Legal and political philosophers[63] as well as courts and legal scholars in different jurisdictions[64] appeal to religious autonomy[65] and defend religious freedom on the grounds of personal autonomy. Since this study of the Indian PLS has the potential to transcend its jurisdictional boundaries and contribute to the debates on the accommodation of religious norms in the family law of other jurisdictions, it is useful to base the study on a conception of religious freedom that is commonly (even though not universally) accepted across jurisdictions.

Second, using this conception of religious freedom widens the relevance of the thesis to all those interested in personal autonomy, including those partial to other accounts of religious freedom (as they are unlikely to disagree that autonomy provides *one* reason for its protection). Even those sceptical of the value of autonomy itself may not be sceptical of the value of the *prerequisites* of autonomy, which the thesis will

[63] As Michael Sandel notes, 'in contemporary liberalism… religious liberty *serves the broader mission of protecting individual autonomy*.' Michael Sandel, 'Religious Liberty – Freedom of Conscience or Freedom of Choice' [1989] Utah Law Review 597, 611 (emphasis added). Benjamin Berger, 'Law's Religion: Rendering Culture' 45(2) Osg Hall LJ 277; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001); and Kent Greenawalt, *Religion and Constitution: Establishment and Fairness, Volume 2* (Princeton University Press 2008) all see autonomy as underlying religious freedom. See also Douglas Laycock, 'Religious Liberty as Liberty' [1996] Journal of Contemporary Legal Issues 313. But also note John H Garvey, 'An Anti-Liberal Argument for Religious Freedom' [1996] Journal of Contemporary Legal Issues 275; Andrew Koppelman, 'Religious Establishment and Autonomy' (2008) 25 Constitutional Commentary 291; Rex Ahdar and Ian Leigh, *Religious Freedom and the Liberal State* (OUP 2005) 58-64.

[64] For US examples, see Laurence Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) 1284–1300 and Kent Greenawalt, *Religion and The Constitution: Free Exercise and Fairness, Volume 1* (Princeton University Press 2006) 3–4. For a Canadian example, see *Syndicat Northcrest v Amselem* [2004] 2 SCR 551. For a UK example, see *R (Williamson and others) v Secretary of State for Education and Employment* [2003] QB 1300 (CA).

[65] Sometimes the appeal to religious autonomy is implicit. The thinking is: 'We protect religious freedom because religious freedom enhances personal autonomy. Why? Because religion is a sphere of life over which it is possible to exercise personal autonomy.' Personal autonomy in the religious sphere is referred to in this thesis as 'religious autonomy'.

discuss. Third, this conception of religious freedom is more relevant to an evaluation of the system than are some others. For instance, taking a purely negative conception of religious freedom[66] would be less fruitful than the one explored here[67] – it would cause us to overlook many of the concerns raised by the PLS.

Some argue that the Indian Constitution protects a group-based conception of religious freedom.[68] They might further argue that the constitutional right to freedom of religion in India might diverge from this thesis' notion of religious freedom.[69] Even if true, this is not a conclusive reason for this thesis to adopt the Indian Constitution's conception of religious freedom. This is after all not a thesis on constitutional law; our purpose is not to evaluate the Indian PLS against any constitutional rule or value.[70] In any event, the autonomy-based conception of religious freedom is not 'foreign' or incompatible with Indian constitutional law or values. Even if the Indian case law has moved towards a group-based conception of religious freedom,[71] there are cases on

[66] In the sense explained above.

[67] Although, as discussed in §4.2.1 and §4.2.4, the PLS does raise concerns for negative freedom, and therefore concerns for religious autonomy.

[68] See below §2.6.

[69] cf the comments of Ambedkar, who piloted various drafts of the Indian Constitution through the Constituent Assembly, stating that the individual rather than the group was the basis of the Indian Constitution: Rajeev Dhavan and Fali Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in BN Kirpal (ed), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000) 256. See also Ambedkar's comment: 'I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.' Constituent Assembly of India Debates (4 November 1948) <www.indiankanoon.org/doc/843976/>.

[70] For an evaluation of constitutional implications of the PLS, see Agnes (n 21).

[71] §2.6; Dhavan and Nariman (n 69).

religious freedom that indicate a more individual-based conception at work.[72] The Indian Supreme Court and High Courts have referred to personal autonomy as a constitutional value on several occasions.[73] It has connected the value to the constitutional protection of freedom of speech,[74] constitutional anti-discrimination provisions,[75] the right to privacy,[76] the right against self-incrimination,[77] the prohibition on child marriage,[78] gender justice[79] and the right to choose a profession.[80] Commentary has noted the need for, and the absence of, an evaluation of the PLS from the point of view of freedom.[81] It is also important to bear in mind that the Indian Constitution protects 'freedom of conscience and the right freely to profess, practise and propagate religion'[82] in terms compatible with an autonomy-based conception of religious freedom.

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[72] See, eg, *Bijoe Emmanuel v State Of Kerala* 1987 AIR 748. While the *Sarla Mudgal* (n 41) judgment has been heavily criticised, Sahai J writes: 'But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, *are not autonomy* but oppression' (emphasis added).

[73] *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 .

[74] *The Secretary, Ministry of Information and Broadcasting v Cricket Association Of Bengal* 1995 AIR 1236; 1995 SCC (2) 161 [35]; *Khushboo v Kanniammal* (2010) 5 SCC 600; *Madhavi v Thilakan* 1989 Cr LJ 499.

[75] *Naz Foundation v Government of NCT of Delhi* WP(C) No 7455/2001 [112].

[76] *Shri Alok Singhai v High Court of Delhi* <www.indiankanoon.org/doc/21100/> accessed 15 November 2011 [111]; *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [31–34].

[77] *Selvi v State of Karnataka*, 2010 (3) Supreme 558 [192].

[78] *Association for Social Justice v Union of India* <www.indiankanoon.org/doc/1652773/> accessed 15 November 2011.

[79] *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [39], [47].

[80] ibid [31–34].

[81] Pratap Mehta, 'Obscuring the Real Issues' *The Hindu* (30 July 2003) <www.hindu.com/2003/07/30/stories/2003073001431000.htm> accessed 15 November 2011.

[82] Constitution of India 1950 art 25.

It is not the claim of this thesis that religious autonomy is the only conception which is useful in evaluating the PLS. It might well be worth evaluating the PLS against another conception – one based on group life for instance – as well. But for reasons of clarity, coherence and space, this would have to be a task for another academic project. It is also not the claim of this thesis that religious autonomy is an uncontroversial value, or the most important value, or a value that has no relationship to other moral standards by which we might assess the PLS. Quite the contrary. As noted above, the PLS raises many other concerns and impinges on other values. But religious autonomy is *one* important value, one that has received inadequate attention in the literature, and one that plausibly might be thought to have an intimate bearing on any religiously-organised system of family law. The limited claim here is that an evaluation based on religious autonomy makes a valuable contribution to the debate on the PLS in India and on the accommodation of religious norms in family law more generally, in other jurisdictions.

1.1 METHODOLOGY

The thesis does not aspire to contribute to the historical or socio-legal literature on the problem, though it is at particular points a consumer of some of that literature. It blends doctrinal and philosophical argument and, though sensitive to history and context, it is not a work of socio-legal inquiry. It is a work of *applied* normative legal theory. As such, this thesis will draw mainly on literature on the legal doctrine relating to the PLS, the legal reform of the system and philosophical literature about multiculturalism, autonomy and religious freedom. This thesis primarily applies normative legal theory for the purpose of addressing the research question. This in turn is expected to contribute to the

practical problem of what, if anything, should be done to reform the system, as well as the practical problem of whether, and how, other jurisdictions should accommodate religious norms in family law.

Since this thesis is an applied project, it needs to present basic empirical and legal doctrinal information about the system. While there are many complex and controversial issues of fact here, we do not need to adjudicate them. For our purposes, a fairly general understanding will suffice. As little or nothing will turn on very fine-grained empirical questions, many controversial issues can be set to one side, at least temporarily.[83]

The approach that this thesis should take to the *content* of the separate personal laws for Hindus, Muslims, Parsis, Christians and Jews is another key methodological question. As suggested earlier, much of the academic and political commentary on the PLS focuses on the effects of *Muslim* personal law on women. Some recent commentary considers Hindu personal law as well.[84] If this thesis were to examine, say, only Muslim or Hindu personal law, it would only be evaluating the content of the law applied to persons in these legal categories; this evaluation would not amount to an evaluation of the personal law system *as a whole*.[85] Given the thesis' ambition of contributing to more general debates on the accommodation of religious norms in family law, it is important that the PLS as a *mode* of accommodation is evaluated – not just the content of the religious norms.

[83] For a work with similar aspirations, see JH Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (OUP 2000) 199.

[84] E.g. Agnes (n 21) and W Menski, *Hindu Law: Beyond Tradition and Modernity* (OUP 2003).

[85] Because this would not be an objection to the other personal laws. In any case, examining all (or even some of these detailed regulations) is, because of space constraints, clearly beyond the scope of this project.

That is not to say that the content of the personal laws is irrelevant. It is doubtful that an evaluation of the PLS, without any reference to the content of the laws that it applies, would be useful or even possible. Some facts about the content of the personal laws have to be considered. For instance, a common argument against some modes of accommodation of religious norms is that they encourage or promote religious norms harmful to women.[86] It is possible that the personal laws – the rules enforced relating to divorce, inheritance, alimony, etc – themselves have important implications for religious autonomy. To ignore the content of the personal laws is to ignore an extremely important feature of the PLS. Although we can expect different religious norms to feature in different jurisdictions where the debate on religious norms in family matters is live, India's religious diversity and the breadth of the personal laws in the PLS means that paying attention to the content of the personal laws contributes to the debates in other jurisdictions as well.[87]

Paying attention to the content of the personal laws does not amount to an evaluation of the religious doctrines that it purports to apply. As this thesis will discuss,[88] the PLS does not, unlike potential forms of the *millet* system, simply leave religious groups or individuals to govern themselves in family law matters. Rather it applies different norms which purport to be based on religion, i.e. the personal laws, to these

[86] E.g. under Islamic inheritance law, male heirs in the same relationship to the deceased as female heirs inherit more: Asaf AA Fyzee and Tahir Mahmood, *Outlines of Muhammadan Law* (5th edn, OUP 2008) 316.

[87] See generally, Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP, Cambridge 2001).

[88] §5.2.4.

groups. Any evaluation of the personal laws is not the same as an evaluation of religious doctrine. So any indication in this thesis that the content of a particular personal law harms religious autonomy does not translate into a judgement that the religion associated with that personal law harms religious autonomy as well.

But this thesis' aim to provide a (partial) evaluation of the personal law system *as a whole*, as opposed to merely one or the other of the personal laws, raises further methodological concerns. When the chapters that follow argue that the PLS, as a whole, has particular implications for religious autonomy, some of these arguments are completely general and will apply equally regardless of which of the personal laws are placed in the foreground: for instance, arguments relating to the possibility of exit from the system. However, other arguments may apply with differing strengths depending on which of the personal laws are placed in the foreground. For instance, any argument that depends on how the personal laws affect women applies with differing force for each of the personal laws, as they have different provisions relating to women. This is a necessary cost of proposing arguments that are applicable to the PLS as a whole. It is important to emphasise that even if some arguments apply with differing strengths to different personal laws, they do apply to the PLS in general.

A final point to make about the method of this thesis is its relationship with the current debates within India and in other jurisdictions. In any academic effort, and this thesis is no exception, choices are made about what arguments to emphasise, and to what degree. In this thesis those choices were influenced, if not dictated, by gaps in current debates. It attempts to contribute both to internal Indian debates on the reform of the PLS in India as well as the debates in other jurisdictions on the accommodation of religious

norms in family law. In its aims then, this thesis sits Janus-faced between India and the rest of the world.

1.2 ORGANISATION OF THE THESIS

The practical significance of this research question influences the structure of this thesis. Part I is foundational and addresses preliminary questions. Chapter Two of Part I describes the aspects of the PLS most relevant for this thesis. It outlines how and when the personal laws apply, how the PLS responds to internal diversity between personal law categories, the availability of general family law, the possibility of avoiding or escaping the personal laws, the relationship between the personal laws and religious doctrine and the interation between the PLS and Indian constitutional law, especially the protection of religious freedom. Chapter Three of Part I describes the nature and value of religious autonomy. This thesis defines religious autonomy as 'personal autonomy in the sphere of religion.' In other words, religious autonomy is the ideal of shaping one's own religious life. Chapter Three highlights key features of this value, particularly its preconditions and contributory factors, as it is the value against which we shall evaluate the PLS.

Part II of the thesis considers the implications of the PLS for religious autonomy, by considering the PLS's implications for important preconditions and contributory factors of religious autonomy. So the chapters in Part II consider the effects of the PLS on the range of religious options available to those subject to the PLS (Chapter Four), on their membership of religious groups (Chapter Five) and on their self-respect (Chapter Six). Chapter Four considers how the PLS affects the precondition of having an adequate range of religious options. In particular, it will consider the effect of the PLS on the

option of religious practice and the option of refraining from religious practice. It will also consider several defences of the PLS based on its effect on this precondition. Chapter Five will consider two defences of the PLS based on its contribution to the precondition or contributory factor of having a certain relationship to their religious community. The first defence is that religious communities can contribute to the religious autonomy of their members and the PLS might help build or strengthen religious communities which have this potential. The second defence is that the PLS contributes to, or is a form of, religious group autonomy, and as such, that it promotes religious autonomy. Chapter Six focusses on the precondition of self-respect, especially respect for one's own religious identity. This chapter considers one defence and one criticism of the PLS based on self-respect. The defence is that the PLS provides minority religions with recognition and validation which support their self-respect; this is particularly important because adherents of minority religions in India face threats to their self-respect, including threats based on religious hatred that is directed towards them. The chapter also considers a criticism of the PLS based on the implications of its discriminatory features for self-respect.

Finally, Chapter Seven of Part III of this thesis indicates the implications of the thesis findings for reform by briefly considering different reform proposals including modificiations to the PLS, a move towards a *millet* system,'internal' reform of individual personal laws and the introduction of a Uniform Civil Code. This thesis began by explaining how a study of the PLS in India can contribute to wider debates on the accommodation of religious norms in family law in other jurisdictions. The debates in many of those jurisdictions – Canada, Australia, the US, the UK and Europe generally – have however focussed not on personal law systems, but on religious alternative dispute

resolution, as a mode of accommodation of religious norms in family law. Chapter Seven particularly focusses on this reform possibility - religious alternative dispute resolution – since it is little-studied form of accommodation in the Indian context which is often proposed or used in other jurisdictions. This thesis concludes in Chapter Eight by consolidating its findings and drawing out its implications for other jurisdictions with arrangements similar to those of the PLS, for jurisdictions contemplating religious alternative dispute settlement, for private international law, for debates on multiculturalism and for debates on religious freedom.

2. OVERVIEW OF THE PLS

The system of personal laws is complex. The PLS applies personal law to those it identifies as members of certain religious groups. These groups will be referred to as 'personal law groups' to indicate that the groupings made by the PLS do not necessarily correspond to the way individuals or religious groups self-identify. The content of each of the laws that applies to each of the personal law groups is derived from diverse sources including religious texts, commentaries on religious texts, case law interpreting religious doctrine, statutes codifying personal law and general statutes that affect, for example, the situations in which personal law (as opposed to general civil law) will apply. The personal laws are also typically gender-differentiated, so that a person's legal rights and duties are a function of not only their personal law group but also their gender. (The table in Appendix 'A' will illustrate this feature of the PLS with examples of the rules pertaining to marriage, divorce, adoption and succession.) Further, it is not always clear to which personal law group the PLS will assign people, nor how it will treat people who seem to fall into the 'gaps' between the personal law groups. The multiplicity of the sources of personal law and the relative paucity of settled case law on key legal questions mean that many such legal questions of personal law are difficult to ascertain. However, what follows will provide a general outline of how the PLS functions, highlighting the features which have particular implications for religious autonomy which will, therefore, be considered in greater detail in the chapters that follow.

2.1 APPLICATION AND ENFORCEMENT OF PERSONAL LAWS

Most disputes to which personal laws would ordinarily apply are settled out of court by way of private agreements or through alternative dispute resolution bodies, such as *sharia* 'courts', caste-based village councils and other traditional bodies applying rules of

custom or religious doctrine.[1] However, such private resolutions will not always be legally binding,[2] as the ultimate jurisdiction to decide questions of personal law rests with the state system of courts.[3] Indian courts, for instance, have refused to find that annulments of marriages granted by the ecclesiastical council left parties legally free to marry again.[4] Galanter describes this 'expropriation' of law, 'which made the power to find, declare and apply law a monopoly of the government,' as an alternative to the Ottoman *millet* system.[5]

2.2 RESPONSE TO INTERNAL DIVERSITY

The rules for working out which personal law group (if any) a person falls into are complex. It is difficult to predict how the courts will deal with cases that do not fit neatly into the established personal law groups.[6] In many cases, personal laws are applied to those who do not subscribe to the interpretation of religion that the personal laws claim to

[1] A Malhotra and R Malhotra, 'Hindu Law and the Uniform Civil Code: The Indian Experience' in WR Atkin (ed), *The International Survey of Family Law 2007* (Jordans, 2007) 107–109; 'Plea against Muslim Personal Law Board Setting Up Parallel System,' *The Hindu* (Chennai, 17 August 2005) <www.thehindu.com/2005/08/17/stories/2005081703311300.htm> accessed 14 November 2011; Z Hasan, 'Governance and Reform of Personal Laws in India' in I Jaising (ed), *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited 2005) 355, 362; W Menski, 'The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda' (2008) 9 German LJ 211, 240.

[2] V Reddy and V Nagaraj, 'Arbitrability: The Indian Perspective' (2002) 19 J Intl Arb 117, 124–26. See §7.

[3] See AM Bhattacharjee, *Muslim Law and the Constitution* (2nd edn, Eastern Law House 1994) 23–28. For more detail on the system of Indian courts that deal with family law, see KB Agrawal, 'India' in W Pintens (ed) *International Encyclopaedia of Laws (Family and Succession Law)* (Kluwer 2003) 60.

[4] *Jordon Diegdeh v SS Chopra* AIR 1985 SC 935 and *George Sebastian v Molly Joseph* AIR 1997 SC 109.

[5] M Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24 J Social Issues 65, 67–68.

[6] J Levy, 'Three Modes of Incorporating Indigenous Law' in W Kymlicka and WJ Norman, *Citizenship in Diverse Societies* (OUP 2000) 315.

codify.[7] Personal laws are based on an understanding of these religions that glosses over even strong differences in interpretation of religious doctrine.[8]

The PLS's understanding of Hindu religious doctrine is applied even to those who dissent from this understanding. For example, the Hindu Adoption and Maintenance Act 1956 recognises a particular form of adoption known as *dattaka*, in preference to other customary forms of adoption practiced by Hindus.[9] There are customary forms of Hindu adoption which allow married women to adopt in their own right. But the Hindu Adoption and Maintenance Act 1956 does not permit such adoptions except in unusual circumstances.[10] Furthermore, there are customary Hindu forms of adoption which allow the adoption of an unlimited number of children, while the Hindu Adoption Act permits the adoption of only two children.[11] Similarly, the courts have interpreted the Hindu Marriage Act 1955 to mean that *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire) and *datta homa* (invocation before the sacred fire) must be performed in order to validate a Hindu marriage. However, these ceremonies are not customarily performed in many Hindu communities.[12]

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[7] §4.2.1.

[8] Kumkum Sangari, 'Gender Lines: Personal Laws, Uniform Laws, Conversion' (1999) 27(5/6) Social Scientist 17; Galanter (n 5). All those who are associated with these religions have this single state-endorsed interpretation applied to them. See Kishwar (n 9). Some have argued that this homogenising trend in the personal laws was motivated by Hindu and Muslim nationalism.

[9] Madhu Kishwar, 'Codified Hindu Law: Myth and Reality' (1994) 29 Economic and Political Weekly 2145, 2153.

[10] The Hindu Adoptions and Maintenance Act 1956 s 8(c).

[11] A Hindu cannot, under the Act, adopt a boy if he already has a son, or adopt a girl if he already has a daughter.

[12] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (CUP 2006) 253; Flavia Agnes, 'Hindu Men, Monogamy and Uniform Civil Code' (1995) 30 Economic and

On the question of 'prohibited degrees' for marriage, the statement of object and reasons to section 2 of the Hindu Marriage Act 1955, notes:

> there is the greatest diversity among Hindus in different parts of India as to what are the prohibited degrees for marriage. The usual rule is that the parties should not be *sapindas* of each other. Not only, however, has the *sapinda* relationship been interpreted in different ways by different authors, but the rule itself has been subjected to modification by custom. Some kind of limit has, therefore, to be provided to prevent incestuous marriages, subject to judicially recognised customs or well-established customs which satisfy the requirement of the definition of that expression.

Even more surprising is that Sikhs, Buddhists and Jains,[13] who generally speaking do not think of themselves as Hindu, are regarded as such by Hindu personal law.[14] They are also, therefore, governed by this state-sanctioned interpretation of Hindu law. This is in spite of the fact that Sikhs, Jains and Buddhist have religious beliefs quite distinct from Hindus.[15] Some Sikhs, as well as Hindus, who disagree with the state's understanding of

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Political Weekly 3238; *Nagalingam v Sivagami* AIR 2001 SC 3576 ('it has been held that if the parties to the second marriage perform traditional Hindu form of marriage, "Saptapadi" and "Datta Homa" are essential ceremonies and without there being these two ceremonies, there would not be a valid marriage'). This latter reading, however, is a questionable interpretation of the Act: see Werner Menski, *Hindu Law* (OUP 2008) 286–88.

[13] *Shuganchand v Prakash Chand* AIR 1967 SC 506; *Bal Patil v Union of India* <indiankanoon.org/doc/502741/> on Jains as a minority; Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (OUP 2010) 18.

[14] See Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956 ; Hindu Adoptions and Maintenance Act 1956.

[15] However, some tribal people are exempted from Hindu law. Poonam Saxena, *Family Law Lectures: Family Law II* (LexisNexis 2007) 6–7.

Hindu doctrine have requested exemptions from Hindu personal law, but these requests have been denied.[16]

Similarly, Muslim personal law applies regardless of 'peculiarities in belief, orthodoxy or heterodoxy.'[17] But Muslim personal law sometimes accommodates custom[18] and the courts will generally apply the law of the sect or 'school' to which at least one of the parties belongs,[19] thereby recognising and accommodating differences in religious belief within a tradition. However, it is unclear what criteria, if any, would be used by courts in deciding whether to recognise a sect or school for the purpose of applying personal law. In general 'syncretic, ambiguous or localised' identities are unlikely to receive special legal recognition, and are more likely to be subsumed under a larger, legally-recognised religious sect or school.[20] Tahir Mahmood, writing about Muslim personal law, says that 'the courts cannot exercise the power of *ijtihad*;[21] nor do

[16] Kishwar (n 9) 2151; Menski, *Hindu Law* (n 12) 293; *Partap Singh v Union of India* AIR 1985 SC 1695; Menski, *Comparative Law in a Global Context* (n 12) 250. See also 'Centre Says No to Separate Sikh Marriage Act, SAD to Meet PM' *Indian Express* (New Delhi, 31 August 2011) <www.indianexpress.com/news/centre-says-no-to-separate-sikh-marriage-act-sad-to-meet-pm/839594/> accessed 6 October 2011.

[17] AAA Fyzee and T Mahmood, *Outlines of Muhammadan Law* (Law in India Series, 5th edn, OUP 2008) 46; P Diwan and P Diwan, *Muslim Law in Modern India* (8th edn, Allahabad Law Agency 2000) 1.

[18] Fyzee and Mahmood (n 17) 51; Diwan and Diwan (n 17) 8. Hindu personal law does as well: Hindu Marriage Act 1955 ss 5, 7.

[19] M Hidayatullah and A Hidayatullah (eds), *Mahomedan Law* (18th edn, Tripathi 1977) 27; Diwan and Diwan (n 17) 11; Fyzee and Mahmood (n 17) 54; *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84 [20] (Gajendragadkar J); *Rajah Deedar Hossain v Ranee Zuhoornussa* (1841) 2 MIA 441.

[20] Michael R Anderson, *Islamic Law and the Colonial Encounter in British India* (WLUML 1996) <www.iiav.nl/ezines/web/WomenLivingUnderMuslimLawsOP/1996/No7June.pdf> accessed 12 November 2011; Sen (n 13).

[21] 'A process of legal reasoning and hermeneutics through which the jurist-mujtahid derives or rationalises law on the basis of the Quran and the Sunna': WB Hallaq, *The Origins and Evolution of Islamic law* (CUP 2005) 208.

they recognise the authority of any *mujtahid*[22] of our age.'[23] In other words, the courts cannot exercise the process of reasoning of a scholar, theologian or cleric of Islam;[24] and yet even the most established scholar, theologian or cleric of Islam would have to follow the court's interpretation of Islamic family law, rather than his own opinion, in the matters covered by Muslim personal law.

Similarly, while less studied, Parsi personal law has undoubtedly taken a stance on controversies within Parsi religious doctrine, such as those described in Mitra Sharafi's account of *Bella's case*.[25] The PLS has done the same with religious doctrinal arguments in Jewish personal law.[26] The PLS's lack of recognition for the self-identification of the individuals poses major problems for religious autonomy.[27]

So far this section has discussed the PLS's response to religious diversity with a personal law group. However, another group of people who are not easily categorised under the PLS are those who find themselves in the interstices of two or more personal

[22] 'Often interchangeable with *mufti*, one who is competent to reason from the revealed texts, fashion new rules or justify and rationalise pre-existent law': ibid 209.

[23] T Mahmood, *The Muslim Law of India* (Law Book Co 1980) 13–15.

[24] They cannot exercise this process of reasoning both because of inexpertise and also because of the disapproval that follows their attempts. The judgement in *Mohammad Ahmed Khan v Shah Bano Begum AIR* 1985 SC 945 [17] was severely criticised *inter alia* because it engaged directly with Quranic text. See Sylvia Vatuk, 'A Rallying Cry for Muslim Personal Law: The Shah Bano Case and its Aftermath' in Barbara Metcalf, *Islam in South Asia in Practice* (Princeton University Press 2009) 352.

[25] Mitra J Sharafi, 'Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925' (PhD dissertation, Princeton University 2006).

[26] For an account of some of the Jewish controversies played out in Indian courts see Flavia Agnes, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP 2011); Duncan Derrett, 'Jewish Law in Southern Asia' (1964) 13 ICLQ 288; Joan G Roland, *The Jewish Communities of India: Identities in a Colonial Era* (2nd edn, Transaction Publishers 1998).

[27] E.g. §6.1.2.2, §4.2.1 and §4.2.4.

laws. They face uncertainty and often lack legal protection, as is illustrated by the following extract from an influential case:

> Rather interestingly Sunita alias Fathima is the petitioner in Writ Petition 347 of 1990. She contends that she along with Jitender Mathur who was earlier married to Meena Mathur embraced Islam and thereafter got married. A son was born to her. She further states that after marrying her, Jitender Prasad, under the influence of her first Hindu-wife, gave an undertaking on April 28, 1988 that he had reverted back to Hinduism and had agreed to maintain his first wife and three children. Her grievance is that she continues to be Muslim, not being maintained by her husband and has no protection under either of the personal laws.[28]

In such cases the courts resort to a residuary rule that is found in pre-independence statutes and was endorsed by the Privy Council in *Waghela Rajsanji v Shekh Masluddin*:[29] where there are 'gaps' in the law, the courts might decide 'according to justice, equity and good conscience'. This rule might also be applied to cases of conflicts between the personal laws, for instance, when different personal laws apply to each party to a marriage, or in cases of conversion.[30] Given the gaps in the PLS and its response to internal diversity, it would be natural to ask what other laws govern family law in India. The next section describes these general family laws.

[28] ibid [4].

[29] ILR 11 Bom 551, 561; Bhattacharjee (n 3) 85–106.

[30] *Sarla Mudgal v Union of India* (1995) 3 SCC 635 [12].

2.3 GENERAL FAMILY LAWS

In addition to the personal laws, there are general family laws that govern some of the matters that the personal laws traditionally dealt with. It is difficult to discern any principle which explains when these general laws apply to people instead of (or in addition to) the personal laws. Much of what follows is therefore only *generally* true; however, it indicates how complicated and unpredictable movement between the personal laws and general family laws can be.

The Special Marriage Act 1954, an ostensibly secular[31] enactment,[32] allows the registration of marriages solemnised according to both civil and traditional or religious ceremonies.[33] The Special Marriage Act allows two people of the same or different faiths to marry,[34] does not recognise polygamous marriages,[35] does not grant men a more expansive power of divorce than it does women[36] and gives courts the power to grant

[31] That is to say, not based on conventional religious norms.

[32] But the Special Marriage Act 1954 s 21A creates an exemption from the general rule that those marrying under the Act will be governed by the Indian Succession Act 1925 . Instead, if a 'marriage is solemnized under [the] Act [by] any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion', religious personal law would govern and not the secular law. The object of this exemption is to protect coparcenaries. It has been argued that it is discriminatory and intended to act as a disincentive to Hindus who wanted to marry a person from another personal law group. It also leaves such Hindus without the power to choose not to be governed by the Hindu personal law of succession. See F Agnes, *Law and Gender Inequality*: *The Politics of Women's Rights in India* (Law in India Series, OUP 1999) 98–99.

[33] Special Marriage Act 1954 ss 4, 12(2).

[34] Typically people can only marry others of a particular faith under the personal laws. However Muslim men can marry Christian or Jewish women under Muslim law. (See Appendix B)

[35] Special Marriage Act 1954 s 4(a).

[36] ibid ch VI.

alimony or maintenance to the woman.[37] In another move towards more uniform marriage laws, the Supreme Court in a recent case directed the central and state governments to provide for the registration of all marriages, regardless of personal law.[38] But the Special Marriage Act 1954 has major limitations. Only those marriages registered under the Act are governed by its provisions.[39] The Act has not been well-publicised, and only a small number of marriages are actually registered under it.[40] Flavia Agnes notes:

> Though the Act has been in existence for a long time, it is the least publicized legislation and is shrouded by misconceptions. The most common misconception which prevails is that this law is to be used only in cases of inter-religious or inter-caste marriages, or 'love' marriages, which term refers to marriages of choice contracted against parental wishes. The fact that anyone, including those belonging to the same religion, can opt to get married under this Act has not been sufficiently highlighted.[41]

Besides a lack of awareness about the existence of this enactment, there are serious practical difficulties in having a marriage solemnised under the Act.[42] One account of an

[37] ibid s 37.

[38] *Seema v Ashwini Kumar* (2005) 4 SCC 443.

[39] ibid s 21.

[40] Agnes, *Law, Justice, and Gender* (n 26) 97; G Mahajan, 'Can Intra-Group Equality Co-Exist With Cultural Diversity? Re-Examining Multicultural Frameworks of Accommodation' in AI Eisenberg and J Spinner-Halev (eds), *Minorities Within Minorities: Equality, Rights and Diversity* (CUP 2004) 105–106.

[41] Agnes, *Law, Justice, and Gender* (n 26) 92.

[42] Coomi Kapoor, 'Act of Vigilantism' *The Indian Express* (18 April 2007) <www.indianexpress.com/news/act-of-vigilantism/28598/> accessed 14 November 2011.

attempt to register a marriage under the Act suggests that it was impossible to do so without identifying the religion(s) of the couple.[43] Moreover, if a Hindu marries someone identified by the PLS as non-Hindu under the Act, his property rights might be adversely affected.[44]

When people marry or register their marriage under the Special Marriage Act, they are also automatically governed by the Indian Succession Act 1925,[45] except if they are both considered 'Hindu' by the system.[46] Thus the Indian Succession Act can, like the Special Marriage Act, only be described as *ostensibly* secular.[47] There are also general family laws that apply to people without their having to opt-out of the PLS or explicitly choose the general family laws. Maintenance may be claimed from a person by his parents, minor children, wives and ex-wives[48] under the Code of Criminal Procedure 1973, which therefore applies almost uniformly. The Guardians and Wards Act 1890,

[43] 'When I presented my daughter's fiancé's documents with the column for religion left blank, the marriage officer took great offence and snapped that he had never heard of anyone doing such a thing in all his years': ibid.

[44] Special Marriage Act 1954 s 19 and s 21A.

[45] ibid s 21.

[46] ibid s 21A.

[47] 'The Indian Succession Act contained separate sections for Parsis and non-Parsis … Although applicable primarily to Christians, this statute could be deemed a residuary law since it was also applicable to person contracting a civil marriage.' Agnes, *Law, Justice, and Gender* (n 26) 66–67.

[48] If the ex-wives are Muslims married under Muslim personal law, the Muslim Women (Protection of Rights on Divorce) Act 1986 applies. See *Danial Latifi v Union of India* (2001) 7 SCC 740 and *Shabana Bano v Imran Khan* AIR 2010 SC 305 for the way this enactment operates. In Flavia Agnes' words: 'first, a divorced Muslim woman's right to maintenance (or economic settlement) from her husband is not extinguished upon divorce; second, she has dual claims — under Section 125 for recurring maintenance, or for a lump sum settlement under MWA. Third, while the jurisdiction for MWA is in magistrates' courts, where family courts have been set up, divorced Muslim women are entitled to claim maintenance in family courts.' Flavia Agnes, 'Shah Bano to Shabana Bano' *The Indian Express* (15 December 2009) <www.indianexpress.com/news/shah-bano-to-shabana-bano/554314/0> accessed 18 July 2011. See also *Sabra Shamim v Maqsood Ansari* 2004 (9) SCC 616.

which deals with guardianship of minors, applies regardless of one's personal law group.[49] In 2006, an amendment to the Juvenile Justice (Care and Protection of Children) Act 2000 allowed people of any personal law group to adopt.[50] However, this provision is restricted to children who are orphaned, abandoned, neglected or abused.[51] Before this, only Hindus had the power to adopt.[52]

There is also some uniformity in institutional arrangements relating to family law: the Family Courts Act 1984 sets up a system of courts looking into family law disputes. Since most of the laws discussed in this section are neither completely uniformly applicable nor completely secular,[53] they will be referred to as the 'general laws' to distinguish them from the personal laws.

2.4 AVOIDING OR ESCAPING THE PLS

With that outline of general family laws in mind, it is worth considering whether and how a person can avoid or escape the PLS, or move from one personal law group to another.

[49] With at least one exemption (a relatively minor one) for Hindus (in s 21 of the Act).

[50] Section 41, Juvenile Justice (Care and Protection of Children) Act 2000. A recent judgement of the Bombay High Court found that even Hindu parents who have adopted under the Hindu Adoptions and Maintenance Act 1956 can adopt further children under the Juvenile Justice (Care and Protection of Children) Act 2000: *Vinay Pathak and his Wife v Unknown* <indiankanoon.org/doc/1722132/> accessed 14 November 2011.

[51] Section 41(2) clarifies that '[a]doption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non- institutional methods.'

[52] Under the Hindu Adoptions and Maintenance Act 1956 s 7.

[53] Despite formally bearing names that suggest that they are secular.

The personal laws apply to children[54] (who are generally presumed to follow the religion of their father)[55] and even foetuses.[56] Even an adult has only limited control over which of the personal laws or general family laws (or the combination of these laws) apply to her. For instance, a person may renounce Hinduism and still be governed by Hindu personal law.[57] It is unlikely that renunciation of all religion will allow someone to escape the system; it is more likely to lead to their being classed as a Hindu.[58] Which personal law (if any) is applicable to an individual is decided by the state system of courts.[59]

As just mentioned, in some circumstances a person subject to a personal law could choose to be governed by one of the general codes discussed above. There are, however, significant obstacles to making this choice. (What this means for religious autonomy will be considered in §4.1.4.) Two people who meet the requirements could marry under the Special Marriage Act 1954 and their marriage would be governed under that Act. (Although, as noted above, there are obstacles to this.)[60] But if these people were to

[54] Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956 s 2; Hindu Adoptions and Maintenance Act 1956 s 2; Fyzee and Mahmood (n 17) 46.

[55] AM Bhattacharjee, *Hindu Law and the Constitution* (2nd edn, Eastern Law House 1994) 139; Fyzee and Mahmood (n 17) 46.

[56] Hindu Succession Act 1956 s 20.

[57] Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956 s 2; Hindu Adoptions and Maintenance Act 1956 s 2; Bhattacharjee (n 55) 138.

[58] Because of the wide definition of Hindu in s 2 of Hindu Marriage Act 1955 .

[59] Family Courts Act 1984.

[60] Text to nn 34 to 47.

marry under a personal law, which appears to be much more usual,[61] one of them may not later choose to be governed by the Special Marriage Act 1954 instead.[62] This significantly undermines the power of each party to a marriage to opt-out of the system.[63] Spinner-Halev suggests that people may hesitate to suggest to a potential spouse that they opt-out of the PLS in case this is perceived as sign of mistrust.[64] It is also noteworthy that the main means of escaping the PLS involves getting married. In any case, as the discussion above shows, even the 'uniform' codes are not all that uniform, are not available regardless of personal law status, are not always practically feasible[65] and do not address all the questions of family law that the personal laws do.

Even if one were willing to take the somewhat extreme step of religious conversion in order to escape the provisions of one's personal law, there are still obstacles.[66] The Caste Disabilities Removal Act 1850[67] prevents courts from enforcing some of the disabilities and forfeiture of rights that are associated with renunciation or conversion from a religion. But significant costs continue to attach to conversion, as

[61] Agnes, *Law, Justice, and Gender* (n 26) 97.

[62] Special Marriage Act 1954 s 15 provides for the application of the Act to marriages solemnised under a personal law on the application of *both* parties.

[63] On the importance of freedom to change one's mind, see §4.2.3.2.

[64] J Spinner-Halev, 'Feminism, Multiculturalism, Oppression and the State' (2001) 112 Ethics 84, 109.

[65] §4.1.4.

[66] LD Jenkins, 'Legal Limits On Religious Conversion in India' (2004) 71 L & Contemp Prob 109. See also Sangari (n 8) 36.

[67] Also known as the Freedom of Religion Act.

conversion can affect marital status,[68] the right to receive maintenance payments,[69] the power of guardianship,[70] power to give a child up for adoption,[71] power to stop one's spouse from giving one's child up for adoption[72] and the inheritance rights of third parties such as children of converts.[73] Further, those identified as belonging to the 'Scheduled Castes'[74] – who are the beneficiaries of affirmative action measures by the state – no longer qualify for these measures on conversion to any religion which is not Hinduism, Sikhism or Buddhism.[75] While the Constitution guarantees freedom of religion,[76] in practice several state-level enactments regulate conversions in a way that arguably amounts to an impediment to conversion.[77] Even if one were willing to accept these disadvantages of, and practical obstacles to, conversion, recent case law suggests that

[68] It can provide an additional ground for divorce (e.g. Hindu Marriage Act 1955 s 13) and can cause the marriage to be dissolved *ipso facto* if both parties are Muslims married under Muslim personal law and the man renounces Islam. See Fyzee and Mahmood (n 17) 138–39; Bhattacharjee (n 3) 98–107.

[69] Hindu Adoptions and Maintenance Act 1956 s 24.

[70] Hindu Minority and Guardianship Act 1956 s 6; *Helen Kinner v Sophia* 14 MIA 309.

[71] Hindu Adoptions and Maintenance Act 1956 s 9.

[72] Hindu Minority and Guardianship Act 1956 s 9(3); Duncan Derrett, *Religion, Law and the State in India* (OUP 1999) 332–33.

[73] Bhattacharjee, *Hindu Law and the Constitution* (n 55) 126–27; Hindu Succession Act 1956 s 26 (disqualification of children of converted parents); Agnes, *Law, Justice, and Gender* (n 26) 94.

[74] These are castes mentioned in the Indian Constitution who are entitled to certain benefits and affirmative action.

[75] Sen (n 13) 117–20; The Constitution (Scheduled Castes) Order 1950 s 4 <lawmin.nic.in/ld/subord/rule3a.htm> accessed 14 November 2011; 'No Access to Quota Benefits after Conversion: Court' *The Deccan Herald* (7 March, 2011) <www.deccanherald.com/content/143863/no-access-quota-benefits-conversion.html> accessed 20 November 2011.

[76] §2.7.

[77] Constitution of India 1950 art 25; JA Redding, 'Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law' (2006) 4 Nw U J Hum Rts 436, 461–66.

even on conversion, one's former personal law may continue to apply in some respects.[78] In any case, proving conversion in court can be difficult, especially since the courts will often question *bona fides*.[79] A pretended conversion for the purpose of eluding the personal law of the parties will be considered a 'fraud upon the law and will not be permitted by the courts.'[80] As one writer on the subject notes on exit from, and movement between, the personal laws:

> Muslim religious spokesmen want to close all routes from Muslim personal law to common laws through exemptions. Hindu communalists want to block any route from Hindu to Muslim personal law by abolishing personal laws. …[B]oth want to foster exclusivity, foreclose choice and movement from personal to non-religious laws (for Muslims) or traffic between denominations (for Hindus). Both want to harden and freeze boundaries… The fairly extensive complicity of the state stretches to inhibiting inter-religious marriage and conversion through either a reduction or a loss of rights… It appears that religious primordiality has been made to supersede or even cancel affective and primordial ties based on kinship and family: conversion can 'legally' annihilate parental ties along with the rights and obligations obtaining from marriage and nurture…[81]

[78] See *Sarla Mudgal* (n 30). See for a case of a Hindu woman who converted to Islam and then back to Hinduism whose marriage under the Hindu Marriage Act was upheld: *Rajiv Gakhar v Bhavana Wasif* <indiankanoon.org/doc/731156/> accessed 14 November 2011.

[79] See, eg, *VM Ramakrishna Mudaliar v Smt Nagammal* MANU/TN/0812/1995; Redding (n 77) 461–66.

[80] *Skinner v Orde* (1875) ILR 1 All 230; *Sarla Mudgal* (n 30); *Lily Thomas v Union of India* (2000) 6 SCC 224; Fyzee and Mahmood (n 17) 47.

[81] Sangari (n 8) 28.

The table in Appendix B to this thesis provides an overview of when exit from the PLS and movement between the personal laws are possible.

2.5 RELATION TO RELIGIOUS DOCTRINE

This section will first consider whether, and to what extent, the personal laws claim to apply religious doctrine. It will then consider how, and how far, the personal laws in fact apply religious doctrine. It is difficult to say anything that is generally applicable in this respect of all the personal laws. But most personal laws claim to apply religious doctrine (or religious 'law') or some version of it. Legislation reinforcing the application of personal law has been justified in the past by reference to its 'religious sanctity'.[82] This claim is echoed by Members of Parliament[83] and religious organisations.[84]

Consider the following clauses of the Muslim Personal Law (Shariat) Application Act, 1937:

> WHEREAS it is expedient to make provision for the application of the Muslim Personal Law (Shariat) to Muslims; It is hereby enacted as follows:-

[82] Zoya Hasan, 'Gender Politics, Legal Reform and the Muslim Community in India' in P Jeffery and A Basu, *Appropriating Gender: Women's Agency, the State, and Politicized Religion in South Asia* (Zones of Religion Series, Routledge 1998) 76.

[83] 'Eduardo Faleiro, a prominent Congress spokesman from the Christian community declared: "… [in] a truly secular state in a multi-religious society, it is the paramount duty to equally respect all religious [sic] and give equal respect and protection to all laws, including personal laws, which are based on the religious tenets …".' Rochana Bajpai, 'The Conceptual Vocabularies of Secularism and Minority Rights in India' (2002) 7 Journal of Political Ideologies 179, 188.

[84] From the website of the All India Muslim Personal Law Board: 'Ulema, leaders and various Muslim organisations successfully convinced the Indian Muslim community that the risk of losing applicability of Shariah laws was real and concerted move by the community was needed to defeat the conspiracy.' <www.aimplboard.org/introduction.html> accessed 8 October 2011.

> 2. *Application of Personal Law to Muslim*:- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religion endowments) *the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).*[85]

This enactment claims to apply 'Muslim personal law (Shariat)' to Muslims on certain questions. This is a claim that a certain set of rules will apply to Muslims and also that these are rules of Islamic religious doctrine. It does not *merely* claim to accommodate Muslim practices in generally-applicable law. Nor does it merely claim to apply a law inspired by Muslim religious doctrine. It claims to apply this religious doctrine itself. Indian courts seem to take this claim seriously. The Indian Supreme Court has claimed that 'there can be no greater authority on … [a particular question of Muslim personal law] than the Holy Quran'.[86]

Similarly, the statement of objects and reasons of the Dissolution of Muslim Marriages Act 1939 (Act No VIII of 1939) describes it as '[a]n Act to *consolidate and*

[85] Shariat Application Act 1937 (Act no 26 of 1937).

[86] *Mohammad Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945 [17]. While it is true that this case has been severely criticised, *inter alia* because it engaged directly with Quranic text, it certainly does not stand alone in doing so. Cases decided many years after *Shah Bano* have done the same. See, for example, the recent case of *Shabnam Bano v Mohd Rafiq* MANU/RH/0131/2009. Further, *Yousuf Rawther v Sowramma* MANU/KE/0059/1971 quotes the Quran.

clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to *remove doubts as to the effect of* the renunciation of Islam by a married woman on her marriage tie.'[87] It also claims to 'consolidate and clarify', and 'to remove doubts' relating to what it describes as 'Muslim law'. It, therefore, claims not to change or modify Muslim doctrine, but to aid its application. Similarly, the much more recent Muslim Women (Protection of Rights on Divorce) Act 1986 was justified on the grounds that it was based on the correct interpretation of Islamic Law.[88]

Hindu personal law statutes may not make the same claim to apply unmodified Hindu law as the Muslim personal law statutes do. But as textbook writers frequently note, the legal sources of Hindu personal law include not just legislation, but also religious sources such the *Shrutis*, *Smritis* and commentaries and digests such as *Medhatithi*, *Mitakshara* and *Dayabhaga*.[89] As for legislation, the Hindu Marriage Act 1955 is 'an Act to amend and *codify* the law relating to marriage among Hindus'.[90] Hindu Law therefore still makes claims to apply Hindu doctrine, and in doing so identifies certain principles as 'Hindu law'. An indicator of this is the Indian courts' doctrinaire response to the question of what constitutes a valid Hindu marriage ceremony. As Werner Menski, a scholar of both 'classical' and modern Hindu law, writes:

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[87] Emphasis added.

[88] Bajpai (n 83), text in fns 38–40.

[89] Saxena (n 15) 36–50. As an example, see *Surjit Lal Chhabda v Commissioner Of Income Tax* 1976 SCR (2) 164, 170 where Chandrachud J notes the continued 'juristic weight of Smritis like the Yajnavalkya Smriti and Vijnaneshwara's Commentary on it, the critique bearing the humble title of "Mitakshara".' See also *Swaraj Garg v Garg* AIR 1978 Delhi 296.

[90] Emphasis added. See the statement of object and reasons of several clauses of the Act.

> It is remarkable that this rule was copied directly from *Manusmriti* 8.227, where it had the obvious function, in the context of contract law, to suggest precisely when a Hindu marriage should become binding. The sacramental Hindu contract of marriage, according to the *Manusmriti* as well as section 7(2) of the Hindu Marriage Act, is completed on the seventh step of this particular ritual. Manifestly, the new legal order has just recycled the old law, even if such use of tradition may carry particular risks.[91]

Similarly, rules relating to prohibited degrees of relationship (*sapinda*),[92] joint family property,[93] guardianship and adoption[94] are derived, to varying degrees, from Hindu doctrine. The Hindu Code Bill and the legislation that followed were defended by citing their basis in the Hindu religious doctrine.[95]

The personal law applicable to Parsis is similar to that applicable to Hindus insofar as it claims to modify but also to apply Parsi religious doctrine. Clause 3 of the statement of objects and reasons of the Parsi Marriage and Divorce Act 1935 claims, for example, that '[t]he new table [of prohibited degrees of relationship with respect to

[91] Menski, *Comparative Law in a Global Context* (n 12) 255.

[92] See Hindu Marriage Act 1955 s 5(v) on *sapinda* relationships.

[93] '[T]he one remaining characteristically Hindu complex of rules, the joint family, is still a bulwark of Hindu law and it is as such that the courts view it': Duncan Derrett, *The Death of a Marriage Law* (Carolina Academic Press 1978).

[94] See account of Hindu adoption law in §2.2.

[95] 'An official of the secular state [the law minister] became an interpreter of Hindu religion, quoting and expounding the ancient Sanskrit scripture in defence of his bill': Donald Smith, *India as a Secular State* (Princeton University Press 1963) 281.

marriage] is based on clear principles *in accordance with Parsi religion and custom*, and is more concise and at the same time more comprehensive than the present one.' Since Jewish Law is not codified at all in India, courts have referred directly to passages in the Pentateusch[96] as well as two texts on Jewish Religious Law in English, Mielizner's *Jewish Law of Marriage and Divorce in Ancient and Modern Times*[97] and Kadushin's *Jewish Code of Jurisprudence*,[98] that are accounts of Jewish religious doctrine.

While it is clear that the personal laws often claim to be applying religious doctrine, they are often criticised for being *misinterpretations* of religious doctrine.[99] A complete enquiry into the accuracy of the personal laws' claims to apply religious doctrine lies far beyond the scope of this thesis. Instead this section will proceed to a modest enquiry into the effect that administration of the personal laws, first by the British administrators of India and then by the administrators of independent India, had on the connection between these laws and religious doctrine.

As just discussed, the Muslim Personal Law (Shariat) Application Act 1937, claims to apply Muslim religious doctrine within the areas listed in the Act, including marriage and inheritance. While, as noted below,[100] this claim is often treated as well-

[96] *Mozelle Robin Solomon v Lt Col RJ Solomon* MANU/MH/0220/1968.

[97] Moses Mielziner, *Jewish Law of Marriage and Divorce in Ancient and Modern Times* (Bloch Publishing Company 1901).

[98] Jacob Kadushin, *Jewish Code of Jurisprudence* (Talmud Society 1921). See Agnes, *Law, Justice, and Gender* (n 26) 88.

[99] Tahir Mahmood, 'Personal Law, Social Myths' *The Indian Express* (7 September 2007) <www.indianexpress.com/news/personal-law-social-myths/513767/> accessed 19 November 2011.

[100] Text to nn 128 to 131 below.

founded, it is problematic. Scholars of Muslim personal law in India have, at least from 1895, acknowledged that the Muslim personal law of India is very different from Islamic religious doctrine.[101] This is why some writers refer to Muslim personal law in India as 'Anglo-Muhammadan law'.[102] The British administrators in India chose which matters would be governed by Muslim personal law and which would be 'left to the consciences of those who acknowledge it as religiously binding'.[103] Apart from restricting the areas over which their understanding of religious doctrine would apply as law, these administrators tended also to treat as 'law' parts of religious doctrine that were probably regarded by their adherents as optional or supererogatory, but not mandatory.[104] The bases of early Muslim personal law were textbooks that were translated from Persian and Arabic and were later found to have a number of translating errors.[105] Some commentators argue that the authors of these textbooks had a perspective on Islam which distorted their understanding of the original texts.[106] The British administrators also represented Islamic doctrine using the normative frame of reference that they were most familiar with, namely English law.[107] This, along with the incorporation of elements of

[101] Roland Wilson, *Anglo-Muhammadan Law: A Digest Preceded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as such by the Civil Courts of British India, with Full References to Modern and Ancient Authorities* (first published 1895, 4th edn W Thacker & Co 1912) 50.

[102] 'As one of the judges from Delhi, commenting on the Bill, remarked: "there has been a great conflict between Anglo-Mohammadan law on the one side and the Muslim law, generally known as the Shariat on the other. Courts give their findings … in accordance with the former, consequently the latter is ignored".' R De, 'Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act' (2009) 46 Indian Economic & Social History Review 105, 123.

[103] Wilson (n 101) 2, cited in Anderson (n 20); John Strawson, 'Islamic Law and English Texts' (1995) 6 Law and Critique 21.

[104] Anderson (n 20) 10–15.

[105] ibid.

[106] See for examples Strawson (n 103) 28–33.

English law into Muslim personal law, certainly affected the content of what was meant to be Islamic religious doctrine.[108] Indeed, parliamentary debates relating to the passage of the Dissolution of Muslim Marriages Act 1939 suggests that some Indian parliamentarians were aware of the effect that British administration of Muslim personal law had had on the law's nature and content.[109]

The Dissolution of Muslim Marriages Act 1939 provides an example of how personal law was modified by state action. This enactment was a response to a certain practice among Muslim women. Prior to the enactment, the law that applied to some Muslim women, thought to be derived from the *Hanafi* school of Islamic thought,[110] did not give them the power to divorce their husbands.[111] However, the apostasy of either of the Muslim parties to an Islamic marriage was thought *ipso facto* to dissolve the marriage. Based on this, Muslim women who wanted a divorce would renounce Islam in order to have their marriage dissolved. The 1939 Act undeniably altered the law that applied in such cases from rules (supposedly) based on the *Hanafi* school of thought, followed by most Indian Muslims, to rules (supposedly) based on the *Maliki* school of thought.[112] It was explained in the statement of objects and reasons that this was because

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[107] ibid.

[108] In *Waghela Rajsanji* v *Shekh Masluddin* ILR 11 Bom 551, a direction to apply 'justice, equity, and good conscience' meant that where indigenous laws seemed to provide no rule, the matter should be decided according to English law.

[109] De (n 102) 119.

[110] Until quite recently, there was a presumption that every Indian Muslim subscribed to this school of thought: Fyzee and Mahmood (n 17).

[111] Lucy Carroll, 'Muslim Women and 'Islamic Divorce' in England' (1997) 17 Journal of Muslim Minority Affairs 97, 102.

[112] ibid.

the *Hanafi* school permitted the application of the rules of other schools of Islamic thought in cases of hardship.[113]

This move was by no means universally accepted as conforming to Islamic religious doctrine. The 1939 Act was criticised as being a collection of rules cherry-picked by legislatures, as opposed to true religious doctrine.[114] While the law justified the application of *Maliki* rules to *Hanifis*, it also applied these rules to Muslims associating with other schools of thought (e.g. the *Shafi* and *Hanbali* schools) as well as Muslims belonging to the Shia sect. It is unclear what, if any, justification was provided for the application of *Maliki* law to these groups. Although the Act purports to 'consolidate and clarify the provisions of Muslim Law', it appears that this claim is misleading. It *may* be that the Act is in keeping with one school of Islamic thought; an examination of that claim is beyond the scope of this thesis.[115] But it undoubtedly applies the rules of one school of Islamic thought to people belonging to other schools who are unlikely to accept the validity of the former set of rules. The administration of Muslim personal law by the state cannot therefore be characterised as the simple application of Islamic religious doctrine.

Hindu, Parsi and Christian Personal Law make a less unequivocal claim to apply religious doctrine. But even this qualified claim – that they partially apply religious doctrine – needs to be further qualified. Consider Hindu Personal Law. Commentators

[113] ibid.

[114] De (n 102) 118–19.

[115] Namely, the *Hanafi* school, followed by the majority of Muslims in India. Even this claim was deeply contested: see the comments of religious scholars on the Act in De (n 102).

note how the British administrators of India, in their search of a Hindu code that could be applied to the Hindu population of India, mistakenly took religious writings that were meant to be flexible or advisory to constitute such a code.[116] The resulting understanding of Hindu doctrine that was applied to Indian Hindus before India's independence is referred to as Anglo-Hindu law by some commentators, to distinguish it from what they perceive to be a more authentic understanding of the Hindu religion.[117] Codified Hindu law has certainly made other changes to the Hindu doctrine it purports to apply; it has legalised inter-caste marriage and divorce, it has prohibited polygamy,[118] and it has given daughters some of the rights of inheritance of sons.[119] Hindu personal law has also led to 'the subversion of the institution of *stridhana* which was meant to protect women's right to property'.[120] Duncan Derrett, a commentator on Hindu law, describes modern Hindu law in these terms:

> We are left in this indefinite interim period with the anomalous situation in which, by reason of their religion or supposed religion, nearly four hundred million Indians have applied to them, whether they like it or not, a system of law which has certain roots in the Anglo-Hindu system, certain roots in the shiftless cosmopolitanism of vocal and influential elements of the Indian population,

[116] Kishwar (n 9).

[117] Derrett, *Religion, Law and the State in India* (n 72) 321–22.

[118] Werner Menski, *Modern Indian Family Law* (Routledge 2001) 204–12.

[119] Partha Chatterjee, 'Secularism and Tolerance' in Rajeev Bhargava (ed), *Secularism and its Critics* (OUP 1998) 356–57.

[120] Agnes (n 26) 31–35.

> certain roots in rather questionable academic propositions about law, but has *little to do with Hinduism by any possible definition of the term.*[121]

He goes on to note that the very few people responsible for the codification of Hindu law between 1954 and 1956[122] were familiar with Hindu law.[123]

As with Hindu and Muslim personal law, the state court's ability to accurately identify and apply Jewish religious doctrine is highly suspect. Consider one judge's response to a Jewish *kethuba*, and particularly his method of confirming its nature:

> In accordance with the custom amongst the Jews the parties executed a writing known as the Kethuba. These documents are usually in the Aramaic language. I have been shown the original of the document executed by the parties and, except for the signatures of the parties and the date which are in English, *the document is in a script so unfamiliar to everyone in Court that I have no hesitation in presuming that this document must also be in the Aramaic language.*[124]

The judge in that case further comments on the 'the formidable necessity of resorting to the English translations of any of these works [of certain books of Jewish law] for the

[121] Derrett, *Religion, Law and the State in India* (n 72) 321–22 (emphasis added). See also remarks by V G Deshpande: 'When I try to understand the meaning of the Hindu code bill, has it anything to do with the name "Hindu"? Does it signify that it is based on Hindu traditions, Hindu ideas, personal law and values?', Indian Parliament (Lok Sabha), *Lok Sabha Debates, Vol IX, Part 11* (Lok Sabha Secretariat 1954) 2243–49 (cited in Kishwar (n 9) 2153).

[122] Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956 ; Hindu Adoptions and Maintenance Act 1956 .

[123] Derrett, *Religion, Law and the State in India* (n 72) 328.

[124] *Mozelle* (n 96) [2] (emphasis added).

purpose of ascertaining the law on the subject (a task rendered more formidable by the fact that these works in the English translation are not easily available)'.[125] He also notes a more general problem with the PLS's attempts to apply religious doctrine in state courts, a problem that also arose in the discussion above of Hindu personal law: 'any unqualified and unquestioning reliance upon any passage in the Pentateuch as containing rules of positive law and particularly rules of law to be applied to the present-day circumstances would be fraught with danger and lead to error, for in the Pentateuch positive law is intermingled with religious and moral precepts and ethical doctrines. This is equally true of the Talmud as also of any ancient system of jurisprudence.'[126]

The examples in this section were merely to qualify the PLS's claim of applying religious doctrine. The institutional barriers to applying religious doctrine – the judges unfamiliarity with religious doctrine, the difficulties in obtaining expert advice, the tendency of the common law to entrench inaccuracies and fail to adapt to changing religious doctrine, the superimposition of English law on religious doctrine during British rule such as through the 'justice, equity and good conscience' rule[127] – all complicate the relationship between religious doctrine and the personal laws.

Given what was said in this section about the connection between religious doctrine and the personal laws, it might seem natural that people would not take the claims that the state makes about religion very seriously. While there appears to be no

[125] ibid [15].

[126] ibid.

[127] See n 108 above.

empirical studies on this question,[128] there is some reason to believe that people do in fact take the PLS's claims about religion seriously. Despite the well-documented changes to religious doctrine on its way to becoming personal law outlined in this section, it is clear that many Muslim and Hindu Parliamentarians thought their personal laws to be based on, and largely co-extensive with, their religion.[129] So Donald Smith, a prominent commentator on secularism in India, could maintain that 'probably over ninety per cent of the Indian Muslims feel that their law is of the very essence of Islam'.[130] Many of the religious organisations campaigning for the protection of the PLS clearly see them as co-extensive with their religion.[131] This is the only way to make sense of resistance to change of personal laws on the grounds that, just as religious doctrine cannot be changed by men, neither can the personal laws.

With respect to Hindu law, however, the view that current Hindu personal law is 'secular' has gained some currency.[132] For instance, at least one prominent Supreme

[128] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary' in Bhargava (n 119) 288: 'But if the courts deliver "reformist" decisions, does the addition of religious justifications enhance their effect? Here we need empirical information and we have none.'

[129] RV Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (OUP 2006) 100–102.

[130] Smith (n 95) 498.

[131] Williams (n 129) 100–102; Mahboob Ali Baig Sahib Bahadur, Constituent Assembly of India Debates, 23 November 1948 <164.100.47.132/LssNew/constituent/vol7p11.html> accessed 13 November 2011 ('As far as the [Muslims] are concerned, their laws of succession, inheritance, marriage and divorce are completely dependent upon their religion'); R Upadhyay, 'Muslim Personal Law: Should it be politicised?' (South Asia Analysis Group, Paper no 666) <www.southasiaanalysis.org/papers7/paper666.html> accessed 9 October 2011. The Working Committee of JUH, which projects itself as an organisation of nationalist Muslims, in its resolution of April 1970 maintained: 'The Muslims consider the personal law to be an essential part of their religion and stand therefore for status quo' (see HA Gani, *Muslim Politics and National Integration* (Sterling 1978) 94–95). The group cites Surah 33, verse 37 in support of their stand. This verse reads: 'It is not open to a believing man or a believing woman, when Allah and his messenger have decided a matter, to exercise their own choice in deciding it' (ibid 95). They argue that no one is competent to change or amend the explicit provisions of Quran, which is divine.

[132] Agnes, *Law, Justice, and Gender* (n 26) 21.

Court judgement makes this assumption.[133] As the introduction to this thesis points out, the Hindu Right, which can be viewed as a group of movements seeking to represent Hindus in India, does not favour the retention of the PLS, but rather seeks its replacement by a Uniform Civil Code. One explanation of this is that the Hindu Right, and perhaps other Hindus, do not regard Hindu personal law as being based on religious doctrine. However, perhaps a more plausible explanation for the Hindu Right's position on the Uniform Civil Code is that they hope that this Uniform Civil Code will be a version of Hindu religious doctrine or norms, applicable to all Indian citizens.[134] Their opposition to the PLS might be explained as opposition to personal laws based on other, non-Hindu religious doctrine.[135] Their call for a Uniform Civil Code in the post-independence period has also been explained as a tactic to delay the reform of Hindu personal law.[136] Moreover, Hindu personal law, as we have pointed out above, retains several religious and sacramental aspects.[137] Numerous commentators have noted how Hindu personal law was used to crystallise and strengthen Hindu identity.[138] As Werner Menski notes: '[d]espite enormous internal changes, Hindu law as a conceptual entity has remained an integral part of the living and lived experience of all Indians, particularly of those very

[133] *Sarla Mudgal* (n 30) [34–35].

[134] Agnes, *Law, Justice, and Gender* (n 26) 21.

[135] Rather than their view that current Hindu personal law does not reflect Hindu religious doctrine.

[136] Agnes, *Law, Justice, and Gender* (n 26) 149.

[137] ibid 21–23.

[138] ibid 152; Sudipta Kaviraj, 'On Thick and Thin Religion: Some Critical Reflections on Secularisation Theory' (Department of Middle East and Asian Languages and Cultures Colloquium, Columbia University, April 2009) 12–14; Ronojoy Sen, 'The Indian Supreme Court and the Quest for a 'Rational' Hinduism' (2010) 1 *South Asian History and Culture* 86.

diverse people who might call themselves Hindus, or whom others refer to as Hindu.'[139] Like other personal laws, therefore, Hindu personal law has a complicated relationship with religious doctrine.

2.6 THE PERSONAL LAWS AND THE CONSTITUTION

The chapter of the Indian Constitution on 'Fundamental Rights' guarantees equality before the law and equal protection of the laws,[140] prohibits discrimination on the grounds (*inter alia*) of sex or religion,[141] protects persons from deprivation of life and personal liberty[142] and entitles all people to 'freedom of conscience and the right freely to profess, practise and propagate religion.'[143] Article 13 of the Constitution states that all 'laws in force' before the commencement of the Constitution, as well as all laws made by the state, which are inconsistent with the fundamental rights chapter, are void to the extent of the inconsistency.

The Constitutional Assembly debates record a failed attempt to 'save' the personal laws from the effect of Article 13 of the Constitution through a proviso to the Article.[144] It would be natural to ask, then, how the personal laws have not been declared

[139] Werner Menski, 'Postmodern Hindu Law' (2001) SOAS Law Department Occasional Papers 7 <www.casas.org.uk/papers/pdfpapers/pomolaw.pdf> accessed 19 November 2011.

[140] Constitution of India 1950 art 14.

[141] ibid art 15.

[142] ibid art 21.

[143] ibid art 25.

[144] *Constituent Assembly Debates Book No 2* (Lok Sabha Secretariat 1999) 781.

void because of their inconsistency with the fundamental rights guaranteed by the Indian Constitution. The answer might lie in the distinction between uncodified personal law and codified personal law. The personal laws are only partially codified.[145] In *Narasu Appa Mali*,[146] a case reported in 1952, the Bombay High Court upheld a statute that criminalised bigamy among Hindus, although polygamy was still legal for men who belonged to the Muslim personal law group.[147] The court held, firstly, that uncodified personal laws were not 'laws in force' within the meaning of Article 13 of the Constitution and therefore need not be tested against its provisions;[148] secondly, that in any case, polygamy does not necessarily constitute discrimination only on the ground of sex;[149] and thirdly, that the impugned law does not discriminate against Hindus only on the grounds of religion only and that the law has a reasonable basis, as it reflects differences in how Muslims and Christians regard marriage.[150]

Since *Narasu Appa Mali*, many personal laws have been codified. This is significant because the Bombay High Court had observed in *Narasu Appa Mali* that the

[145] R Dhavan, 'Codifying Personal Laws' *The Hindu* (Chennai, 1 August 2003) <www.hinduonnet.com/2003/08/01/stories/2003080100521000.htm> accessed 14 November 2011.

[146] *Narasu* (n 19).

[147] Though rarely practiced: see Martha Nussbaum, 'India Implementing Sex Equality Through Law' (2004) 2 Chicago JIL 35, 43.

[148] *Narasu* (n 19) [12]–[13], [19]–[23]; cf HM Seervai, *Constitutional Law of India: A Critical Commentary* (4th edn, Tripathi 1991) 676–78.

[149] *Narasu* (n 19) [14], [24].

[150] According to Chagla J: 'The institution of marriage is differently looked upon by the Hindus and the Muslims. Whereas to the former it is a sacrament, to the latter it is a matter of contract. […] The State was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work social reform; another may not yet be prepared for it': ibid [10].

'laws in force' in Article 13 referred to statutory laws.[151] This implies, in the words of a constitutional commentator, that 'judicial forbearance in testing personal laws against equality standards is limited to uncodified laws. As soon as a personal law is codified, it becomes "law" and can be struck down on fundamental rights grounds.'[152] So while considering a case dealing with uncodified Hindu law in 1981, the Supreme Court confirmed that 'Part III of the Constitution (the chapter on fundamental rights) does not touch upon the personal laws of the parties.'[153] But in a 1996 case involving provisions of the Hindu Succession Act 1956 (which codified Hindu law on succession), the Supreme Court took a very different position: 'The personal laws conferring inferior status on women is [sic] anathema to equality… The laws thus derived must be consistent with the Constitution lest they became void under Article 13 if they violated fundamental rights.'[154] In this case, the Supreme Court suggested that the Hindu Succession Act 1956 ought to be interpreted harmoniously with the provisions of the Constitution, especially those relating to discrimination and equality.[155]

Geeta Hariharan v Reserve Bank of India represents another case challenging the Hindu law of adoptions (codified in a 1956 enactment) which made the mother the guardian of a minor only 'after' the father. The court did not invalidate the law, but read it down to increase the number of situations in which the mother could act as the natural

[151] ibid [19].

[152] Dhavan (n 145).

[153] *Shri Krishna Singh v Mathura Ahir* MANU/SC/0657/1981.

[154] *C Masilamani Mudaliar v The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli* AIR 1996 SC 1697.

[155] ibid [26].

guardian. There was not much doubt that the constitutional right against discrimination was relevant to cases such as this one involving codified personal law.[156] In other cases, the courts have also distinguished between uncodified personal law and custom[157] and seem willing to consider challenges to the latter based on the fundamental rights chapter of the Constitution.[158] So the Supreme Court has considered such a challenge to a codified customary tribal inheritance law that excluded women.[159] Although the court did not strike the provisions down on the grounds that they were discriminatory, they did read them down to accommodate the constitutional right of women to their livelihood.[160]

Significantly, Public Interest Litigation cases challenging all gender-discriminatory personal laws have not been successful. In *Ahmedabad Women Action Group (AWAG) v Union of India,* a number of provisions of both codified and uncodified Hindu, Muslim and Christian personal law were challenged based on their inconsistency with the Constitution.[161] The court observed that the petition did not deserve to be considered on its merits because it involved 'issues of State policies with which the Court

[156] AIR 1999 SC 1149.

[157] *Narasu* (n 19) [12]: 'Custom or usage is deviation from personal law and not personal law itself. The law recognises certain institutions which are not in accordance with religious texts or are even opposed to them because they have been sanctified by custom or usage, but the difference between personal law and custom or usage is clear and unambiguous.'

[158] *Shri Krishna* (n 153).

[159] *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125.

[160] ibid [56]–[58].

[161] AIR 1997 SC 3614.

will not ordinarily have any concern'[162] and that these issues ought to be 'dealt with by the legislature.'[163]

So, while the distinction drawn here between codified and uncodified personal law is not uncontested,[164] the position generally seems to be that Indian courts will not consider whether uncodified personal laws are consistent with the Constitution, on the grounds that they do not amount to 'laws in force'. They will, however, consider this question when dealing with custom or codified personal laws. The courts have been reluctant to invalidate these laws, preferring to read them laws down, thereby mitigating some of their unconstitutional features.

2.7 RELIGIOUS FREEDOM UNDER THE INDIAN CONSTITUTION

Given this thesis' focus on religious autonomy, it would be helpful to briefly consider the legal protection of religious freedom in India. Religious freedom is protected by the Indian Constitution.[165] This raises a number of questions for this thesis. One preliminary

[162] ibid [3].

[163] ibid [14].

[164] See *Halsbury's Laws of India (Family Law)* s 15.008. *Swaraj Garg* v *KM Garg* AIR 1978 Delhi 296 is sometimes cited as an example of where a court suggests that uncodified personal laws are subject to the Constitution (at [15]). A closer reading of the case makes clear that the Hindu Marriage Act 1955 was actually the personal law in question. The comments were *obiter* in any case. Similarly, *In The Matter Of Manuel Theodore v Unknown* 2000 (2) BomCR 244 (at [28] and [30]) has been thought to imply that *Narasu Appa Mali* has been overruled and that *all* personal laws are now to be tested against the Constitution: Tarunabh Khaitan, 'Adoption Rights of non-Hindus and Constitutionality of Personal Laws' (*Law and Other Things*, 28 February 2010) <lawandotherthings.blogspot.com/2010/02/adoption-rights-of-non-hindus.html> accessed 24 July 2010. However, *Manuel Theodore* did not feature a *conflict* between the personal laws and a constitutional right. Rather the personal law of the community in question (Christians) simply did not have a provision for adoption. In allowing a Christian couple to adopt, therefore, the court was not overriding or even modifying personal law.

[165] Constitution of India 1950 arts 25–30.

question is: how does the protection of religious freedom by the Indian Constitution impact the working of the personal laws? As indicated in the section above, the courts will not generally test uncodified personal laws against the touchstone of fundamental rights (including the right to religious freedom). Many religious autonomy concerns that the personal laws might raise are unlikely, therefore, be remedied by challenging the constitutionality of the personal laws.

There is another reason why the concerns that this thesis will raise relating to religious autonomy are unlikely to be remedied using Article 25 (the religious freedom provisions of the Indian Constitution). The PLS and constitutional religious freedom doctrine largely converge on questions of the appropriate level of state involvement in religion, the way that religious doctrine is identified, the weight that individual self-identification is to be given, the ability to exit and move between religious groups and the appropriate response to diversity and heterodoxy within a religion. These convergences are helpful for the purposes of understanding how the PLS interacts with the Constitution. Therefore, this section presents an overview of the constitutional protection of religious freedom in India, with an eye on points of convergence with the PLS.

Three points of convergence will be discussed below. First, religious groups play an important role in the doctrine relating both to religious freedom and to personal laws. Second, the state plays an important role in interpreting, regulating and reforming religious doctrine and religious institutions. In determining the scope of religious freedom under the constitution, as well as the content of the personal laws, courts often decide questions of religious doctrine. Religious institutions are heavily regulated by the state and sometimes supervised by courts, in much the same way as religious doctrine is under

the PLS. In both the personal law and religious freedom contexts, the state plays an active role in reforming religion. Thirdly, the constitutional protection of religious freedom provides only limited protection to proselytisation; exit and movement between personal laws is similarly difficult. In both contexts, the self-identification of groups or individuals does not determine how the state identifies them.

In providing this overview, there is an important mistake to avoid. Many studies of the nature of secularism in India, such as Donald Smith's early work *India as a Secular State*,[166] are criticised for incorrectly assuming that India is, or aspires to be, secular in the same way that some other nations are secular. Often underlying this assumption is the idea that '[w]e [the West and the rest of the world] were all headed for the same destination… but some people were to arrive earlier than others.'[167] So Smith writes about Indian law: 'India is a few paces behind the Western world in the evolution of its law, but it is on the same path which the West itself has trodden.'[168]

This criticism could apply just as strongly to an attempt at a description of the Indian constitutional conception of religious freedom. There is a natural temptation to conflate this conception of religious freedom with familiar conceptions in the liberal West. Differences are then attributed to faults in the Indian model, instead of being recognised

[166] Smith (n 95). 'Professor Smith's ideal is a completely secular state which is a projection from the American pattern with an extra dose of separation. Assuming that the peculiar settlements and compromises among the three principles reached in the US are the only reasonable ones, he overlooks the fact that they are compromises and balances rather than mere deficiencies dictated largely by the nature of American religion and society, and that they are not necessarily appropriate to India where there are different kinds of religion and less agreement on what is the proper realm of religious experience': Galanter (n 128) 263.

[167] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2007) 8.

[168] Smith (n 95) 269.

as core features of the model itself. It is important to notice therefore that although the Indian Constitution guarantees 'freedom of conscience and the right freely to profess, practise and propagate religion'[169] in terms similar to those of many liberal constitutions, it has several unique features.

2.7.1 Group life and religious institutions

On one understanding of religious freedom jurisprudence in India:

> [h]ere we speak not of the beliefs of individuals but of the practices of groups. Religious liberty means distancing the state from the practices of religious groups. The first principle of secularism therefore grants to a religious community a right to its own practices.[170]

There can be little doubt that 'protecting, nurturing and advancing the claims of traditional group life'[171] is a major concern of the Indian Constitution. It protects the rights of religious denominations to manage their own affairs in matters of religion and to establish religious institutions[172] and forbids state from discrimination against minority

[169] Constitution of India 1950 art 25.

[170] Rajeev Bhargava, 'What is Secularism For?' in Rajeev Bhargava (ed), *Secularism and its Critics* (OUP 1998) 519.

[171] Rajeev Dhavan and Fali Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in BN Kirpal (ed), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000) 258.

[172] This right is qualified by Constitution of India 1950 art 25(2).

educational institution when granting state aid.[173] As indicated in the Introduction to this thesis, it would be a caricature to portray the Indian constitutional doctrine as having only communitarian concerns; Article 25 first grants religious freedom to all *persons*. As Dhavan and Nariman note, at least some of the framers of the Constitution emphasised that concern for the individual, not the group, was the primary basis on which the Constitution was designed.[174]

The important place of religious groups in Indian religious freedom jurisprudence might suggest that the state does not interfere with the working of these groups, and their institutions. On the contrary, the Indian state's level of regulation of religious institutions has been criticised as an egregious infringement of religious freedom by some observers of Indian law.[175] Article 25 of the Constitution qualifies the right to religious freedom with the clauses:

> Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
>
> …
>
> (*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

[173] Constitution of India 1950 art 30.

[174] Dhavan and Nariman (n 171) 256. See also Ambedkar's comment: 'I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.' Constituent Assembly of India Debates (4 November 1948) <www.indiankanoon.org/doc/843976/>.

[175] Smith (n 95) 203–205.

The last clause is particularly radical because, before legislation forbidding this, many Hindu religious denominations restricted entry into their temples to members of certain castes within their denomination. These restrictions are still considered by some Hindus as necessary to preserve the spiritual power of the temples.[176]

Besides opening temples up to all castes, several states in India have detailed regulations in place for the management of Hindu religious institutions, and state officials now perform some of the roles of the traditional heads of these institutions.[177] Similar legislation is also in place for the management of some Muslim institutions, such as the shrine of Moinuddin Chisti in Ajmer.[178] The extent of state involvement has led some commentators to refer to the 'nationalisation' of religious institutions.[179] These regulatory regimes have largely survived several constitutional challenges on the grounds of interference with religious freedom.[180]

These regimes also invite comparison with the personal laws. Unlike in the *millet* system, where the state gives force of law to the decisions of religious authorities, the *state* (as discussed in the previous section) identifies the religious doctrine to be applied as law. At the same time, the decisions of religious authorities on the question of personal

[176] Galanter (n 128) 268, 280.

[177] Sen (n 13) 60–61.

[178] Dargah Khwaja Saheb Act 1955 and Wakf Act 1995.

[179] Dhavan and Nariman (n 171) 262.

[180] See, eg, *Durgah Committee v Hussain Ali* AIR 1961 SC 1406; *Hindu Religious Endowments* (n 185); *Govindlalji* (n 183).

law do not have any binding force. The state thus 'expropriates'[181] the interpretation of religious doctrine in the PLS much as it does with religious institutions. Moreover, there is a connection between the tendency to think of religious freedom as accruing to groups rather than individuals and the structure of the PLS. In both cases less attention is paid to the individual's self-identification than to their relation to a recognised group. This tendency might also explain some of the other peculiarities of the Indian doctrine examined below.

2.7.2 State involvement in religion

The courts and constitutions of some Western liberal states are sometimes characterised as being reluctant to pronounce on the content of religious doctrine, or the authenticity or veracity of the competing schools of religious thought.[182] This reluctance contrasts strongly with Indian jurisprudence on religious freedom, where the courts engage in a 'hands-on' manner with religious doctrine, especially that of Hinduism. In deciding constitutional cases on religious freedom, the Indian courts distinguish between 'superstition' and 'true' religion.[183] They have, in prominent cases, claimed that the followers of a religious denomination have misunderstood their religion.[184] This might be contrasted with the 'auto-determinism' test that the Indian Supreme Court favoured in the

[181] Galanter (n 166).

[182] K Greenawalt, 'Hands Off! Civil Court Involvement in Conflicts over Religious Property' (1998) 98 CLR 1843, 1844.

[183] *Govindlalji v State of Rajasthan* AIR 1963 SC 1638, 1660–61.

[184] *Sastri Yagnapurushdasji v Muldas Bhundaras Vaishya* AIR 1966 SC 1119, 1135. See Galanter (n 128) 277.

past - questions of religion were to be decided by the religious community itself (and not the court).[185]

Even once a practice has qualified as religious, Indian courts further distinguish between essential and non-essential religious practices. While this might not have been the intention when the distinction was first formulated,[186] it now means that practices that the court does not consider essential are not constitutionally protected. Early cases emphasised the autonomy of religious organisations and denominations in deciding what practices are essential. The essential part of a religion, the court said, 'is primarily to be ascertained with reference to the doctrines of that religion itself.'[187] The problem with this, of course, was that religious doctrine was often disputed. Later cases, therefore, acknowledged that the question of whether the practice is essential to a religion would ultimately have to be decided by the court.[188]

Many commentators express surprise at the conclusions reached by the Indian courts on what constituted essential practices of a religion.[189] For instance, neither praying in a mosque[190] nor slaughtering a cow on *Bakr Id*[191] qualified as essential

[185] *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282; 1954 1 SCR 1005; Galanter (n 128) 280–81.

[186] *Hindu Religious Endowments* (n 185) is often cited as marking the beginning of this distinction.

[187] ibid.

[188] See Gajendragadhkar's judgement in *Govindlalji* (n 183).

[189] Dhavan and Nariman (n 171) 260–61.

[190] *Ismail Farooqui v Union of India* (1994) 6 SCC 376 [80].

[191] (also known as *Eid-ul-Adha*) *Mohammed Hanif Qureshi* (1959) SCR 629; *AH Qureshi v State of Bihar* (1961) 2 SCR 610.

practices of Islam. The methods used by the courts are sometimes even more surprising than their conclusions. As Rajeev Dhavan notes,[192] the decision on cow slaughter was taken without advice from an Islamic scholar. Instead a Hindu *pandit* was consulted. The judge relied on his own interpretation of the Quran, although he was not a theologian. He also relied on Charles Hamilton's translation of the *Hedaya* published in 1791, a translation that has been criticised as inaccurate and Orientalist.[193] One scholar writes: '[f]or Hamilton there is a different concern; not the conservative nature of Islam, but its falsity. He calls the Prophet Mohammed, "the impostor of Mecca" and writes of his "pretended mission".'[194] Similarly, Marc Galanter notes that when considering whether caste distinctions form a part of the Hindu religion 'the court does not address this as a question of fact; it does not appeal to usage, to popular understanding or to Hindu learning. Instead, it acts as if it enjoyed a mandate to make such determinations on its own authority.'[195]

Parallels of these trends are found in the PLS. As indicated in §2.5, the personal laws are very much the product of state, especially judicial, interpretation of religion. Just as they determine which practices are religious and which of these are essential to a religion in the context of Article 25 of the Constitution, the courts determine what version of religious doctrine is to be applied as the personal law associated with that religion.[196] In both cases, the ideas that true or correct religious doctrine can be identified and that it

[192] Rajeev Dhavan, 'Religious Freedom in India' (1987) 35 Am J Comp L 209, 222–24.

[193] ibid 222; Strawson (n 103) 28–33.

[194] Strawson (n 103) 29.

[195] Galanter (n 128) 280.

[196] §2.5.

has an identifiable essence or a core raise concerns for the religious autonomy of the heterodox, which shall be discussed later in this thesis.[197]

Unsurprisingly, the method that the courts use in making these determinations of the content of religious doctrine in Article 25 cases (discussed above) raises similar problems to the method they use in making these determinations the context of personal law (discussed in §2.5). The following criticism of the 'essential practice' test might be said to apply also to the state's involvement in the personal laws:

> [T]his is an undesirably unsafe way of examining and pronouncing on a faith. Judges become theologians and are forced to make roving inquiries about all or any religious text, beliefs or practices. Once this door is opened, there is no limit to which the court cannot go. While some judges have been cautious, their 'reformist' counterparts have felt free to deconstruct meaning at will and reconstruct events to suit their reformist or other agenda.[198]

These worries about how courts determine the content of religious doctrine are exacerbated by the sense that the courts, in its religious freedom jurisprudence as well as in its administration of the PLS, attempts to reform religion. State reform of religion might, in some countries, sit uncomfortably with a guarantee of religious freedom.[199] Not in India. Religious freedom in India, it has been said, is the freedom to practice religion

[197] E.g. §4.2 and §6.1.2.2.

[198] Dhavan and Nariman (n 171) 260.

[199] Greenawalt (n 182) 1844.

as it ought to be, rather than religion as it is.[200] The state's power with respect to religion is thought by many to further a larger agenda of reforming Hinduism, in particular.[201] The Indian Constitution has indeed been called 'a charter for the reform of Hinduism'.[202] But several observers believe that Indian courts tend to exceed the constitutional mandate in reforming Hinduism.[203]

As discussed in the Introduction to this thesis, state focus on the reform of Hinduism over other religions is also a key theme in debates on the personal laws. For Hindu Nationalists, this is evidence of the state playing favourites amongst religious groups and appeasing minorities.[204] Hindu personal law has been largely codified[205] while Muslim personal law has not.[206] The PLS is thus seen as another site for state reform of Hinduism. This thesis discusses issues of reform of these religious traditions further in Chapter Seven.

[200] Sen, 'Indian Supreme Court' (n 138).

[201] ibid; Galanter (n 128) 287–91.

[202] Galanter (n 128) 280.

[203] ibid 285–86. An *enfant terrible* for his messianic zeal in the reform of Hinduism is former Supreme Court Justice Gajendragadhkar. This state reform of Hinduism continues despite its criticism as an incursion upon religious freedom: Chatterjee (n 119) 359–60.

[204] M Hasan, *Legacy of a Divided Nation: India's Muslims Since Independence* (OUP, New Delhi 2001) 277–80.

[205] Hindu Marriage Act (1955), Hindu Succession Act (1956), and Hindu Adoptions and Maintenance Act (1956).

[206] Except for the Wakf Acts, the Dissolution of Muslim Marriages Act 1939 and the Muslim Women (Protection of Rights on Divorce) Act 1986.

2.7.3 Self-identification, conversion and exit

Indian religious freedom doctrine is slow to recognise disassociation or exit from a religion, especially when that religion is Hinduism. The courts have held that certain religious groups which claimed not to be Hindu were in fact Hindu, even if they did not recognise it themselves.[207] This tendency to override an individual or group's identification or disassociation with a religion is very much a characteristic of the PLS. As we have seen, the system identifies Buddhists, Sikhs, Jains as well as some atheists, agnostics and those who have renounced Hinduism all as 'Hindu'.[208]

A further significant feature of religious freedom in India is that it does not extend to 'the right to convert a person to one's own religion'.[209] This is in spite of the constitutional protection of the freedom to *propagate* religion. A distinction has been made between constitutionally protected propagation of religion – 'spreading awareness or knowledge about a religion' – and propagation in the sense of inducing someone to convert to a religion. Propagation in this latter sense is not protected by the constitution, and legislation punishing attempts to convert people using 'allurement' and 'inducement'[210] has been held to be constitutional.[211] This approach to religious freedom

[207] *Sastri Yagnapurushdasji v Muldas Bhundaras Vaishya* AIR 1966 SC 1119; *DAV College, Bhatinda v State of Punjab* AIR 1971 SC 1731; *Bramchari Sidheshwar Shai v State of West Bengal* AIR 1995 SC 2089.

[208] See text to nn 57 to 59 above.

[209] *Rev Stanislaus v State of Madhya Pradesh* AIR 1977 SC 908, 911. Donald Smith compares the Indian Constitutional position on conversion with that of Nepal. Art 5 of the 1959 Nepalese Constitution provides that 'no personal shall be entitled to convert another person to his religion'. See Smith (n 95) 194; Pratap Bhanu Mehta, 'Passion and Constraint' (2003) 521 Seminar <www.india-seminar.com/2003/521/521%20pratap%20bhanu%20mehta.htm> accessed 20 November 2011.

[210] *Rev Stanislaus v State of Madhya Pradesh* AIR 1977 SC 908.

explains why the impediments to conversion mentioned in §2.4, in §4.1.4 and Appendix B are allowed to stand. This attitude to conversion might also explain why, even on conversion, one's former personal law may continue to apply in some respects.[212]

Thus the constitutional doctrine of religious freedom in India shares many features with the PLS. However, as the following chapters will show, the PLS is in many ways inconsistent with religious autonomy. An implication of this thesis (although this is not its main point) might therefore be that the constitutional provisions on religious freedom are themselves incongruent with the value of religious autonomy. Amending the personal laws so that they are consistent with the constitution may not therefore fully address the problems which this thesis raises.

2.8 CONCLUSION

This chapter aimed to provide a basic overview of the PLS for the limited purposes of this thesis. It outlines how and when the personal laws apply, how the PLS responds to internal diversity between personal law categories, the availability of general family law, the possibility of avoiding of escaping the personal laws, the relationship between the personal laws and religious doctrine and the interation between the PLS and Indian constitutional law, especially the protection of religious freedom. The implications of these features for religious autonomy will be explored in the chapters that follow. Before

[211] Constitution of India 1950 art 25; Redding (n 77) 461–66; Rajeev Dhavan, 'The Right to Disbelieve' (PILSARC Blog, 8 July 2009) <pilsarc.blogspot.com/2009/07/right-to-disbelieve.html> accessed 20 November 2011.

[212] See, eg, *Sarla Mudgal* (n 30).

that, the next chapter lays a further part of the foundation of this thesis by outlining the conception of religious autonomy used here.

3. RELIGIOUS AUTONOMY

The value of religious autonomy, as a conception of religious freedom, operates in different contexts. Medical ethicists enquire into whether particular medical practices infringe on patients' religious autonomy.[1] Psychologists are interested in religious autonomy and how it develops.[2] As outlined in the introduction to this thesis, legal and political philosophers as well as courts appeal to religious autonomy and defend religious freedom on the grounds of personal autonomy. This chapter aims to describe the value of religious autonomy as it is used in this thesis.

This thesis will use 'religious autonomy' to mean personal autonomy in a particular sphere of human life: the sphere of religion.[3] (By analogy: professional autonomy would be personal autonomy in the professional aspects of life, sexual autonomy personal autonomy in the sexual aspects of life, and so on.)[4] As personal autonomy is the ideal of shaping one's own life, religious autonomy is the ideal of shaping one's own religious life. As much of the PLS' effect on religious autonomy involves diminishing or enhancing its background conditions and contributory factors,[5] this chapter will focus on the most pertinent of those conditions and factors, including having an adequate range of religious options, the absence of coercion, the absence of

[1] Raanan Gillon, 'Refusal of Potentially Life-saving Blood Transfusions by Jehovah's Witnesses: Should Doctors Explain that Not all JWs Think it's Religiously Required?' (2000) 26 Journal of Medical Ethics 299, 300.

[2] Richard Kahoe and Mary Meadow, 'A Developmental Perspective on Religious Orientation Dimensions' [1981] Journal of Religion and Health 8.

[3] Peter Gardner, 'Religious Upbringing and the Liberal Ideal of Religious Autonomy' (1988) 22 Journal of Philosophy of Education 89; TH McLaughlin, 'Peter Gardner on Religious Upbringing and the Liberal Ideal of Religious Autonomy' (1990) 24 Journal of Philosophy of Education 107; John H Garvey, 'An Anti-Liberal Argument for Religious Freedom' [1996] Journal of Contemporary Legal Issues 275.

[4] §3.3.2 for an elaboration of this point.

[5] §3.5.

manipulation, minimal self-respect and socialisation in a culture or group. To have religious autonomy, a person has to have the option of religious practice – i.e. the option to express, through the variety of forms that human expression can take, all attitudes, values and opinions on religious matters and the freedom to engage in rituals, rites, ceremonies, forms of worship or other religious acts. But it should be clarified that religious autonomy is not the same as 'the autonomy (self-creation) of persons who are religious'. So religious autonomy is not a value *merely* for religious people. Rather it implies the power to embrace *or* reject religion.[6]

But the description of religious autonomy as personal autonomy in the sphere of religion raises four questions. First, what is personal autonomy (§3.1)? Secondly, what is meant by 'sphere of religion' (§3.2)? Thirdly, what is the relationship between religious autonomy and personal autonomy (§3.3)? Fourthly, why is religious autonomy valuable (§3.4)? This chapter addresses these questions. As this thesis is concerned with the implications of the PLS for religious autonomy, §3.5 considers the ways in which the law (and thus the PLS) can affect religious autonomy. Finally, a major preliminary objection to appealing to the value of 'religious autonomy' is that it is impossible. Section 3.6 will consider therefore whether the concept of autonomy can be coherently applied to religion, and whether religious autonomy is indeed possible.

3.1 THE IDEA OF PERSONAL AUTONOMY

If 'religious autonomy' is personal autonomy in the sphere of religion, what then is 'personal autonomy'? Like religious autonomy, personal autonomy is relevant to a wide

[6] See §4.2.4 and §3.2 for an elaboration.

range of questions. In political philosophy, prominent defences of liberalism appeal to personal autonomy.[7] Since autonomy has important implications for how we treat human beings, it is also a central concern of moral philosophers.[8] Applied ethicists consider it relevant to a number of issues in the philosophy of education, bio-ethics and medical ethics.[9] It also forms a part of legal doctrine, often as a value that informs certain rights.[10] Moreover, discussions on freedom (especially positive freedom),[11] authenticity,[12] self-realisation,[13] free will,[14] and personhood[15] are either about the concept of personal autonomy going by another name, or are intimately related to this concept.

There are many disagreements about the nature of personal autonomy, its preconditions, what diminishes it, whether it is valuable[16] and why it is valuable.[17] Many

[7] The most important of these for this thesis' purpose is Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986). For others, see John Christman, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2009) <plato.stanford.edu/entries/autonomy-moral> accessed 9 August 2011.

[8] Christman (n 7).

[9] R Gillon, 'Ethics Needs Principles – Four can Encompass the Rest – and Respect for Autonomy should be "First Among Equals"' (2003) 29 Journal of Medical Ethics 307.

[10] David Richards, 'Rights and Autonomy' (1981) 92 Ethics 3; Joel Feinberg 'Autonomy' in John Christman (ed) *The Inner Citadel: Essays on Individual Autonomy* (OUP 1989). E.g. autonomy is said to ground rights against discrimination (John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167) and religious freedom (Laurence Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) 1284–1300).

[11] John Christman, 'Liberalism and Individual Positive Freedom' (1991) 101 Ethics 343.

[12] I Hyun, 'Authentic Values and Individual Autonomy' (2001) 35 Journal of Value Inquiry 195.

[13] Bernard Berofsky, 'Identification, the Self and Autonomy' [2003] Soc Phil & Pol'y 199.

[14] Harry Frankfurt, 'Freedom of the Will and the Concept of a Person' [1971] Journal of Philosophy 5.

[15] ibid.

[16] Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (OUP 2003).

liberal political and legal philosophers, however, have a shared understanding of at least the core of the concept of personal autonomy.[18] Joseph Raz, in the *Morality of Freedom*, largely appeals to this core, shared understanding of personal autonomy.[19] This is why he does not develop a complete theory of autonomy or defend, in great detail, the concept of autonomy he uses, even though it plays a central role in his argument.[20] This thesis broadly adopts Raz's approach to the concept of autonomy because of its ecumenical (but not universal) appeal, its plausibility and its resonance with the issues raised by the PLS. However, since Raz's account of autonomy is incomplete,[21] other writers on autonomy including Alfred Mele and Gerald Dworkin will also be drawn upon when appropriate to develop a working conception of autonomy which is plausible, coherent, ecumenical (as far as possible) and sensitive to the issues that are in focus in this thesis. But the primary purpose of this thesis is to evaluate the PLS in light of personal autonomy, rather than contribute to general debates about the nature of personal autonomy. A complete description of the concept of personal autonomy is thus beyond its scope as well as unnecessary. After all, discussions in the philosophy of education, bioethics and medical

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[17] For an outline of these debates, see Sarah Buss, 'Personal Autonomy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/entries/personal-autonomy/#2> accessed 31 July 2011; Jeremy Waldron, 'Autonomy and Perfectionism in Raz's *The Morality of Freedom*' (1989) 62 S Cal L Rev 1097; David McCabe, 'Joseph Raz and the Contextual Argument for Liberal Perfectionism' (2001) 111 Ethics 493.

[18] '[I]n neither *The Morality of Freedom* nor the later essays does Raz provide such an account ['a clearly articulated account of autonomy']… My sense is that Raz does not provide a highly detailed account of autonomy … because he quite reasonably takes it for granted that, in its overall features, the notion of autonomy relevant to debates over liberalism is fairly non-controversial and well understood': McCabe (n 17) 494–95, n 5. Buss (n 17) also notes the overlaps between prominent accounts of autonomy.

[19] McCabe (n 17) 494–95, n 5.

[20] See note 18.

[21] Waldron (n 17) 1117.

ethics coherently appeal to the value of autonomy, assuming a core and shared understanding of the concept.[22]

Personal autonomy is often described using metaphors. An autonomous person is the helmsman,[23] the author,[24] the creator[25] or the governor[26] of her own life. Autonomy is a matter of degree, but there is a threshold for a person to have an autonomous life. So in this thesis, describing a person as autonomous means that they have at least a minimally autonomous life. (If they have much more than a minimally autonomous life, they will be described as 'significantly autonomous.') Some important preconditions of autonomy of either sort will be discussed below. Other features of autonomy will be discussed in the course of this thesis where they are most relevant.

3.1.1 The capacity for autonomy

Certain capacities are necessary for autonomy. These capacities include mental capacities of reasoning and rationality, as well as psychological characteristics like self-control. Making a degree of responsiveness to reason a necessary condition of autonomy may invite the charge that by doing so we are no longer talking about autonomy, but rather

[22] See, eg, Stefaan Cuypers, 'Is Personal Autonomy the First Principle of Education?' [2006] J Phil Education 5; R Gillon, 'Ethics Needs Principles – Four can Encompass the Rest – and Respect for Autonomy should be "First Among Equals"' (2003) 29 Journal of Medical Ethics 307.

[23] Thomas May, 'The Concept of Autonomy' [1994] American Philosophical Quarterly 133.

[24] Raz (n 7) 370.

[25] ibid.

[26] Alfred R Mele, *Autonomous Agents: From Self-Control to Autonomy* (OUP 1995) 155–56.

rule or governance by an external, objective standard – that of reason.[27] But most accounts make some level of responsiveness to reason necessary for autonomy[28] because it is undeniable that a person without the ability to reason will be unable to effectively translate their will to action. For example, say Peter wants to send his daughter to the best school in his area. A person with the ability to reason might go about making enquiries from friends or colleagues, consult school rankings and visit various schools in his area. He might estimate the accuracy of all the resulting information, assign a certain weight to opinions depending on their source, consider factors specific to his daughter and then come to a decision based on a comparison of the available schools. If Peter has little or no reasoning ability, he will not be able to translate his desire into results. His ineffectuality, if it is extreme, may cause us to question whether he has the capacity to live an autonomous life.[29] An agent who governs himself so ineffectively that he cannot be thought of as governing himself at all is not autonomous to any significant degree.

Closely connected to the requirement of responsiveness to reason, autonomy is also thought to require the ability to *revise* preferences.[30] But what of persons who have been socialised in a culture or religion that leaves them with attachments to religion, culture or gender-role that they cannot conceive of revising? This question, which is of

[27] John Christman, 'Autonomy and Personal History' [1991] Canadian Journal of Philosophy 1.

[28] Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (OUP 2000) 1; Christman (n 7); John Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99 Ethics 109; B Berofsky, *Liberation from Self: A Theory of Personal Autonomy* (Routledge 1995) 199; Buss (n 17); Raz (n 7) 372–73.

[29] Gary Watson, 'Free Agency' [1975] Journal of Philosophy 205; B Berofsky (n 28) 199.

[30] G Dworkin, *The Theory and Practice of Autonomy* (CUP 1988) 64; Frankfurt (n 14) 7: 'Besides wanting and choosing and being moved *to do* this or that, men may also want to have (or not to have) certain desires and motives. They are capable of wanting to be different, in their preferences and purposes, from what they are'.

particular importance for this thesis, will be addressed in §3.6.2. In addition, without self-control, another capacity, an agent is unlikely to be able to accomplish any complex long-term or ambitious project which requires dedication.[31] Consider the kind of dedication and sacrifice that goes into being a successful doctor, philosopher, pilot, parent or partner. Temptation to stray from the long-term goal will constantly beat at the door. Those who can resist will have more autonomous lives.[32] Clearly, there are many capacities which are necessary for one to be autonomous. But it is important to note that there is also more to autonomy than having the capacity (or other conditions) for it – the agent must actually create or determine their own life.[33]

3.1.2 An adequate range of valuable options

In order to be self-author or self-creator, an agent must have options. Without options, her life is determined by forces other than herself. Since an autonomous life is one that is shaped by the agent's choices, this presupposes that she has options. Not only must she have options, but she must have an adequate range of options of a sufficient quality. So possessing options that are extremely unattractive (adding the option of torturing herself or committing genocide to a set of options) does not generally enhance autonomy.[34] An option which she is *highly* unlikely to choose also does not add to autonomy. Further, possessing only trivial options – to eat a chocolate bar or scratch her ear[35] – does not

[31] Mele (n 26) 112–26.

[32] Raz (n 7) 384.

[33] Only in part, of course.

[34] From an autonomy-perspective, for most people (who are assumed to be non-genocidal).

[35] Raz (n 7) 373.

make for an autonomous life. Chapter Four will discuss this condition of autonomy in greater detail.

3.1.3 Coercion

The mere capacity for autonomy, without the (negative)[36] freedom to exercise that capacity, does not make a life autonomous.[37] To take an extreme case, it would be difficult to regard someone as autonomous if she were physically prevented by another from moving, communicating or otherwise affecting the outside world, regardless of how much intelligence, self-control or self-respect[38] she had. Negative freedom, in other words, is necessary for a person to have an adequate range of valuable options, which is in turn necessary for autonomy.[39] Coercion harms autonomy by reducing options. But it can also harm autonomy because of its social meaning:

> [C]oercion invades autonomy not only in its consequences but also in its intention. As such, it is normally an insult to the person's autonomy. He is being treated as a non-autonomous agent, an animal, a baby, or an imbecile. Often coercion is wrong primarily because it is an affront or an insult and not so much because of its more tangible consequences, which may not be very grave.[40]

[36] While the notion of negative freedom is much contested, these debates are not relevant here; our interest in negative freedom is only that it contributes to autonomy. Roughly, negative freedom is used here to mean the absence of non-natural (particularly human) constraints external to the agent.

[37] Raz (n 7) 407–408.

[38] Or other internal qualities that are either prerequisites or contributors to autonomy.

[39] Raz (n 7) 400–30.

[40] ibid 156–7.

This insulting social meaning can harm autonomy by affecting another of its preconditions, self-respect.[41] One condition of an autonomous life, therefore, is that it is not a coerced life.[42]

3.1.4 Manipulation

Some ways of influencing people's desires or values – exposing them to information, for instance – are thought of as having a benign effect, or no effect at all, on autonomy. But there are other forms of influence which are regarded as interfering with autonomy. Hypnosis or other forms of mind-control interfere with autonomy because they are manipulative.[43] Manipulation sometimes results in agents having the desires and values that their manipulator wants them to have, such that these values and desires are no longer the agent's. Manipulation is discussed further in §3.6.4. For now it is enough to note that something about the process of manipulation leaves the agent less the author of her life because of the influence of the manipulator.

3.1.5 Self-respect

There are clear connections between self-respect and our ability to live an autonomous life. In *A Theory of Justice*, John Rawls argues that self-respect, which includes confidence in one's own value and the value of one's plan of life, is essential for life-plans

[41] See Chapter Six.

[42] This does not mean that coercion is never justifiable in the name of autonomy: see Raz (n 7) 377.

[43] Waldron (n 17) 1117–20.

to be carried out.[44] Without self-respect a person is very unlikely to have the confidence to achieve autonomy. Self-respect as a condition for autonomy will be discussed in greater detail in Chapter Six.

3.1.6 Cultural or religious group life

The question of how personal autonomy relates to group or community life is significant for this thesis. If caricatures of the liberal view of community life are to be believed, autonomy is antithetical to membership in a community, including a religious community. This view is not consistent with our conception of autonomy. Socialisation in a community gives individuals many of the skills and capacities described in §3.1.1 above.[45] A community can provide psychological and material support and thereby be an 'anchor for [individual] self-identification and the safety of effortless secure belonging.'[46] In this way communities promote the self-respect of individuals.[47] Moreover, if the community is associated with a culture or sub-culture, this gives them access to a range of meaningful options.[48] The literature on multiculturalism often relies on an argument of very roughly the following form: a) autonomy requires an adequate range of valuable

[44] John Rawls, *A Theory of Justice* (Clarendon 1972) 178, 440.

[45] These skills, as a capacity, are autonomy enhancing. The relationships they result in may also be autonomy-enhancing (if they are supportive).

[46] Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87 The Journal of Philosophy 439, 448.

[47] See §3.1.5 above.

[48] Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989) 162–82; In a similar vein, 'it is only by being socialized into a culture that one can tap the options which gives shape and content to individual freedom': Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 177; Denise Réaume, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 UBC L Rev 117, 121–35.

options; b) respected and prosperous[49] cultures (and perhaps by extension, religious cultures) provide the background or frame of reference through which we become aware of our options; so c) socialisation in a cultural (and possibly by extension, religious) group is a prerequisite for autonomy.[50] Socialisation in a community thus has the potential to contribute to autonomy in many ways. Many of the contributions that communities make to autonomy generally apply *mutatis mutandis* to religious communities. The conception of autonomy used in this thesis is thus not antithetical to membership in a community. Given this thesis' focus on religious autonomy, Chapter Five discusses the special contribution that religious communities make to *religious* autonomy.

It should be clarified that personal autonomy is always ultimately *personal* autonomy, even if communities have the potential to support it. That is, unless supporting a community or enhancing a community's autonomy (see §5.2) contributes to an individual community member[51] part-creating her own life, it cannot be said to support personal autonomy. Our concern with religious group life is thus in its potential to harm or support personal autonomy (particularly in the sphere of religion) without denying that there might be other values that religious group life supports or harms.

[49] The qualification is Raz's: ibid 178.

[50] ibid; Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989) 162–82.

[51] Or any individual, for that matter.

3.1.7 Other senses of autonomy

For the sake of clarity, it is also worth mentioning three common uses of 'autonomy' which should be distinguished from our use of the word. First, the word 'autonomy' is often associated, in discussions of current affairs, for instance, with the autonomy of regions or groups.[52] While there are potential connections between group or regional autonomy and personal autonomy,[53] this thesis is concerned primarily with the latter. Second, owing to the influence of Kant, 'autonomy' is also often taken to mean *moral* autonomy, which differs from the conception of personal autonomy that this thesis will use.[54] Finally, as David McCabe writes, personal autonomy does not imply 'the crazy belief that individuals create themselves *ex nihilo*'.[55] Critiques of autonomy aimed at this 'crazy belief' therefore do not affect this thesis.

3.2 USE OF 'RELIGION'

The definition of religious autonomy in this thesis refers to 'the sphere of religion'. So what is meant here by 'religion'? Legal scholars have found it extremely difficult to define.[56] This section will not attempt to define 'religion' for all purposes but

[52] Geoffrey Levey, 'Equality, Autonomy, and Cultural Rights' (1997) 25(2) Political Theory 215; R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996) 19–26.

[53] §5.2.1.

[54] "A person is autonomous in the moral sense when he is not guided just by his own conception of happiness, but by a universalized concern for the ends of all rational persons" Jeremy Waldron, 'Moral Autonomy and Personal Autonomy' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (CUP, Cambridge 2005) 307.

[55] McCabe (n 17) 495.

[56] K Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 Calif L Rev 753; G C Freeman, 'The Misguided Search for the Constitutional Definition of "Religion"' (1983) 71 Geo LJ 1519; J Choper,

rather to explain how it is used in this thesis. The first step is to identify the purpose of any usage of 'religion'. Its usage in a taxation statute is likely to have a different purpose from its use in a constitutional Bill of Rights. In this thesis 'religion' is used in the context of considering whether the PLS is consistent with 'religious' autonomy. Our larger purpose is to contribute to the debates on the accommodation of religious norms in family law, both in India and in other jurisdictions. Given the purpose and subject of this thesis, we want to use 'religion' in a way that tracks conventional usage in these legal and political debates in India, but which also has resonance with its usage in these debates other jurisdictions.[57] This will keep this study relevant for the debates it hopes to contribute to.

Identifying this conventional usage is challenging. But the conventional usage of 'religion' does not need to be determined *completely* here because it would certainly include as central cases the religions commonly discussed in this thesis – Hinduism, Buddhism, Jainism, Sikhism, Islam, Judaism, Christianity and Zoroastrianism in all their variations as religions.[58] These are the (putative) religions that the PLS applies. The conventional usage in the legal and political context in India would also include many

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'Defining "Religion" in the First Amendment' (1982) 3 U Ill L Rev 579; Dworkin (n 52) 107; DA Giannella, 'Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee' (1967) 80 Harv L Rev 1381; C Taliaferro, 'Philosophy of Religion', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/archives/fall2008/entries/philosophy-religion/> accessed 16 November 2011.

[57] As writing on the debates on the accommodation of religious norms in family law, often do not make their understanding of religion explicit, other legal contexts (particularly constitutional definitions) are referred to here.

[58] Including their different sects and schools, and those considered heretical or heterodox within these religions. This is not contested in the debates on the accommodation of religious norms in family law, certainly in India and almost certainly elsewhere.

(putative) religions, such as Baha'ism[59] and tribal religions,[60] which are not recognised by the PLS, and which are mentioned in this thesis.[61] The conventional usage in India, however, may not completely match usage in all other jurisdictions where the conclusions of this thesis are relevant. We might think that, besides social context, the usage of 'religion' in many jurisdictions often depends on the factual and legal context;[62] some jurisdictions may use 'religion' more loosely than others.[63] Moreover, we might expect to see different usages of religion in different jurisdictions, as spheres of life (including religion) are socially individuated and defined.[64] In particular, we might expect jurisdictions unfamiliar with 'Eastern' (putative) religions to be less likely than India to classify them as 'religions.'[65] The conventional usage of 'religion' in India does,

[59] Law Commission of India, *Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform: Report No. 211* (October 2008) <lawcommissionofindia.nic.in/reports/report211.pdf> accessed 6 October 2011.

[60] For an example, see Ram Ahuja, 'Religion of the Bhils: A Sociological Analysis' in Priyaram Chacko (ed), *Tribal Communities and Social Change* (Sage 2005) 154-160.

[61] The implications of their exclusion from the PLS is considered in §6.1.2.

[62] As writing on the debates on the accommodation of religious norms in family law, often do not make their understanding of religion explicit, other legal contexts (particularly constitutional definitions) are referred to here.

[63] Peter Edge, *Religion and Law: An Introduction* (Ashgate 2006) 28-29. *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [23]. I thank Jane Norton for this point.

[64] Some societies are said not to recognise a sphere of life that is non-religious, and the separation of religious and secular spheres is sometimes attributed to Protestantism. Tariq Modood, 'Anti-Essentialism, Multiculturalism and the "Recognition" of Religious Groups' (1998) 6 J Pol Phil 378.

[65] Worries in the literature in anthropology and religious studies that a Protestant conception of religion is often used to (mis)classify "Asian religion" and doubts that some religions of India – notably Hinduism and Buddhism – are in fact religions (Will Sweetman, '"Hinduism" and the History of "Religion": Protestant Presuppositions in the Critique of the Concept of Hinduism' (2003) 15 Method & Theory in the Study of Religion 329, 339-342 and Fred Clothey, Religion in India: A Historical Introduction (Routledge 2006) 10-11.) are sometimes reflected in Indian judicial attempts to define religion *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt* (1954) Supreme Court Appeals (SCA), 415, 431.

however, resonate with the legal usage of religion by at least some influential courts and commentators outside India.[66]

Consider, for instance, Freeman's and Greenawalt's prominent account of features which taken together constitute the paradigm case of a religion for the purposes of US constitutional law:

1. A belief in a Supreme Being
2. A belief in a transcendent reality
3. A moral code
4. A world view that provides an account of man's role in the universe and around which an individual organises his life
5. Sacred rituals and holy days
6. Worship and prayer
7. A sacred text or scriptures
8. Membership in a social organisation that promotes a religious belief system.[67]

They use this paradigm case approach to religion such that none of the features listed above is necessary or sufficient in themselves to qualify as a religion. The more listed features a putative religion has and the more it exhibits those features, the closer to a religion it is. It is significant that most of these features are considered relevant to the

[66] Perhaps partly because these courts and commentators in the West have become more familiar with such 'Eastern' religions in recent times.

[67] Freeman (n 56) 1553 and Greenawalt (n 56) 767–8. Dworkin (n 52) 107 suggests a similar list of features to determine the scope of religion.

definition of religion not just in Western countries such as the US[68] and Australia,[69] but also in the Indian context.[70] This account attempts to adequately capture both 'traditional Eastern and Western religions' and discusses case law relating to 'Eastern religion'.[71] As mentioned earlier, this thesis does not require a complete or precise definition of religion; in this thesis, the question of whether a tradition or practice is religious or not is either clear, or is not in issue. However, to the extent that it is helpful to have a sketch of what we mean by 'religion', Freeman's and Greenawalt's account can serve as a useful working definition.

At several points in this thesis, the system is criticised for interfering with the religious autonomy of atheists, agnostics, or others who are not religious. How, one might ask, is the religious autonomy of these persons affected? *They have no religion*, after all. As the definition of religious autonomy outlined at the beginning of this chapter suggests, it is a mistake to think we ought to be concerned *only* about the religious autonomy of those who are religious. Autonomy in the religious sphere implies the power to embrace *or* reject religion. It implies the power to take any position on features 1–4, including disbelieving in a Supreme Being or a transcendent reality, or subscribing to a moral code

[68] Greenawalt (n 56) 774–6, 815.

[69] All features except the sixth and seventh have been cited as relevant in the Australian context. Carolyn Evans, 'Legal Aspects of the Protection of Religious Freedom in Australia' (2009) 19–21 <www.hreoc.gov.au/frb/papers/Legal_%20Aspects.doc> accessed 23 December 2011.

[70] A prominent case on the definition of religion in the Indian Constitution, *SP Mittal v Union of India*, 1983 SCR (1) 729, 772–75 refers to practically all features in this list. See §2.7 for more on how religious freedom is protected in India.

[71] Freeman (n 56) 1553. The cases that he and Greenawalt (n 56) discuss include cases involving 'Eastern' religion – eg *International Society for Krishna Consciousness, Inc v Barber* 650 F 2d 430 (2nd Cir 1981) (US), cited ibid 1528; and *Malnak v Yogi*, 592 F 2d 197 (US), cited in Greenawalt (n 56) 791–2.

or world view that is at odds with that of all religions. As argued in §4.2.4, religious autonomy implies freedom *from* religion.

3.3 RELIGIOUS AUTONOMY AND PERSONAL AUTONOMY

3.3.1 Religion-specific aspects of autonomy

How does the concept of personal autonomy apply in the sphere of religion? The capacities necessary for personal autonomy[72] are equally necessary for religious autonomy. Coercion and manipulation harm religious autonomy in much the same way as they harm personal autonomy. Self-respect is vital to both religious and personal autonomy.[73] Other preconditions or contributory factors of autonomy might be more important in the religious context. Community or group life might play an even larger role in religious autonomy than it does in personal autonomy.[74] The practice of at least some religions is made easier by the acceptance and cooperation of a group of co-religionists; communal religious activity, church going or congregational prayer presupposes a community. Similarly, as argued in §7.5.4, access to religious expertise can play an important role in enhancing religious autonomy despite the fact that access to expertise in general is not usually emphasised as enhancing personal autonomy.[75]

[72] §3.1.1.

[73] See §6.1.1.

[74] §5.1.1 and §5.2.3; McCabe (n 17) 510.

[75] 'But a person may also act unfreely because he lacks the information to evaluate his options or because he lacks the ability to process what information he has.' Alternatively, the role of expertise in autonomy and religious autonomy can be viewed as an extension of the precondition of rationality and reasoning discussed above. George Sher, 'Liberal Neutrality and the Value of Autonomy' [1995] Soc Phil & Pol'y 136, 137.

However, some other aspects of personal autonomy might seem difficult to reconcile with the nature of religion.[76] These will be discussed in §3.6. For now, having considered how personal autonomy adapts to the sphere of religion, it is worth considering some important connections between religious autonomy and personal autonomy.

3.3.2 The relationship between personal and religious autonomy

Autonomy can be used in a 'local' as well as 'global' sense.[77] The global sense is the one we use when we speak of an autonomous life. But a single action can be autonomous (or not), as can a single belief, desire or value.[78] A coerced action is not autonomous, for instance, nor is a belief formed as a result of indoctrination or manipulation. Similarly, a judgment of autonomy or lack of it can be made with respect to larger regions of a person's life. So a person who displays a lack of self-control with respect to her health (and is therefore non-autonomous in this sphere) might still be autonomous[79] in her professional life.[80] Religious autonomy is therefore autonomy in one sphere – the religious sphere.

Turning to the relationship between religious autonomy and personal autonomy, in theory at least, each is achievable, even if the agent has failed to achieve the other. So,

[76] And some aspects of personal autonomy might not be relevant at all to the religious context.

[77] For an example of its use in this sense, see Mele (n 26) 8.

[78] 'But the more numerous and more central to one's character one's nonautonomously possessed pro-attitudes are, the less autonomous one apparently is': ibid 149.

[79] Because she has the requisite self-control as well as the other conditions for autonomy.

[80] Mele (n 26) 8.

a person might have an autonomous life 'overall' even though she is *not* autonomous in the religious sphere. This might happen because she enjoys many of the conditions for personal autonomy except for religious freedom. Conversely, a person might be autonomous in the religious sphere, but not in any other. But religious autonomy and 'global' personal autonomy are intimately related. They share at least some pre-conditions. A person who lacks self-control, or has to struggle to fulfil basic physical needs will have neither religious nor global personal autonomy. It also seems unlikely, even if possible, that someone is autonomous in the global sense but is not autonomous in the religious sphere. This is because in such a case, the shared pre-conditions for personal autonomy and religious autonomy would have been met.[81] Moreover, since autonomy is a matter of degree, being significantly autonomous in a sphere as potentially important to human life as religion would increase autonomy overall.

If an agent not only has the capacity for global autonomy, but also determines his or her life taken as a whole, what could explain their non-autonomy in the sphere of religion? There are two possible answers. The first, obvious answer is they might live in an environment where *religious* beliefs and practices, but not other areas of life, are interfered with. Such a society might have a religious orthodoxy to which everyone must subscribe, without an option of dissent; but it might also fulfil, to a very high degree, other pre-conditions for autonomy. Say that the religious orthodoxy is quite minimal – consisting of a belief in a god without any accompanying doctrine. This one belief cannot be questioned[82] by citizens, but otherwise there is freedom of thought and expression. It

[81] Otherwise the person would not be globally autonomous.

[82] Engaging in any religious practice apart from the religious orthodoxy might be seen as implicit 'questioning' or dissent from the religious orthodoxy.

might respect liberty in all spheres of life apart from the religious. It might ensure that its citizens are healthy, in material comfort, educated and exposed to various ways of life – thereby ensuring that they have the capacity for personal autonomy, and the opportunities for its exercise.

The second possible answer is that the psychological state of the agent prevents her from achieving religious autonomy. Manipulation, as discussed in detail in §3.1.4 above, interferes with autonomy. Certain types of religious indoctrination might constitute manipulation. It might result in the agent being influenced by her manipulator such that she is not autonomous. The manipulation might be confined to the sphere of religion, such that the agent cannot form her own beliefs and desires in religious matters. She might be completely autonomous in other respects. It is possible that such an agent would achieve global autonomy despite failing to achieve religious autonomy.

Alternatively, if an agent has not only the capacity for religious autonomy, but also determines her religious life, what can explain her lack of autonomy in the global sense? If she has the capacity for religious autonomy, the best explanation for her overall lack of autonomy is probably the inverse of the example provided two paragraphs above. If the agent lives in a society with very little personal freedom *except* for religious freedom, it is possible that they could achieve religious but not global autonomy. Religious autonomy is unlikely in the absence of global personal autonomy and vice versa.[83] But it is important to recognise their limited independence for the sake of conceptual clarity.

[83] One reason is that granting religious freedom would ultimately mean that citizens would have substantial freedom in other spheres. They would have, for instance, freedom to express themselves and to associate as long as they do so in the name of the good life. This is why the example given two paragraphs above is unlikely as well.

3.4 THE VALUE OF RELIGIOUS AUTONOMY

Nothing in this thesis turns on the precise *reasons* for the value of religious autonomy. It is enough for our purpose to note the strong arguments, based on both the value of personal autonomy and the value of religion, for the value of religious autonomy. So the purpose of this section is merely to sketch the considerations that make the assumption that religious autonomy is valuable as common and as plausible as it is.

One reason why religious autonomy might be valuable is its contribution to personal autonomy.[84] As indicated in the section above, religious autonomy may be necessary for personal autonomy. Even if it is not, religion is an important sphere of the lives of many; if they are autonomous within the religious sphere, this would certainly enhance their personal autonomy overall. Since the concept of religious autonomy implies the power to embrace *or* reject religion, religious autonomy enhances the personal autonomy of those who reject religion as well.

Personal autonomy in turn might be thought to be valuable because it is necessary for a good life.[85] A weaker claim of its value is that it is 'a transcendent value which any life would be the worse for lacking.'[86] Personal autonomy might be thought to be 'a

[84] See text and nn 63–65 in the introduction.

[85] McCabe (n 17) 494.

[86] ibid.

constituent part of [a person's] well-being or happiness.'[87] It might be valued as a means of recognising or expressing human dignity.[88] Alternatively, personal autonomy might be thought to have 'contextual value'; that is, conditions in modern societies might be such that autonomy is essential for a good life.[89] Autonomy might also be valued for its role in realising other values. Other sources of (potential) value – family, work, community and *religion* – might be thought to be valuable only when they are autonomously chosen.[90] Moreover, autonomy allows individuals to judge for themselves what will allow them to lead a good life. This is important because each individual might be thought to be the best judge of what will allow her to lead a good life.[91]

Some question, however, whether we ought to value autonomy as highly as we do, especially in comparison with other values.[92] Some of the commentaries questioning the value of autonomy could also be read as contributions to the debate on the nature of autonomy, as they make the claim that certain descriptions of the concept of autonomy

[87] Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' [2006] Ethics 263, 266, citing Mill.

[88] ibid; Joseph Raz, 'Liberalism, Autonomy and the Politics of Neutral Concern' [1982] Midwest Studies in Philosophy 89, 111.

[89] 'It is an ideal particularly suited to the conditions of the industrial age and its aftermath with their fast changing technologies and free movement of labour. They call for an ability to cope with changing technological, economic and social conditions, for an ability to adjust, to acquire new skills, to move from one subculture to another, to come to terms with new scientific and moral views. Its suitability for our conditions and the deep roots it has by now acquired in our culture contribute to a powerful case for this ideal.' Raz (n 7) 369–70; see also Raz (n 7) 391 ('the social forms characterizing contemporary liberal states reflect the pervasiveness of autonomy and that success in the goals these forms make available requires the effective exercise of autonomy'). McCabe (n 17) 498; cf McCabe (n 17) 505–509.

[90] Sher (n 75) 148; Kymlicka (n 50) 12; Ronald Dworkin, 'Comment on Narveson: in Defense of Equality' (1983) 1 Social Philosophy and Policy 24, 29.

[91] Darwall (n 87) 265.

[92] Marina Oshana, 'How Much Should We Value Autonomy?' [2003] Soc Phil & Pol'y 99; Kukathas (n 16) 15, 16, 36.

pay inadequate attention to the role of culture, social relations or gender in the life of the individual.[93] Some feminist critiques of autonomy, including those that led to the development of the concept of 'relational autonomy', might be placed in this category.[94] Many of these critiques are aimed at conceptions of autonomy different from that used in this thesis – they would not apply to autonomy as it is used here. In any case, despite commentary questioning the value of autonomy, autonomy remains a central value of much moral and political philosophy, especially of liberalism.[95] Discussions in the philosophy of education, bioethics and medical ethics coherently appeal to the value of autonomy, assuming both its value and a core, shared understanding of the concept.[96] This assumption of autonomy's value is the reason why it is recognised in many jurisdictions, including India,[97] either as a legal right or as a value that informs certain rights.[98]

Religious autonomy might also have value independently of personal autonomy. Religious *autonomy* might allow individuals to realise partly or fully the value of religion

[93] Y Tamir, *Liberal Nationalism* (Princeton 1993) 6; see generally, DT Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 The Journal of Philosophy 619.

[94] J Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts, and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7.

[95] Consider its prominent place in the work of JS Mill (1859), Joseph Raz (1986) and Will Kymlicka (1989) among others: John Stuart Mill, *On Liberty* (2nd edn, J W Parker 1859); Kymlicka (n 50); Raz (n 7).

[96] See, eg, Stefaan Cuypers, 'Is Personal Autonomy the First Principle of Education?' [2006] J Phil Education 5; R Gillon, 'Ethics Needs Principles – Four can Encompass the Rest – and Respect for Autonomy should be "First Among uals"' (2003) 29 Journal of Medical Ethics 307.

[97] See *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [41], [51]; *Naz Foundation v Goverment of India* WP(C) No.7455/2001.

[98] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (Canada); *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BHRC 127 (South Africa); *Lawrence v Texas*, 123 S Ct 2472 (2003) (USA); *Planned Parenthood v Casey*, 505 US 833 (1992) (USA).

itself.[99] Religion is valued for different reasons. It is said to promote virtues such as self-restraint, self-discipline and integrity.[100] Some find religion valuable because it contributes to our search for the ultimate meaning of life, since most religions take some view on this.[101] Religious autonomy, it could be said, allows us to realise these (potential) values, or allow us to realise them to a greater extent. To take the last-mentioned value as an example, if religion contributes to our search for the meaning of life, this search would be all the more effective if participants were autonomous in their religious life. Having the power to change, re-interpret, reason about and exit one's religion is surely necessary for any meaningful search for the truth. Similarly, it is difficult to see how religion can promote virtues such as self-restraint, self-discipline and integrity if its adherents did not engage with it autonomously. If they have no option or little reasoning ability, or were manipulated or coerced, it is difficult to see how these virtues would be open to them, since these virtues assume that one has an attractive (but not necessarily good) alternative option (i.e. a temptation) that one is free to embrace, but instead rejects it as a matter of discipline or integrity. These are all plausible defences of the value of religious autonomy. But as explained above, nothing in this thesis turns on the precise reason that one chooses to explain the value of religious autonomy.

[99] This is analogous to the argument made above about personal autonomy allowing people to realise other values.

[100] William Galston, *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State* (CUP 1991) 257–89. Besides their intrinsic value, these are also the virtues that a good citizen should have. Michael J Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press 1996) 66.

[101] Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008) 168–69. See also Andrew Koppelman, 'Is It Fair to Give Religion Special Treatment' [2006] U Ill L Rev 571.

3.5 HOW THE LAW COULD AFFECT RELIGIOUS AUTONOMY

Earlier sections have set out our definition of religious autonomy and the conditions for religious autonomy. As this thesis examines the implications of the PLS for the value of religious autonomy, it is worth setting out the different ways in which the law could potentially affect religious autonomy. Many of these correspond to ways in which the law could affect personal autonomy. They reflect the distinction drawn earlier between minimal and significant autonomy and the fact that autonomy is a matter of degree.

1. The law could *provide* a necessary condition for the *exercise* of religious autonomy. The legal protection of (negative) religious freedom is an example.
2. The law could similarly *preclude* religious autonomy by precluding a necessary condition for its *exercise*. A legal prohibition of religious practice or belief would accomplish this.
3. The law could *provide* a necessary condition for religious autonomy by providing a necessary condition for the *capacity* for religious autonomy. For instance, it could encourage the development of mental faculties by providing educational opportunities.
4. The law could *preclude* a necessary condition for religious autonomy by precluding a necessary condition for the *capacity* for religious autonomy. For instance, it could hinder the development of mental faculties by failing to provide adequate nutrition to children or by engaging in large-scale manipulation which diminishes mental capacities.
5. The law could *provide* a condition which, while not amounting to a necessary condition for (minimal) religious autonomy, *enhances*, increases or strengthens

religious autonomy. For instance, in certain circumstances, adding an option to an already adequate set of options could increase the autonomy of the agent.[102] Similarly, enhancing self-respect above the minimum level necessary for autonomy might not be necessary for religious autonomy, but might enhance it.

6. Conversely, the law could *diminish* religious autonomy, but not to the point where it precludes it. Removing an option from a set of adequate options such that the set nonetheless remains a set of adequate options would, in some circumstances, be an example of diminishing autonomy.
7. The law could equally *enhance* or *diminish* religious autonomy by enhancing or diminishing the capacity for it while still keeping it above the threshold for minimal religious autonomy.

In addition, laws might affect religious autonomy in trivial ways, for instance by providing trivial options. Further, some of the capacities and other preconditions of religious autonomy might be important and affected by the law, but are not worth mentioning here because they are either taken for granted or are not directly relevant to the thesis. For instance, religious autonomy would be impossible if the law obligated all citizens to work all day, breaking rocks in intense heat. While such baseline preconditions for autonomy as minimal nutrition, tolerable temperatures and some leisure are vital, they not *directly* implicated by the PLS.

[102] Thomas Hurka, 'Why Value Autonomy?' (1987) 13 Soc Theory & Prac 361 (arguing that more options enhances autonomy generally). But, as discussed in §4.1.1, having every possible option open to one is neither necessary not sufficient for religious autonomy, and too many options or religious-autonomy-reducing options can indeed harm religious autonomy.

The law, and the PLS in particular, can thus affect religious autonomy in many ways. However it is important to note that:

> [I]t is the special character of autonomy that one cannot make another person autonomous. One can bring the horse to the water but one cannot make it drink. One is autonomous if one determines the course of one's life by oneself. This is not to say that others cannot help, but their help is by and large confined to securing the background conditions which enable a person to be autonomous.[103]

The very nature of religious autonomy therefore places limits on how far any law can enhance it.

3.6 AN OBJECTION: IS RELIGIOUS AUTONOMY POSSIBLE?

The frequency with which the concept of religious autonomy is used can hide the sources of tension within the concept. This section will study an objection to this thesis based on the possibility that religion and autonomy are incompatible such that religious autonomy is impossible.[104] Since this thesis evaluates the PLS against the value of religious autonomy, it is important to address this objection.

There are at least four reasons why one might think religious autonomy impossible. The first is based on an understanding of religious beliefs and practices as

[103] Raz (n 7) 407. See also Amy Gutmann, 'The Disharmony of Democracy' in John W Chapman and Ian Shapiro (eds), *Democratic Community* (New York University Press 1993) 142.

[104] For one prominent view that they are incompatible, see Rajeev Bhargava, 'What is Secularism For?' in Rajeev Bhargava (ed), *Secularism and its Critics* (OUP 1998) 495.

fixed, static and bound. Even many of those who include contestation in their idea of religion often recognise boundaries to such contestation in order for the religion to remain *that* religion.[105] Following a religion therefore implies fidelity to religious doctrine. Autonomy on the other hand presupposes choice.[106] This might suggest that 'religion' and 'autonomy' are necessarily incompatible. Second, as §3.1.1, autonomy is also thought to require the ability to *revise* preferences. At the same time it is sometimes thought that religious belief is non-revisable. This might raise concerns for whether religious autonomy is possible.

Third, religious autonomy may be thought to be impossible due to its connections with responsiveness to reason. As our discussion on our conception of autonomy indicates, the most plausible accounts of autonomy associate it with responsiveness to reason.[107] The characterisation of religion as somehow antithetical to responsiveness to reason is trite, but this is how it continues to be characterised.[108] If responsiveness to reason is necessary for autonomy and if religion is evidence of a lack of responsiveness to reason, then 'religious autonomy', one might conclude, is impossible.[109] A fourth worry about the possibility of religious autonomy comes from the suspicion that common modes of acquiring religion impinge on autonomy. Fears of 'brainwashing' and religious indoctrination are extreme versions of this suspicion.

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[105] DG Réaume, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 UBC L Rev 127, 129.

[106] §3.1.3, §3.1.6.

[107] §3.1.1.

[108] Rodney Stark, Laurence R Iannaccone and Roger Finke, 'Religion, Science and Rationality' (1996) 86 Am Ec Rev 433; Madhavi Sunder, 'Piercing the Veil' (2003) 112 Yale LJ 1399.

[109] Bhargava (n 104).

This section concludes that, while there is some truth to these worries about religious autonomy, religious autonomy is not impossible. There is conceptual room for it.

3.6.1 Religion and choice

The first worry about religious autonomy relates to the compatibility of religion and choice. For instance some psychologists of religion write:

> *[A] thoroughly autonomous faith tends to be antagonistic to the interests of organized religion – to the extent that the latter emphasizes conventional rule-oriented morality and caters to personal needs for cognitive structure and external control.* There are cases, no doubt, in which an institution advocates a high degree of individual freedom in the believer's religious beliefs and practices. But it is usually a personal disposition that leads an occasional believer to the level of religious autonomy, *despite institutional discouragement*.[110]

It is important to appreciate this concern that steering one's course within a religion or self-authoring one's religious life is impossible because religions do not permit the freedom and choice necessary for this. It is equally important to emphasise, however, that the concept of autonomy used by this thesis, as outlined in §3.1.6 and §3.1.7 above, does not require unbounded choice or complete self-creation. The fact that religions constrain

[110] Richard D Kahoe and Mary Jo Meadow, 'A Developmental Perspective on Religious Orientation Dimensions' (1981) 20 J Religion & Health 8, 11 (emphasis added). Again, although their notion of religious autonomy is different from the one this thesis uses, it also overlaps in significant ways that makes this comment helpful.

choice to some extent does not, therefore, imply that religious autonomy is impossible. Whether it is or it is not depends partly on the extent to which religion constrains choice.

There is a tendency to paint all religions, and their many interpretations, schools and sects, with the same brush. This tendency is reflected in the way we cast the first worry about religious autonomy. But at least three important qualifications should be noted. First, religions vary dramatically in comprehensiveness. There is a great deal of difference between organised religious traditions where doctrinal details will be worked out to a very fine-grained level by religious officials or authorities,[111] on the one hand, and loose-textured or indeterminate religious traditions,[112] on the other. The latter will barely engage this worry.

Second, religious interpretations could be based on very different sources: on claims of greater fidelity to a religious text, better 'fit' between different teachings of a religion, greater consistency with empirical or other 'secular' facts[113] or even greater consistency with morality. The vagueness, indeterminacy and scope for widely differing interpretations of religious doctrine thus leave room for a believer to autonomously steer her own course within a religion.

[111] For example, the liturgy in some churches, or dietary rules in Judaism or Islam.

[112] Such as paganism. 'Paganism is not based on doctrine or liturgy. Many pagans believe "if it harms none, do what you will"': 'Pagan Beliefs' (BBC, 2 October 2002) <www.bbc.co.uk/religion/religions/paganism/beliefs/beliefs.shtml> accessed 7 August 2011.

[113] Eileen Barker, 'Thus Spake the Scientist: A Comparative Account of the New Priesthood and its Organisational Bases' (1979) 3 Review of the Social Sciences of Religion 79.

Third, religions are not merely set in stone tablets and passed on through generations. It has been plausibly argued that religion cannot be perpetuated without changing it.[114] Applying religious doctrine, given the certainty of change in the environment in which it functions, requires 'extraordinary inventiveness and spontaneity'.[115] An exercise of this inventiveness and spontaneity is surely an exercise of autonomy within religion. Fidelity to a religion thus does not imply straightforward obedience to a completely determined set of rules, but often *requires* or at least allows room for creativity and choice in the interpretation and application of these rules.[116]

As an illustration, both Islam and Judaism are thought of as patriarchal religions. But there are also interpretations of Islam and Judaism which are *not* patriarchal. For instance, some of the work of women's rights organisations, such as Women Living Under Muslim Laws, results in women reading Islamic texts to accommodate gender equality and gender justice.[117] Similarly, Martha Nussbaum writes about Judaism:

> [a]s a reform Jew, I think that the core of Judaism is a set of timeless moral ideas that are imperfectly revealed in both text and rabbinic history. Thus 'Reform' to me, does not mean a 'reformed version of' Judaism; it means a reform of

[114] Michele M Moody-Adams, 'Culture, Responsibility, and Affected Ignorance' (1994) 104 Ethics 291, 309. The argument is made here with respect to culture, but it applies to religion as well.

[115] ibid.

[116] Moreover, the religious practice of interpretation could enhance autonomy in general. A person must be able to understand and interpret the world around her before she can be the part-author of her own life. As noted in §3.1.1 above, this is at least part of the reason why a minimum degree of rationality or intelligence is a pre-requisite of the capacity for autonomy. The skill of interpreting and applying religious doctrine could enhance autonomy as this skill could contribute to better interpreting people and their actions. Or, if this claim is too strong, a weaker one is that the better a person is at understanding and interpreting the world around her, the better she is able to shape her life.

[117] Sunder (n 108).

> defective historical practices in the direction of a more authentic (I'd say orthodox) realization of Judaism.[118]

At this stage, worries might be voiced that conceiving of religion in a manner that focuses too strongly on individual autonomy carries the risk that religion itself will be contested, abstracted or rarefied out of existence.[119] There is little point, it might be said, in discussing 'religious autonomy' because when people have religious autonomy, their interpretation of religion will leave very little of conventional religious doctrine intact. Many heterodox readings of religious doctrine will survive, the objection goes, but conventional or orthodox ones will not.

But to continue our illustration relating to interpretations of women's roles in religion, while some feminist interpretations of religion may deviate from orthodox doctrine, there is no reason to think that religious autonomy would necessitate this. There is certainly anecdotal evidence of adults displaying religious autonomy while living according to conventional, orthodox religious doctrines.[120] Azizah Al Hibri provides the example of 'contemporary women with established careers' who, as adults, convert to

[118] Martha Nussbaum, 'A Plea for Difficulty' in Susan Moller Okin and others, *Is Multiculturalism Bad for Women?* (Princeton UP 1999) 105, 107. Elsewhere she writes: 'Often the dissident forms of a religion view themselves with considerable plausibility as more authentic, more true to the religion's genuine spirit than the patriarchal forms': Martha Nussbaum, 'Religion, Culture and Sex Equality' in Indira Jaising (ed), *Men's Laws, Women's Lives: a Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited, 2005) 117.

[119] An example of this might be Paul Tillich's description of religion as something of 'ultimate importance': Paul Tillich in Note, 'Towards a Constitutional Definition of Religion' (1977) 91 Harv L Rev 1056, 1066–1068.

[120] See Maleiha Malik, '"Progressive Multiculturalism": Minority Women and Cultural Diversity' (2010) 17 International Journal on Minority and Group Rights 447, 463–64.

Hasidic Judaism.[121] Why, if they are autonomous within religion, would they endorse or follow traditional practices such as early marriage, fixed gender roles, segregation of the sexes, or bath ceremonies following menstruation, which might be seen as oppressing or degrading women? Al Hibri notes that these ceremonies are perceived by some of these women as empowering, 'women-centred spiritual experiences' and opportunities for bonding.[122] They might see Orthodox Judaism as offering *different* roles and options for women, roles and options that are not available for men. Some Haredi women who sit at the back of segregated buses in Israel describe the measures as 'plac[ing] women on a pedestal,[123] as a 'form of empowerment'[124] and as ensuring that they are not viewed 'less as human beings and more as sexual beings'.[125] These women resist comparisons of such segregation with Jim Crow laws and might be said exercise autonomy within orthodox religious doctrines.[126]

It is true that not all who exercise religious autonomy will completely endorse orthodox religious doctrine in this way. However, even those who do not, may not abandon religious doctrine entirely. A developmental sequence in religious experience proposed by some psychologists of religion will serve as an illustration. At the first stage

[121] Susan Moller Okin, 'Is Multiculturalism Bad for Women?' in Okin and others (n 118) 7.

[122] Azizah Al Hibri, 'Is Western Patriarchal Feminism Good for Third World/Minority Women?' in Okin and others (n 118) 107.

[123] Nathan Jeffay, 'Invoking Rosa Parks, Haredi Women Move to Back of the Bus' (The Jewish Daily Forward, 1 August 2008) <www.forward.com/articles/13821/> accessed 7 August 2011.

[124] Shira Leibowitz Schmidt, 'Black Hats in the Front of the Bus' *The Jerusalem Post* (Jerusalem, 19 March 2007) <www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=55239> accessed 7 August 2011.

[125] ibid.

[126] One objection to this view would be that these women are 'brainwashed'. This is considered in greater detail in §3.6.4.

of development, religion for 'extrinsically' religious persons fulfils emotional and other needs. 'Intrinsically' religious persons, on the other hand, engage with religion for reasons beyond self-interest.[127] Only some attain 'religious autonomy', the apex of human religious development. Since these psychologists describe religious autonomy as an experience of 'individualized religion'[128] and compare it to 'observance' of institutional norms, this may suggest that they believe that those who have passed the extrinsic and intrinsic stages are no longer connected with religious doctrine or orthodox practice. However,

> [a]utonomously religious persons … are able to recognize and accept extrinsic and observance religious needs in themselves and in others and to experience intrinsic religious gratifications, while plotting their own paths toward universal principles.[129]

Religious autonomy is thus not impossible, as engagement with religion often leaves considerable scope for the exercise of choice.

3.6.2 Revisability, identification and religion

Closely related to the place of choice in the realisation of autonomy is the ability to revise beliefs, desires, values, aesthetic preferences etc – what we shall refer to as 'attitudes'.

[127] Gordon Allport, 'The Religious Context of Prejudice' (1966) 5 Journal for the Scientific Study of Religion 447, 455.

[128] Kahoe and Meadow (n 110).

[129] ibid.

The question of revisability[130] (as we may refer to this ability) is especially pertinent to any discussion of religious autonomy. The ability to revise attitudes is, on many accounts, necessary for autonomy. At the same time, it might be thought that religious belief is non-revisable. It is often suggested that religious freedom be protected precisely because religion is not revisable.[131] Accounts of the nature of religious belief as non-voluntary,[132] a species of insanity[133] or a disability[134] often make this assumption. Religious traditions themselves may also emphasise the importance of non-revisability. Martin Luther is not alone in claiming an inability to act differently than he did with respect to his religious beliefs.[135] Religious belief and the voice of conscience are experienced by others as well as in some sense irresistible.[136] This characteristic of religious belief has been used to justify exemption from military service as well as other policies that accommodate religion.[137] If religious belief is non-revisable, and yet if its revisability is necessary for religious autonomy, this implies that religious autonomy is impossible.

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[130] Revisability, it should be noted, implies that the attitude can be shed, not just modified so that it becomes stronger. The ability to modify an attitude so that it is stronger, therefore, does not amount to revisability.

[131] See, eg, Michael Sandel, 'Religious Liberty – Freedom of Conscience or Freedom of Choice' [1989] Utah Law Review 597.

[132] Michael Sandel notes that viewing religious beliefs as voluntary misconceives how these beliefs are experienced by believers. While courts talk of people choosing to take a day off as their Sabbath, the Sabbath-keeper did not choose the day: it was conveyed to her as a command, an imperative: ibid 612–14.

[133] John H Garvey, 'Free Exercise and the Values of Religious Liberty' (1985/1986) 18 Conn L Rev 779; John H Garvey, 'Freedom and Equality in the Religion Clauses' (1981) 17 Sup Ct Rev 193.

[134] Christopher Eisgruber and Lawrence Sager, 'Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61 U Chi L R 1245; Michael McConnell, 'The Problem of Singling Out Religion' (2000) 50 DePaul L Rev 1; Sandel (n 100).

[135] Daniel Dennett, 'On Giving Libertarians What They Say They Want' in *Brainstorms* (Branford Books 1978).

[136] Partly because they are non-revisable.

[137] Sandel (n 132).

However, it is important to bear in mind that not *all* religious beliefs are non-revisable. Conversions to and between religions are obvious examples that prove this point. Less dramatically, people might change their beliefs on non-fundamental questions of religious doctrine when faced with new information. Even when religious beliefs are non-revisable, this does not make religious autonomy impossible. Consider the place given to this revisability in Gerald Dworkin's formulation of the capacity for autonomy (which is one endorsed with some modification by many influential theorists of autonomy):

> Autonomy is a second-order capacity to reflect critically upon one's first-order preferences and desires, and the ability either to identify with these or to change them in light of higher-order preferences and values. By exercising such a capacity we define our nature, give meaning and coherence to our lives, and take responsibility for the kind of person we are.[138]

This formulation shows how not all non-revisable attitudes are non-autonomously held. A good example is parental love. Some parents who love their children might not be able to revise this love. Their love for their children might determine or influence large swathes of their life. But we tend not to think of them as non-autonomous because of the role of this non-revisable attitude in their life. This is despite the feeling that parents might have

[138] Dworkin (n 30) 108.

of being under the thrall of their love, and the self-interest and comprehensive goals that many parents sacrifice for their children.[139]

Alfred Mele considers the case of Al, who is one such parent:

> The root notion of autonomy, again is self-government or self-rule. Al's capacity to govern himself need in no way be hampered by his parental values… *Al is not victimized in any way by his parental values and he wholeheartedly endorses them.* If he had what he took to be decisive reasons to shed them, he would, but his psychological constitution is such that reasons of this kind can be found only in scenarios quite remote from his actual circumstances…[140]

The implausibility of the assertion that Al is non-autonomous simply by virtue of his parental attitudes is a part of the reason why revisability is not, in Dworkin's formula, or in most formulations of autonomy, a necessary condition of autonomy. Revisability is necessary only if a certain condition obtains: *the person does not have the ability to identify with the attitude in question.* According to Dworkin's formulation, a necessary (but not sufficient)[141] condition of autonomy with respect to an attitude is that the person *either* has to have the ability to revise it *or the ability to identify with it*. This latter ability will be referred to as 'the identification alternative' and the disjunction of the two abilities (revisability and ability to identify) as 'the disjunctive condition' (for autonomy). Saying

[139] Such as their careers, spending time with friends, or hobbies.

[140] Mele (n 26) 155–56.

[141] See §3.1.3 and §3.6.4 on the absence of coercion or manipulation – other necessary conditions.

that an agent identifies with an attitude in this context is to say that he has that attitude and that he values having that attitude, or more roughly, that he thinks that it is good that he has that attitude.[142]

The rationale for adding the identification alternative to any formulation of autonomy is underscored when we consider the earlier part of Dworkin's formulation: the requirement of critical reflection. To meet his test of autonomy then, it is not enough that the agent has the ability to identify with an attitude. *Any such identification must be the result of critical reflection on that attitude.* It is particularly difficult to think of someone being victimised by an attitude which they not only identify with but which they identify with following critical reflection.

The identification alternative thus allows the possibility of religious autonomy *even* when religious attitudes are non-revisable. Especially since not all religious attitudes are non-revisable, this leaves us with more conceptual space for the existence of religious autonomy. But we might still have doubts about whether all that we said about Al, the parent, applies equally to a person who has religious attitudes. First, Mele makes the assumption that 'Al's commitment to his parental values is entirely rational by his own lights'.[143] But, as this thesis suggested earlier, some scepticism about the possibility of religious autonomy is based on the perceived conflict between religion and

[142] ibid 117. There are debates surrounding the requirement for identification. For instance, consider an agent who does not identify with an attitude, but is not alienated from it; he is simply indifferent to it. 'Thus, in his early work, Gerald Dworkin argues that someone who identifies with his motives lacks autonomy if this identification reflects the fact that he has "been influenced in decisive ways by others in such a fashion that we are not prepared to think of it as his own choice". (In later work, Dworkin suggests that an autonomous agent need not actually identify with her motives as long as she is capable of altering her preferences in light of her uncompelled reflection.)' Buss (n 17).

[143] Mele (n 26) 155.

responsiveness to reasons. Second, this thesis stated that the fact that identification with an attitude was the product of critical reflection was a reason to consider it autonomously-held. But there are ways of skewing, biasing or otherwise manipulating perceptions, so that any reflection is not the product of the agent's critical thought. This is why Dworkin introduced the requirement of procedural independence for autonomy (discussed below). The following sections consider each of these doubts in turn.

3.6.3 The reasons-responsiveness problem

As discussed in §3.1.1, at least some degree of reasons-responsiveness is a prerequisite of religious autonomy.[144] What 'responsiveness to reasons' entails precisely is both a difficult problem[145] and one that it is unnecessary to solve for the purpose of this thesis. All that we need to say here is that responsiveness to reasons ('RR') is a quality of persons which involves 'a sensitivity to, and a *potential* to be responsive to, reasons'.[146] This is by no means a complete definition, but it is all that is necessary for our limited purposes.

The responsiveness-to-reasons problem simply stated is this: (1) RR is a precondition of autonomy (including religious autonomy) but (2) some paradigmatic religious beliefs are taken to be *evidence* of a lack of RR on the part of those who possess them. If it is true that anyone who has religious beliefs lacks RR, which is a condition of

[144] See n 28.

[145] JM Fischer and M Ravizza, *Perspectives on Moral Responsibility* (Cornell University Press 1993) 30–33.

[146] Marina Oshana, 'The Misguided Marriage of Responsibility and Autonomy' (2002) 6 The Journal of Ethics 261, 267.

religious autonomy, this implies that (3) religious autonomy is limited to those who reject religion and is impossible for those with religious beliefs. Let us consider this problem in greater detail. It is commonly assumed that those who are religious necessarily lack RR[147] because (a) religious beliefs are not based on reasons[148] or (b) because it is contrary to reason to hold (some or most) religious beliefs.[149] Three responses to the RR problem show that it does not render religious autonomy impossible.

First, assumptions (a) and (b) are based on a further assumption: that there is insufficient evidence for religious beliefs, or that they are false.[150] But it is clear however that not all religious beliefs fit this description. There might also be religious beliefs that we *have* sufficient epistemic reason to hold. These might include some religious beliefs about morality or the nature of human beings or the nature of physical world. It is important to keep in mind that such religious beliefs exist, that they could potentially form the core of a religion and that assumptions (a) and (b) have very little weight with respect to such beliefs.

Second, even assuming that religious beliefs are false or based on insufficient evidence, the fact that someone holds them is not necessarily evidence that that they lack RR. Rather, a person might choose to have such beliefs for non-epistemic reasons. For

[147] Stark and others (n 108).

[148] ibid 4; Pratap Bhanu Mehta, 'Passion and Constraint' (2003) 521 Seminar <www.india-seminar.com/2003/521/521%20pratap%20bhanu%20mehta.htm> accessed 20 November 2011 for these assumptions in the context of Indian law.

[149] 'For many leading scholars, religion was not so much a phenomenon to be explained as it was an *enemy* to be overcome. Starting with the assumption that *religion is false, and thus less rational than other behaviors*, these scholars employed unique theoretical principles to explain (and dismiss) it and, above all, to pronounce its inevitable demise': Stark and others (n 108) 6 (emphasis added); Mehta (n 148)

[150] Ibid.

instance, believing (even without an epistemic basis for this belief) that one will be successful might contribute to the likelihood that one will indeed succeed.[151] There is even some empirical research that suggests that holding some beliefs that people have no epistemic reason to hold, even beliefs that are false, can promote mental health.[152] These include beliefs about 'one's personal qualities, degree of control and likely future.'[153] If religious beliefs fall into this class of beliefs, and there is again some evidence that suggests that they do,[154] then it might be in keeping with the requirements of reason to try to hold them.

Third, even if assumptions (a) and (b) are true, they do not imply that religion is inconsistent with RR. The sense of RR we are focusing on is that of the *potential* of responding appropriately to reasons. Possessing a potential does not necessarily imply that it is constantly exercised or exercised at all, or that when exercised it functions perfectly. A person might possess a high potential of RR and yet they may make no attempt to seek the reasons that apply to the question of what she should do in a particular case. Or, these reasons might be obscured from her view by circumstances beyond her control, such as being fed false information. If a necessary condition for a person to be RR is that she *always* responds correctly to the reasons that she has, and therefore has beliefs based on insufficient evidence and *no* false beliefs, then responsiveness to reasons is an unachievable goal. This 'infection' assumption about responsiveness to reasons – that if a person does not respond to reason with respect to some beliefs, she lacks

[151] This is possibly because of the psychological effects of such beliefs.

[152] J Kirsch, 'What's So Great about Reality?' (2005) 35 Canadian J Phil 407.

[153] ibid 408–10.

[154] Harold Koenig, *Is Religion Good for Your Health?* (Routledge 1997) 71–2.

responsiveness to reasons with respect to all – is misguided. It denies the possibility of a person who reads her horoscope every morning with some trepidation or avoids walking under a ladder, but is RR in general.

In conclusion, it is important to bear in mind these three responses to the RR problem. First, not all religious beliefs are either based on insufficient evidence or are false. Second, even those that are might be held for non-epistemic reasons. Finally, RR is a potential, and it does not require constant exercise for religious autonomy to be possible.

3.6.4 The 'brainwashing' problem

Another common assumption about religion is that religious beliefs can come to be held only through a process of manipulation, 'indoctrination' or 'brainwashing'.[155] This section studies this assumption and considers whether it means that religious autonomy is impossible. The discussion in §3.6.2 above pointed out that many commentators on personal autonomy believe that a necessary condition of autonomy is either the agent's ability to identify with an attitude or to revise it. Identification, however, may seem suspiciously easy. People identify with all sorts of attitudes that appear antithetical to their autonomy; religious beliefs are not the least of these. It is difficult to consider members of cults or communities that are said to manipulate, 'brainwash' or 'engineer' the values of their members as autonomous.[156] The members' attitudes, one might say,

[155] 'Since it is "self-evident" that no informed, rational person would *choose* to join an unusual religious group, converts must have been coerced, hypnotized, or otherwise robbed of reason': Stark and others (n 108) 3.

[156] This could be said of many women who appear to endorse patriarchal religious attitudes. But see §3.6.1 on whether these women do autonomously endorse these attitudes.

are not their own. They are not self-governed, but heteronomous: governed by their manipulators.[157] Because of this intuition, Dworkin adds a requirement of 'procedural independence' to the disjunctive condition of autonomy. He does not say much about what procedural independence entails, but it is clear that he thinks that it is inconsistent with 'manipulation, coercive persuasion, [and] subliminal influence.'[158]

One doubt about the possibility of religious autonomy, therefore, originates from the suspicion that religion indoctrinates in a way that is hostile to the development and possession of religious autonomy. Common allegations against cults and New Religious Movements ('NRM') reflect these suspicions. It is claimed that these movements appeal, or seek out, those who are vulnerable, alienated and psychologically unhealthy.[159] Their methods of recruitment are often subtle and deceptive.[160] Once they have the attention of the potential recruit, they subject them to 'brainwashing'. (They use this term in an implied analogy to the Chinese Communist programme of 'thought reform' used on prisoners of the Korean War.)[161] Once the cults and NRMs in question successfully brainwash their members, they isolate them from the outside world, including from

[157] §3.1.4 flagged that manipulation harmed autonomy.

[158] Dworkin (n 30) 18.

[159] John Saliba, 'Teaching New Religious Movements: Views from the Humanities and the Social Sciences' in David Bromley (ed), *Teaching New Religious Movements* (OUP 2007).

[160] ibid.

[161] Robert J Lifton, *Thought Reform and the Psychology of Totalism: A Study of "Brainwashing" in China* (UNC Press 1989).

families and friends. When the victims – the new members – are rescued, they must be 'deprogrammed' to remove the effects of the brainwashing.[162]

This may seem like an alarmist view of how these cults and New Religious Movements influence and are capable of influencing their members. Perhaps the most implausible part of this picture is the 'image of "brainwashing" as an all-powerful, irresistible, unfathomable, and magical method of achieving total control over the human mind.'[163] But serious studies of some of these movements have also noted that they exercise 'boundary control' by, for example, avoiding interaction between members and outsiders and developing distinctive dress, and that they are correlated with high levels of 'behaviour conformity.'[164] Some of the methods, actual and alleged, used by NRMs have ignited fears that ways of influencing others that hitherto seemed benign – a religious upbringing, education, advertising, political propaganda – are in fact watered down forms of brainwashing.[165] Such fears inspire this doubt about the possibility of religious autonomy: if exposure to religion is a form (even a milder form) of brainwashing, and if brainwashing is antithetical to autonomy, then perhaps talk of religious autonomy is indeed misplaced.

One response to this fear is resignation to the idea that there is no way to prevent brainwashing; people are always going to be influenced by the commands, suggestions,

[162] David Bromley and James Richardson, *The Brainwashing/Deprogramming Controversy: Sociological, Psychological, Legal, and Historical Perspectives* (E Mellen Press 1983).

[163] Lifton (n 161) 4.

[164] Marc Galanter, 'A Psychological Perspective on Cults' in James Boehnlein (ed), *Psychiatry and Religion: The Convergence of Mind and Spirit* (American Psychiatric Press 2000).

[165] Lifton (n 161) ch 1.

values and thoughts of others. Besides isolating individuals at birth,[166] little can be done. But is it really true that all influences on human beings should trouble us for the same reason that brainwashing does, the difference being only a matter of degree? Dworkin says about the requirement of procedural independence: '[s]pelling out the conditions of procedural independence involves *distinguishing* those ways of *influencing* people's reflective and critical faculties which *subvert them* from those which *promote and improve them*.' [167] The assumption here, that such a distinction can be made, accords with our common understanding (barring periods of panic about brainwashing) of legitimate and illegitimate ways of influencing people. A good education, for example, is commonly spoken of as enhancing reflective and critical faculties, as are reading, argumentation, travel and new experiences. What factors go into making this distinction between legitimate and illegitimate influences?

Alfred Mele suggests one way of making this distinction. He argues that the autonomous possession of an attitude requires that it be possessed *authentically*.[168] A necessary condition of such authentic possession of an attitude is that it is not compelled.[169] But how does compelling someone to have an attitude differ from other ways of contributing to them having it? Often we attempt to persuade others to have a belief by presenting them with reasons to do so. If they, in an exercise of their rational faculties, respond to these reasons and come to have this belief, we can hardly be accused

[166] Which would create other autonomy-related concerns.

[167] Dworkin (n 30) 18.

[168] Mele (n 26) 156.

[169] 'Compulsion' here excludes attempts to control the mind which are arranged by the agent himself or herself.

of ‘compelling’ them to have it. On the other hand, thought experiments involving brainwashing or mind control are often used as an intuitive, central case of compulsion or non-autonomous possession of an attitude.[170] What is it that distinguishes brainwashing from reasoned argumentation? Some claim that, in the former case, a person’s character or their ‘capacities for control over their mental lives’[171] are bypassed, while in the latter, they are not. David Blumenfeld writes:

> [I]n saying that a free act is caused by one’s character, I do not mean to suggest that it is determined by factors that are exclusively innate, or that external stimuli do not play an important role in bringing the act about. Naturally, our actions are determined in part by the various stimuli that impinge upon us – by the things, for example, that we see and hear. When an individual does something it is obviously no bar to his freedom that he behaves as he does because of what he has noticed, observed, or otherwise taken in. … But if I am to act freely, these external factors must have their effect by working through my existing values and desires, so that the action expresses my character …[172]

This metaphor of ‘bypassing’ is helpful.[173] But with this rough picture of the notion of attitudes which people are compelled to have, we can consider the source of doubt about religious autonomy mentioned above. If engaging with religion implies or is something

[170] Mele (n 26); David C Blumenfeld, ‘Freedom and Mind Control’ (1988) 25 Am Phil Q 215.

[171] Mele (n 26) 166.

[172] Blumenfeld (n 170) 221.

[173] Some qualifications will be made to the use of this metaphor later on.

like being brainwashed, i.e., if people come to religious beliefs by having their character or their mental faculties bypassed, then engaging with religion causes people to have attitudes that they are compelled to have. Religious autonomy might seem impossible if, instead of steering their own course through a religion, individuals are necessarily compelled to have religious beliefs or other attitudes.

Some of the strongest cases of the 'brainwashing' view of religion are made with respect to children or young people. The following case is an illustration of how even religions which appear to allow deliberation could manipulate its followers:

> The leader of a religious cult has developed a sophisticated technique for producing certain deliberative habits in his followers. Disciples, typically recruited as teenagers, are required to deliberate aloud several times a day concerning such matters as how to spend their free time, what kind of diet to adopt, and what sort of literature to read. Deliberation appealing to theological premises endorsed by the cult is rewarded, whereas deliberation involving premises that one accepts on the authority of science is punished. Reward and punishment are subtly administered and members are never explicitly instructed that scientific authority is an illegitimate source of deliberative premises or that deliberation should be driven by theological premises … [but] by engendering in his disciples deliberative habits that suit his own aims, the leader exerts considerable control over some of their deliberative reasoning.[174]

[174] Mele (n 26) 182.

In this case, the deliberative habits of the followers of the religious cults are largely determined by the leader. This is an instance of what has been described as covert non-constraining control of a person.[175] Such control can be exercised not only over a person's deliberative habits, but over the material that is fed into their deliberation: their beliefs. One way of doing this is to interfere with the relevant information that the person receives. In such cases, the agent is not stopped from doing what she wants; rather, she wants what the controller wants her to want. The methods of non-constraining control in the case described, one might notice, are much subtler than both the alarmist fears of brainwashing by cults and some of the thought experiments involving remote-control people used in some philosophical discussions. We must bear in mind therefore that not all non-constraining control is purely futuristic and fantastical, and worrying about religions as the site for similar control is not completely absurd. Rather, it is a worry that must be engaged.

But more has to be said before this worry is proven to be true. Part of the weight of this worry comes from the commonly-held assumption that many religious persons and institutions wish for other people to share their beliefs. Two points must be made here. First, even if some religions subject their followers to the kind of mind control that the cult in our example does, this does not mean that all religions do. Many religious institutions attempt to propagate their beliefs at least partially through persuasion by reasoning with the potential convert. A sample of proselytising literature should show this to be the case. They rely on what they consider *evidence* of the truth of their claims.[176]

[175] Robert Kane, *Free Will and Values* (State University of New York Press 1985) 35.

[176] See, eg, John R W Stott, *Why I Am a Christian* (Intervarsity Press 2004) 18.

Some proselytisers even claim that their beliefs are based on scientific method.[177] The validity of these claims and the reliability of the evidence they are based on are beside the point. What is important is that this method of proselytising and teaching of religion to those who are already followers does *not* amount to the kind of mind control or compulsion (to have attitudes) that religion is sometimes assumed to entail. So, while it might well be true that *some* religious institutions or proselytizers subject their followers or potential converts to what would amount to compulsion to have certain attitudes, this is certainly not necessarily true of all of them.

Second, there is no reason to think that all religious beliefs acquired by bypassing mental faculties (call them 'religious bypass experiences' or RBEs) are permanent or non-revisable. An attitude which is acquired through bypassing mental faculties can always be subjected to critical scrutiny later. Following this scrutiny, the agent can revise or identify with the attitude. For instance, there are many attitudes that children develop from their parents, when they presumably do not have the fully-developed mental faculties or character through which their parents could mediate. Good manners, emotional reactions, or even a taste for fried chicken are some examples. We do not seem to think the fact that these children have these attitudes is necessarily autonomy-reducing for them. Some RBEs of children might also be unobjectionable on the grounds of autonomy.[178] This attitude towards RBEs in children might be due to the potential revisability of, or identification with, the RBE-induced attitudes when the child is older

[177] The writer of one such pamphlet writes: '[t]o attribute the presence of scientific facts in the Qu'ran to coincidence would be against common sense and a *true scientific approach*'. Zakir Naik, *The Qu'ran and Modern Science: Compatible or Incompatible?* (Islamic Research Foundation) <www.scribd.com/doc/20171525/Islam-Modern-Science-by-Dr-Zakir-Naik> accessed 4 August 2011. More examples of theology's appeal to science are available in Barker (n 113).

[178] Cf Peter Gardner, 'Hand on Religious Upbringing' (2004) 38 J Phil Education 121.

and possessed of the capacity for autonomous decision-making. This is sometimes true of RBEs in adults as well. There is less to fear from RBEs if we know that a person can later choose to revise or identify with it.[179]

Thus religious beliefs are *not* propagated only by brainwashing, even in its subtler forms. Rather, reasoning and persuasion are probably the more usual form of propagation. Moreover, even when religious beliefs are acquired through the bypass of one's mental faculties, this is not necessarily harmful for the faculty of reasoning and is not always autonomy-reducing. The purpose of this section was not to suggest that worries about the possibility of religious autonomy are insignificant. It shows that the possibility of religious autonomy, in the sense in which this thesis uses it, depends on the religious tradition in question and the way in which the individual engages with it. There are likely to be religious traditions that do indeed constrain and 'brainwash' individuals in ways that are inimical to religious autonomy. However, this study of the possibility of religious autonomy shows that given the nature of many religious traditions and individuals' engagement with them, religious autonomy is not impossible and that there is conceptual room for it.

3.7 CONCLUSION

The purpose of this chapter was to lay part of the groundwork for the rest of this thesis by describing the concept of religious autonomy as it will be used here. 'Religious autonomy' was described as personal autonomy in a sphere of human life: particularly the sphere of religion. A person has religious autonomy when they shape their own religious

[179] However, it is true that the original pro-attitude acquired through an RBE was compelled.

life. This chapter elaborated on this idea of personal autonomy within the sphere of religion, it considered the problem of defining religion, it considered the relationship between the ideals of personal autonomy and religious autonomy, it considered the value of religious autonomy, it outlined how the law could affect religious autonomy, and, finally, it considered an important objection to the use of ‘religious autonomy’: that it is impossible.

PART II

4. ADEQUATE RELIGIOUS OPTIONS

Section 3.1.2 explained that the degree to which a person is autonomous bears some relation to the number, quality and variety of options that are available to her.[1] It also suggested that the variety of options is more important than their number. Without adequate options, events overtake the agent, instead of being chosen by her; she can no longer claim self-authorship or self-creation. Having an adequate range of valuable options is thus a condition of autonomy. Even once this threshold condition is met, subject to some important qualifications, further increasing a person's range of options can contribute to autonomy, as explained in §4.1.1 below. As §4.1.3 discusses, this is true *mutatis mutandis* of religious autonomy as well as personal autonomy more generally.

This chapter addresses the precondition of having a range of valuable options as it relates to our research problem. It considers how the PLS might harm religious options available to the agent. It asks: does the PLS affect important religious options by interfering with option of practicing religion or the option of not practicing religion? Before we delve into this question, four preliminary questions about the precondition of having a range of religious options should be considered. Addressing these preliminary questions will allow us to expand on the brief account of this condition for autonomy provided so far, identify the appropriate comparator to the PLS, discuss the special features of religious options and discuss whether the personal laws are, in fact, options.

[1] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 373-376; Thomas Hurka, 'Why Value Autonomy?' (1987) 13 Soc Theory & Prac 361.

4.1 PRELIMINARY QUESTIONS

4.1.1 Do more options mean more religious autonomy?

Autonomy, as used in this thesis, requires an adequate range of valuable options. But it does not necessarily follow from this that increasing a person's options always contributes to her autonomy. So what does happen when an additional option is added to a given range of valuable options which already meets the threshold for (minimal) autonomy? Does it harm autonomy? Does it make no difference to autonomy?[2] Does it enhance autonomy?

Examples of when such an additional option makes no difference to autonomy or even harms autonomy are plentiful. Some of these examples have to do with the quality of the options. First, given a set of options, adding another option to the set which is very similar to an existing option in the set does not enhance autonomy because this does not enhance the variety of options available.[3] Second, adding an autonomy-reducing option to a set of options will not enhance, and might harm, autonomy. (More is said about this below, in §4.2.3.1). Other examples have to do with the costs associating with decision-making: adding too many options to a set of options might not enhance, and might harm, autonomy because of the time and effort involved in deciding between the options.[4] It is

[2] Michael Blake, 'Distributive Justice, State Coercion and Autonomy' (2001) 30 Phil & Pub Aff 257, 269: 'Autonomy, it seems, does not depend upon the sheer number of options available, at least above a certain baseline of adequacy.'

[3] Raz (n 1) 375.

[4] Gerald Dworkin, 'Is More Choice Better than Less?' (1982) 7 Midwest Studies in Philosophy 47; Blake (n 2) 269.

difficult for an agent to be an author or creator of her life if she spends most her time deciding between scores of options for every decision she makes.[5]

It appears then that more options do not necessarily lead to greater autonomy. This is true even when the range of options available to a person falls *below* the threshold of an 'adequate range of valuable options' necessary for autonomy.[6] However, we might still say that assuming (a) that we are talking about adding valuable, autonomy-neutral or autonomy-enhancing options which are sufficiently different from the options already available to the agent[7] and assuming (b) that the costs associated with choosing between options are not too high, more options lead to greater autonomy. One reason to favour this proposition, duly qualified, is that choosing from amongst options is constitutive of an autonomous life. Gerald Dworkin writes:

> If one wants to be the kind of person who makes decisions and accepts the responsibility for them, or who chooses and develops a life-plan, then choices are valued not for what they produce nor for what they are in themselves, but as constitutive of a certain ideal of a good life. What makes a life ours is that it is shaped by our choices, is selected from alternatives, and therefore choice is valued as a necessary part of a larger complex.[8]

[5] Dworkin (n 4).

[6] Because all the considerations noted in the previous paragraph apply.

[7] Raz cares about the variety of options, not their number: Raz (n 1) 375.

[8] Dworkin (n 4) 61: 'But, again, this would at most support the view that, with respect to a certain range of choices, it is desirable to have some options.'

Thomas Hurka notes that having additional options gives agents the opportunity to *reject* them, which is a valuable opportunity to exercise their autonomy.[9] Consider an example. Sue and Bob are teachers.[10] Before she first started working as a teacher, Sue had the option of becoming a teacher, a lawyer, a judge or a social worker. Before he first started working as a teacher, Bob had the options of either becoming a teacher or becoming a social worker. So while Sue determined that she would *not* be a judge or a lawyer, Bob did not have those options, so he could not choose to reject them. Bob did not have the power to determine what he *would not be* in the same way as Sue did. Thus by having and exercising power – the power *not* to become a lawyer and *not* to become a judge – Sue was more autonomous (in this matter) than Bob was.

Moreover, having options also affords agents opportunities to develop the mental and psychological abilities that are necessary for autonomy, or at least that enhance it. '[T]he human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice.'[11] If the exercise of these faculties hones them, and if these faculties contribute to our capacity for autonomy (see §3.1.1), having more options might mean more opportunities to hone autonomy-enhancing faculties.[12]

These considerations explain why an 'adequate range of valuable options' is a prerequisite for autonomy as well as why even past this threshold, generally speaking,

[9] Hurka (n 1) 366.

[10] ibid.

[11] John Stuart Mill, *On Liberty* (first published 1859, Cosimo 2005) 71.

[12] cf Hurka (n 1) 365.

increasing a person's range of options enhances her autonomy. However, as just outlined, the effect that additional options have on autonomy is complicated.[13] Depending on the context, additional options can enhance, have no effect on, or even harm autonomy. We can thus make the following general observations:

1. If the range of valuable options available to a person falls below the threshold of adequacy, options that contribute to the achievement of an adequate range of valuable options will contribute to autonomy.
2. If the range of valuable options available to a person falls below the threshold of adequacy, options which do not meet assumptions (a) and (b) above will not contribute to autonomy because they *do not* contribute to the achievement of an adequate range of valuable options.
3. If the range of valuable options available to a person is already adequate, adding options which do not meet assumptions (a) and (b) above will likely not enhance, and possibly harm autonomy.
4. If the range of valuable options available to a person is already adequate, adding options which meet assumptions (a) and (b) above will probably enhance autonomy further.[14]
5. It follows that removing an option that meets assumptions (a) and (b) decreases autonomy regardless of whether the number of options has reached the threshold

[13] Text to n 2 to 7 above.

[14] Robert E Goodin, 'Liberal Multiculturalism: Protective and Polyglot' (2006) 34 Pol Theory 289, 302. Goodin (at 291) says that Kymlicka and other liberal multiculuralists believe that more options after the threshold point, 'while not exactly making one "more autonomous", makes one's autonomy "more valuable."' The distinction sought to be drawn between is not clear, and in this thesis we will say that more options after this point make one more autonomous. Raz (n 1) 375 does not seem to say much about this. He defends the necessity of an adequate range of options for autonomy, and he makes it clear that an infinite number of options is not necessary, but his opinion on the situation in between is not clear. Cf Blake (n 2) 269.

point of adequacy or not. Naturally the removal of the option which results in range of options dipping under the 'adequacy' threshold is more serious than if the range is still within the 'adequacy' threshold after the removal.

We can now proceed to consider the second preliminary question of this chapter.

4.1.2 The appropriate comparator

When we talk of the PLS adding or diminishing options, there is an implicit comparison with a legal framework which would (or should) exist instead of the PLS. What does this alternative look like? The debate on the PLS in India has often focussed on the possibility of introducing a 'Uniform Civil Code'. As §7.4 notes, the content of such a code is unclear. There are fears that a uniform civil code proposed by Hindu nationalists would really be a version of Hindu family law imposed on all groups in India.[15]

Given the assumptions made in this thesis and its focus on religious autonomy, the appropriate comparator is a religious-autonomy-respecting legal regime. It is far beyond the scope of this thesis to detail what such a regime would look like, though Chapter Seven will discuss some options. For now, some of the general characteristics of such a regime can be indicated. A religious-autonomy-respecting legal regime would provide individuals with an adequate range of valuable options in the religious sphere, it would not coerce or manipulate individuals without good justification[16] and it would

[15] Marc Galanter and Jayanth Krishnan, 'Personal Law and Human Rights in India and Israel' (2000) 34 Is LR 101, 111–15; M Nussbaum, 'India Implementing Sex Equality Through Law' (2004) 2 Chi J Intl Law 35.

[16] Raz (n 1) 413–20.

respect their choices as far as these choices do not interfere with the autonomy of others.[17] A religious-autonomy-respecting legal regime would also possess many other characteristics which the PLS is accused, in the following chapters of this thesis, of lacking – it would not harm self-respect and it would allow autonomy-enhancing socialisation in religious or cultural groups.[18] A legal regime could meet these criteria in many different ways. Certainly some of the characteristics of the general family laws noted in §2.3 respect religious autonomy. The Indian Succession Act 1925 allows all except Muslims to dispose of their property as they like; the Juvenile Justice (Care and Protection of Children) Act 2000 allows any citizen to adopt;[19] the Special Marriage Act 1954 allows people to marry anyone (at least of the opposite sex) who is not a close relative;[20] and contract law (although not used much) has the potential to allow individuals to make private arrangements over family matters.[21] The comparator legal regime therefore does not have to look completely alien to the current legal regime governing family law in India. It is important to keep in mind that the potential legal framework to which this thesis should compare the PLS must be realistic. If the comparator legal framework is unachievable, then it would be churlish to criticise the PLS for falling short of it. With these general considerations about the appropriate comparator in mind, we can proceed to consider the next preliminary question.

[17] And with their own autonomy, Raz would add; ibid.

[18] §6.2 discusses concerns that the PLS raises for self-respect.

[19] Section 41, Juvenile Justice (Care and Protection of Children) Act 2000. However, this provision is restricted to children who are orphaned, abandoned, neglected or abused.

[20] See §2.3 for further details of these enactments.

[21] This possibility is discussed further in §7.5.

4.1.3 Are religious options special?

Religious autonomy is personal autonomy over the religious sphere of life. In the context of religious autonomy, 'options' refers to religious options as well as the option of rejecting religion. Since religious options are important for our discussion, before delving into our main argument, it is worth thinking about how religious options might be special or different from options in general.

Religious options often share an important feature. Rather than choosing between religious options from scratch, most people have already chosen, endorsed, committed or accepted them.[22] Barring extremely unusual circumstances (perhaps, waking up on a desert island with no memory of who you are), most adults would have already chosen, endorsed, committed or accepted some options. These may take the form of relationships, group membership, complex skills (violin-playing) or cultivated tastes (for fine wine). It is important not to treat such options as though they can be replaced by others of equal value with no implications for autonomy. Even assuming the option of raising a child is equal in value to the option of studying medicine, few fathers would consider the latter option a fair exchange for their child. Options that one has already chosen, endorsed, committed or accepted are thus not easily replaceable with others for two reasons. First, the agent may have invested considerable time, emotion and energy into the option. This applies to religion: even if Catholicism and Paganism are equally valuable ways of life,

[22] See §3.6.4 on ways of acquiring religious belief. Of course, this argument for protecting this option would not apply to religious beliefs acquired by manipulation.

the autonomy of a person committed to one will be harmed if she is forced to 'swap' religions.[23]

Second, the fact that a certain option was chosen, endorsed, committed or accepted by the agent means that thwarting this option thwarts, to some degree, her autonomy. Not all options are equal from the point of view of autonomy. The value of autonomy naturally implies that those options which are likelier to be endorsed by the agent are more valuable from the point of view of autonomy. As §3.1.2 noted, an option which one is highly unlikely to choose does not add to autonomy. Giving a person a wide range of options, calculated to be unattractive to the agent, is not a good way to ensure autonomy.[24] Similarly, the preservation of options which are endorsed by an agent is very important for her autonomy. Generally speaking, the greater the significance the agent attaches to an option, the greater its significance is for her autonomy. Those who are religious tend to attach great significance to their religious options,[25] which suggests that cutting off religious options is likely to harm autonomy overall. It is helpful to keep these features of religious options in mind when we discuss options in the context of religious autonomy.

[23] Raz (n 1) 411.

[24] The value of already-chosen options leads Raz to add to the conditions for adequacy of options: 'For most of the time the choice should not be dominated by the need to protect the life one has. A choice is dominated by that need if all options except one will make the continuation of the life one has rather unlikely.' Raz (n 1) 376.

[25] Some, like Paul Tillich, would even make this a definitional feature of religion: see Note, 'Towards a Constitutional Definition of Religion' (1977) 91 Harv L Rev 1056.

4.1.4 The possibility of exit from the PLS

As a natural preliminary question to the discussion that follows on the PLS's effect on religious options, it is important to consider whether the personal laws are presented as an option. It is also important to consider whether people can in fact choose to be governed by generally-applicable family laws instead of personal laws. Some supporters of the PLS argue that the limited movement that the PLS allows between personal law and the general family law alleviates other concerns one might have about the system's effect on autonomy.[26] However, as §2.4 pointed out, those subject to the PLS often do not, as a matter of law, have the option to switch to general family law or another personal law.[27] In addition, this section finds that even when general family laws is presented (as a matter of law) as an alternative to the personal laws, this is not sufficient to guarantee that individuals, in fact, have a choice between the two.

The fact that there is a legal right of exit from a personal law group does not guarantee that remaining in the group is voluntary,[28] especially because of the high costs associated with such an exit.[29] In order to properly appreciate these costs, let us consider the process by which an individual decides between personal law and general family law under the PLS (assuming that there are no legal obstacles to this choice).[30] Stanley Benn

[26] Catharine A Mackinnon, 'Sex Equality under the Constitution of India: Problems, Prospects and "Personal Laws"' (2006) 4 ICON 181; JA Redding, 'Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law' (2006) 4 Nw U J Hum Rts 436.

[27] ibid.

[28] Leslie Green, 'Rights of Exit' (1998) 4 Legal Theory 165.

[29] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001) 150–52.

provides the following illustration of how the presence of another person alters our experience of a situation:

> if C knows that A is listening [to his conversation with D], A's intrusion alters C's consciousness of himself, and his experiences relation to his world. Formerly self-forgetful, perhaps, he may now be conscious of his opinions as candidates for A's approval or contempt. But even without self-consciousness of this kind, his immediate enterprise – the conversation with D – may be changed for him merely by the fact of A's presence… what is at issue is the change in the way C apprehends his own performance.[31]

This description suggests an important obstacle to autonomous decision-making – pressure to conform. People sometimes have to make decisions on matters around which there tends to be fairly intense pressure to do and think as most other people are doing and thinking, especially within a community.[32] Religion is generally one of those matters, at least in India. People are therefore unlikely to be able to make autonomous decisions about religious matters if they are subject to public scrutiny and pressure to conform.

As for the choice between personal law and general family law, in many communities in India, if an individual chooses general family law, this will be interpreted

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[30] Although we know that there are in fact such obstacles – §2.4 and Appendix B.

[31] Stanley Benn, 'Privacy' in JR Pennock and JW Chapman (eds), *Privacy* (Atherton Press 1971) 9–10.

[32] Of course, this claim is not likely to be true of all communities.

as a denunciation or rejection of the community.[33] Other members of these communities are likely to react negatively to such a choice. Specifically, it is likely that they will think less of a member who chooses the secular law, try to convince her not to make this choice, and at least in some cases threaten her with some degree of ostracism.[34]

It is difficult to provide further evidence of this claim, because the PLS as it functions at present often does not allow a choice between generally-applicable family law and personal law, and even when it does, people are often unaware of the existence of an option apart from the personal law.[35] However, the very low levels of usage of the Special Marriage Act 1954[36] fit with, and may be partly explained by, pressure to conform to personal law. Moreover, anecdotal evidence, including the much-discussed reaction of one community to Shah Bano, a woman who claimed maintenance from her husband under general family law when she was also governed by Muslim personal law,[37] supports this claim:

[33] For the possibility that 'exit' is an indication of dissatisfaction with an association or organisation, see Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

[34] Farida Shaheed, 'Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws' (1994) 19 Signs 997, 1004; Spinner-Halev (n 131). Flavia Agnes, 'The Hidden Agenda beneath the Rhetoric of Women's Rights' in M Dutta, F Agnes and N Adarkar (eds), *The Nation, the State, and Indian Identity* (Popular Prakashan 1996) 84 writes: 'The argument against an optional code would be that a large majority of women do not have a choice and they will be excluded from the application of this act.'

[35] Flavia Agnes, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP 2011) 92.

[36] §2.3.

[37] *Mohammad Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945.

> In her native Indore, the 75-year old Shah Bano was denounced by conservatives as an infidel; demonstrations were held outside her house and neighbours were asked to ostracise her. On 15 November Shah Bano succumbed to the pressure, affixing her thumb impression to a statement saying that she disavowed the Supreme Court verdict, that she would donate the maintenance money to charity and that she opposed any judicial interference in Muslim personal law.[38]

Another commentator recounts how Shah Bano was forced to state '(in a pitiful statement signed with her thumbprint) that she now understands that her salvation in the next world depends on her not pressing her demand for maintenance'.[39]

It might also be instructive to look at a situation in another jurisdiction which was faced with some of the issues examined here. In a report considering the question of what Ontario ought to do about religious arbitration (discussed in the Introduction to this thesis and in §7.5), the Women's Legal Education and Action Fund (LEAF) made this statement:

> LEAF is concerned that arbitration may not be chosen freely in many circumstances. For some women there may be very strong pressures based on culture and/or religion, or fear of social exclusion. These issues may be very real in faith-based communities, where some women may be called a bad adherent to a particular faith or even an apostate if they do not comply with arbitration. Such

[38] Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2007) 581.

[39] Nussbaum (n 15) 45.

> condemnation would leave such women very alone, shunned in their communities or even their houses of worship, and would only compound feelings of alienation created by a family break-up. In addition, there are many women whose economic lives depend on a close association with their faith-based community or cultural group… For other women there may be fear of violence…*When these conditions are present it is not accurate or reasonable to suggest that arbitration is being chosen freely.*[40]

There is some evidence that women and other vulnerable groups in India live in circumstances similar to those described by LEAF.[41] All of this suggests that these vulnerable persons face a great deal of pressure to choose the personal law over the general family law and that, if they defy this pressure, they often face denunciation and ostracism. There is, in other words, reason to think that this pressure is *coercive* and that exit from the personal law is effectively not an option for many people.[42]

We think of a threat as coercive when the threat is to bring about such a consequence that there is a reason of great weight (for the one who is threatened) to avoid the consequence.[43] One commonly-accepted test for whether a threat is coercive, therefore, is to ask whether the actor would have been justified or excused by the fact that

[40] M Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney-General, Ontario 2004) 50–51 (emphasis added).

[41] Ministry of Education and Social Welfare *Towards Equality: Report of the Committee on the Status of Women in India* (Government of India 1974); GH Forbes, *Women in Modern India*, (CUP 1996) 223-254.

[42] For the proposition that coercive threats invade autonomy, see Raz (n 1) 148–56.

[43] For a more complete definition, ibid 149.

the threat was made, had the threat been successful.[44] Raz's definition of a 'personal need' helps explain why the women and other vulnerable people described above are under coercive pressure. Personal needs are 'the conditions necessary to enable a person to have the life he or she has or has set upon … Personal needs are not necessarily the needs of survival. They are more like the needs for having a worthwhile life'.[45] It is difficult to dispute that social bonds are an important personal need. Social bonds are often indispensable to those who are attached by them. Religious communities, at least in India, are often a major (or sometimes a primary) setting in which social bonding takes place; families tend to share a religion and religious people tend to know and form bonds with people of the same religion. Religious schools, churches, community service activities all make it likely that people could find many of their social needs met by their religious communities.[46] Under these conditions, acceptance by, and continued membership in, one's religious community[47] can constitute an important personal need.

Thus women and other vulnerable persons living under the PLS may *sometimes*, on the face of the law, have a choice between general family law and personal law. However, the exercise of this power to choose in favour of the general family law appears to attract adverse consequences for them. In particular, it harms a personal need of great importance – their social bonds. The preservation of their social bonds is clearly a reason of great weight for them to select the personal law, even when formally offered an alternative by the state. The community's behaviour in these circumstances amounts to

[44] ibid 151–52.

[45] ibid 152.

[46] At least in societies where religion is relevant.

[47] §5.1.

coercive pressure, which makes autonomous decision-making impossible.[48] The fact that these obstacles to autonomous decision-making come from religious or social communities rather than the state does not render them less coercive. As Mill reminds us in *On Liberty*, 'the moral coercion of public opinion' is also a means of 'compulsion and control' of the individual by society.[49] Since many of these vulnerable persons effectively have no choice between general family law and personal law, the personal laws cannot be accurately described as an 'option' for them.

4.2 DOES THE PLS INTERFERE WITH THE OPTION TO PRACTICE RELIGION OR THE OPTION TO NOT PRACTICE RELIGION?

4.2.1 Interfering with the option of practicing one's religion: barriers to practice

The PLS does not affect religious profession; those subject to the personal laws can profess any religion or none.[50] However, although this is not usually noted in the literature, the PLS interferes with religious practice. It obliges people to organise their lives according to *certain* religious norms; this means that those who endorse *other* religious norms (i.e. the norms of other religions as well as different interpretations of the religious norms applied to them) are prevented from organising their lives in accordance with the latter norms. To have religious autonomy, a person has to have the option to express, through the variety of forms that human expression can take, all attitudes, values

[48] The threat does not need to be explicit in these sorts of cases. Implied threats can be just as coercive.

[49] Mill (n 11) 13.

[50] §2.7.

and opinions on religious matters and the freedom to engage in rituals, rites, ceremonies, forms of worship or other religious acts.[51] In order to guide our thinking about how the system affects this option, those subject to personal laws will be divided into groups.[52]

P1. First, there are those who self-identify in the same way that the PLS identifies them (i.e. Muslim, Hindu, Parsi etc) and whose religious beliefs coincide completely with those of the personal law that is applied to them. The population of this group is likely to be small, as most personal laws have been established through a historical process that has changed them in ways that make it unlikely that anyone would have religious views that coincide exactly with them.[53]

P2. Second, there are those who self-identify in the same way that the PLS identifies them but whose religious beliefs differ from those of the personal law that applies to their personal law group.[54]

P3. Third, there are those whose religious beliefs coincide with those of a personal law, but who do not identify with the personal law group that the PLS assigns

[51] For the relationship of freedom to autonomy more generally, see Raz (n 1) 401–430; Jeremy Waldron, 'Autonomy and Perfectionism in Raz's *The Morality of Freedom*' (1989) 62 S Cal L Rev 1097; David Miller (ed), *The Liberty Reader* (Edinburgh University Press 2006).

[52] This grouping is illustrative rather than exhaustive.

[53] §2.5.

[54] This is not to exclude the possibility that some of P2 might want this personal law applied to them, even if their religious beliefs diverge from the personal law.

them to. This is more likely than it sounds, especially given the wide net cast by the category of 'Hindu'.[55]

P4. Finally, this category consists of those who do not self-identify in the same way that the PLS identifies them, and whose religious beliefs do not coincide with that of the personal law applied to them. This too is possible because renouncing Hinduism is *not* enough to avoid being regarded as a Hindu for the purpose of the personal law.[56] So a secular humanist may well find Hindu law applied to her.

More will be said about cases like P3 in another chapter[57] and more about both P1 and P3 below. But cases like P2 and P4 seem immediately problematic. One problem with the PLS is that when (at least some) people subject to the PLS do the things that most people do during their life-times – get married, divorced, inherit property, manage property, make gifts, create trusts, enter into contracts, bequeath property, and so on – they sometimes *have* to do them (if they are to do them at all) through the religious forms prescribed by their personal law.[58] These represent important opportunities for religious

[55] Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956 s 2; Hindu Adoptions and Maintenance Act 1956 s 2.

[56] ibid.

[57] §6.1.2.2.

[58] As an example, consider the fact that the testamentary power of Muslims (to whom the general law, the Indian Succession Act 1925, is unavailable unless they are married under the Special Marriage Act 1954) is limited by quantum and has restrictions on bequests to heirs (AAA Fyzee and T Mahmood, *Outlines of Muhammadan Law* (5th edn, OUP 2008) 289–300). Consider as well as the limitations on marriages that can be contracted under the Special Marriage Act 1954 s 4(a). Similarly, although it is (sometimes) possible for a Hindu born into a family that follows the coparcenary system to ask for a partition, the norms of Hindu personal law may govern such a person from birth until the partition request. Such a partition is itself effected according to Hindu personal law (see DF Mulla and SA Desai, *Principles of Hindu Law* (17th edn, Butterworths India 2000) 493–505). Further, a marriage under a personal law can only be governed (and therefore ended) by its norms, which can be problematic: first, because it is not unusual for people in India to marry so young that they cannot be assumed to have freely chosen the norms of personal law and second, because of the problems that being 'bound' in this way can pose for free choice (see §4.2.3.2).

practice. Under the PLS, not only is this opportunity lost, but the person may also have to do something that is fundamentally inconsistent with her religious beliefs. She will thus be forced to act according to religious beliefs that are not her own.

Consider the case of 'H', who was born to an orthodox Hindu family but renounces their understanding of Hinduism. His understanding of Hinduism is such that he considers many of his parents' beliefs superstitious and false. Such a person is likely to have aspects of his life governed by orthodox Hindu norms despite his views. To begin with, rights and liabilities associated with the coparcenary of a Hindu joint family accrue to him as a foetus.[59] If he were to try to exit the system, he would probably face heavy exit costs.[60] When he marries, he chooses to marry under the Special Marriage Act 1954, as he knows that usually when parties marry or register their marriage under this Act, they are governed by the Indian Succession Act 1925 (which he considers less pervaded by orthodox Hindu norms than Hindu personal law). However, he finds that, since he is marrying another Hindu, he continues to be governed by Hindu succession law. This means he has no choice but to be governed Hindu personal law in matters of succession.[61]

Consider another case. A person ('M') considers himself Muslim, but holds religious views that most Muslims would consider unorthodox. These views include

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Additionally, as elaborated below, the social pressure to conform to personal law means that people are often forced to act according to personal law.

[59] Hindu Succession Act 1956 s 20.

[60] See Appendix B, §2.4 and §4.1.4.

[61] Flavia Agnes, *Law and Gender Inequality*: *the Politics of Women's Rights in India* (OUP 1999) 98–99.

interpretations of Islamic doctrine to conform to the idea of the equality of the sexes.[62] He has a daughter ('D') and a son ('S'). M tries his best both to live his life and to raise his children according to his religious beliefs.[63] He gives his daughter all the advantages of education that he gives his son. He hopes that this will serve as an example to others, especially his children. Nevertheless, by Muslim personal law, M's testamentary powers are severely restricted and S will inherit twice as much from M as D will.[64]

Both M and H are unable to fully practice or realise their chosen religious options because of the personal laws which govern them. The law insists that they organise their lives according to certain ostensibly religious rules, which they disbelieve in and even find distasteful. This prevents them from living according to the religious norms that they would like to follow. By diminishing their ability to practice or realise in their chosen religious option, especially given the features of religious options noted in §4.1.3 above, the PLS diminishes their religious autonomy.

An objection might be raised to the argument so far. The objection is that most personal laws are voluntary, power-conferring rules. Power-conferring rules dictate how a person marries, makes a will, adopts, gives in adoption, etc, and they enable her to create

[62] Similar to the views described in §3.6.1.

[63] He did not marry under the Special Marriage Act 1954 because he married before he had developed any position at all on these matters. Also see §2.3 on why this act is not a realistic option.

[64] GC Venkata Subbarao, *Family Law in India: Hindu law, Mahomedan law, and Personal Law of Christians, Parsis, etc., including Law of Testamentary and Intestate Succession* (3rd edn, C Subbiah Chetty 1979) 400; P Diwan and P Diwan, *Muslim Law in Modern India* (8th edn, Allahabad Law Agency 2000) 218. It is true that he could probably transfer assets to D during his lifetime to make up for D's smaller inheritance, but this would not be a good substitute, for practical or symbolic reasons. Transferring assets during his lifetime would mean that A has to make do with less during his lifetime, which is not a consideration while making a will. Also people often use wills to express attitudes towards others. These expressions may be seen as special, perhaps because the deceased is seen as being disinterested.

new duties or modify old ones.[65] If the personal laws are all voluntary power-conferring rules, i.e. if they only *enable* individuals to create and change their legal duties, then, arguably, they should not be viewed as affecting autonomy or reducing options. After all, it is difficult to view them as constraints. Take the laws of marriage. The fact that the PLS allows Shias to contract *muta* (temporary) marriages does not affect the negative religious freedom[66] of those Shias who think their religion prohibits the practice. There is nothing, after all, stopping two or more people from celebrating a religious marriage even if the state does not legally recognise it. Neither the legal non-recognition of this marriage nor the legal recognition of other marriages infringes negative religious freedom. It does however raise other issues which will be dealt with in a subsequent chapter.[67]

It is important to emphasise first that not all personal laws are voluntary power-conferring rules. Many personal laws, notably rules relating to inheritance, the division of property[68] and maintenance payments, are not power-conferring but mandatory and duty-imposing. The objection considered in this section does not apply at all to these rules. It is therefore at best a partial objection to the argument outlined above. Moreover, even voluntary power-conferring rules in general, and the voluntary power-conferring personal laws in particular, can raise problems for religious autonomy by affecting options.

[65] HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1994) 81.

[66] Roughly, negative freedom is used here to mean the absence of non-natural (particularly human) constraints external to the agent.

[67] §6.1.

[68] Especially in a Hindu Undivided Family.

It is possible to affect religious autonomy by making the option of religious practice unviable to such an extent that it is effectively eliminated. Voluntary power-conferring rules can have this effect on the option of religious practice. For instance, power-conferring personal laws could effectively eliminate the option of P2 and P4 organising their lives according to their religious beliefs as opposed to the norms of the personal laws. Let us explore this problem raised by the PLS using a specific power-conferring rule as an example.

Consider again the case of M, described above.[69] The rule recognising wills is a power-conferring rule. While it is true that M can write out as many wills as he likes, it would be strange to count these as viable options for him. His purpose in making a will is to make arrangement for the disposal of his property after his death. The unrecognised wills do not further this purpose, unless it is assumed that at least some of his heirs are willing to accept less than the shares of his property that they are legally entitled to.[70] His heirs' failure to abide by the rules that confer rights of property – by for instance, taking more than their share of an inheritance – would leave them open to the penalties of criminal law.[71] In other words, the voluntary power-conferring personal law ('VPPL'), in this case, by providing legal recognition to one kind of arrangement, effectively removes

[69] M's religious beliefs require him to treat his daughter and son equally, but he is unable to because of his limited testamentary power.

[70] It is not completely impossible that they would be so willing, out of respect for M's wishes. But it is probably unsafe for M to depend on the magnanimity of these heirs to ensure that his property is disposed of as he would wish.

[71] See note 89.

the option of having any other kind of arrangement, including one based on his actual religious beliefs.[72]

But religious autonomy requires that a person have an adequate range of options in the religious sphere; it does not require that she have any particular option.[73] It might be argued that even if it is true that the VPPL eliminates some options, autonomy is not harmed as long as they are replaced by an equivalent range of options. That is, if without VPPL, a person would have had options A and B and if the VPPL replace A and B, with C and D, we cannot conclude from this that the person's religious autonomy is necessarily harmed. To come to such a conclusion, more has to be said.

As §4.1.3 above pointed out, in the kind of situation we are concerned with, religious options are often options which agents have already chosen, endorsed or accepted. They are options which the agent is likely to value highly. As the example of M shows, the VPPL sometimes replaces options that the agent values with those that she does not. When the VPPL stands in the way of the agent fully engaging in their chosen, endorsed or accepted religious options in this way, the VPPL diminishes autonomy. Moreover, it makes sense to talk of VPPL diminishing religious autonomy only by comparing them to our comparator regime in §4.1.2. It is safe to assume that the comparator regime would allow M the option of dividing his property (and organising his

[72] Jeremy Waldron, discussing Raz's concept of autonomy, explains how power-conferring rules relating to marriage make some unrecognised 'marriages' so unviable that they are no longer viable options: Waldron (n 51) 1149–52.

[73] Raz (n 1) 308–13, 344, 348–57, 391. Subject to the qualification in §4.1.3. Another response to this objection based on this qualification, not elaborated on here, is that M is already committed to some of the options available to him under the comparator regime.

life in general) according to his true religious beliefs.[74] His bequest is unobjectionable from an autonomy-perspective, so there is no reason for the comparator regime not to respect his choice. Thus the VPPL does not merely replace the range of options available for bequests under the comparator regime with an equivalent range of different options. Rather, by recognising a power-conferring testamentary rule based on *one* interpretation of religious doctrine, and which does not enforce completely the wishes of the deceased, the VPPL constricts his religious options.

The fact that at least some personal laws are power-conferring rules is not therefore a valid objection to the arguments against the PLS raised in this section. VPPLs do in fact diminish religious autonomy by eliminating some religious options. Religious autonomy is harmed especially when the options eliminated are important to the agent. The case of M is just one instance of how VPPL might make it so difficult for an agent to organise her life by any norms other than those of the personal law that it could harm the option of organising her life according to her own religious beliefs. The failure to conform to the power-conferring personal laws will lead, effectively, to the loss of property, marital status or familial status (as adoptive child or parent). Disregarding the rights that these rules bestow on others – by taking property that they inherited or by taking into custody a child not legally recognised as one's own – can lead to criminal penalties. By diminishing their ability to practice or realise in their chosen religious option, especially given the features of religious options noted in §4.1.3 above, the PLS diminishes their religious autonomy.

[74] As well as any other belief or value system.

At this stage, a final objection might be raised to the overall argument that the PLS affects religious autonomy by affecting the option of practising religion. This objection might lie in the symmetry between the application of personal law and the application by law of other political ideals or ideologies such as secularism or socialism. India, for instance, claims to be a 'socialist, secular, democratic, republic'[75] committed to equality of the sexes.[76] Would religious autonomy not be compromised by laws based on these ideals in the same way that it is compromised by the personal laws? Would anti-discrimination legislation, or a law criminalising domestic violence, not have the same effect on those who want to maintain traditional practices such as untouchability or unequal gender relations[77] for religious reasons, as the personal laws do on those who deviate from the state-endorsed interpretation of religion (like P2[78] and P4[79])? In other words, would our worry about the effect of the personal laws on religious autonomy not apply equally to these other laws – perhaps almost all laws?[80] This is not to say that our claims are false, simply that they are concerns not just about the PLS, but the authority of the state, or law itself.

[75] Constitution of India 1950, the Preamble.

[76] ibid arts 14, 15 and 16.

[77] Which, in their view, may need to be reinforced by keeping the option of violence open.

[78] P2 consists of those who self-identify in the same way that the personal law identifies them but whose religious beliefs differ from those of the personal law.

[79] P4 consists of those who neither self-identify in the same way that the personal laws identify them, nor agree with the religious beliefs of the personal law applied to them.

[80] That is, perhaps our concern boils down to the anarchist concern for the effect of authority on autonomy? See Robert Paul Wolff, *In Defense of Anarchism* (Harper & Row 1970).

Such objections overlook the fact that the reasons states have anti-discrimination laws and laws criminalising domestic violence – reasons that appeal to justice, well-being or harm – often mean that they are justified even if they affect religious autonomy in the same way that the personal laws do. The personal laws cannot plausibly be justified on comparable grounds.[81] Further, as explained in §4.1.2 above, the comparator legal regime for this thesis respects religious autonomy. Both its duty-imposing, as well as power-conferring rules would be designed to avoid the harms to religious autonomy described in sections 4.2.1, 4.2.2 and 4.2.4. Without denying the possibility that the criticisms made in this chapter might apply to legal regimes other than the PLS,[82] they do not apply to the comparator regime used (and thus the argument made) in this thesis.

The arguments in this section apply mainly to P2 and P4 in our scheme above. But is the option of religious practice, of P1 and P3 affected by the PLS? The next section outlines one way in which they are.

[81] There are rather strong reasons to think that the content of some of the personal laws are deeply objectionable. Our overview of its features in Chapter Two and Appendix A indicate some of these: they often discriminate on the grounds of both religion and gender, they show inadequate concern for the welfare of women and children, they are unjust in the way they distribute resources, they show inadequate respect for individual liberty and so on. Zoya Hasan notes: 'Two recent reports, *Voice of the Voiceless* and *Muslim Women Speak*, detail innumerable instances of distress, which reveal that in most situations personal law undermines the rights of women, especially poor women caught in the intersection of class and community': Z Hasan, 'Governance and Reform of Personal Laws in India' in I Jaising (ed), *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited 2005) 362.

[82] For some examples of other regimes, see §8.

4.2.2 Interfering with the option of practicing one's religion: transparency of motivations

A common worry about laws based on religion is their treatment of those who do not subscribe to that religion. It might appear unfair, intolerant, disrespectful and invasive of autonomy that those who do not subscribe to a religion are obliged by law to conform to it. To a great extent, these worries apply to the personal laws; as the previous section noted, there is almost always a mismatch between the content of the personal laws and the religious beliefs of those to whom they apply. This section however concentrates on a different worry about the personal laws, a worry relating to how they interfere with the religious practice of those few whose religious beliefs coincide with the personal laws – P1 and P3 in our scheme.[83]

Consider an idea that is familiar from Locke:

> Whatever profession we make, to whatever outward worship we conform, *if we are not fully satisfied in our own mind that the one is true and the other well pleasing unto God,* such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation. For in this manner, instead of expiating other sins by the exercise of religion, I say, in offering thus unto God Almighty *such a worship* as we esteem to be displeasing unto Him, we add unto

[83] It is unlikely that there is anyone whose beliefs coincide completely, but there might be those whose beliefs are roughly similar to those in the laws.

> the number of our other sins those also of hypocrisy[84] and contempt of His Divine Majesty.[85]

Consider also a similar idea from the Virginia Act for Establishing Religious Freedom 1786:

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness.

Some, probably many, religious people want to perform actions not out of *any* motivation, but out of religiously-acceptable motivations (such as a love for, or desire to please, a deity; a sense of religious duty; or a love for humanity). If a religious person performs a religious act for religiously unacceptable motivations, she might regard her act as void of religious significance or effect. She might even think it better not to perform the act at all than to perform it out of unacceptable motivations. A religious person might even regard an act, performed without the right motivations, as not being the same act as one performed with the right motivations. Does someone who assumes the posture of prayer really pray if he does it out of improper motives? Does an atheist who participates in mass really 'receive communion'? Does the public-relations-minded philanthropist really perform acts of charity?

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[84] The case of hypocrisy is not identical to the concern relating to transparency outlined below in this section.The hypocrite is denounced because he lacks the religious motivation, and performs religious acts out of unacceptable non-religious motivations. Ours is a case where the agent could have acted on religious motivations, i.e. he could have been motoivated by religion. He is just unsure whether he acted on that motivation. See David Moberg, 'Holy Masquerade: Hypocrisy in Religion' (1987) 29 Review of Religious Research 3–24.

[85] John Locke, *A Letter Concerning Toleration* (William Popple tr., 1689) (emphasis added).

This might all seem artificial. Why would you perform a religious act out of what you yourself recognise as an undesirable motivation? As frustrating as it might seem, this is neither uncommon nor artificial. Imagine that Anna is a devout Christian who goes to church most Sundays. But there is the occasional Sunday when she decides to stay at home and rest instead. She makes the decision, to go or not go, on the morning of each Sunday. On one particular Sunday, Anna's visiting, rather judgemental, grandmother is at breakfast before Anna has even thought about the possibility of going to church. On seeing her grandmother, Anna recognises that if she does not go to church, she will judged adversely by her grandmother. So she decides, *motivated by a desire to avoid her grandmother's adverse judgement*, that she will go to church. The point to notice is Anna might well have acted out of religious motivations had the non-religious ones not been brought to her attention first.

There is another point to be made about Anna's situation. On the second Sunday of her grandmother's visit, Anna might decide to go to church and be unclear about why she does so. The knowledge of the unpleasant grandmother-related consequences of not going to church has been lurking in her mind. But she also has genuine religious faith and sees church-going as an important part of her religion. This is hardly an exceptional story: faced with the question 'why did you act as you acted', few can provide the main motivation, let alone a complete set of motivations for their action.

All of this suggests:

1. at least some people want not only to perform religious acts, but also to perform these acts at least partly out of a certain motivation (or, they at least do not want to perform these acts purely out of an unacceptable motivation) and they want to *know* that they performed the act at least partly out of the desired motivation.[86]
2. If they do not act at least partly out of the motivation they want to act on, or they act purely out of the motivation they do not want to act on, they might consider themselves as having failed in some way.
3. There are circumstances such that when there is more than one putative motivation for acting, it is not clear to the agent which of these, if any, she acted on. In particular, she cannot be sure that she acted (at least partly) on the desired motivation.

3 is referred to as the *opaqueness problem*. 1, 2 and 3 imply:

4. In such circumstances, removing or not providing the people in 1, 2 and 3 with the alternative, undesirable motivation is a way to allow them to conform better to the desire expressed in 1.

Returning once again to the PLS, assume that there is a religious person ('Adam') such that his religious beliefs match exactly the religious norms enforced by the law. He corresponds to the groups identified as P1 and P3. The discussion above suggests that there are problems even with the application of the personal laws to people like Adam.[87]

[86] Rather than, for instance, out of a desire to escape punishment from the state.

[87] This will remain true even if Adam consented to the application.

The personal laws, and any other law enforcing religious norms, give Adam the undesirable additional motivation for action. There are strong incentives to conform to the personal law. It is true that none are like criminal laws such that their breach leads to imprisonment or a fine. Some of the personal laws are power-conferring rules,[88] rules about the validity of marriages, wills, adoptions; others confer rights, for example, of inheritance or alimony. However, failure to conform to the power-conferring personal laws will lead, effectively, to the loss of property, marital status or familial status (as adoptive child or parent). Moreover, failure to abide by the rules that confer rights of property – by for instance, taking more than one's share of an inheritance – would leave one open to the penalties of criminal law.[89]

Like Anna's grandmother, personal laws create two dangers for Adam. First, there is the danger that he might perform religious acts purely with a view to avoiding the burdens that the law imposes on him if he fails to conform to it. This is a danger because Adam considers performing religious acts purely on this motive to be wrong, or at the very least void. If the first danger seems unlikely, the second danger is that even if Adam performs a religious act at least partly out of the religiously-acceptable motive, he might become confused about what his motivation was, leading to him again considering his action void or wrong.

It might seem that, so far, the worries amount to concern for certain psychological responses that religious people might have to acts performed with inappropriate motivation. But these worries are also important from the point of view of religious

[88] §4.2.1.

[89] Indian Penal Code 1860, s 403 and s 378.

autonomy. As argued earlier, religious practice is an important aspect of engaging with a religious option. Given the importance for successful religious practice of acting at least partly out of the right motivation, and of knowing that one acted at least partly out of the right motivation, the opaqueness problem interferes with the agent option of practicing her religion. This argument is similar to Melvin Eisenberg's argument against the enforcement of donative promises:

> Under an enforceability regime, *it could never be clear to the promisee*, or even to the promisor, *whether a donative promise that was made in a spirit of love, friendship, affection,* or the like, was also *performed for those reasons,* or instead was performed to discharge a legal obligation or avoid a lawsuit. Accordingly, gifts made pursuant to simple, affective donative promises would be seriously impoverished, because at the point of the transfer, *the promisor's motives would invariably be mixed*.[90]

An objection to this argument this lies in the characterisation of what religious people require of themselves. It is not true, the objection might go, that all religious people want to perform religious acts with certain motivations. There are traditions within which religious duties consist exclusively in the performance of religious acts. The motivation of the agent who performs them is irrelevant. Perhaps there are also traditions which require agents to *try* to have certain religiously-mandated attitudes, but do not blame them if they, having tried, fail to have the attitude. Those within these traditions do not face the same dangers from the personal laws that are described above.

[90] Melvin Eisenberg, 'The World of Contract and the World of Gift' (1997) 85 Cal L Rev 821, 848 (emphasis added).

One could respond to this objection in the way that some of the New Testament responds to the supposed law-focused religious practice of the Pharisees and say that such practices of religion are not valuable. This would be a mistake; such religious practices can be an important part of an autonomously religious life. Consider this account of the value of practice in a school of Judaism:

> This truly was a religion of doing rather than believing…The 613 commandments of the Law brought God into the minutiae of daily life, whether one was eating, drinking, cooking, working or making love. No activity, no matter how mundane, was without religious potential. Each was what Christians called a sacrament: it was an opportunity to encounter the divine moment by moment. Every time a Jew observed one of the commandments (*mitzvoth*), he or she was turning towards God….[91]

> Religion is not about accepting twenty impossible propositions before breakfast, but about doing things that change you. It is a moral aesthetic, *an ethical alchemy. If you behave in a certain way, you will be transformed.* The myths and laws of religion are not true because they conform to some metaphysical, scientific or historical reality but because they are life-enhancing. They tell you how human nature functions, but you will not discover their truth unless you apply these myths and doctrines to your own life and put them into practice.[92]

[91] Karen Armstrong, *The Spiral Staircase: My Climb Out Of Darkness* (Random House 2004) 274–5 (emphasis added).

[92] ibid 305 (emphasis added).

A similar argument has been made about Hinduism.[93] It must be acknowledged therefore that there might be religious traditions that will be much less affected by the opaqueness problem than others and that this argument must be qualified accordingly. This is not a place for a tally of the number of religious traditions to which motivations matter and of the number to which they do not. Ignoring the latter would open one up to the charge of colouring all religious traditions with a Protestant world-view. Despite the existence of traditions in which motivations matter *less*, it is important to remember, firstly, that there are still a very significant number for which motivations matter a great deal. Secondly, even in the traditions in which they matter less, it is rare that they do not matter at all. In the extract above for instance, while the practice is valuable, this is because it *transforms* practitioners – possibly into the kind of persons who act rightly and on the right motivations.

But there is also a more difficult objection. Criminal law and the policeman on the corner provide us with a reason not to kill. This is a motivation in addition to our moral duty not to kill. The considerations outlined above relating to the personal laws would surely apply equally, if not more strongly, to criminal law. It was argued that the PLS's effects on Adam or Anna's certainty about their motivation for their religious action harms their religious autonomy. But all moral agents, whether they are religious or not, might be uncertain of their motivation because of criminal law. Did they refrain from killing, maiming, raping, stealing because of the law or because of their sense of morality? This uncertainly might well lead to a failure of their moral goals: to act or

[93] J Spinner-Halev, 'Hinduism, Christianity, and Liberal Religious Toleration' (2005) 33 Pol Theory 28, 29.

refrain from acting[94] out of a sense of right and wrong, out of compassion, sympathy or kindness, and not out of fear of criminal sanction. This, one might argue, is surely as harmful for a person's autonomy in the moral sphere[95] as Anna or Adam's failure is harmful for their religious autonomy. Yet, and here is the objection, this argument is rarely made in support of the abolition of criminal law.

This objection might be met by the fact that there are countervailing reasons for having criminal law – for instance, the prevention of harm to others – that do not apply to the personal laws.[96] Some doubt remains. If the opaqueness problem applies equally to the criminal law and the personal law, one would expect that we would at least regret having criminal law, for this reason. While recognising that criminal law is necessary, we would expect to think it unfortunate that moral people, given an additional reason to refrain from some immoral acts, have their autonomy diminished by the existence of criminal law. But this seems somewhat forced.

The reason why it appears forced is not, however, that the opaqueness problem does not exist. It is because the sort of moral persons we are concerned about do not contemplate performing the kinds of criminal acts we have been talking of, namely the criminal acts which are commonly thought to coincide with moral wrongs (which criminal lawyers may refer to as *mala in se* as opposed to *mala prohibita*). While it is true

[94] Killing, maiming, etc.

[95] This is not described as moral autonomy here to avoid confusion with different uses of that phrase: Jeremy Waldron, 'Moral Autonomy and Personal Autonomy' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (CUP 2005) 307.

[96] There are of course regimes of non-personal/secular laws that serve the functions that the personal laws do (in relation to managing property, etc) without creating the problem of opaqueness. However, some might argue that there are reasons relating to peace and communal harmony to maintain the PLS.

that moral persons have at least two reasons not to commit these criminal acts, neither of these reasons play a part in their practical reasoning. Under normal circumstances, they do not wake up every morning and consciously deliberate about whether or not to kill or maim on that day. They might very occasionally face conditions under which they do consider this question. Someone might mistake them for an assassin and offer them money to kill someone. They might then become victims of the opaqueness problem if they could not be sure if they refused for moral or prudential reasons.

Barring such unusual circumstances, most minimally-moral people do not therefore face the opaqueness problem as a result of criminal law. It is misleading to compare Anna or Adam's religious acts to acts such as 'refraining from murder' or 'refraining from rape'. The performance of these latter acts is given. The option of killing is not part of a minimally-moral person's moral landscape. A more helpful comparison is with supererogatory acts: charity, kindness to children, helpfulness to neighbours or concern for the disadvantaged. These are more typical of the acts that would make up the moral goals of a moral person. The law *generally* does not provide an additional, opaqueness-inducing reason to perform these acts.

There are exceptions, such as Good Samaritan laws and some principles of tort law. Lord Atkin's duty of care was inspired by the Christian exhortation to 'love thy neighbour'.[97] Contract law might also give people an additional prudential reason to keep their promises (which would be their moral duty in any case). The opaqueness problem might, it is true, apply to these legal rules as well as the personal laws. It is important, however, to keep two qualifications in mind. First, the opaqueness problem is not

[97] *Donoghue v Stevenson* [1932] AC 562, 580.

significant in every sphere of human action. For instance, while Eisenberg, among others, notes that the opaqueness problem is a reason not to enforce donative promises, he equally recognises that 'the world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices.'[98] This being the case, if an agent's motivations for supplying a client, with whom she has no personal relationship, on time are not entirely clear to her, this is less of a problem than if she were giving a gift to her parents or offering an act of worship to a deity. Second, in some circumstances where the opaqueness problem exists, it is sometimes better that the agent do the act in question with the wrong motivation than not do it at all, even if it would be *best* if he did it with the right motivations. For instance, it may be best to not injure your neighbour out of the Christian duty to love her, but taking care to not injure them out of any motivation is better than not taking care to injure them. This is all the more true in the case of the injunctions of criminal law, and to some extent tort law.

But the same cannot be said of the religious acts contained in the personal laws. It is difficult to see how following the religious rules that they contain, *on any motivation*, is better than not following them at all. As discussed above, although there are exceptions,[99] for most people the motivation in performing these religious acts *matters*. Moreover, other areas of Indian law consist of secular, uniform rules, which do not cause the opaqueness problem.[100] There is no necessity for the *personal law*. Their enforcement, therefore, cannot be justified on the same basis as criminal and tort law.

[98] Eisenberg (n 90) 847. For a similar approach to the distinction between contracts and promises, see generally D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003).

[99] Text to notes 90 to 93.

[100] At least, not to the same extent.

A final objection, and perhaps the most important one, to consider is that the opaqueness problem is so pervasive in religious practice, at least in the context of India, that the PLS's contribution to it is negligible. Anna's grandmother-related motivation is easily generalisable to pressure within a religious community to conform to the prevailing religious orthodoxy. This kind of social pressure, rather than the PLS, might be primarily blamed for the opaqueness problem. One reply to this objection is that pressure from a religious community is unlikely to have the strength that pressure to conform to, or not disobey, the personal laws has. As §4.2.1 above notes, failure to confirm to the personal law can lead to loss of property rights, parental rights and even to criminal sanctions. Motivations based on the personal laws are therefore likely to feature more prominently in an agent's deliberations than pressure from a religious community. They are therefore likelier to cause the opaqueness problem. Another reply to this objection might be that while this social pressure is widespread, it is not pervasive. There are probably religious individuals who are not subject to pressure to conform from a religious community. This could be, for instance, because of the relative anonymity of urban life, even in India, described in our example involving Ravi in §5.1.1. It could also be because the individual is not associated with a religious community, or because the individual's social group respects individual autonomy in religious matters and therefore does not exert much pressure to conform. A final reply to this objection is that pressure on the individual from the PLS and pressure from religious communities do not simply run separately and parallel to each other. Rather, as this thesis argues elsewhere,[101] the Indian PLS, like similar systems in other jurisdictions, crystallises traditions and maintains the power of

[101] §6.2.3.

sections of the religious community, who are often opposed to re-interpretation.[102] The PLS could thus encourage religious communities to exert pressure on individuals to conform.

To take stock of the argument so far: having certain motivations is regarded by many as necessary for the successful performance of religious acts. The PLS, in some situations, makes the motivations behind such acts opaque, affecting agents' ability to successfully practice their religion and ultimately their religious autonomy.

4.2.3 Enhancing the option of practising one's religion?

The arguments in sections 4.2.1 and 4.2.2 discuss how the PLS *harms* or diminishes the option of religious practice.[103] But as we saw earlier, there are certainly those who believe that personal laws could be said to enhance or form part of this important option of religious practice.[104] If they are right, this would constitute an important defence of the PLS based on religious autonomy. So this section explores the possibility that having the option of personal law, in addition to general family law enhances the option of religious practice, and thus the religious autonomy of some of those subject to the PLS.

An obvious counterargument to this claim might present itself based on §4.1.4, §2.2 and Appendix B. The personal laws are not usually presented as an *option*. Agents

[102] Ayelet Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 J Pol Phil 285.

[103] And the many other options – e.g. to practice different religions – that this broad option represents.

[104] Text and nn 51–55 of the Introduction to this thesis.

often do not get a choice as to whether they are governed by personal law or not; they often do not get a choice as to which personal law they are governed by. Exit and movement are prevented by legal obstacles as well as community pressure to conform to the personal law. The defence of the PLS as part of the option of religious practice, is problematic for these reasons. However, since there is the (relatively small) possibility that the personal laws are genuinely an option for some, this section will consider the options-based defence of the PLS. It is important to consider this defence because some proposals for reform of the PLS argue that the personal laws be maintained as an option along with a general code of family law.[105]

The options-based defence of the PLS will be considered in three stages. The first stage considers whether the option of personal law, qua an option, can be said to enhance the option of religious practice and, more generally, religious autonomy. The second stage considers whether conceiving of the choice of personal law as a promise suggests that the PLS enhances the option of religious practice. The third considers whether the symbolic value of being governed by the personal laws enhances the option of religious practice. To re-iterate, in the spirit of exploring this defence of the PLS, each of the three sections below assume that the personal laws are optional even though they are not for many people, as discussed earlier in § 4.1.4.

[105] §7.4.

4.2.3.1 The option of personal law qua *an option*

Section 4.1.1 argued, that assuming certain conditions were met, additional options generally enhanced autonomy. Given the potential significance of the personal laws for religious practice, one might then ask why the addition of the *option* of personal law does not enhance religious autonomy. One immediate answer might be that the personal laws harm religious autonomy of many of those subject to them. First, as will be argued in Chapter Six, the norms contained in the personal laws often undermine the self-respect necessary for religious autonomy. Second, as argued in §4.2.1 and §4.2.2 the personal laws interfere with the option of religious practice in many ways. Third, the personal laws affect some common preconditions of personal autonomy and religious autonomy by showing inadequate concern for the welfare of women and children and leaving them with inadequate resources for autonomy. By giving women weaker rights to inheritance and weak powers of marriage, divorce, adoption and guardianship, most personal laws leave them with fewer options and less power over their own lives. Without such rights, women are denied valuable options including the many options that lacking money closes.[106]

As indicated in §4.1.1 above, adding an autonomy-reducing option to a set of options is unlikely to enhance autonomy overall. To take an extreme example, it is difficult to justify adding the option of complete slavery to a set of options in the name of autonomy. Any autonomy-gain from having the additional option is surely outweighed by the danger to autonomy posed by the possibility that the agent will choose the severely

[106] Hasan (n 81) 362; Gerald Cohen, 'Freedom and Money' (2001) *Revista Argentinade Teoría Jurídica*.This might seem to be about personal autonomy, but it is also about religious autonomy.

autonomy-reducing option.[107] This is true, *mutatis mutandis*, of adding to a set of options an option which reduces religious autonomy.

But let us consider the following (sometimes overlapping) groups of people:

1. those whose religious autonomy the personal laws does not reduce;
2. those whose religious autonomy the personal laws does reduce;
3. those who are faced with coercive pressure discussed in §4.1.4 above to select the personal laws to govern them;
4. those who are *not* faced with coercive pressure to select the personal laws to govern them;
5. those who prefer to be governed by personal law (e.g. as part of their religious practice); and
6. those who prefer to be governed by general family law .[108]

Even assuming that it is true that the personal laws harm the religious autonomy of some, a defender of the system might note that this does not settle the question of whether the PLS harms religious autonomy. There might still be some who, regardless of whether they choose personal or general family law, will not be adversely affected by the personal laws, and may benefit from the fact that they have a choice between the two types of law. Despite what was said earlier in §4.1.4 about the social pressure to choose religious law,

[107] Raz (n 1) 380–1.

[108] To remove any doubt that there are people who want to be governed by secular law, Hasan (n 81) 357 shows that since Muslim women use the general Code of Criminal Procedure 1973 more than they use the Muslim Women's (Protection of Rights on Divorce) Act 1986, there is reason to think that they want to be governed by secular law.

some people may be able to reject the personal laws, as they do not face such coercive pressure. These could include some of those for whom the personal laws are religious-autonomy-reducing. As explained in §3.1.2 and §4.1.1, to give people this opportunity to *reject* the personal laws is to give them an opportunity to exercise their autonomy.[109] So, given the potential value to some of having an option, including the value of rejecting it, why should the interests of some[110] be privileged over those of others?[111] The answer lies in the difference between the natures of the personal laws and the general family laws – particularly the comparator regime sketched in §4.1.2.

Under a system of general family law which showed respect for religious autonomy, which we have taken as our comparator regime, those who are religious would not, by and large, be prevented from performing most of their religious duties. For instance, the comparator regime would not prevent the performance of religious duties not to bequeath more than a certain percentage of property to people other than listed heirs, or to make payments on marriage or to perform religious ceremonies relating to marriage. In most situations, someone who wanted to organise his or her affairs according to his or her religious beliefs could do so by means of general family law or contract law.[112] Those who prefer personal law, even if the personal law were not an option,

[109] Hurka (n 1) 366–67.

[110] (including those who are would be coerced into choosing personal law which harms their religious autonomy even though they prefer general family law)

[111] (including those who would prefer personal law, and whose religious autonomy is not harmed by it)

[112] This is not to deny that the concerns relating to coercion would apply to these private arrangements. However the fact that the general law would be the default, that the enforcement of contracts in this area is often limited by considerations which take into account the welfare of vulnerable parties, and that it is not the state that applies the autonomy-reducing norms, all mean that the concerns raised by such private arrangements are less severe than those raised by personal law. §7.5.

would therefore still have the advantage of the religious rights and freedoms that the comparator regime protects.

As for those who would be coerced into selecting the personal law, quite apart from the fact that the personal laws might reduce their religious autonomy because of their content, their religious autonomy might also be affected by the insult of coercion outlined in §3.1.3. So the religious autonomy of such people is adversely affected by the 'option' of personal law, while those who prefer personal law are only very minimally (if at all) affected by having only the general family law (our comparator regime). The option of personal law thus has worrying implications for religious autonomy.

It is important to notice that having only general family law, without the option of personal law, also allows those who favour general family law to benefit from it without having to reveal their preference and face the social consequences outlined in §4.1.4. For one cost of giving people an (apparent) choice, is that they are then seen as responsible for their selection (of personal law or general family law). Gerald Dworkin observes:

> [a]t the most fundamental level, responsibility arises when one acts to bring about changes in the world as opposed to letting fate or chance or the decisions of other actors determine the future. Indeed, once I am aware that I have a choice, my failure to choose now counts against me. I now can be responsible, and be held responsible, for events that prior to the possibility of choosing were not attributable to me. And with the fact of responsibility comes the pressure (social and legal) to make 'responsible choices.'[113]

[113] G Dworkin, *The Theory and Practice of Autonomy* (CUP 1988) 66.

Dworkin tells us that this is why the law made dueling illegal. If it were legal, refusing a duel or abstaining from challenging someone to a duel may be seen as a freely-made choice. A person who acted in this way may then have to bear (in his eyes and those of others) full responsibility for this choice. In a time and place different from our own, we can imagine how such a person would be branded a coward. Say that our potential duelist thinks the practice immoral and wasteful of human life and that the last thing he wants to do is take part in a duel. If he finds himself in a situation where a code of honour obliges him to challenge someone to a duel, the law at the very least provides an 'honourable' reason not to. Perhaps the penalty for a duelist is so harsh that someone who refused to duel would not be judged adversely because of it. Or perhaps the law enforcement officials keep an eye on potential duelists, not giving them the opportunity to duel. Either way, the law can serve the function of cloaking the real motivation of the actor who feels he cannot, due to social pressure, do what he really wants.

Our potential duelist has much in common with those who would be coerced into choosing personal law even though they prefer general family law. The cloaking function of the law – particularly general family law with no personal law option – saves both from having to select an option which is harmful to them, which they do not want to select and which there is social pressure to select. An argument considered in the Ontario controversy is true of the system: 'if women are not required to choose between dispute resolution methods but rather are required to go through the court system, there will be no shame to them or to their spouses because the law requires them to take that route.'[114]

[114] Boyd (n 40) 53. Dworkin's example has implications for C′ as well. Those in this position may seem well-off relative to C since the former have a choice while the latter are coerced. However, the pressures of making this choice, in an environment where the 'personal law question' is a burning one, are potentially immense – as the example of Shah Bano narrated above indicates. The cloaking function of the law might

4.2.3.2 Autonomy and binding oneself

There is another powerful argument that defenders of the system could make. One could conceive of the act of choosing the law that one would be governed by as a commitment, like a promise. A decision to be governed by personal law might then be seen as a promise to abide by it. Such a promise could be particularly significant for religious autonomy because of the personal law's association with religion.

It is easy to see the value of the power to bind one's future self. Some people ask their bartender, at the beginning of an evening, not to serve them more than a certain number of drinks because they anticipate that their inebriated self will make less responsible decisions. Often, requests to be woken up at a certain time are accompanied by instructions to ignore entreaties to be allowed to sleep more. Psychiatric patients sometimes provide consent to future treatment that they are unlikely to agree to once the psychiatric ailment recurs.[115] These 'Ulysses contracts' allow people to decrease the likelihood that they will make certain choices in the future which they, at present, regard as bad choices; the power to make such contracts can therefore enhance autonomy.

This, it might be argued, is particularly true of a commitment to be governed by a personal law. Consider the case of a person who has strongly-held religious beliefs. These include the belief that she ought to live according to certain religious norms. She has just

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therefore be appreciated by C′ as well as C, as it saves them from having to take sides on a contentious and divisive question.

[115] Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (rev edn, CUP 1984) 38.

moved to a new city where people tend not to be very religious and is worried that her commitment to her religion will weaken. She wants to lock this commitment in, ensuring that she complies with her religious duties not just now, but in the future as well. Assume that she considers the Indian personal law that would apply to her to be a close approximation of these religious norms (like P1 and P3). By giving her the power to bind her future self to these religious norms, the PLS, one might argue, enhances her religious autonomy. The constitutions of many liberal states arguably bind their entire population to certain values. The PLS might be seen as allowing religious people to bind themselves in a similar way, should they choose to do so. All this seems to suggest that there is value in being able to bind future selves – a value that might give us a reason in support of the personal laws being available.

The power to bind our future selves is certainly valuable, in some circumstances. But it is no coincidence that we are most willing to acknowledge that a person should be bound by an undertaking made in the past when the person is less in control of himself in the relevant future state than he was when he made the undertaking. Inebriation, drowsiness and psychological illness all left those in our examples with little control over themselves. That is not to say that these are the only circumstances where the power to bind our future selves is valuable; they also seem valuable in cases where we fear future weakness of will. However, not all promises or commitments present such strong cases for the value of binding future selves. In the absence of such a strong case, another value assumes an important role: the freedom to change one's mind.[116] This value is closely bound up with our ability to lead autonomous lives, including in the religious sphere.

[116] Charles Fried, *Contract As Promise: A Theory of Contractual Obligation* (Harvard University Press 1981) 17–21; Patrick S Atiyah, *Essays on Contract* (Clarendon Press 1990) 126; Jennifer Radden, 'Second Thoughts: Revoking Decisions Over One's Own Future' (1994) 54 Philosophy and Phenomenological Research 787; Kimel (n 98) 112–17.

> Our ability to entertain second thoughts, to reconsider, adapt and change direction in the light of a new piece of information, or a telling experience, is deeply bound up with what makes us autonomous human beings. Because we are not mere creatures of instinct, we change our minds. This ability is as essential to the full and complete exercise of our freedom as is our ability to bind ourselves with a plan.[117]

To hold people to a decision on the question of whether they will be governed by personal or general family law, as the PLS would, would be unjustifiably burdensome. If they picked an option that significantly reduces religious autonomy – personal laws – then holding them to it is even more odious. The use of this argument to allow people to choose the personal law is unconvincing unless it means that, having opted into it, they could always opt back out again if they change their minds or if it became too much of a burden. This, however, is not the way the PLS has usually been designed.

In sum, while it is possible that enforcing some voluntary undertakings or commitments enhances autonomy, and that under some circumstances this could be true mutatis mutandis of religious autonomy, the PLS cannot be defended on this basis. Especially when the content of the undertaking significantly reduces religious autonomy, as the personal laws do, it is facetious to argue for its enforcement on the basis of respect for religious autonomy.[118]

[117] Radden (n 116) 787; See also Joseph Raz, *Authority* (New York University Press 1990) 12–13.

[118] This is one reason why some autonomy-reducing contracts are not enforced in liberal states: Kimel (n 98) 129–31.

4.2.3.3 The expressive potential of the option of personal law

Even if the PLS cannot be justified as a kind of religious-autonomy-enhancing promise, perhaps giving people the opportunity to choose personal law gives them a means of religious expression that might enhance their option of religious practice. It is unnecessary to make a strong claim here about the meaning of the act of choosing the personal law for the person in question, his or her community, or Indian society at large. This is a claim that might require more research, possibly of a sociological nature, which is beyond the scope of this thesis. But let us consider some possible meanings that this act of choosing the personal law could have, in order to colour in more thickly this argument for the value of the PLS.

Subscription to the personal laws might be thought of a watered-down version of another deeply symbolic act – a monastic vow. Gerald Dworkin, in making a very different point, says something helpful to us about marriage vows.

> Consider, for example the notion of fidelity in marriage. By foreclosing in advance the idea of alternative sexual relationships (foreclosing not by declining options but by abandoning the very idea of an option) one can express to one's partner the special character of one's relationship. The abandoning of certain choices provides a way of manifesting in the clearest fashion that the relationship is of a special nature.[119]

[119] Gerald Dworkin, *The Theory and Practice of Autonomy* (CUP 1988) 75.

Having the option of choosing a personal law, it might be argued, gives the person who wants to make a commitment to their faith the kind of expressive opportunity that marriage vows can. Such an option may be particularly important for religious autonomy because making a commitment, especially an irrevocable one, to a religion can have great symbolic value for some. In their daily lives, religious people may not have much of an opportunity to promote or aid their religion. They may have to work and raise their families, leaving them little time for proselytising or fund-raising for their church (assuming that these are activities that promote their religion). In the face of such inability to create positive consequences for his religion, a deeply religious person trapped by commitments to family or other responsibilities may turn to symbol.[120] If he cannot *do* anything for his religion, at least he can express that he *is* for his religion.[121] The scope for martyrdom or similar grand symbolic acts is limited in tolerant societies where the religious may not be persecuted for their beliefs. But making an irrevocable commitment to live by the tenets of one's religion, insofar as they are reflected in the personal laws, could be a way for him to express this sentiment. This expression is an expression of his autonomy in a significant sphere of his life.

The passion and conflict that surrounds the 'personal law question' in India is symptomatic of this expressive aspect.[122] Consider this remark of Zoya Hasan, a prominent commentator on Indian political history:

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[120] Robert Merrihew Adams, 'Symbolic Value' (1997) 21 Midwest Studies in Philosophy 1.

[121] ibid.

[122] Zoya Hasan, 'Introduction: Contextualising Gender and Identity in Contemporary India' in Zoya Hasan (ed), *Forging Identities: Gender, Communities and the State in India* (Westview 1994) xiii; Gurpreet Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India* (OUP 1998) 107–108.

> The Jamiyat-al-Ulema-I-Hind took the lead in opposing changes in personal law stressing the need for safeguarding the sanctity of the Shariat, which became not only a *symbol for representing Muslim identity*, but the basis for claim to establish a status for the community commensurate with its substantial minority position. A powerful section of the Muslim leadership, pre- and post-Independence, has consistently tried to politicize religion as a means of safeguarding the community's socio-religious identity. Muslims in the 1920s used religious and cultural symbols which were relevant to all strata of the community[…]. In the post-independence period this *symbolism has come to rest entirely on laws pertaining to family and women*.[123]

Hindu law has similarly been used as a symbol of Hindu unity.[124]

While the personal laws as well as the act of choosing to be governed by the personal law can have symbolic value in the lives of some religious people,[125] other symbolism that could be associated with the personal law could harm the religious autonomy of those whose understanding of a religion deviates from the understanding

[123] Zoya Hasan, 'Minority Identity, State Policy and the Political Process' in M Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005) 204 (emphasis added). Other reasons for resistance to change among Muslims in India are the fact that the preservation of the personal laws are seen as a matter of 'honor', 'civic position', and a 'legitimate sense of exclusion', see Nussbaum (n 15).

[124] RV Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (OUP 2006) 106–109.

[125] Certainly it has great symbolic value for organisations such as the AIMPLB The stated aim of this organisation is to 'defend' and to 'protect' Muslim personal law and to subvert 'the conspiracy' against it: see All India Muslim Personal Law Board, 'Introduction' <www.aimplboard.org/introduction.html> accessed 15 November 2011.

enforced by the personal laws (like P2[126] and P4[127] in §4.2.1). This is because the personal laws are based on an understanding of these religions that glosses over even strong differences in interpretation of religious doctrine. As elaborated in §2.2 codified Hindu law applies not only to those who identify as Hindu, but also to Buddhists, Jains and Sikhs and some others who may not consider themselves Hindu.[128] Similarly, Muslim personal law applies regardless of 'peculiarities in belief, orthodoxy or heterodoxy'.[129] All those who are associated with these religions have this single state-endorsed interpretation applied to them. By giving effect to only one understanding of religious doctrine for each personal law group, the state could be seen as making a judgment on what positions are most authentic within those religious traditions. It might thereby be seen as implying that those individuals who subscribe to a different understanding of that religion are doctrinally misguided or insincere. The expression of such a view, coming as it does with the authoritative voice of the state, is likely to harm the self-respect and therefore the religious autonomy of all whose understanding of a religion deviates from that of the personal laws.[130]

Applying the personal laws might also detract from the religious experience of even those whose religious views coincide with the religious norms applied through these

[126] P2 consists of those who self-identify in the same way that the personal law identifies them but whose religious beliefs differ from those of the personal law.

[127] P4 consists of those who neither self-identify in the same way that the personal laws identify them, nor agree with the religious beliefs of the personal law applied to them.

[128] See Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956 ; Hindu Adoptions and Maintenance Act 1956.

[129] Fyzee and Mahmood (n 58) 46; Diwan and Diwan (n 64) 1.

[130] §3.1.5 and Chapter Six.

laws (P1 and P3). Returning to the analogy of marriage discussed above, for the personal law to be truly analogous to a marriage, we would have to imagine a completely different kind of marriage from the one we are used to. Consider, for instance, a situation in which the law on marriage provided that each party was obliged to do a certain minimum percentage of the housework, or show affection for the other in statutorily approved ways. The law might further provide that the marriage obligations were not transferable to any other party, and that divorce was prohibited. Such a system would destroy much of the expressive function that marriage currently serves, because the parties' motives in caring for and expressing themselves to each other would no longer be transparent. But because a religious person has to perform the religious obligations that the personal law enforces, *because it is also the law*, this may well cloud her motives to others and possibly even to herself, thereby impoverishing her religious experience. This problem of transparency, which is elaborated upon in §4.2.2 above, weakens the claim that the PLS is, for expressive reasons, unambiguously in the interest of the religious autonomy of even those whose understanding of a religion conforms closely to that of the corresponding personal law.

4.2.4 The option of not practicing (a) religion

The PLS's interference with freedom *from* religion is more obvious than its interference with freedom of religious practice. Freedom from religion here refers to the freedom to refrain from any or all religious practice. Chapter Two pointed out that under the PLS, unlike under the Ottoman-style *millet* systems, the state has 'the power to find, declare

and apply law'[131], in this case, law that is ostensibly derived from the religious doctrine of the recognised personal law groups. Although the personal laws can be seen as discontinuous with religious doctrine in some ways,[132] these laws maintain strong links to religious doctrine and the norms of personal law groups.[133] As mentioned in §4.2.1 above, this means that when some people subject to the personal law do the things that most people do during their life-times, they often *have* to do them (if they are to do them at all) in accordance with religious norms.[134] Most of the examples cited in the section above apply here too.

The earlier section 4.2.1 noted that cases like P2 and P4 seem immediately problematic because religious autonomy implies the freedom to engage in religious practice. But religious autonomy also implies the freedom to be agnostic, undecided, indifferent, silent or uncommunicative on religious matters and to refrain from any form of practice relating to religion.[135] But this assertion that religious autonomy presupposes these freedoms may not mean much to those who think that religious autonomy should

[131] Galanter and Krishnan (n 15). For a suggestion for reform based on the fact that the state is involved in the interpretation and construction of personal law see J Spinner-Halev, 'Feminism, Multiculturalism, Oppression and the State' (2001) 112 Ethics 84, 107–109.

[132] See §2.5.

[133] See §2.5.

[134] See note 58.

[135] §3.2 For some helpful discussions in the context of US constitutional law, see *Lee v Weisman* 505 US 577 (1992); *Torcaso v Watkins* 367 US 488, 489 (1960); C H Esbeck, 'The Lemon Test: Should It Be Retained, Reformulated or Rejected?' (1990) 4 Notre Dame J L Ethics & Pub Pol'y 513, 548.

not necessarily be bilateral (i.e. include freedom *from* religion).[136] It is important to consider therefore the implications of the absence of this freedom for religious autonomy.

Denial of freedom from religion is potentially just as harmful, or even more harmful, to religious autonomy than a denial of freedom to engage in *a* religion, especially if the denial of the latter freedom leaves more valuable options open than the denial of the former. Consider a state that bans the wearing of religious dress, say chador, in all public places, at all times. Most people would consider this a denial of religious freedom. But what if this state, apart from the ban, also required all persons in the state territory to wear a different religious dress (say a nun's habit) in all public places at all times. In the first case, the state is undoubtedly harming religious autonomy by denying people a potentially significant (for expressive and other reasons) option of dress. But what the state does in the other case is arguably even worse – by imposing this more onerous restriction, it does not just eliminate *one* option, it eliminates *all* options but one in the matter of dress.[137]

But those who deny that religious autonomy is bilateral, thus denying that it includes freedom from religion, might also say that freedom *from* religion is not important for religious autonomy, as it is after all *religious* autonomy with which we are concerned. This approach would be a mistake, because as discussed in §3.2 the concept

[136] JH Garvey, *What are Freedoms For?* (Harvard University Press 1996); D Barak-Erez and R Shapira, 'The Delusion of Symmetric Rights' (1999) 19 OJLS 297; G Sapir and D Statman, 'Why Freedom of Religion Does Not Include Freedom from Religion' (2005) 24 Law & Phil 467.

[137] It is true that this example is of a rather extreme case of denial of freedom for conventional religion. A state could be said to deny such freedom when it does a great number of things that liberal (and especially multicultural) states do (e.g. celebrate religious festivals or recognise religious forms of marriage). The argument that application of personal law denies people options applies with less force than in the nun's habit example provided. Moreover, whether the denial of all options but one, or the denial of just one option, is worse for autonomy depends on the factors outlined elsewhere in this chapter.

of religious autonomy implies the power to disbelieve in a Supreme Being or a transcendent reality, or to subscribe to a moral code or world view that is at odds with the code of all religions. If someone does not have freedom from religion, they might be religious, but they cannot possess religious autonomy. If religious autonomy assumes a freedom to *choose* religion, then it is impossible without freedom from religion. James Nickels, following Locke, writes:

> The presence of an alternative is required for the meaningfulness of the choice… [C]hoice is more voluntary and meaningful in the presence of an option. The value of religious commitment is undermined in the absence of freedom to refrain from religious belief and practice.[138]

To outline the argument so far: the PLS interferes with the option of practising religion as well as the option of not practising it. Interfering in agents' engagement with these options therefore diminishes religious autonomy.

4.3 CONCLUSION

This chapter was devoted to examining the implications of the PLS for the range of religious options available to people. It found that the PLS harmed the option of religious practice and the option of refraining from religious practice. Several defences of the PLS's effect on the range of options – including the symmetry of personal law and other law, the voluntary power-conferring nature of many personal laws and the possibility that the option of personal law enhanced religious practice – were considered and rejected.

[138] JW Nickel, 'Review: Why Basic Liberties Are Bilateral' (1998) 17 L & Phil 627.

5. GROUP LIFE

> For these pitiful creatures are concerned not only to find what one or the other can worship, but to find something that all would believe in and worship; what is essential is that all may be *together* in it. This craving for *community* of worship is the chief misery of every man individually and of all humanity from the beginning of time. For the sake of common worship they've slain each other with the sword.[1]

A defence of the PLS could be constructed based on its contribution to religious communities. This defence, explored in this chapter, is as follows: with respect to at least some religious traditions, it is a prerequisite, or at least a contributory factor, of religious autonomy that the individual has a certain relationship to their religious community. For instance, religious autonomy might be enhanced by (1) membership and socialisation in a religious community or (2) membership in an autonomous religious community. Beginning with the first, this chapter considers whether the PLS contributes to these suggested contributory factors.

[1] Fyodor Dostoevsky, *The Brothers Karamazov* (Wordsworth Editions 2007) 278 (the speech of the Grand Inquisitor to Christ).

5.1 DOES THE PLS CONTRIBUTE RELIGIOUS AUTONOMY BY CONTRIBUTING TO MEMBERSHIP AND SOCIALISATION IN A RELIGIOUS COMMUNITY?

5.1.1 Religious communities and religious practice

The PLS is often defended in the name of 'religious communities',[2] most often the Muslim community. This section considers whether the PLS facilitates religious autonomy by supporting religious communities. Socialisation in a community can support autonomy, as §3.1.6 briefly discussed. Socialisation in a community gives individuals many of the skills and capacities required for autonomy. A community can also provide support, material and psychological, that can facilitate autonomy. It can bolster and protect individual self-respect, which is essential for autonomy as discussed in greater detail later.[3] Moreover, if the community is associated with a culture or sub-culture, this could give members access to a range of meaningful options, thus facilitating autonomy.[4] Many of the contributions that communities make to autonomy generally apply *mutatis mutandis* to religious communities.

While bearing in mind, as background, how religious communities can support religious autonomy in these ways, this section pays particular attention to the *special*

[2] 'The right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and this provision should really be made amongst the statutory and justiciable fundamental rights': Mohamad Ismail Sahib, Constituent Assembly of India Debates, 23 November 1948 <164.100.47.132/LssNew/constituent/vol7p11.html> accessed 13 November 2011.

[3] §3.1.5 and Chapter Six.

[4] 'It is only by being socialized into a culture that one can tap the options which gives shape and content to individual freedom': Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 170, 177–78; Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989) 162–182.

contribution that *religious* communities can make to the religious autonomy of their members. Religious practice sometimes requires a community.[5] Communal religious practices, church-going or congregational prayer, presuppose a community. The religious community is sometimes conceived as the primary unit of worship. It is true that in some forms of Protestant Christianity, despite the persistence of communal worship, the relationship with the divine might be thought of as personal – as being between a person and his or her own god.[6] The gathering together of people, the dedicated site of worship and communal rites are, on this view, the background or the facilitators of personal communion with God. Christianity's move towards a view of religion which is personal in this sense, often associated with the Reformation,[7] might encourage us to ignore a different view of communal religious practices. For instance, of early religion, it is said:

> The primary agency of important religious action: invoking, praying to, sacrificing to, or propitiating Gods or spirits; coming close to these powers, getting healing, protection from them, divining under their guidance, etc. - *this primary agency was the social group as a whole, or some more specialized agency recognized as acting for the group.*
>
> *In early religion, we primarily relate to God as a society*. We see both aspects of this in, for example, ritual sacrifices among the Dinka, as they were described a

[5] §4.2.1.

[6] Prominent American theologian Stanley Hauerwas, for example, characterises American Protestantism as producing people who say 'I believe Jesus is Lord – but that's just my personal opinion.' Stanley Hauerwas, 'America's God is Dying', (*ABC Religion and Ethics*, 20 Jul 2010) <www.abc.net.au/religion/articles/2010/07/20/2947368.htm> accessed 14 November 2011. See also Peter Harrison, '*Religion' and the Religions in the English Enlightenment* (CUP 1990) 61–85.

[7] See for an account of this move Charles Taylor, 'The Future of the Religious Past' in Hent de Vries (ed), *Religion: Beyond a Concept* (Fordham University Press 2008) 180–82.

> half century ago by Godfrey Lienhardt. On one hand, the major agents of the sacrifice, the 'masters of the fishing spear', are in a sense 'functionaries', acting for the whole society; while on the other, the whole community becomes involved, repeat the invocations of the masters, until everyone's attention is focussed and concentrated on the single ritual action. It is at the climax 'that those attending the ceremony are most palpably members of a single undifferentiated body'.[8]

In our times, has this view truly given way to the understanding of religion as personal? It is not clear that it has.[9] The current practice of at least some religions either requires, or is facilitated by, the acceptance and cooperation of a group of co-religionists. Congregational worship and prayer is still common in many traditions. The Westminster Confession states that 'there is no ordinary possibility of salvation' outside of the Church.[10] The central Christian practice of the Eucharist cannot, for Catholics especially, take place outside of the communal setting and it must be received from an authorised person.[11] The Jewish festival of Passover might similarly be seen as a communal affirmation of identity, reflecting God's calling of a people as a nation as understood in the Old Testament book of Exodus.[12] Congregational prayers on Fridays are an important

[8] Taylor (n 7) 180–81 (emphasis added).

[9] Taylor too seems to think that it continues, in some degree, up to the present day: ibid 182.

[10] The Westminster Confession of Faith (1646) Chapter XXV <www.reformed.org/documents/westminster_conf_of_faith.html>. In the Christian New Testament, Jesus states: 'For where two or more gather in my name, there I am with them' (Matthew 18:20, New International Version).

[11] M Volf, *After Our Likeness: The Church as the Image of the Trinity* (WB Eerdmans 1998) 32–39.

[12] Baruch Bokser, *The Origins of the Seder: the Passover Rite and Early Rabbinic Judaism* (University of California Press 1984) 138. I thank Joel Harrison for suggesting many of the examples above.

part of Islamic practice.[13] In India, the reason for the Tamil proverb 'one should not live in a town without a temple' is said to be that:

> a temple is the focus of a community's faith, a symbol of its hopes and aspirations. A town which does not have a temple is a place without faith, a place where people have no collective aspirations.[14]

These communal practices are important to many religious individuals; without them, several important religious options, including the option of religious practice, are closed off.[15] Religious communities can therefore be said to be necessary for, or at least facilitate, religious autonomy.

5.1.2 Religious communities and the PLS

How do these remarks on religious communities affect our evaluation of the PLS? Might the PLS promote religious autonomy by supporting religious communities? To indicate how it might, let us consider a narrative in support of this defence of the PLS. (This narrative is not meant to be historically accurate, or applicable to all religious traditions, but only a thought experiment.)

[13] John L Esposito, *What Everyone Needs to Know about Islam* (2nd edn, OUP 2011) 35–36.

[14] Irawati Karve, 'A Town without a Temple' in Eleanor Zelliot and Maxine Berntsen (eds), *The Experience of Hinduism: Essays on Religion in Maharashtra* (SUNY Press 1988) 72.

[15] §4.2.1. Rex Ahdar and Ian Leigh, *Religious Freedom and the Liberal State* (OUP 2005) 325-327.

Ravi lives in a largely Hindu village. He visits the local temple often, as do others in the village. He is confident that the gods worshipped by his village are adequately propitiated. (This ameliorates his fear of drought, floods or disease.) The priest is sincere. After all, the priest's welfare lies in the welfare of the village as he depends on villagers' offerings for his survival. If the village is hit by famine, they will have no offerings to make to him. In general, the villagers are generous in their offerings and do not break religious rules of conduct. They know each other and when Ravi is troubled, he asks the community to pray for him during communal prayer sessions. Thus the way that this religious community functions plays a very important role in allowing Ravi to successfully practise his religion.

At some point, Ravi hears that factory workers in the closest city make far more than he can hope to make by working his land. So he moves to the city with his family. The many challenges of city life are compounded by spiritual unease. He lives in a diverse neighbourhood without a common priest or a common temple. There are small shrines around his neighbourhood where he worships sometimes, but rarely in the company of his neighbours. He does not know them or their religious practices. He finds a priest in another neighbourhood who will carry out invocations for him, but this priest does not know him at all. He performs rituals in return for payment[16] for hundreds of people he does not know, many of whom do not even share a neighbourhood. The priest's success does not depend on the success of a geographically or socially bounded community. If Ravi's neighbourhood were to be afflicted by a disease, or if he were to lose his job, the priest loses little.

[16] This payment might be described as an offering to the temple.

Ravi can no longer depend on the spiritual support of the other villagers or the sincerity of his priest. His former manner of religious self-identification (as resident of the village, a member of a certain caste and sect) is now meaningless to those around him. Without his religious community, he cannot have the same relationship with his gods as in the past. His view of the metaphysics of worship makes his individual invocations pointless, or at best quite weak.[17] When he moved out of the village, he lost his 'plug-in' to a spiritual powerhouse whose energy he cannot generate by himself. Since he is unaware of the religious practices of his immediate neighbours, he also worries that their sins or irreverence might make him guilty by association – and a victim of their divine retribution. In other words, his lost connection with his religious community significantly compromises Ravi's ability to practice his religion.

If there is any sense in which Ravi has lost a connection to his religious community by moving to the city, can the PLS ameliorate this loss? Aspects of the PLS, Hindu and Muslim law in particular, have been accused of promoting communalism[18] and undermining national unity by strengthening religious identity.[19] Both laws clearly bring individuals into the 'Hindu' and 'Muslim' fold who might not otherwise be

[17] Taylor writes of the Dinkas: 'This collective action is essential for the efficacy of the ritual. You can't mount a powerful invocation of the Divinities like this on your own in the Dinka world. This "importance of corporate action by a community of which the individual is really and traditionally a member is the reason for the fear which individual Dinka feel when they suffer misfortune away from home and kin."' Taylor (n 7) 181.

[18] The term is meant pejoratively; see R Bajpai, 'The Conceptual Vocabularies of Secularism and Minority Rights in India' (2002) 7 J Pol Ideologies 179, 184. Gerald James Larson, 'Introduction: The Secular State in a Religious Society' in Gerald James Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Social Science Press, Delhi 2001) 7 defines it as 'the selfish and separatist efforts of a particular religious group to act in ways contrary to the larger community or nation'. See also Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Law in India Series, OUP 1999) 117–18.

[19] *Mohammed Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945; Agnes (n 18) 117.

identified or self-identify as such.[20] Diversity within all the religious groups in the PLS is ignored.[21] While the problems these features raise for religious autonomy is discussed in some detail in this thesis, might these same features give Ravi some of what he lost when he left his village? In other words, could the categories, Hindu, Muslim, Christian, Jew or Parsi give Ravi an imagined village, with some of the advantages it had for religious autonomy of his former one?

Let us flesh out this potential line of defence of the PLS. As a part of the PLS, Ravi has an identified community. He knows that all members will be governed by the same personal law and that many of them will follow the law. Moreover, the process of enumeration of religious communities through the census, mapping, mass media, democratic processes and political movements (including Hindu nationalism) make members of these communities much more 'visible' to each other.[22] When members of this community all follow a common set of rules, this might enable them, collectively, to act as Ravi's village did. After all,

> [t]hese abstract communities were seen as increasingly *agentive* in character: they were viewed as gigantic collective actors, involving all their innumerable constituent members, such that an act of an individual or a group of Muslims

[20] Such as Jains, Buddhists, Sikhs, and various Muslim groups who used to be governed by separate laws, e.g. Khojas, the Kachi Memons, Malsan Muslims. See Susanne Rudolph and Lloyd Rudolph, 'Living With Difference in India: Legal Pluralism and Legal Universalism in Historical Context' in Larson (n 18) 52.

[21] §2.2.

[22] Where religious groups try to form or ally themselves with religious majorities to garner power: Sudipta Kaviraj, 'On Thick and Thin Religion: Some Critical Reflections on Secularisation Theory' (Department of Middle East and Asian Languages and Cultures Colloquium, Columbia University, April 2009) 14.

> came to be regarded as an 'act of Muslims' as a putative group in which all unacting members were in some sense involved, or at least implicitly subsumed.[23]

In a recent judgment on the 'Ayodhya dispute'[24] and commentary on it, for example, 'Hindus' and 'Muslims' were litigants and often cast as such agentive communities. It might be argued that the agentive nature of such a community might allow for the collective spiritual action that Ravi has lost. The PLS might therefore be thought to promote religious autonomy.[25]

There will be those who are sceptical about any such argument. The best the PLS can offer, they might say, is an assurance that a number of people will follow the law, probably because of the material consequences of not following it. This does not constitute a religious community of the kind Ravi has lost. It is a necessary condition of a religious community that its members *believe* in the religion in question. It is not enough that they follow rules of the religion. The view that dismisses any religion that does not prioritise belief over practice has been questioned elsewhere in this thesis.[26] However, the religious beliefs of many of those identified by the PLS as 'Hindu' are unknown, although we do know that many who do not believe in Hinduism are identified as Hindu.[27] Therefore, Ravi could not be assured that those identified as Hindu by the PLS

[23] ibid.

[24] 'Q&A: The Ayodhya dispute' (*BBC News*, 30 September 2010) <www.bbc.co.uk/news/world-south-asia-11435240> accessed 14 November 2011.

[25] Even if this feature of the PLS is bad, all-things-considered, for instance, because it promotes religious communalism. See the Introduction to this thesis for the sense in which this word is used.

[26] §4.2.2.

[27] §2.2.

actually share his beliefs. Without this assurance, it is unclear that that the PLS could serve the same function for Ravi as his spiritual village-community did.

Even if following the law, regardless of belief, could replace Ravi's religious community, one might argue that this at least requires that those following the law do so willingly.[28] But as noted in §2.4 it is very difficult to change or opt-out of the personal laws. Furthermore, many personal laws are overbroad; they include within their fold people who do not identify with the religion that is associated with the personal law in question.[29] It is difficult, then, to know how many of those governed by Ravi's personal law had no choice in the matter, and how many of those would have chosen differently had they a choice. Thinking back to the description of Ravi's village, it is difficult to believe that the members of Ravi's village community believe that kidnapping villagers from neighbouring villages and forcing them, on pain of a bludgeoning, to bow before the village deity would add anything to their 'spiritual powerhouse'. Of course, there have been religious rituals in which non-consenting participation has been thought to have religious value, notably human sacrifices.[30] But despite a persistence of the trope of the virgin sacrificed to a volcano in a certain genre of film, this is clearly an unusual and exceptional kind of ritual.

This feature of the PLS – that it is impossible to be sure that those who follow it do so willingly – creates a problem of transparency, similar to the one discussed in §4.2.2. Ravi cannot know whether members of the Hindu personal law community are

[28] It might seem strange that someone would willingly follow a law based on a religion they do not subscribe to, but they might have reasons to do so. To them, this might seem like the equivalent of an atheist participating in a church service by singing in the choir.

[29] §2.2.

[30] This assumes, of course, that the sacrifice is unwilling.

willing members, as easily as he can know this about other villagers.[31] This theological concern is joined by a liberal one. If we are concerned about religious autonomy, it hardly makes sense to secure Ravi's religious autonomy at the expense of others who are unwillingly governed by a personal law.

Both these problems might be solved by instituting an option of secular law, an option which has been proposed in the context of reform.[32] This thesis spells out some problems with this option,[33] but it certainly might make it more likely that those who follow personal law do so willingly. If we can leave the transparency problem aside, the PLS might be viewed as allowing those, like Ravi, who have lost a spiritual community to regain it by connecting to each other through the shared personal law.

But here we come across another important set of objections to the analogy between Ravi's village and a personal-law-based community. This analogy is attractive at a time when there is much interest in comparisons between actual villages and 'global' online villages created by social networking websites.[34] However, a further reason to be sceptical of the analogy lies in another difference between Ravi's village and a community based on a shared personal law. Ravi's village was a religious community that might be described as 'thick'. According to one description in the context of Hinduism,

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[31] Of course, there are limits to how well we can understand the state of minds of others; the comparison is one of degree.

[32] §7.4.

[33] §4.1.4.

[34] 'Even Online, the Neocortex is the Limit', *The Economist* (26 February 2009) <www.economist.com/node/13176775?story_id=13176775> accessed 20 November 2011.

> [t]his means that a social individual's identity was anchored in beliefs that were spread across a wide variety of religious themes, which can be arranged at different levels of generality. These included metaphysical beliefs about the nature of existence, the nature of God and his relation to the created world, epistemological theories about the nature, limits and trustworthiness of human cognition, sociological perceptions about the basis and boundaries of community, ritual observances in practical situations of worship, minutely detailed paraphernalia about everyday religious practice – how to determine the days of worship, how to decorate the place, what to offer to the deity, physical comportment in prayer, the exact chants specific to occasions, and even where to place holy objects like a coconut, a mass of flowers or a banana plant. *This religion is thick in the sense that its internal contents are a vast, but not disorderly, catalogue of beliefs about large and small things, but all of them are crucial to the practice of this faith.*
>
> …if he [a practitioner of a thick form of religion] was asked who practised the same religion as his own, he would have laid down a long list of criteria starting from metaphysical beliefs to ritual observances, and claimed that only someone who satisfied all these criteria of religious sameness practised the same religion.[35]

Our putative community based on a shared personal law, encompassing all who are identified with a particular religion (and including many who do not belong to that religion) cannot be thick in this way. The vast numbers involved means that there is no

[35] Kaviraj (n 22) 10 (emphasis added).

shared thick religion; there is instead extreme diversity within the putative community. A shared thick religion is also inhibited by the fact that the personal laws, as important as they are, mostly cover matters relating to the family. They do not direct modes of worship or belief in metaphysical doctrines.

While it is clear that any personal-law-based communities are likely to be bound only by thin religion, we might pause before coming to the conclusion that these communities cannot provide the spiritual support that Ravi is wistful for. The Muslim personal-law-community provides a natural starting point. The ideal of a global *ummah* is frequently invoked by the Hindu Right as evidence that Muslims are not loyal Indian citizens.[36] While their conclusion might not follow from the ideal, it is true that this ideal has played its part in the history of Islam in India. Most Muslim rulers of India based their authority on ties to recognised Caliphates of the time.[37] Nor were Indian Muslims alone in rallying around the Caliphate. The Indian '*Khilafat* Movement' which aimed to restore the Ottoman Sultan (after World War I) was supported not just by Muslims but by the Congress Party[38] and Mahatma Gandhi. It was made an integral part of the general 'Non-Cooperation Movement' against British rule. Gandhi wrote that the *Khilafat* 'must concern the whole of India'[39] since it concerned India's Muslims.

[36] Cyra Choudhury, '(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India' (2007) Georgetown University Public Law & Legal Theory Research Paper No. 969020, 15 <ssrn.com/abstract=969020> accessed 19 November 2011.

[37] See for an account, TN Madan, *Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (2nd edn, OUP 2010) 106–128.

[38] The party that eventually campaigned for India's independence.

[39] Madan (n 37) 269.

Why was the Caliphate so important to Indian Muslims and to others through their sense of community with Indian Muslims? It is thought to have 'represented the familiar yearning for that ideal universal socio-political order under one leader which has been inaugurated by Prophet Muhammed … by breaching barriers of race, language, environment and custom.'[40] This order would satisfy the Qu'ranic injunctions for unity within the *ummah*;[41] the driving force behind the *Khilafat* Movement was maintaining the place of Indian Muslims within this order. Some detect, at the historical moment of the *Khilafat* Movement, a fear, not just of the loss of political power, but of religious community.[42]

It is important to note that this order they yearned for, the *ummah* governed by the Caliph, was by necessity thin. Indian Muslims were unlikely to have considered the wearing of the Turkish Fez necessary for membership and Turkish Muslims are unlikely to have thought it necessary to learn Urdu.[43] The basis of this ideal of the *ummah*, and the very authority of the Caliph, was not custom, language or dress; it was *sharia*.[44] Here is the nub of this defence of the PLS: Indian Muslims might not be able to unite under a

[40] M Naeem Qureshi, *Pan-Islam in British Indian Politics: A Study of the Khilafat Movement, 1918–1924* (Brill 1999) 10-11.

[41] For a polemical account, see Hizb ut-Tahrir Britain, 'Islam demands the Political Unity of this Ummah' (16 August 2008) <www.hizb-ut-tahrir.org/PDF/EN/en_w_pdf/160808UK.pdf> accessed 20 November 2011.

[42] Gail Minault, *The Khilafat Movement: Religious Symbolism and Political Mobilization in India* (OUP India 1999) 57; see also Pratap Bhanu Mehta, 'On the Possibility of Religious Pluralism' in Thomas Banchoff (ed), *Religious Pluralism, Globalization, and World Politics* (OUP 2008) 80–81.

[43] Urdu is associated with many of the subcontinent's Muslims. This is not to deny that the movements associated with the restoration of the caliphate would have resulted in cultural exchange. the point is only that the shared religion is not thick.

[44] Qureshi (n 40) 10–11; Abdullah al-Ahsan, 'The Quranic concept of Ummah' (1986) 7 Journal of Muslim Minority Affairs 606.

Caliph, but they can still unite as a community, connected to an even larger global *ummah*, because they are governed by the *sharia*.[45] True, not all of the *sharia* applies to them as law, but the part which does might suffice for this purpose.

Returning to the Hindu community, something similar might be said about Hindu personal law. At least some saw it as a part of the unification and construction of the Hindu community:

> [The] definition of 'Hindu' made sense if one recognised that the primary purpose of the HCB [Hindu Code Bill][46] was to unify the community through uniform laws. Its very purpose was precisely to minimize or erase such distinctions within the Hindu community and create Hindu social unity through legal uniformity – the actual reality of the multiplicity of ways of being Hindu notwithstanding.[47]

The idea of a unified Hindu community is thought to be relatively recent,[48] constructed partly to ensure that 'Hindus' constituted a majority.[49] It is difficult to deny that the construction of 'Hindu' as an identity is closely associated with the rise of the Hindu

[45] 'The current status of the ummah requires a separate treatment. Here we may simply note that although the concept did not survive its pristine form, its adherents have subscribed to its law, Shari'ah, and have survived as a law-based community.' See al-Ahsan (n 44) 615.

[46] This Bill, later broken up into the Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956, and Hindu Adoptions and Maintenance Act 1956 represents much of codified Hindu personal law.

[47] Rina Verma Williams, *Postcolonial Politics and Personal Laws* (OUP 2006) 103; see also Madhu Kishwar, 'Codified Hindu Law: Myth and Reality' (1994) 29(33) Economic and Political Weekly 2145.

[48] Romila Thapar, 'Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity' [1989] Modern Asian Studies 209.

[49] 'The attempt is always to draw in as many people as possible since numbers enhance the power of the communal group and are crucial in a mechanical view of democracy': ibid 210.

Right.[50] But the political and sometimes violent aims of many of these attempts to create a Hindu community should not blind us to the potential religious value of such a community. Doubtless many associated with the Hindu Right downplay religious doctrine,[51] but for at least some Hindus, uniting the Hindu community is a *religious* goal.[52] The Hindu religious symbolism of the Hindu Right is an indication of this. Consider this description of a VHP[53] procession:

> Prominent in the processions were trucks with enormous bronze pots *(kalashas),* containing water from India's most sacred river, the Ganges. Water from the pots was distributed in the villages on the way, while the pots were refilled with water from local or regional reservoirs of sacred water, like temple-tanks or sacred rivers. This mixture of sacred, purifying water symbolized in an immensely direct way for Hindus the unity of Hindu India.[54]

[50] See Peter van der Veer, 'God must be Liberated! A Hindu Liberation Movement in Ayodhya' [1987] Modern Asian Studies 283 for the VHP's attempt to unite Hindus through the *Ekalmatayajna* (i.e. 'Sacrifice for Unanimity') processions of 1983.

[51] Sudipta Kaviraj, 'On Thick and Thin Religion: Some Critical Reflections on Secularisation Theory' (Department of Middle East and Asian Languages and Cultures Colloquium, Columbia University, April 2009) 8-11; A Nandy, 'The Twilight of Certitudes: Secularism, Hindu nationalism, and other Masks of Deculturation' (1997) 22 Alternatives: Global, Local, Political 157.

[52] Thomas Blom Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (Princeton University Press 1999) 72 ('Dayananda wishes to save what he saw as a weak and disorganized Hinduism from Islamic and western challenges, by organizing it around a canonization of what orientalism has presented as the oldest, most original and hence most authentic bodies of text, the Vedas.') See Mehta (n 42).

[53] The VHP, the 'Vishwa Hindu Parishad', is a Hindu Nationalist organisation. ibid 101.

[54] van der Veer (n 50) 283.

The numbers of adherents of most of the religions that the PLS[55] represents is so large that any religious community encompassing all adherents would have to be thin. Members are unlikely to have face-to-face contact. But this is why symbols, traditions and their personal laws assume such importance. In the absence of a village-like community, these provide markers of identity, allowing each community to claim its members and draw boundaries around them.[56] Once these markers are drawn and members are made visible to each other,[57] they can use democratic processes, the mass media and other forms of communication to provide support to each other. This support does not have to be at all nefarious. In religious traditions which emphasise learning and teaching religious doctrine, this religious community allows them to use mass-circulation periodicals and the internet to discuss theological questions.[58] When there are violent attacks on Christians in one part of India, churches and church-run schools in other parts of India protest.[59]

While such thin religious 'communities' might thus have value, it is important to ask whether they also support *religious autonomy*. It might be that members' 'visibility' to each other allows them to participate in certain types of collective worship, such as the

[55] Judaism and Parsi Zoroastrianism are exceptions.

[56] Zoya Hasan writes: 'For organisations actively involved in the mobilisation of Muslims, it [the defence of the personal laws] was part of their search for an identity so as to establish the claims to a status commensurate with its substantial minority position.' Zoya Hasan, 'Introduction: Contextualising Gender and Identity in Contemporary India' in Zoya Hasan (ed), *Forging Identities: Gender, Communities and the State in India* (Westview Press 1994) xiii.

[57] Kaviraj (n 22) 14.

[58] E.g. Milli Gazette <www.milligazette.com/> and Church of South India Newsletter, <csinewsletter.com/newsrack12.asp> accessed 20 November 2011.

[59] A G Noorani, 'RSS and Christians' (1998–1999) 15(26) *Frontline* <www.hindu.com/fline/fl1526/15261230.htm> accessed on 4 October 2011.

'virtual vigils' involving virtual candles run by some churches[60] and email prayer requests.[61] Especially in traditions which ascribe a direct relation between spiritual potency and numbers of worshippers,[62] religious communities based on the personal law can be potent. Certainly there are prominent religious groups in India – the Arya Samaj, the Brahmo Samaj, the Tableegh-Jamaat and the Jamaat-i-Islami – which might be seen as reaching out to the entire 'thin' religious community of Muslims and Hindus.

But there is reason to doubt that the PLS can be defended on the basis of its support for these thin religious communities. Even assuming that the 'visibility' of religious adherents to each other has important implications for religious autonomy, it is unclear that the PLS contributes to such visibility. While mass media reporting on religious politics, including the intense political movements that have grown around the PLS,[63] are likely to have increased visibility, the PLS *in itself* probably does not. It does not work like census figures, for example, where the numbers of people identified with different religious groups is identified and reported.

Moreover, the main arguments outlined in this chapter for why religious communities can support or enhance religious autonomy relate to the role such communities play in religious worship or practice. The PLS does not co-ordinate or

[60] 'Oklahoma Candles for 4000: A Virtual Vigil for Peace' (24 March 2008) <peacearena.org/4000candles> accessed 4 October 2011.

[61] Elena Larsen and Lee Rainie, 'CyberFaith: How Americans Pursue Religion Online' (December 2001) <www.pewinternet.org/~/media//Files/Reports/2001/PIP_CyberFaith_Report.pdf.pdf> accessed 4 October 2011.

[62] This is probably the best explanation for email prayer requests; the senders believe that a larger number of people will lead to a stronger invocation.

[63] See the Introduction for a description of these.

facilitate religious worship as in the examples used in §5.1.1 above, even though it does sometimes require the observance of religious *forms* to obtain certain benefits.[64] Nor does the PLS promote religious autonomy by giving those subject to it the autonomy-enhancing support of, or benefits of socialisation in, a religious community mentioned earlier.[65] For this, a much thicker religious community than any the PLS could build would be required.

The defence of the PLS considered in this section is this: religious communities can contribute to the religious autonomy of their members and the PLS might help build or strengthen religious communities which have this potential. This section focussed on the potential that Muslim and Hindu personal law have to strengthen those respective communities. This is mostly because these two groups provide the most accessible historical and empirical data on the relationship between the personal law and community-building. However, the defence applies across all personal laws. While this is an attractive defence, and one which is (usually in quite a rough form) asserted in debates on the PLS, it fails. Religious communities can support and enhance religious autonomy under certain conditions, such as those described in §5.1.1. But any religious community (if it can be called that) built or supported by the PLS would be too thin to meet these conditions. The PLS therefore cannot be said to enhance religious autonomy by supporting religious communities. The next section will consider a second closely-related defence: that the PLS promotes the autonomy of religious groups, and thereby promotes religious autonomy.

[64] §4.2.4.

[65] Text to note 2 to 4.

5.2 DOES THE PLS CONTRIBUTE TO RELIGIOUS AUTONOMY BY CONTRIBUTING TO RELIGIOUS GROUP AUTONOMY?

The previous section considered the possibility that membership in a religious community contributed to (or was a prerequisite of) religious autonomy and the implications of this possibility for the PLS. Perhaps this thesis, concerned as it is with *individual* religious autonomy, can afford to bracket off concerns relating to religious group (or community) autonomy. ('Group' and 'community' are used interchangeably in this chapter.[66]) However, the individual religious autonomy of religious group members might be thought to be enhanced by fact that their group is autonomous. Therefore in this section, we construct and study another defence of the PLS based on religious autonomy: the PLS is said to promote the autonomy of religious groups; religious group autonomy might in some circumstances promote (individual) religious autonomy; so in this way the PLS might be said to promote (individual) religious autonomy. This argument will be considered in three stages. First, §5.2.2 will make a placeholder assumption about whether the PLS enhances religious group autonomy. Section 5.2.3 will consider if and when religious group autonomy enhances religious autonomy and §5.2.4 will consider whether by enhancing religious group autonomy, the PLS promotes religious autonomy. Before proceeding to the argument, the next section will outline what is meant by religious group autonomy in this thesis.

[66] Both terms are used because 'community' is a better description of the kind of group we mean, but 'group autonomy' is used much more frequently in the literature than 'community autonomy'.

5.2.1 Religious group autonomy and religious autonomy

While there are clearly disanalogies between group autonomy and individual autonomy, autonomy is a notion that can be applied both to individuals and groups. Its application to groups is historically prior – this is the sense in which we talk about autonomous regions or national groups.[67] The features of personal autonomy noted in §3.1 roughly apply *mutatis mutandis* to group autonomy. Autonomy is diminished when an individual or group is coerced or dictated to by an outside force such as the state, a person or a group.[68] An autonomous group, like an autonomous person has the capacity and the opportunity to make choices between a range of valuable options. If the idea of groups making choices seems strange, consider Denise Réaume's account of this:

> A group's path is formed through a complex social process in which the choices of individuals play a part but no one 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. A path is set, even if there is no decisive moment of the sort that constitutes the paradigm case of choosing. With each question that arises for discussion within the group about the adequacy of its social forms the community faces a deliberative enterprise very similar to that engaged in by an individual assessing her life plan. There is more than one way socially to organise familial relationships or the workplace or the case of the aged, or to recognise the

[67] Geoffrey Brahm Levey, 'Equality, Autonomy, and Cultural Rights' (1997) 25(2) Political Theory 215; R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996) 19–26**.**

[68] For a similar definition, see Christopher Wellman, 'The Paradox of Group Autonomy' (2003) 20 Social Philosophy and Policy 265, 266.

> spiritual dimension of human experience… Thus a decision can be right for this group, because of its history, that would not be right for – certainly would not be the outcome of an organic process of decision-making within - another group.[69]

It might seem that the description so far of an autonomous group presupposes that the group is democratic. While a group does not need to be perfectly democratic in order to be autonomous, it does need to have to be minimally representative and deliberative. It is difficult to describe a group which is controlled by a small group of leaders who are unresponsive to the views of other group members as autonomous. The group, in this case is not controlling itself, but rather it is being controlled by 'its' leadership. In other words, group autonomy is "something that can be exercised by a collective *as a whole*, rather than individually by persons in a group."[70]

Dictatorial leadership could also be viewed as an internal constraint on a group's autonomy. Autonomy is diminished when the individual or group has internal obstacles to self-governance,[71] even if they are free from external interference. In the case of individuals, this could be because they are insane, lack minimal will-power, or are in the thrall of an addiction.[72] In the case of a group, it could be because the group is controlled by a dictatorial leadership, rather than group members. (A different internal constraint on

[69] Denise Réaume, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 UBC L Rev 117, 133.

[70] Wellman (n 68) 273.

[71] §3.1.1.

[72] §3.1.1.

group autonomy would be if the group is in chaos or has no way of steering or governing itself – the implications of this will be discussed further in §7.5.2).

A group could achieve the minimal representativeness and deliberative quality necessary for group autonomy in this sense by using decision-making process which are reasonably transparent to group-members and which are sensitive to members' views; by allowing (if not encouraging) deliberation among group members on the direction the group should take and by ensuring a right to exit for members (as exit or non-exit by members is itself potentially expressive of their views). None of this implies that group autonomy requires a free and fair elections or an idealised public square for democratic deliberation.

'Religious group autonomy' in this chapter refers therefore to a religious group having a level of freedom from external (usually state) control[73] as well as the ability to govern itself, such as through minimally democratic institutions of governance. This view of group autonomy is taken because, as will become clear in the argument that follows, this is the only conception of group autonomy that can be plausibly said to enhance individual autonomy.[74] (This applies *mutatis mutandis* to religious group autonomy and religious autonomy). The purpose of this section is to construct a defence of the PLS based on its contribution to religious autonomy. No such defence would get off the

[73] For a similar understanding of religious group autonomy see Ahdar and Leigh (n 15).

[74] See Wellman (n 68) for a similar conclusion.

ground if the conception of religious group autonomy used was such that it could not plausibly be said to contribute to religious autonomy.[75]

A few clarificatory points should be made here. For the purpose of the argument in this section, an autonomous religious group is not autonomous with respect to all matters – but only the matters (mostly relating to family) covered by the PLS. By 'religious groups' here is meant, roughly, groups sharing a religion and a common sense of religious identity. It is assumed that these groups will be smaller than the group of all citizens; that is, the groups are smaller than the state as a whole. The arguments which follow assume that the alternative to religious group autonomy is decision-making at the level of the state. In this section, as elsewhere in this thesis, 'religious autonomy' refers to *individual* religious autonomy.

5.2.2 PLS and religious group autonomy: a placeholder assumption

Clearly some commentators think that the PLS is a form of group religious autonomy.[76] One writes:

> At present, constitutionally sanctioned *cultural autonomy* along with the absence of separate minority representation have created a situation in which the state can *justify non-intervention* in the personal laws of the community…Today, the responsibility of

[75] So the conception of group autonomy used here is meant to help this defence of the PLS, rather than stack the deck against it.

[76] Arend Lijphart, 'The Puzzle of Indian Democracy: A Consociational Interpretation' (1996) 90 The American Political Science Review 258, 260-261.

> altering and reforming personal laws of minority communities rests with these communities and, by and large the state has refrained from *intervening* in them.[77]

This statement assumes a relationship between the continuation of the PLS and the autonomy of certain religious groups. The state, the writer suggests, should not 'intervene' in the personal laws because (a) the minority religious group wants them to remain as they are, and (b) their preferences should be respected because the group should decide, as a part of its autonomy, this question (of what happens to the personal laws). The language of 'intervention' by the state suggests another assumption: (c) the PLS *is* a system under which each religious group operates autonomously at least over family matters. It is easy, in the context in which the debates on the PLS take place, to make these assumptions. Some minority religious leaders press the state to preserve PLS.[78] The government talks of the community's consent being necessary to reform the system.[79] In other jurisdictions, other forms of accommodation of religious norms in family law – religious arbitral tribunals for instance – have been defended on the grounds of group autonomy.[80] Assumptions (a) to (c) might suggest then that support for group autonomy for religious minorities in India necessarily translates into support for the PLS.

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[77] Gurpreet Mahajan, 'Indian Exceptionalism or Indian Model: Negotiating Cultural Diversity and Minority Rights in a Democratic Nation-State' in Will Kymlicka and Baogang He (eds), *Multiculturalism in Asia* (OUP 2005) 297 (emphasis added).

[78] From the website of the All India Muslim Personal Law Board: 'Ulema, leaders and various Muslim organisations successfully convinced the Indian Muslim community that the risk of losing applicability of Shariah laws was real and concerted move by the community was needed to defeat the conspiracy.' <www.aimplboard.org/introduction.html> accessed 8 October 2011.

[79] Zoya Hasan, 'Minority Identity, Muslim Women Bill Campaign and the Political Process' (1989) 24 Economic and Political Weekly 44, 48. See also Robert Baird, 'Gender Implications for a Uniform Civil Code' in Gerald Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Social Science Press, Delhi 2001) 152.

[80] Jane Norton, *Law and Religious Organizations: Exceptions, Non-Interference and Justification* (DPhil thesis, University of Oxford, 2011) 241–68.

Given how common this assumption is, for the sake of argument, we shall adopt this assumption and proceed with the next steps of the argument. We shall however study this assumption more closely in §5.2.4.

5.2.3 When (if ever) does religious group autonomy enhance religious autonomy?

There are clearly connections between religious group autonomy and religious autonomy, but these connections have not been completely mapped.[81] The most prominent of the claims about the connection is that religious group autonomy diminishes religious autonomy. The idea here is that '[p]ower, under such circumstances, becomes a zero-sum game, where the more power government grants to religious and cultural groups, the more difficult it will be for an individual religionist to access the fundamental rights granted by the state.'[82] That is, when groups have greater autonomy (vis-à-vis the liberal state), they have more power over their members. This leaves the members with less power over themselves, and thus less religious autonomy.

This relation between group autonomy and religious autonomy is plausible and probably true of many religious groups. However, what follows shows that it is not

[81] The connection between culture, recognition of cultural groups, accommodation, respect for culture and individual autonomy has been commented on at great length. Here we are referring only to the study of group autonomy (as a type of autonomy) and its relation to individual autonomy.

[82] Michael A Helfand, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders' (2011) 86 NYU L Rev (forthcoming) <works.bepress.com/michael_helfand/3/> accessed 29 September 2011. See also Y Tamir, 'Siding With the Underdogs' in SM Okin and others (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999); A Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 J Pol Phil 285; A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001).

necessarily true and that the converse – that religious group autonomy supports religious autonomy – is also true under certain circumstances. This is important because, once we know *when* religious group autonomy is good for religious autonomy, we will know whether we can defend the PLS on the ground of religious autonomy.[83] What follows is not an exhaustive list of how group religious autonomy can enhance religious autonomy, but rather an attempt to highlight some key connections between the two.

Sections 5.2.3.1–5.2.3.4 draw on democratic theory and the literature on subsidiarity for this purpose. They will outline four circumstances in which religious group autonomy can enhance religious autonomy. These are four circumstances in which individuals have more religious autonomy if they are members of an autonomous religious group than if they are simply citizens of a state, or if they are citizens who are members of a non-autonomous religious group. It is important to keep in mind that references here to religious autonomy being enhanced by group religious autonomy are thus implicitly comparative to a state of affairs where the agent is not a member of an autonomous religious group.

5.2.3.1 Religious practice and religious group autonomy

§5.1.1 above argued that membership in a religious community facilitates at least some religious practice. Similarly, the autonomy of this religious community or group[84] might be necessary for certain religious practices. For instance, some religious practices might require that the religious group as a whole, or representatives of the group, perform

[83] Assuming that at least one of them promotes group autonomy.

[84] The terms are used interchangeably in this chapter.

certain actions. Section 5.1.1 for instance, described community religious rites such as those of the Dinkas, or church or synagogue services. Closer to the PLS, 'religious courts' or 'religious tribunals' also perform religious functions. Religious courts are bodies, comprised of members of a religious group, which claim authority (and are recognised by group members as having authority) to solemnise religious marriages, grant religious divorces or resolve disputes based on religious norms.[85] These religious courts are controversial because of worries relating to women and vulnerable persons.[86] However, they clearly serve important religious functions including performing rituals and ceremonies necessary for religious marriage and divorce. Their existence therefore facilitates and in the case of some religions is possibly necessary, for religious practice,[87] and therefore religious autonomy.[88]

But could these religious functions performed by the group or its representatives not equally be performed by a group which is *not* autonomous? A priest or imam leading prayers or a religious tribunal or court, it might be argued, could perform the same service for group members regardless of whether the group is autonomous or not. It is true that there may be circumstances where an *autonomous* religious group, as opposed to a non-autonomous one, is not necessary to perform functions which facilitate religious practice. But as the recent controversy about the Chinese government's efforts to appoint

[85] See generally G Douglas and others, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff University 2011) 24–40 <www.religionandsociety.org.uk/uploads/docs/2011_07/1310467350_Social_Cohesion_and_Civil_Law_Full_Report.pdf> accessed 12 November 2011.

[86] S Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain', (2007) 1 Law, Social Justice & Global Development Journal <www.go.warwick.ac.uk/elj/lgd/2007_1/bano>.

[87] Norton (n 80) 244–45.

[88] §4.2.1.

Catholic bishops demonstrates,[89] if a group is not autonomous because it is controlled by the state, or a large corporation, or a different religious group, it seems unlikely that it truly can serve its members in the same way that an autonomous religious group can. If priests, imams, Battei Din or Muslim Sharia Councils were known to be stooges of the state, it seems unlikely that the communal worship they lead, the marriages they solemnise, or the decisions they come to will have the same quality for group members that they would have if the group were autonomous and free from such control. There is thus reason to think that religious group autonomy facilitates religious practice. Since the option of religious practice is a necessary aspect of religious autonomy,[90] this marks one way in which religious group autonomy enhances religious autonomy.

5.2.3.2 Representation and religious group autonomy

In this section, another way in which religious group autonomy might enhance religious autonomy is considered. Religious group autonomy, it is suggested, facilitates representation of individual group members, which in turn enhances their religious autonomy. When a decision affecting a person has to be made, excepting special circumstances, it is best for their autonomy that they make that decision. Sometimes, this is not possible. In such circumstances, perhaps the second best option is for someone to act on their behalf. On representative accounts of democracy, this second best option is adopted because we live in a society where decisions have to be made collectively. Does this second best option – political representation – preserve to some degree the personal

[89] 'China and the Vatican: Your Billion or Ours?' *The Economist* (London, 20 August 2011) <www.economist.com/node/21526402> accessed 14 November 2011.

[90] §4.2.1.

and religious autonomy of those who are represented? An analogy is easily drawn between a political representative and an agent acting for the principal in her business or personal affairs.[91] Such agents can enhance autonomy: they allow you to transact multiple points of business at more than one place at once. That is, they broaden the sphere of your influence. Moreover, agents are accountable to you for their actions, and you can revoke your agency agreement if they do not act appropriately. The terms of the agency agreement keep a check on the danger that they will do something that you did not authorise.

Doubtless, this analogy between a business agent and a political representative is rough. A political representative in the modern state represents not one, but many constituents. She must take into account *general* public interest, and not just the interests of her constituents. She was, most likely, chosen to represent the constituency by only some constituents, perhaps not even a majority of them. Moreover, she has interests of her own besides those of her constituents.[92] Few would say that the autonomy of a member of society is not (in some sense) constrained by laws which she might otherwise prefer to live without. But given certain facts about her life – that she lives in a community, that decisions affecting the community must be made in some manner and that there are advantages to living in a community – there appears to be good *prima facie* reason to think that the representative aspect of democracy goes some way towards preserving her autonomy.

[91] See, eg, David Ptolke, 'Representation is Democracy' (1997) 4 Constellations 19.

[92] Cf Edmund Burke, 'Speech to the Electors of Bristol' (3 November 1774) <press-pubs.uchicago.edu/founders/documents/v1ch13s7.html> accessed 20 November 2011.

There are of course several problems with this picture of life in a democracy. There is one of particular concern to us: what if a member of a democratic society is governed by those from whom she is so alienated that they cannot truthfully be described as her delegates, representatives or agents? This alienation might result from the fact that her culture or values are completely at odds to those claiming to represent her, or that her political representative does not think of himself as representing *this class of citizen*. The view of her relationship with her representative which allows her to retain some autonomy breaks down.

This worry about alienation is exacerbated when decisions on matters within the sphere of religion must be made. This is where greater religious group autonomy would decrease the likelihood of alienation.[93] If religious individuals feel alienated from their state representatives, the PLS might give them the opportunity to be governed instead, at least in family matters, by those who they feel represent them better – their co-religionists. Group members and their leaders share a religion, and therefore (one might expect) some values, goals and cultural attributes. So the PLS might enhance greater religious group autonomy which in turn improves the representation of individual group members in family matters relating to their religion. This can enhance their religious autonomy, at least in the comparative sense explained in §5.2.3 above.

[93] This is arguably a virtue of subsidiarity in general: Daniel Philpott, 'In Defense of Self-Determination' (1995) 105 Ethics 352.

5.2.3.3 Deliberative participation and autonomy

One way, described above, of preserving autonomy in collective decision-making is to have those in power be representative. Another way is through deliberative decision-making. That is to say decision-making where 'people routinely relate to one another not merely by asserting their will or fighting for their predetermined interests, but by influencing each other through the publicly valued use of reasoned argument, evidence, evaluation and persuasion that enlists reasons in its cause.'[94] There are many competing accounts of why this kind of deliberation preserves autonomy, but the details of these debates are not essential here.[95] The important point is that there seems to be a fair degree of consensus that making decisions by deliberating with the person affected preserves autonomy to some degree.

Because of this consensus, only a few reasons why deliberation protects autonomy will be sketched here. First, there is something to be said for the idea that when decision-making is deliberative, even the person who has lost the argument, and who has to abide by a decision that she might disagree with, retains more autonomy than someone who was not consulted at all. The first-mentioned person at least had an input into the decision-making process. She therefore had at least some power to affect what happened to her. Second, attempting to persuade her by drawing her attention to the applicable reasons implies that she is considered capable of responding to such reasons.[96]

[94] Amy Gutmann, 'Democracy' in Robert Goodin and Philip Pettit (eds), *A Companion to Contemporary Political Philosophy* (Blackwell Publishers 1993) 141.

[95] M Cooke, 'Five Arguments for Deliberative Democracy' (2000) 48 Political Studies 957. Even those who disagree with deliberative accounts of democracy are likely to agree that deliberation goes some way towards preserving autonomy.

[96] Joshua Cohen, 'Reflections on Habermas on Democracy' (1999) 12 Ratio Juris 407.

Attempting to persuade her suffers less, then, from the insult that coercion might otherwise carry: that the coerced person is unable to reason, or take care of herself.[97]

Moreover, deliberation might even enhance autonomy. The ability to respond to reason and the ability to draw attention to the reasons that others have would be sharpened by participation in the process of deliberation. The first ability is a necessary condition for autonomy. As §3.1.1 and §3.6.3 outlined, a person who cannot respond to reason cannot see the world as it truly is. As such he cannot navigate his way through it autonomously. Most accounts of autonomy make some level of rationality necessary for autonomy because it is undeniable that a person without the ability to reason will be unable to effectively translate their will to action. The second ability is a kind of power. Wielding it well enables a person to have the kind of power over others which is consistent with respect for their autonomy.[98] Such a power contributes to the autonomy of the person who wields it.

This is, again, not to say that collective decisions that are deliberative necessarily *completely* preserve religious autonomy.[99] Rather, they go some way towards mitigating the harmful effects of collective decision-making on autonomy. One argument, then, in favour of greater religious group autonomy is based on the potential that it has to make deliberation, especially over religious matters, more effective at preserving religious autonomy. If deliberation protects religious autonomy by giving those affected a say in

[97] See §3.1.5 and Chapter Six for the implications of insults for religious autonomy.

[98] §3.6.4

[99] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts, and Possibilities' (1989) *Yale Journal of Law and Feminism* 7.

the decision, having fewer people at the metaphorical table might give you *more* of a say. Further, as suggested in the section above, religious group-members are less likely to feel alienated from their group than they do from the state. If the goal is for people to influence each other 'through the publicly valued use of reasoned argument, evidence, evaluation and persuasion',[100] this might be easier in a religious group than in the state at large. The kinds of groups we are concerned with share values, goals and norms. Those affected by a decision can appeal to common reasons in defence of their position based on these shared values, goals and norms.[101] As one writer says about a common nationality, it 'facilitates the communications, confidence, and mutual respect that are necessary or desirable in a democracy'[102] This might also apply to shared values, goals and norms of a group and might lead to better participation among group members in deliberation. It might therefore be argued that the PLS, by increasing religious group autonomy over family matters, improves the quality and effectiveness of deliberation and thereby helps preserve religious autonomy. It therefore enhances autonomy at least in the comparative sense explained in §5.2.3 above.

5.2.3.4 Individual political autonomy and religious autonomy

A fourth way in which religious group autonomy can enhance religious autonomy is by enhancing what will be referred to here as 'individual political autonomy'. By political

[100] Gutmann (n 94) 141.

[101] Of course the values themselves might be contested or subject to interpretation.

[102] Fredrick Whelan, 'Prologue: Democratic Theory and the Boundary Problem' in J Pennock and J Chapman (eds) *Liberal Democracy* (NYU 1983) 30.

autonomy is meant the kind of freedom that Benjamin Constant described as the 'liberty of the ancients' – the freedom to:

> exercis[e] collectively, *but directly*, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace; in forming all instances with foreign governments; in voting laws, in pronouncing judgments; in examining the accounts, the acts, the stewardships of the magistrates; in calling them to appear in front of the assembled people, in accusing, condemning or absolving them.[103]

The literature on religious autonomy perhaps neglects to emphasise as much as it should the contribution that the exercise of this political freedom can make to religious autonomy. If an autonomous person is part-author of her life, *direct* partial authorship of the politics of her religious groups – the context in which her life is probably lived – will only give her more autonomy. So political freedom supports autonomy partly through the influence that a member of a democracy might have on political decision-making.

Participation in politics is likely to hone other qualities that enhance autonomy. A sense of responsibility for the fate of their society might habituate people to a sense of responsibility for their actions more generally. This sense of responsibility bears an intimate relation to autonomy.[104] Earlier, autonomy was described as self-authorship or self-creation of one's life. No-one can claim to be the author of her own life, unless she

[103] Benjamin Constant, 'The Liberty of the Ancients Compared to That of the Moderns' in David Boaz, *The Libertarian Reader* (NY: The Free Press 1997) 66 (emphasis added).

[104] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986) 381–85.

takes responsibility for her actions, unless she claims them as her own. If she is alienated from her actions, if she disclaims them, then she cannot be the author or creator of those actions. If individual political autonomy promotes habits of responsibility, it also nourishes the capacity for religious autonomy.

Constant was right to note that this liberty was probably enjoyed to a greater degree in the smaller democratic societies of the past where each participant in politics was much more influential than one voter in the large states of today.[105] It is true that exercises of political freedom continue today through street protests, 'occupations' of landmarks, lobbying, voting, petitions and even the formation of virtual groups in support of 'causes' on social networking websites, even if not everyone has the right to speak in a legislative body as in some societies in the past. But Constant's ideal is that of *direct* influence on political events. This is clearly easier to achieve in smaller political communities than larger ones. If some matters of government – the regulation of family life for instance – were devolved to religious groups, individual political autonomy might be more easily achieved, and more effective, in these (smaller) religious groups, than in the state at large.[106] These groups can serve as a stage for individuals to influence the politics of their religious groups. This is especially true given what was discussed above about the importance of people not being alienated from their government. More will be said about how individual political autonomy within religious groups would work in §5.2.4.4 below.

[105] Benjamin Constant, 'The Liberty of the Ancients Compared to That of the Moderns' in David Boaz, *The Libertarian Reader* (NY: The Free Press 1997) 68.

[106] No effort is made here to try to estimate how large these groups might be. Certainly they are smaller than a state, and likely small enough that direct influence can be felt.

In any case, if individual political autonomy is to be achieved in a religious group, this religious group must be autonomous. If it is not, i.e. if the group does not govern itself and if it is not free (to some degree) from external control, then the agent cannot claim to part-author her political context (i.e. the religious group). She cannot claim to have individual political autonomy. So one defence of the PLS might be that it enhances religious group autonomy, thus providing an appropriate context for the exercise of individual political autonomy (at least over some matters); this in turn enhances religious autonomy. The next section considers whether the arguments just outlined for how religious group autonomy enhances religious autonomy apply to the PLS.

5.2.4 Does the PLS promote religious autonomy by promoting religious group autonomy?

§5.2.2 outlined the common assumption that the PLS is a form of, or promotes, group autonomy. However, despite how commonly it is asserted, it is unlikely that the PLS promotes religious group autonomy. The PLS is not the same as a *millet* system.[107] Unlike the latter system, under the PLS the religious group has no representatives or leaders. The personal laws are applied by state courts and, generally speaking, administered by state officials. Under the PLS, as discussed in §2.1, the state rather than the religious group decides on who qualifies as a member.

If religious group autonomy means anything, surely it means that the group should decide the norms by which it is governed for itself. But the PLS ossifies one

[107] On the millet system, see Will Kymlicka, 'Two Models of Pluralism and Tolerance' (1992) 14 Analyse & Kritik 33. This is not to say that a millet system necessarily promotes group autonomy either. For more on the *millet* system see the Introduction to this thesis and Chapter Seven.

interpretation of each religion into law. The state, and not the group, answers the question of what norms the group should have. Further, the PLS does not recognise a leader elected by the group in any formalised process. It is true that those identified as leaders of some minority religious groups claim to speak for the group, and their opinion may be taken as the opinion of the group by the state in debates about the future of the PLS.[108] But the PLS itself does not recognise them as group leaders. In any case a group is not autonomous when group leaders are identified by the *state*, rather than the group.[109] Leaders whose positions are dependent on the state's identification of them as such are less likely to represent the group's interest, especially if it involves challenging the state. Moreover, there is reason to believe that the state is likely to pick leaders who will serve the state's interests, rather than leaders who best represent the group. After all, the state has a strong interest in the working of these religious groups. As our discussion in §2.7 shows, the Indian state is not reticent in its involvement in religious groups as well as religious doctrine. Finally, the PLS does not allow groups to decide on the boundaries of their own membership, which is a necessary feature of group autonomy.[110]

Since under the PLS the norms, leaders and membership of religious groups[111] are identified by the state rather than the religious groups themselves, it is difficult to argue

[108] The All India Muslim Personal Law Board is often regarded as the spokesperson of Indian Muslims, Flavia Agnes, 'Law and Gender Inequality: The Politics of Women's Rights in India' in Mala Khullar and Ihwa Taehakkyo (eds), *Writing the Women's Movement: A Reader* (Zubaan, New Delhi 2005) 126.

[109] Ahdar and Leigh (n 15) 338-346.

[110] 'If outsiders intervene in disputes between internal dissidents and the rest of the group, they are usurping the power to decide the ultimate membership criteria of the group. It interferes with the autonomy of the group to determine for itself its cultural direction. Autonomy must include the power to reject change as much as to embrace it.' DG Réaume, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 UBC L Rev 117, 121.

[111] Better described as personal law groups.

that the PLS promotes, or is a form of, religious group autonomy. This being the case, any argument in favour of the PLS based on §5.2.3 above will fail, as a key premise of any such argument is that the PLS promotes, or is a form of, religious group autonomy.[112] However, given how commonly it is assumed that the PLS enhances religious group autonomy, it is worth spelling out in more detail why the PLS cannot be said to enhance religious autonomy based on the arguments outlined in §5.2.3.

5.2.4.1 Does the PLS facilitate religious practice?

Religious group autonomy, it was argued in §5.2.3.1 above, facilitates certain religious practices. Religious tribunals were used as an example. But the PLS does not function like a religious tribunal. Rabbis, priests, imams or other representatives of religious groups do not oversee marriages, divorces and disputes relating to family life. Rather these are regulated by personal law which is interpreted and applied by state courts which may possess no special religious authority or even expertise on the religion in question. One would be hard-pressed to argue that this kind of regulation by the state could contribute to religious practice in way that the examples in §5.2.3.1 above do.

5.2.4.2 Does the PLS enhance representation and therefore religious autonomy?

It was argued above that if members of religious groups could be said to be alienated from the state, giving these religious groups greater autonomy might enhance their

[112] It is perhaps unsurprising to those familiar with personal law systems in other jurisdictions that the Indian PLS does *not* enhance religious autonomy. Entrenching religious understandings in law generally appears to lead to the reinforcement of group hierarchy and stagnation of the group's norms. Tamir (n 82); Shachar (n 82); M Sunder, 'Cultural Dissent' (2001) 54 Stan L Rev 495.

religious autonomy.[113] There are signs that minority religious groups are alienated from the Indian state. A recent report commissioned by the Government on the status of Muslims in India concludes on the political representation of minorities: 'They do not have the necessary influence or the opportunity to either change or even influence events which enables their meaningful and active participation in development process.'[114] At least some commentators hold the view that Indian Parliament is so unrepresentative of minorities that it cannot legitimately legislate on the personal laws of the minorities.[115] We might therefore think that, as argued in §5.2.3.2, greater religious group autonomy might enhance the representation of minorities in India. But the PLS cannot be said to enhance representation, given that it does not have *representatives* of religious groups at all, as §5.2.4 explains.

[113] §5.2.3.2.

[114] Prime Minister's High Level Committee, 'Social, Economic and Educational Status of the Muslim Community of India' (2006) 262 <minorityaffairs.gov.in/sachar> accessed 20 November 2011. It also notes: 'Over the last sixty years minorities have scarcely occupied adequate public spaces. The participation of Muslims in nearly all political spaces is low which can have an adverse impact on the Indian society and polity in the long run. The marginalized either have inadequate numbers that comes in the way of making their presence felt in the normal course of governance or they are not politically empowered. Given the power of numbers in a democratic polity, based on universal franchise, minorities in India lack effective agency and political importance. They do not have the necessary influence or the opportunity to either change or even influence events which enables their meaningful and active participation in development process.' Zoya Hasan, a prominent political commentator, writes about the representation of Muslims in particular: 'Averaging between 4 and 6 percent, the political representation of Muslims is much lower than their population would warrant. There were 44 Muslims in the Lok Sabha in 1980, a figure that went down to 26 in the 1991 elections and stands at 13 in the present Lok Sabha made up of 554 members. Since elected representatives are in such s small number, they cannot set the terms and agenda for reform.' Zoya Hasan, 'Governance and Reform of Personal Laws in India' in I. Jaising (ed), *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited 2005) 353, 365.

[115] Gurpreet Mahajan writes: 'The minorities can also, with reason, claim that the state or the central Parliament can as a representative of the majority community legislate on the practices and PLS of that community, but not for the minorities as they are inadequately represented in it.' Mahajan (n 77) 297. This view is said to explain why Hindu personal law has been amended by Parliament, while Muslim personal law has remained relatively unmodified by the state in independent India. This view is questionable given the effect the courts have had on Muslim personal law; §2.5.

So to support the claim that the PLS enhances religious group autonomy, it might be argued that the representatives of religious groups are using the state as a proxy in maintaining and administering the PLS. The personal laws, it might be argued, are the laws they would have passed had they more autonomy. While this is an interesting possibility, there is very little basis for the view that religious groups in India *would* have passed the personal laws as they stand today if they had more religious group autonomy, even though it is a widely-held assumption.[116] Zoya Hasan, in a study of one political upheaval relating to the PLS, notes that while the desire of 'fundamentalist' religious organisations that the PLS remain unchanged was taken to be the position of the 'Muslim community', the Muslims who campaigned for reform of these laws were largely ignored by the state.[117] Ayelet Shachar notes a similar pattern in Israel's version of a *millet* system.[118]

There is another reason why the PLS does not enhance representation. It was argued above that religious group autonomy would contribute to representation because each of the individuals in a religious group would share norms and values which would aid sympathy and understanding. Under the PLS, however, individuals are identified as members of a religious group – i.e. placed in a personal law group – regardless of how the group would identify them, or even of how they would self-identify.[119] So Buddhists,

[116] ibid.

[117] Hasan, 'Minority Identity' (n 79) 47–48.

[118] A Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 J Pol Phil 285, 294–95.

[119] §2.2.

Sikhs and Jains are identified as Hindu.[120] Atheists or agnostics might be put in a religious group. Some, whom the Muslim community – in so far as one exists – would reject as Muslims, are identified as Muslims under the PLS.[121] The sense of sympathy between group members and the benefits that entails for representation depends on the *group*, not the state, deciding the boundaries of membership.[122] The PLS therefore does not contribute to the effective representation of religious group members.

5.2.4.3 Does the PLS enhance deliberation and therefore religious autonomy?

The PLS clearly does not provide an opportunity for deliberation. Rather, as indicated above, it ossifies the religious norms of religious groups leaving very little space for deliberation by the groups themselves. Commentators complain that the state, if it changes the personal laws at all, does so based on the views of only patriarchal and orthodox sectors of the religious group.[123] There is no opportunity for debate or deliberation among the wider religious group.[124] It is difficult to see how the PLS contributes to the kind of deliberation which can enhance religious autonomy.

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[120] ibid.

[121] ibid.

[122] Réaume (n 110).

[123] Such as the All-India Muslim Personal Law Board mentioned in n 78. See Shachar (n 118).

[124] The exclusion of women from religious leadership positions has led to the formation of groups like the Women's Muslim Personal Law Board, but it is difficult to know how influential these groups are likely to be in shaping the law.

5.2.4.4 Does the PLS promote political autonomy?

Religious groups in India might well serve as an important context for individual political autonomy. Greater religious group autonomy might help accomplish individual political autonomy, but the PLS does not. Rather than allow members of religious groups to influence the contents of their religious norms relating to family life, the PLS ossifies one interpretation of the religion into law. As outlined in the §5.2.4 the PLS gives religious persons no control over the PLS, no leaders and no way of choosing leaders, and no way of making collective decisions about the matters that PLS governs. It would therefore be difficult to argue that PLS promotes political autonomy.

This section makes four arguments for why the autonomy of religious groups can sometimes contribute to the religious autonomy of group members. It then considers the argument that the PLS enhances individual religious autonomy by enhancing the autonomy of religious groups. It concludes that this argument does not stand since the PLS cannot be said to promote religious group autonomy, and also does not enhance religious autonomy in any of the four ways outlined in §5.2.3.

5.3 CONCLUSION

This chapter considers two defences of the PLS based on its contribution to religious autonomy. The first defence was that religious communities can contribute to the religious autonomy of their members and the PLS might help build or strengthen religious communities which have this potential. The second defence was that the PLS

contributes to, or is a form of, religious group autonomy, and as such, that it promoted religious autonomy. The chapter concludes that both defences fail.

One question which this chapter leaves open is: what (if any) kind of system would enhance religious autonomy by enhancing group autonomy in place of the PLS? A sceptical response might be that few religious groups in India are likely to operate in the ways outlined in §5.2.1 that encourages participation, deliberation or gives all members some influence over the ultimate decision. Rather, women are likely to be largely excluded from decision-making and decisions are likely to be made by a single leader or a few powerful religious figures who brook little dissent. It is highly unlikely to be quasi-democratic as described in §5.2.1. But the mobilisation of religious groups around at least some political issues, especially women's rights issues,[125] indicates the potential for the formation of religious groups which enhance religious autonomy. One way to promote religious autonomy might then be to leave such religious groups to form and manage (if they wish) a system of optional religious 'tribunals' or alternative dispute resolution institutions, similar to those found in some Western jurisdictions. This is a possibility that will be explored in greater detail in Chapter Seven.

[125] See Hasan, 'Governance and Reform' (n 114) 353 and Hasan, 'Minority Identity' (n 79) 47–48 for examples.

6. SELF-RESPECT

Self-respect, including respect for one's own religious identity, is an important precondition for religious autonomy.[1] This chapter considers both a defence of the PLS and a criticism of the PLS based on self-respect. The defence can be summarised as follows: adherents of minority religions in India face threats to their self-respect, including threats based on religious hatred that is directed towards them. The PLS provides minority religions with recognition and validation, which supports their self-respect. This defence will be studied in §6.1. The criticism of the PLS based on self-respect relates to its discriminatory features. Discrimination is thought to sometimes harm self-respect. Section 6.2 will explore whether this is true of the PLS. It will consider whether such harm to self-respect harms religious autonomy. Therefore, the two questions relating to self-respect addressed in this chapter are: (1) does the PLS provide recognition or validation to religious identities which contributes to self-respect and (2) does the discrimination inherent in the PLS harm self-respect?

6.1 DOES THE PLS PROVIDE RECOGNITION OR VALIDATION TO RELIGIOUS IDENTITIES WHICH CONTRIBUTES TO SELF-RESPECT?

It is worth exploring the connections between recognition, validation, self-respect and religious autonomy briefly, as clarity in our understanding of these values may help ensure that we are able to properly evaluate any claims that the PLS contributes to their realisation.

[1] This was briefly discussed in §3.1.5.

6.1.1 Recognition, validation and self-respect

Earlier in §3.1.5, we outlined the connection between self-respect and our ability to live an autonomous life. John Rawls, for instance, argues that self-respect includes:

> a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out [a]nd … a confidence in one's ability, so far as it is within one's power to fulfil one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavours.[2]

If this is true, then in order to live an autonomous life, a person has to have certain attitudes towards herself, towards her ability to carry out plans and projects, and towards these plans and projects themselves. The way Rawls describes self-respect here might also be described as self-esteem.[3]

Self-respect can hinge – and can be attacked – on a number of fronts. This chapter is particularly concerned with self-respect based on one's religious identity and way of life. To put it in the terms used above, religious autonomy requires that a person have self-respect in his own value as a Muslim, Christian, Parsi or member of any other religious group. An aspect of self-respect, in Rawls' words, is a person's 'secure

[2] J Rawls, *A Theory of Justice* (Clarendon 1972) 178. See also ibid 440.

[3] It also accords with what Darwall would describe as appraisal self-respect: SL Darwall, 'Two Kinds of Respect' (1977) 88 Ethics 36, 48. Appraisal respect 'consists in an attitude of positive appraisal of that person either as a person or as engaged in some particular pursuit'.

conviction that his *conception of his good, his plan of life*, is worth carrying out.'[4] Conceptions of the good can, of course, be associated with religions. If a person wants to carry out a religious way of life, self-respect entails his conviction that this way of life is worth carrying out. This is not to deny the possibility that he might revise his religious way of life – this too is consistent with religious autonomy.[5] Self-respect is also inconsistent with the sort of pervasive self-doubt that Rawls described, such as doubts that one is capable of choosing and following a valuable religious way of life.

The self-respect necessary for religious autonomy requires that others esteem – at least to a minimal degree – one's religious identity and way of life.[6] As will be discussed in greater detail below, it would be difficult to maintain enough self-respect for autonomy in a society where one is hated and despised. But it might also be thought, based on prominent arguments in the debates on multiculturalism, that the *recognition* of others, in addition to their esteem, is necessary for self-respect.[7] To the extent that the recognition we are talking about is the recognition by these others that we are persons, and that this is a pertinent fact to be taken into account in their treatment of us, it is difficult to disagree with this thought.[8]

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[4] Rawls (n 2) 178.

[5] §3.6.2.

[6] cf M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Blackwell 1985) which questions the circle of recognition that turns respect into self-respect.

[7] Appraisal respect or self-respect is distinguished from recognition, or (in Darwall's terms) recognition respect. In Darwall's highly influential formulation: 'There is a kind of respect which … consists, most generally, in a disposition to weigh appropriately in one's deliberations some feature of the thing in question and to act accordingly… Since this kind of respect consists in giving appropriate consideration or recognition to some feature of its object in deliberating about what to do, I shall call it recognition respect. *Persons can be the object of recognition respect*.' Darwall (n 3) 48 (emphasis added).

[8] Leslie Green, 'Two Worries about Respect for Persons' (2010) 120 Ethics 212.

There is however another, more contested, version of this thought. There are many facets to a person's identity. For instance, they may see themselves as members of groups based on language, ethnicity, culture or religion. It is sometimes thought that these aspects of persons, including their membership in cultural or religious groups, should also be recognised. Charles Taylor describes this kind of recognition as constituting a human need.[9] Whether we assign a priority to recognising the personhood of persons or to recognising other aspects of their identity, it is difficult to deny the thesis that for most people the recognition of others influences identity-formation and self-perception. More than this, though, Taylor's ideas, which will be explored in more detail below, suggest that non-recognition of important aspects of a person's identity is damaging, disrespectful and insulting. It could therefore be argued that recognising these aspects of a person's identity helps them attain the self-respect necessary for an autonomous life; recognising their religious identity and way of life helps them attain religious autonomy.

It appears therefore that both the esteem and the recognition by others of a person's religious identity and way of life might be important for self-respect, and thus for religious autonomy. Let us explore a defence of the PLS based on these arguments.

[9] C Taylor, 'Multiculturalism and the Politics of Recognition' in C Taylor, A Gutmann and J Habermas, *Multiculturalism : Examining the Politics of Recognition* (Princeton University Press, Princeton 1994).

6.1.2 Self-respect for religious groups in India

The Indian constitution, as discussed in detail in §2.7, recognises a right to freedom of religion. The constitution describes India as a secular state.[10] It also has a long tradition of religious toleration.[11] While India might appear to be largely successful in its attempt to guarantee religious freedom for its citizens in the face of great religious diversity, it also faces problems on this front. Religious hatred and even violence are not unknown in India. Recent decades have witnessed the ascendance of the Hindu Right. The Introduction to this thesis notes that the Hindu Right is accused of using the 'personal law issue' to portray Indian Muslims as 'obscurantist and fundamentalist' and 'barbaric'.[12] But this only hints at the religious hate that is often associated with this ideological movement. Muslims and Christians are often faced with criticism – ranging from subtle attacks to invective – from the Hindu Right. Muslims are denounced as inhuman, terrorists, oppressors of Hindus, uncivilized and disloyal to India.[13] Christians are described as 'a foreign threat'.[14] Christian missionaries are particularly prone to attack. In one pamphlet, for instance, they are accused of a 'conspiracy of converting gullible tribals [to Christianity] by giving [them] money, goods, [and] black magic.'[15] When the

[10] Donald Eugene Smith, *India as a Secular State* (Princeton University Press 1963); Rajeev Bhargava, *The Promise of India's Secular Democracy* (OUP 2010).

[11] Ashis Nandy, 'A Billion Gandhis' *Outlook* (New Delhi, 21 June 2004) <www.outlookindia.com/article.aspx?224252> accessed 4 October 2011; TN Madan, *Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (2nd edn, OUP 2010).

[12] Note 40 to 42 of the Introduction.

[13] Brenda Crossman and Ratna Kapur, *Secularism's Last Sigh?* (OUP 2001) 7–11.

[14] ibid 10.

[15] Human Rights Watch, *Politics by Other Means: Attacks against Christians in India* (October 1999) <www.hrw.org/reports/1999/indiachr/christians8-04.htm> accessed 13 November 2011.

BJP[16] governed, school textbooks were adapted to reflect the Hindu Right's version of Indian history, in particular the history of Indian Hindus and their relations with other religious groups.[17]

This stream of hate speech[18] – propagated through mass media, pamphlets, public rallies and schools – has, perhaps not surprisingly, had unfortunate results.[19] The Hindu Right is blamed for stirring up crowds in rallies that eventually lead to violence against Christians.[20] It is also blamed for the massacre of Muslims in Gujarat in 2002, when groups belonging to the Hindu Right both incited people to violence and even took part in acts of violence.[21] The Hindu Right has been compared to the Nazi Party, a comparison that, astonishingly, is not always resisted by it.[22] One might hope that such unfavourable

[16] The Bharatiya Janata Party, a Hindu Right political party.

[17] Anjali Modi, 'Tailoring History' *The Hindu* (India, 21 October 2001) <www.hindu.com/thehindu/2001/10/21/stories/0521134h.htm> accessed 5 October 2011.

[18] 'Hate speech' here roughly refers to 'speech expressing hatred or intolerance of other social groups', especially on the basis of religion. See Robert Post, 'Hate Speech' in Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (OUP 2009) 123.

[19] Concerned Citizens Tribunal, *Crimes against Humanity: Incidents and Evidence Vol I* (Gujarat 2002) <www.sabrang.com/tribunal/volI/index.html> accessed 5 October 2011.

[20] Somini Sengupta, 'Hindu Threat to Christians: Convert or Flee' *The New York Times* (New York, 12 October 2008) <www.nytimes.com/2008/10/13/world/asia/13india.html?_r=1&pagewanted=1> accessed 5 October 2011; Celia W Dugger, '47 Suspected Militants in India Charged in Missionary's Death' *The New York Times* (New York, 25 January 1999) <www.nytimes.com/1999/01/25/world/47-suspected-militants-in-india-charged-in-missionary-s-death.html> accessed 5 October 2011.

[21] Concerned Citizens Tribunal (n 19); National Human Rights Commission, *Proceedings* (31 May 2002) <nhrc.nic.in/guj_finalorder.htm> accessed 16 November 2011.

[22] See excerpt from Bal Thackeray's interview with *Time* magazine in January 1993, in Crossman and Kapur (n 12) 8–9.

comparisons might make its ideology attractive to only a few. This hope is belied by the Right's popularity and influence.[23] A BJP-led coalition governed India until 2004.

This account of the problems of India's religious groups is incomplete and highly simplified. It is incomplete because Muslims and Christians are not the only religious groups in India. Other religious minorities, notably Sikhs,[24] have also been the target of riots, and more would have to be said about them in a complete account. There is likely to be a great variation in experiences of religious hate both across and within different religious groups. Many religious groups within Hinduism might face some of the same challenges as other minority religions do. Moreover, even those aligned to the Hindu Right, rather than merely posing a threat to other religious groups, may themselves feel threatened by the latter.[25] Certainly the rhetoric of 'appeasement' suggests that this is the case.[26] The account presented in this section is also rough and highly simplified because the Hindu Right itself comprises a number of diverse movements, parties, wings and individuals.[27] We therefore need to be cautious in characterising 'its' actions in a unified manner.

However, this account is left oversimplified and incomplete because it is provided for a very limited purpose: to demonstrate that there is a degree of hatred towards

[23] See generally Thomas Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (Princeton University Press 1999). Burton Stein, *A History of India* (Blackwell 2010) 410.

[24] Stanley J Tambiah, 'Reflections on Communal Violence in South Asia' (1990) 49 The Journal of Asian Studies 741, 744–48.

[25] This feeling may be sincere, even if it is mistaken.

[26] M Hasan, *Legacy of a Divided Nation: India's Muslims Since Independence* (OUP 2001) 277–80.

[27] See generally Hansen (n 23).

religious groups, especially minorities, in India and that they are, in fact, exposed to hate speech and violence. Moreover, as our purpose is to study a defence of the PLS grounded in the existence of this hatred, it might be helpful to begin with the strongest version of this defence. We will consider objections to it in §6.1.2.2 and 6.1.2.3 below. The defence, recalling from above, is that hatred towards religious minorities in India makes it difficult for them to maintain their self-respect and that the PLS might help mitigate this harm to the self-respect of religious minorities, and thus promote their religious autonomy.

6.1.2.1 The PLS as a form of recognition and validation of religious minorities

The PLS, its supporters might argue, is today a remedial measure to the hatred that religious groups face in India today (even if this was not its purpose in the past). In support of the PLS, it might be said that by identifying individuals as members of a religious group and by applying to them, as far as practicable, the religious doctrine of that group, the state *recognises* an aspect of their identity, namely their membership of that religious group.[28] This kind of recognition by the state, it might be argued in line with the thoughts sketched in §6.1.1 above, helps maintain their self-respect.

The PLS can also be seen as showing esteem for religious minorities and their ways of life. The state, through the PLS, applies to individuals what it takes the norms of their religion to be. This could be thought of as countering the adverse effects on religious groups discussed above by *validating* minority groups. The PLS might thus serve to

[28] On how colonial courts forged Parsi identity, see Mitra J Sharafi, 'Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925' (PhD dissertation, Princeton University 2006).

validate – in the sense of affirming as good or valuable – these religious ways of life and their adherents. If the state could be said to be validating all religious options represented in the PLS, then the PLS could be said to support the self-respect of members of minority religious groups. We might find some support for this view of the PLS in the attitude of some feminist groups towards calls by the Hindu Right for the reform of the PLS and the imposition of a Uniform Civil Code of family law. These feminist groups fear that their opposition to the PLS may be read as support for Hindu nationalism and an endorsement of the Hindu Right's negative assessment of minority religious groups. Many others who support the PLS (usually religious groups), as well as those who tread softly on the question of its abolition,[29] also base their support on worries about the hatred of the Hindu Right and the oppression of minorities.[30] One commentator expresses this fear thus:

> [the personal law question] has to be addressed in ways that do not surrender to the ideological rationale of the Hindu Right for a uniform civil code:[31] an aggressive anti-Muslim/Christian agenda that takes shelter under the insignia of a 'unified' nation. The majoritarian notion of a 'unified nation' is projected as (and perceived to be) a code for Hindu supremacy, and rests on a vaunted universalism that … is of course spurious.[32]

[29] Jeff Spinner-Halev, 'Feminism, Multiculturalism, Oppression and the State' (2001) 112 Ethics 84.

[30] ibid.

[31] Instead of the personal laws. See Introduction for an outline of this problem.

[32] Kumkum Sangari, 'Gender Lines: Personal Law, Common Law, Conversion' (1999) 27(5/6) Social Scientist 17, 19.

This might make the argument that the PLS serves the purpose of validating religious groups seem attractive. For, if the PLS did in fact serve this purpose, it would explain the writer's worry that the abolition of the PLS might imply an 'anti-Muslim/Christian agenda'. But while the argument in favour of the PLS based on its recognition and its validation of religious minorities is attractive because of its resonance with much of the rhetoric that surrounds the debate, it faces important problems. We consider first the problems with the argument that the PLS recognises religious minorities, and then the problems with the argument that it validates them.

6.1.2.2 The non-recognition and misrecognition of the PLS

The demand for recognition, as suggested above, rests on a thesis summarised by Charles Taylor as follows:

> The thesis is that our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.[33]

The demand for recognition, then, is *primarily a demand for an end to non-recognition and misrecognition*. Non-recognition and misrecognition are, as Taylor's remarks

[33] C Taylor, 'Multiculturalism and the Politics of Recognition' in C Taylor, A Gutmann and J Habermas, *Multiculturalism : Examining the Politics of Recognition* (Princeton University Press, Princeton 1994) 25.

suggest, damaging, disrespectful and among the most grating insults to which we could subject a person. Non-recognition comes in many forms. Treating a person as if they did not exist, as if they were invisible, or as if they made no mark on the world at all can certainly have a devastating effect on them. Walzer uses an example from Indian society to explain how important it is to people to be counted:

> To be untouchable is (perhaps) not so awful as to be invisible. In some parts of India, not many years ago, 'an untouchable had to shout a warning when entering a street so that all the holier folk could get out of the way of his contaminating shadow'. I can barely imagine what it would be like to shout that warning, but at least the person who shouts is a formidable presence and he may get some satisfaction out of the fearful fleeing of the others. The invisible man doesn't get this sort of satisfaction.[34]

Failing to recognise the very existence of a person and treating them as if they were invisible is perhaps an extreme case of misrecognition – of failing to recognise the truth about their existence or some aspect of their selves. This may account for the offence people feel when facts are assumed about them (for example based on generalised associations or stereotypes) which are in fact not true. Feinberg suggests that a part of the offence caused in these cases is righteous indignation at the truth not being told.[35] But there is certainly some evidence to suggest that that this kind of misrecognition, such as having one's name misspelled or mispronounced or having significant facts relating to

[34] Walzer (n 6) 253.

[35] Joel Feinberg, 'Non-Comparative Justice' (1974) 83 Phil Rev 297, 324.

identity misrepresented, is often taken as a personal insult.[36] Misrecognition or non-recognition can be particularly wounding because it may suggest that the person in question is so insignificant that it is not worth the trouble of finding out or remembering even the most basic facts about her.

It may seem that the PLS provides valuable recognition: it may seem that it recognises religious aspects of individual's identities. But the PLS, rather than recognising aspects of individual identity in ways that enhance religious autonomy, treats individuals with the kind of misrecognition and non-recognition described above. The individuals that we encountered in §4.2.1 – P2[37], P3[38] and P4[39] – are not recognised, but rather misrecognised and misrepresented.[40] The PLS shows little regard for how people identify themselves and what their understanding of their religion really is. It often identifies people in terms different from the terms in which they identify themselves.[41] By applying a single, state-endorsed religious interpretation to all those who fall within a

[36] Yiannis Gabriel, 'An Introduction to the Social Psychology of Insults in Organizations' (1998) 51 Hum Relations 1. Most people seem to have a special relationship with their name. Studies show that they prefer the letters that are in their name, to letters that are not. '[P]eople's positive, automatic associations about the self influence people's evaluation of nearly anything associated with the self': JT Jones, BW Pelham and MC Mirenberg, 'Name Letter Preferences Are Not Merely Mere Exposure: Implicit Egotism as Self-Regulation' (2002) 38 Ohio St U J Experimental Soc Psych 170.

[37] P2 consists of those who self-identify in the same way that the personal law identifies them but whose religious beliefs differ from those of the personal law.

[38] P3 consists of those whose religious beliefs coincide with those of a personal law, but who do not identify with the personal law group that the system assigns to them.

[39] P4 consists of those who neither self-identify in the same way that the personal laws identify them, nor agree with the religious beliefs of the personal law applied to them.

[40] JA Redding, 'Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law' (2006) 4 Nw U J Hum Rts 436 454–55.

[41] §4.2.1 and §2.2. See also Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press, Princeton 2005) 62–65 for an account of the 'Robbers Cave Experiment' which suggests how important the *terms* in which people are identified can be to their identity-formation.

personal law group (a feature considered in §2.2), it ignores the fact that the religious interpretations of many people within this personal law group may well deviate from that of the state.[42] For instance, a Hindu who does not believe that a 'coparcenary' is a part of the Hindu religion is nevertheless governed by Hindu personal law, which treats this belief as if it is an essential part of the Hindu religion. By bundling together a religious label – 'Hindu', 'Muslim', etc – with a certain interpretation of that religion, the PLS misrecognises or fails to appropriately recognise those who identify with that religion, but do not share the PLS's interpretation of religious doctrine.[43] Despite the fact that a person's understanding of their religion may be central to their identity and self-perception, it is not important enough (it may seem) for the state to take the trouble to do more than paint everyone in one personal law group with the same brush.

Others are misrecognised even more dramatically. As we discussed in some detail in §2.2 Sikhs, Jains and Buddhists, who do not think of themselves as Hindu, are identified as 'Hindu' by the PLS. In this case, there is evidence that this is perceived as insulting and disrespectful.[44] The displeasure of the Sikh community at not having their own marriage law,[45] as well as the Indian Law Minister's recent comments that having a

[42] §4.2.1 and §2.2.

[43] §4.2.1 and §2.2; for example, consider the difference in opinion in the content of the model 'nikahnamas' (or marriage contracts) endorsed by the (more powerful, mainstream) All India Muslim Personal Law Board and the All India Women's Muslim Personal Law Board: 'Women Personal Law Board Unveils New "Nikahnama"' (Mar 17, 2008) *The Hindu* <www.hindu.com/2008/03/17/stories/2008031759171700.htm> accessed 20 November 2011.

[44] Sangari (n 32) 29. There have also been demands from Jains for recognition as a separate religion and as a minority : Press Information Bureau (Government of India), 'Status of Jain Community' (7 May 2007) <pib.nic.in/newsite/erelease.aspx?relid=27576> accessed 20 November 2011.

[45] 'Centre Says No to Separate Sikh Marriage Act, SAD to Meet PM' *Indian Express* (New Delhi, 31 August 2011) <www.indianexpress.com/news/centre-says-no-to-separate-sikh-marriage-act-sad-to-meet-pm/839594/> accessed 6 October 2011.

separate Sikh family law 'would invite similar demands from other religious denominations' [presumably Jains and Buddhists], indicates their non-recognition by the PLS has the worrying consequences described earlier in this section. Thus Sikhs, Jains and Buddhists (like P3 and P4 in §4.2.1) and heterodox[46] members (like P2 in §4.2.1) of all the religious groups in the PLS mentioned in the previous paragraph are misrecognised by being subsumed under existing personal law categories. But at least Sikhs, Jains and Buddhists are mentioned by name in Hindu personal law. Others – Baha'is, atheists,[47] agnostics and smaller and newer religious movements – are even worse off, for they are neither mentioned nor recognised by the PLS. While some of those who are not even mentioned by the PLS might be subsumed under an existing personal law category,[48] the law applicable to others might be decided based on the residuary principle of 'justice, equity and good conscience'.[49] (The latter will be referred to as 'outsiders' to the PLS). Both those subsumed by other personal law categories and outsiders are non-recognised or misrecognised by the PLS in ways likely to harm their self-respect and consequently their religious autonomy.

[46] By heterodox here is meant anyone whose religious beliefs do not coincide with those in the personal laws.

[47] There are certainly atheistic and agnostic movements in India: Gail Omvedt, *Dalit Visions: The Anti-Caste Movement and the Construction of an Indian Identity* (Orient Longman, 2006) 9.

[48] Atheist or agnostic Hindus will be treated as Hindus: §2.4.

[49] *Waghela Rajsanji v Shekh Masluddin* ILR 11 Bom 551, 561.The category 'Hindu' is not residual. Section 2(c) of the Hindu Marriage Act provides that Hindu law shall apply 'to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, *unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed*.' The italicised clause should apply to Baha'is or other groups as Hindu law (before the passing of the Hindu Code Acts) would not have applied to them.

It is also possible that outsiders are relieved to have been excluded from the PLS. This thesis has pointed out several flaws of the PLS – that it is oppressive to women, it does not accurately reflect religious norms, it does not allow members to exit from it, and so on. So it could be that outsiders are happy to be well clear of the system. Equally, outsiders might recognise that the law is a blunt tool. Their numbers are dwarfed by the five recognised religions of India. The 2001 census lists 6,639,626 individuals under 'Other Religions[50] and Persuasions'.[51] A further 727,588 did not state any religion. The size of their numbers might make non-recognition, which would otherwise be an insult, acceptable.

But it is more plausible that the fact that outsiders are *not* recognised, while others in the PLS *are* recognised, is perceived as a form of insulting non-recognition. It could be taken to mean that they are insignificant or unworthy, compared to those who are recognised.[52] The passion with which minority communities in India, and in the past many Hindus, have defended their personal laws is immense. These laws tend to become

[50] Other than Hindu, Muslim, Christian, Buddhist, Sikh and Jain. The figure thus includes Parsis and Jews who do have personal laws. But the total number of Parsis is small: 69,601 in 2001(National Commission for Minorities, Government of India, 'Research Project Report on All India Birth Rate of Parsi – Zoroastrians from 2001 till 15th August, 2007' (2008) <ncm.nic.in/pdf/Parsi%20%20Report.pdf> accessed on 20 November 2011). The number of Jews in India is also small: estimated at 5000 (Flavia Agnes, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP 2011) 86). So the number of those outside the PLS can be approximated to 6,565, 025.

[51] They constitute only 0.6% of the population, however: Office of the Registrar-General & Census Commissioner of India, *Census Data: Religious Composition* (2001) <www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx> accessed 6 October 2011.

[52] These are people who can say that they are neither Muslim, Christian, Jewish, Parsi, Hindu, Sikh, Jain or Buddhist, *and* neither of whose parents were Hindu, Sikh, Jain, Buddhist and who would not have been governed by Hindu law (Hindu Marriage Act 1955 s 2; Hindu Succession Act 1956; Hindu Adoptions and Maintenance Act 1956). The expressive or symbolic implications of their exclusion from the system is completely unrelated, of course, to any practical benefit they may receive from exclusion, such as if they are subject to the general laws that might be better for their well-being.

a locus of group identity, especially when that identity is threatened.[53] This suggests that outsiders to the system, precisely *because* they are numerically small, are likely to feel disrespected by their non-recognition in the PLS. Even if they do not want to be included within the PLS, they might find the likely explanation for their non-recognition – that they are not important enough – insulting. But further research is needed on this question – for example, a study of how atheists, agnostics or Indian Baha'is respond to their exclusion from the PLS.[54]

The defence of the PLS on the basis that it promotes self-respect by providing valuable recognition to religious people is therefore at best overblown. While there might be religious groups who benefit from the PLS in this way, there are many others who are harmed by the misrecognition and non-recognition of the PLS.

6.1.2.3 The PLS as a provider of validation and an antidote to hate

Even if the defence of the PLS based on its recognition of religious groups fails, we are left with the defence based on the PLS's validation of religious groups. It might be argued that the enforcement of the personal law associated with certain religions indicates a positive attitude towards religious groups, especially minority groups and their members, and that this attitude counters, or acts as an antidote to, the hatred (described in §6.1.2

[53] Note 46 of the Introduction.

[54] Baha'is are starting to make more of an appearance in legal studies in India. A recent law commission report mentions their marriage practices: Law Commission of India, *Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform: Report No. 211* (October 2008) <lawcommissionofindia.nic.in/reports/report211.pdf> accessed 6 October 2011.

above) towards them. However, again, there are a number of problems with this defence of the PLS.

One apparent objection will not be explored in great detail. The objection is: how could the state be said to validate several ways of life that are inconsistent with each other? Some of the religions represented in the PLS could even be said to be based on mutually opposing or contradictory beliefs and values. So we might doubt that the state could logically validate all the religions represented in the PLS. But this doubt is countered by the appeal of value pluralism – the idea, roughly, that there is more than one way of life that is valuable.[55] If we accept value pluralism, we might also accept that some good ways of life are inconsistent with others, while remaining good. This doubt will not then trouble us.[56] The appeal of value pluralism, and the task involved in disproving it, makes it prudent to leave this objection aside.

But there remain fundamental problems with the defence of the PLS based on its supposed validation of religious groups. First, we might question the need for validation outlined in §6.1.1 above. We might question the thesis that the esteem of others – and correspondingly, the validation of religious identity – is necessary for self-respect. Perhaps there are people who do not let the attitudes of others affect their attitudes towards themselves and their projects. Perhaps occasionally someone persists in a project, belief or way of life despite the disapproval or even condemnation of friends, family,

[55] Elinor Mason, 'Value Pluralism', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2011) <plato.stanford.edu/archives/fall2011/entries/value-pluralism/> accessed 20 November 2011.

[56] We may continue to have doubts about whether the ways of life represented by the PLS are good. However, we will not doubt that, in principle, the state could validate inconsistent, opposing or contradictory ways of life.

significant others and perhaps even an entire society. Founders of religious movements or proponents of controversial political views come to mind here. Their self-respect seems to survive the negative attitudes of others. While such persons are rare, they are not unknown.[57]

Second, even if the esteem of others is necessary for self-respect, the esteem of the *state* might not be. There are many potential sources of esteem: family, professional colleagues, members of religious groups, members of other social groups. If the esteem necessary for self-respect is garnered from these sources, we might question whether the esteem of the state is necessary at all. Third, sometimes the hatred, disgust, contempt or other negative attitudes of others might actually *produce* or *reinforce* self-respect. Someone with a healthy sense of self-respect may think that the majority of people in their society are sheep-like, idiotic, irrational, incapable of judgement, or prejudiced. This person might think it natural that this majority would think badly of anyone who did not share these qualities with them. She might almost think of the hatred of the majority as confirmation of her own individuality, goodness or intelligence. If the majority's judgement is, in her view, always incorrect, then their disrespect might even affirm her view of herself and her self-worth.

Fourth, and perhaps most importantly, the fact that the state enforces the norms of minority religions does not necessarily translate to state *validation* of these norms.[58] The

[57] An interesting problem is that of people who define themselves based on other people's hatred or persecution of them. Their identity may be threatened if people esteemed or liked them. This does not make what has just been said problematic because such people may not have the appraisal respect of hostile persons, but they probably still have their recognition respect as persons. See Appiah (n 41) 62–65.

[58] *Denying* permission to live by these norms, on the other hand, probably sends a message of condemnation.

prescription of heroin in order to help a heroin addict recover from his addiction does not translate to approval of its use in general.[59] Similarly, the state could enforce the personal laws because its enforcement has good consequences such as peace, stability and good relations between the state and religious groups. If the enforcement of some objectionable religious norms will prevent civil strife, this might well be reason enough for the state to enforce personal laws. Some see the PLS as an aspect of India's consociationalist or power-sharing arrangements.[60] Article 44 of the Indian Constitution[61] also suggests that the PLS was not viewed as the ideal arrangement. None of these rationales for the enforcement of the personal laws imply the validation of the religious identities or ways of life of minorities in India.

In §6.1.2.1 above, it was suggested that the reluctance of feminist groups to endorse calls for a Uniform Civil Code might imply that the PLS validates minority religions. But the attitude of feminist groups might say more about how the Hindu Right 'spins' the problems of the PLS to appear to be problems caused by minority religions. Because of the machinery of the Hindu Right, the rationale most often vocalised for the abolition of the PLS is the inferiority of the norms of religious minorities. Those who favour its abolition *on other grounds* therefore fear that their true rationale (e.g. the gender discriminatory nature of the personal laws) will be conflated with that of the Hindu Right. Favouring abolition would then result in appearing to support the views of

[59] Louis Charland, 'Cynthia's Dilemma: Consenting to Heroin Prescription' (2002) 2 The American Journal of Bioethics 37.

[60] Arend Lijphart, 'The Puzzle of Indian Democracy: A Consociational Interpretation' (1996) 90 (2) The American Political Science Review 258, 260.

[61] "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

the Hindu right. This might explain the attitude of feminist groups towards the PLS better than the idea that the PLS validates minority religions.

Even if we are unconvinced that the PL can be defended because it validates religious identities and ways of life, and that this provides an antidote to the hatred they face, we might consider a more modest version of this argument. Could enforcement of the personal law of minorities still indicate a weaker attitude towards religious groups that counters hatred towards them? If the norms of religious minorities were *all that bad,* the message might be, the state would not enforce them. Since they are enforced, they cannot be all that bad. So even if we would not go so far as to say that the enforcement of the personal laws constitutes *validation* of minority religious norms, perhaps it suggests an official judgement that they are *not bad*; or at least not as bad as the Hindu Right and similar movements would have people believe.

But even this weaker position has difficulties. The personal laws of each religion in the PLS are applied only to those identified as their adherents. Rather than view the PLS as proof that the state views minority religious norms as not bad, it could be viewed as abandoning minority religious groups to suffer under their evil and inferior religious norms. Certainly, this was how many perceived the *Shah Bano* case.[62] When a certain law was passed, which at the time was thought to retract the right of Muslim women to maintenance from their former husbands on divorce,[63] the reaction from many quarters was that the state had turned its back on the problems of *Muslim* women. There was little

[62] *Mohammed Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945. See note 33 of the Introduction.

[63] The Muslim Women (Protection of Rights on Divorce Act) 1986. However, the Act has since been interpreted differently. See *Danial Latifi v Union of India* (2001) 7 SCC 740 for the way this enactment operates.

to commend the principle that Muslim women in general and the woman at the centre of the controversy – the elderly Shah Bano – should not be entitled to such maintenance. Nor did the state commend this principle. Its justification for the law was more that it was 'the consistent policy of the government that in matters pertaining to a community[,] priority would be given to the leaders of the community'.[64] This hands-off position does not imply that the government had any particular attitude, even a mildly approving one, towards the religious norms that it enforced through the PLS. Especially given the perception that the state, through the enforcement of the personal laws, 'abandons' vulnerable members of religious minorities, the PLS seems not to counter but to underscore the negative attitudes faced by some religious groups.

The defence of the PLS based on its supposed recognition and its supposed validation of religious identities, and their contribution to self-respect, therefore fails. However, as the next section shows, the misrecognition and non-recognition described in this section are not the only ways in which the PLS harms the self-respect of religious individuals.

6.2 DOES THE DISCRIMINATION INHERENT IN THE PLS HARM SELF-RESPECT?

The PLS applies different rules to people based on their sex and their religion. As the table in Appendix A shows, Muslims have different rules applied to them than Hindus, and Muslim women have different rules applied to them than Muslim men. It has been

[64] Zoya Hasan, 'Minority Identity, Muslim Women Bill Campaign and the Political Process' (1989) 24 Economic and Political Weekly 44, 48. See also Robert Baird, 'Gender Implications for a Uniform Civil Code' in Gerald Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Social Science Press, Delhi 2001) 152.

argued that this amounts to discrimination on the basis of religion. In *Narasu Appa Mali*, the leading constitutional law case discussed in §2.6, the argument was made that the fact that Muslim men were allowed to marry four women under their personal laws while Hindu men could be prosecuted for bigamy for doing the same constituted unlawful discrimination on the grounds of religion.[65] Other writers assume that the PLS discriminates on the basis of religion, usually without exploring the question in great detail.[66] But this argument is worth exploring because if it is valid, it might constitute another manner in which the PLS adversely affects the self-respect necessary for religious autonomy. This section will argue that the discriminatory nature of the PLS does adversely affect religious autonomy, but not quite for the same reasons given in *Narasu Appa Mali* and the other literature on religious discrimination in the system.

'Discrimination' in this chapter will be used to mean 'differential treatment.' Discrimination on certain familiar grounds such as sex, religion, ethnicity, race or sexual orientation is thought to be prima facie wrong. This is so for a variety of reasons including the fact that it offends against rationality, equality or dignity.[67] Since this thesis is concerned with the implications of the PLS for religious autonomy, it focuses on the worries that some discrimination raises for religious autonomy without taking a position on other reasons why such discrimination might be wrong. Two reasons are prominent in the literature explaining why discrimination harms autonomy: it reduces options, and it

[65] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84. The argument failed in that case.

[66] Martha Nussbaum, 'Beyond Toleration to Equal Respect' [2008] 581 Seminar <www.india-seminar.com/2008/581/581_martha_nussbaum.htm> accessed 6 October 2011; Catharine MacKinnon, 'Sex equality under the Constitution of India: Problems, Prospects, and "Personal Laws"' (2006) 4 Intl J Con Law 181.

[67] For a summary of rationales that are often cited in defence of anti-discrimination law, see Tarunabh Khaitan, 'An Autonomy-Based Foundation for Legal Protection against Discrimination' (DPhil thesis, University of Oxford 2010).

harms self-respect.[68] This section finds that the harm to self-respect caused by the discrimination inherent in the PLS is more worrying (from a religious autonomy perspective) than the reduction in options. It will however consider both the ways in which the discrimination inherent in the PLS can harm religious autonomy, to better highlight the importance of the argument from self-respect made in §6.2.3 below. First, we will consider whether the PLS's discrimination reduces the options available to a person.

6.2.1 Discrimination and options

Some kinds of discrimination reduce the options available to those discriminated against. When discrimination is endemic and based on immutable characteristics, the reduction in options could well lead to the available options being inadequate for autonomy.[69] This is because when the discrimination is on immutable grounds, the person discriminated against cannot change the characteristic (at least not without great effort).[70] But the discrimination they face means that many options – particular jobs, housing, public facilities – are not available to them.

In other cases, as John Gardner argues, the characteristic leading to discrimination might be based on a 'fundamental choice'; that is, a choice between valuable options that people ought to have regardless of their other choices.[71] Practicing a religion of one's

[68] John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167.

[69] ibid 170.

[70] ibid 170.

[71] ibid 171.

choice, engaging in sexual activity with a partner of one's choice and having children are plausible examples. We might feel that people ought to have these choices because some of the options are very valuable, or because they affect many areas of a person's life. When discrimination based on fundamental choices is so endemic that many or all of these fundamental options are rendered nugatory, personal autonomy is gravely affected.[72]

Assuming that religion constitutes a fundamental choice and assuming that the argument in the preceding paragraph applies *mutatis mutandis* to religious autonomy,[73] does the PLS have such an adverse effect on religious autonomy because of its discriminatory features? The fundamental choice possibly at risk here is the choice between different religions (and between accepting and rejecting religion). The PLS provides incentives to associate with particular religions. A reason for the enactment of the Dissolution of Muslim Marriages Act 1939, for instance, was that Muslim women were thought to be unable to initiate a divorce; but their apostasy dissolved the marriage.[74] Muslim personal law, as it was, therefore provided an incentive for apostasy or conversion of Muslim women who wanted a divorce. Similarly, Hindu men, faced with onerous divorce laws and a desire to divorce and remarry (another partner), have resorted to conversion to Islam. They hoped that their conversion, and consequent change of

[72] ibid 171.

[73] §4.1.3.

[74] Lucy Carroll, 'Muslim Women and 'Islamic Divorce' in England' (1997) 17 Journal of Muslim Minority Affairs 97, 102.

personal law, would allow them to lawfully have more than one wife, and therefore marry again by circumventing the need for a divorce.[75]

Besides such special circumstances under which the personal law gives individuals an incentive to subscribe to a particular religion,[76] each of the personal laws could be thought of having burdens or benefits for those who are governed by them. We might question whether a man's right to polygamy – thought of as a benefit in the *Narasu Appa Mali* case – was truly one, but more straightforward examples can be provided. Muslims can transfer immovable property under personal law without written agreements by making an oral gift ('*hiba*').[77] This allows them to avoid stamp duties and taxes that members of other religions have to pay. Some religious groups have much easier routes to divorce than others.[78] Women in each of these groups have different rights to custody of children, alimony and maintenance.[79] All religious groups except Muslims can make a will bequeathing more than one-third of their property.[80] 'Hindu Undivided Families' have taxation advantages over others.[81]

[75] Following *Lily Thomas v Union of India* (2000) 6 SCC 224 and *Sarla Mudgal v Union of India* AIR 1995 SC 1531, this second marriage is no longer recognised.

[76] Not that the choice is free. As discussed earlier, there are barriers to conversion is not easy. §2.4 and Appendix B.

[77] Muslim personal law exempts Muslims from certain registration requirements under Transfer of Property Act, 1882, s 129, AAA Fyzee and T Mahmood, *Outlines of Muhammadan Law* (Law in India Series, 5th edn OUP, Delhi 2008 181–85.

[78] See Appendix A.

[79] See Appendix A.

[80] The testamentary power of Muslims (unless they are married under the Special Marriage Act 1954) is limited by quantum and has restrictions on bequests to heirs (Fyzee and Mahmood (n 77) 289–300).

[81] Flavia Agnes, 'Conjugality, Property, Morality and Maintenance' (2009) 44(44) Economic and Political Weekly 58; Hindu joint families whose property matters are governed by Hindu personal law may enjoy

The question here is: is this difference in the distribution of benefits and burdens such that it renders nugatory the fundamental choice of which religion to choose? Before proceeding it is important to clarify the question. It is not the *relative* benefit or burden that people in different personal law groups face that affects whether they have a fundamental choice. Gardner's worry about discrimination based on fundamental choices is that it might be *so endemic* that those subject to it have their options reduced to a degree that they are no longer adequate to live an autonomous life.[82] But their options relative to other people's options are not relevant to this argument. (They are relevant to another argument for how discrimination affects autonomy discussed below.) So, if A and B start off with identical options and only A has her options reduced by discrimination, A might still have adequate options remaining for an autonomous life. The fact that she now has fewer or worse options than B is not relevant to the question of whether she has an adequate range of options for religious autonomy.

The PLS might *affect* individual choices about which religion to affiliate with. But it is important to remember that the concept of autonomy used in this thesis does not require the making of decisions in complete isolation from the pressures of the outside world (even if such a thing were possible). The worry that such external pressures or incentives necessarily harm autonomy indicates a misunderstanding of the concept of autonomy used in this thesis. As discussed in section §3.1 autonomy does not require that individuals create themselves completely from scratch; rather, background conditions

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some tax benefits. Flavia Agnes, *Law and Gender Inequality*: *The Politics of Women's Rights in India* (Law in India series, OUP 1999) 82.

[82] §3.1.2.

such as cultural and social groups can contribute to autonomy.[83] These background social conditions bring with them incentives and disincentives for any non-trivial decision, the most pervasive of these being societal approval or disapproval (even if not expressed). These social facts do not make us non-autonomous. An autonomous person is not one who has no external pressures upon her, nor one who insulates herself from these pressures, but one who against the background of these pressures is able to make decisions which make her life her own.[84]

Still, some of these pressures harm autonomy and even make it impossible. For instance, coercion, which can be characterised as leaving the victim with no choice,[85] often reduces autonomy. As outlined in §4.1.4, one test for determining when people are coerced is to ask whether they would be justified or excused if, as a result of threats made against them, they performed an otherwise wrongful action.[86] We also said earlier that a person is coerced when they are threatened with the loss of the life they have already embarked upon.[87] So a pianist might be more easily excused for acting wrongfully in response to a threat to break his fingers than would be someone whose fingers are not as important to his life.

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[83] §3.1.6; Denise Réaume, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 UBC Law R 117, 121–35.

[84] Michael Lavin, 'Ulysses Contracts' (1986) 3(1) Journal of Applied Philosophy 89.

[85] Alan Weirtheimer, *Coercion* (Princeton University Press 1987); Scott Anderson, 'Coercion', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/archives/fall2008/entries/coercion/> accessed on 7 October 2011.

[86] Robert Nozick, 'Coercion' in Sidney Morgenbesser, Patrick Suppes and Morton White (eds), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1969) 440.

[87] To use Raz's definition of a personal need: Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 152.

It would be difficult to characterise the religious discrimination of the personal law as amounting to coercion or as *leaving people with no choice* simply because it allows people advantages in selecting one religion over another. Let us take the examples suggested above. In the case of Muslim and Hindu law of marriage, if we adopt the view of the claimant in *Narasu Appa Mali*, the Hindu male is burdened by his religion to the extent that he is restricted to one wife. Similarly the non-Muslim is burdened by her religion to the extent they have to pay stamp duty on immovable property, just as the Muslim is burdened to the extent that she cannot bequeath the remaining two-thirds of her property.[88] But additional wives, savings on stamp duty and the power to bequeath,[89] except in special cases, are essential neither to human survival nor to continue to have the life that one has embarked upon. Some special cases are where these 'benefits' have a particular significance in a person's life, such that the benefits represent necessary condition for them to continue to have the life they have embarked upon. The power to marry additional women might indeed qualify as necessary to continue to have the life one has embarked upon for a Fundamentalist Mormon who believes that the principle of plural marriage is a keystone of his faith, or to someone committed to a polyamorous relationship, but it is unlikely to qualify as such for a Muslim who views polygamy, at best, as a permission.[90]

[88] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.

[89] This is the most likely contender for the status of a personal need of the three.

[90] John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (Syracuse University Press 2001) 135–36.

The incentives and disincentives provided by the PLS do not, therefore, reduce options in the religious sphere to the point of inadequacy for autonomy.[91] We should therefore turn to another reason for why the religious discrimination of the PLS harms religious autonomy – a reason based on self-respect, which is the core concern of this chapter.

6.2.2 Discrimination and self-respect

Discriminating on the basis of religion, in many social contexts, is taken to mean that those receiving favourable treatment are favoured and preferred: the followers of that religion are better, or the religion is better, or both. The prevention of this expression of inferiority of some religions or their followers is sometimes expressed as the rationale of the US anti-establishment clause[92] and, for some countries, of state secularism.[93] We have described, earlier in this chapter, how self-respect depends partly on the esteem of others and how hatred or disrespect can undermine self-respect. If the discrimination of the personal laws on the grounds of religion has the social meaning of disfavour or

[91] But they might be seen as a case of manipulation. Earlier we argued that manipulation harms autonomy, sometimes to the point of making it impossible. Having choice of religion 'weighted' as the personal law does, giving people the incentives to choose some religions over others, might be described as attempting to manipulate them. But, as we discussed in some detail in Chapter Three, the kind of manipulation that harms autonomy requires that the person's character be 'bypassed' in a way that arguing with them or (openly) providing them with incentives or disincentives does not.

[92] Arnold H Loewy, 'Rethinking Government Neutrality Towards Religion Under the Establishment Clause: the Untapped Potential of Justice O'Connor's Insight' (1985) 64 North Carolina Law Review 1049, 1051.

[93] Rajeev Bhargava, 'What is Secularism For' (1994) 9 <www.law.uvic.ca/demcon/victoria_colloquium/documents/WhatisSecularismforPreSeminarReading.pdf > accessed 20 November 2011.

disrespect, the personal laws could harm religious aspects of the self-respect of disfavoured religious groups.[94]

This characterisation of the personal laws is misconceived. More than any other group in the PLS, *Hindus* are thought to be disfavoured by the system. The claimant in *Narasu Appa Mali* is not alone in feeling that the PLS grants powers to Muslims that he is denied, despite material advantages that the PLS grants Hindus.[95] This perception has an important place in Hindu Nationalist propaganda.[96] Whether these claims are true or not is irrelevant for our purpose. Our concern here is about the social meaning of (purportedly) disfavourable treatment. Laws that are *perceived* as disfavouring certain groups will have this social meaning, since social meaning, at least in this case, depends on perception, not truth. However, there seems little reason to worry that this perception of the PLS as disfavouring Hindus will harm the self-respect of most Hindus. While the structure of Indian society is complex, Hindus constitute the vast majority of the country's population and are more politically powerful than other religious groups.[97] It is difficult to see how the self-respect of Hindus, as a group, is in danger of erosion by any perceived disfavour shown by the PLS. This case against the PLS is thus difficult to defend.

[94] Text to nn 2–6 above.

[95] See n 81.

[96] See n 26.

[97] See Prime Minister's High Level Committee, 'Social, Economic and Educational Status of the Muslim Community of India' (2006) 262 <minorityaffairs.gov.in/sachar> accessed 20 November 2011 for the political power and influence of Muslims, compared to Indian Hindus.

So far then, the religious discrimination between the different religious groups that the PLS governs appears to raise no major concerns for the religious autonomy of their members. It might now be useful to consider another set of comparator groups. The section above discussed the harm caused to those who faced non-recognition or misrecognition by the PLS. While a part of the harm comes from *just* their non-recognition or misrecognition, a part might also come from their *comparative* non-recognition, misrecognition or disfavouring.

As a first comparison, how do religious groups within the PLS compare to those left out of it? In the section above, we discussed the significance of state recognition of the five religious groups. The non-recognition of other religious groups and persons could, it was argued, harm their self-respect because it is could be taken to mean that they are insignificant or unworthy, *compared* to those who are recognised. As argued above,[98] a second group also fares badly under the personal laws – heterodox members of the religions. As §2.2 suggests, the interpretations of heterodox Hindus are treated as less authentic, accurate or important than the interpretation found in the personal law.[99] This disfavouring of the heterodox can certainly harm their self-respect as Hindus. They might well perceive the law as treating them as *misguided* Hindus.[100] This applies to heterodox adherents of other religions as well. A third group also lacks the recognition given to the five personal law groups. Sikhs, Jains and Buddhists, who certainly do not think of themselves as Hindu, are identified as 'Hindu'. These three groups are disfavoured by the PLS in ways likely to harm their self-respect and consequently their religious autonomy.

[98] See text to nn 41 to 46.

[99] ibid.

[100] §6.1.2.

While some of the harm to their self-respect is caused by non-recognition and misrecognition as such (discussed in the section above), this harm is compounded by their *comparative* non-recognition and misrecognition; i.e. by the fact that others are appropriately recognised while they are not.

So this discriminatory feature of the PLS – that it recognises some appropriately, but misrecognises or fails to recognises others – can harm self-respect and consequently religious autonomy. But so far we have compared religious groups to religious groups.[101] While the personal laws are sometimes criticised for discriminating based on religion, they are much more commonly criticised for discriminating on the grounds of sex. This might be thought of as being a completely different problem than the problem that this thesis is concerned with: the effect of the PLS on religious autonomy. But there is reason to believe that the sex-discrimination characteristics of the personal laws also harm religious autonomy.

6.2.3 Sex discrimination and self-respect

Earlier in §6.2, the connection between religious discrimination and self-respect for one's religious identity was emphasised. Favouring one religion over another can affect the self-respect of people in the disfavoured religion. One of the examples given of 'advantages' (from the point of view of the participants) was the right of a Muslim man to have more than one wife.[102] This is not the only 'advantage' that relates to the ability of men to retain control over women through the PLS. Muslim men are similarly seen as

[101] That is, groups within the system and groups outside.

[102] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.

being advantaged by having powers to divorce easily and by having few alimony obligations.[103] As one writer puts it, 'men of the various religions tend to think of the systems of personal law as ways of ensuring their power over women, and they view any advance toward greater gender equality as an assault upon the privileges guaranteed them by the system.'[104] If the PLS is viewed as ensuring the power of men over women, the extent to which they discriminate on the grounds of sex is perhaps unsurprising. Since this discrimination is ostensibly supported by religion – as the personal laws often claim to be enforcing religion[105] – they give credence to the view that these religions endorse the inferiority of women. The effect this can have on women within these groups is best illustrated using Muslim personal law.[106]

Commentators frequently note how the debate about the PLS and Muslim personal laws in particular casts Muslim women as 'victims of their own community's oppression and implicitly, therefore, as inferior to Hindu women.'[107] This comment might seem strange at first; victims are not, merely by virtue of their victimhood, inferior to non-victims.[108] But Muslim women might be cast in this light for two reasons. First, they are not 'innocent' victims; some of them support the PLS and they are, in any case, still

[103] Tanika Sarkar, *Hindu Wife, Hindu Nation* (Permanent Black 2000).

[104] Martha Nussbaum, 'Personal Laws and Equality: The Case of India' (Comparative Constitutional Design conference, University of Chicago Law School, 17 October 2009) <www.law.uchicago.edu/audio/nussbaum101709> accessed 13 November 2011.

[105] §2.5.

[106] This argument might apply with less force to other religious communities, but it still applies. In the debates on Christian marriage, Christian women might be said to face the same problems.

[107] Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Duke University Press 2003) 48.

[108] But see Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 Harvard Human Rights Journal 1.

Muslim.[109] Second, their plight highlights not just the 'undifferentiated, congenitally monstrous figure'[110] of the Muslim man, but also the pathetic infantility of the Muslim women. As such, they evoke not just pity, but also disgust. Nor is this construction of the religious woman peculiar to the Indian debates. The Canadian *sharia* arbitration debates also saw the construction of the Muslim woman as lacking agency if she does not resist her religious community.[111] By promoting such a public image, it is easy to see how the discrimination against Muslim women in the PLS affects their self-respect *as* Muslim women.

The sex-discrimination of the personal laws also affects women in religious groups in another, perhaps more immediate, way. For many religious people, participation in a religious community is an important part of exercising their religious autonomy.[112] Participation could include communal worship and engagement with the community's affairs. The image of the Muslim woman described above – infantile, victimised and helpless – is reiterated both *within* and outside the Muslim community.[113] It would not be surprising if this view comes to dominate Muslim women's views of themselves. The result is what Malina Mahathir has described, in response to similar laws

[109] Zoya Hasan, 'Gender Politics, Legal Reform and the Muslim Community' in Patricia Jeffery and Amrita Basu (eds), *India Appropriating Gender: Women's Activism and Politicized Religion in South Asia* (Zones of Religion Series, Routledge 1998) 84–85.

[110] ibid 78.

[111] Anna Korteweg, 'The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women's Agency' (2008) 22 Gender & Society 434.

[112] §5.1.1 and §5.2.3.1.

[113] 'The ability to produce and reiterate these stereotypes, sometimes through sheer repetition, is the most important source of communal power': Hasan (n 109) 78.

in Malaysia, as a form of apartheid between Muslim women and others.[114] They are 'second-class citizens held back by discriminatory rules that do not apply to non-Muslim women.'[115] If this view of Muslim women comes to dominate their community's perception of them, this would make meaningful participation in community life difficult. If their intellect is weak, their opinions count for less in discussions. If they are helpless, they need to be protected and might need their freedom to be restricted for their own good. If they lack strength of will, they cannot take on leadership roles. By casting Muslim women in this light, the PLS thus diminishes their religious autonomy by closing many aspects of community participation to them.

To this claim it might be said that it is not the personal laws, but the religion itself, that casts women in this light. The personal laws, it might be said, might replicate the stereotypes found in religion, but it does not affect the religious autonomy of these women any more than the religion itself does. In other words, the religious autonomy of these women would have been diminished even in the absence of the personal laws.

But the Indian PLS, like similar systems in other jurisdictions, crystallises traditions which would otherwise evolve, entrenches certain (often patriarchal) interpretations of religion and maintains the power of sections of the religious community who are often opposed to re-interpretation.[116] The counterfactual – what would the image

[114] Jonathan Kent, 'Malaysia "apartheid" row deepens' *BBC News* (London, 11 March 2006) <news.bbc.co.uk/1/hi/world/asia-pacific/4795808.stm> accessed 13 November 2011.

[115] 'In our country, there is an insidious growing form of apartheid among Malaysian women, that between Muslim and non-Muslim women': ibid.

[116] Ayalet Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 The Journal of Political Philosophy 285.

of Muslim women have been in the absence of the PLS – is difficult to ascertain. But we have some reason to think it would have been better. As §3.6.1 and §2.2 discuss in some detail, there is a diversity of views within each of the religions in the PLS. Among these are interpretations of Islam which do not harm the self-respect of Muslim women in the manner described above. These include feminist interpretations of Islam which in recent years have grown in prominence and influence in India.[117] However these interpretations have to contend with organisations which do cast Muslim women in this light, such as the All India Muslim Personal Law Board, which receive government support and have a strong influence on the direction that Muslim personal law takes.[118] Moreover, the interpretations which disfavour women are strengthened because of the legitimising influence of the law. Since *these* interpretations were chosen for state enforcement, they are likely to be perceived to be the most authentic interpretations of the religion. The others, by implication, are less authentic and therefore less appealing.

While the effect that sex-discrimination has on the religious autonomy of women is clearest in the case of Muslim personal law, it is by no means restricted to Muslim women. Hindu, Christian, Parsi and Jewish laws also discriminate against women, as Appendix A shows. This discrimination sends the same message to these religious communities, including the women of these communities, as does Muslim personal law. The discriminatory feature of the personal law that most affects religious autonomy, it

[117] Sylvia Vatuk, 'Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law' (2008) 42(2/3) Modern Asian Studies 489. The development of the All India Muslim Women Personal Law Board, AIMWPLB, 'About Us' <muslimwomenpersonallaw.com/aboutus.html> accessed 19 November 2011 is another sign of the prominence of feminist interpretations.

[118] Flavia Agnes, 'Law and Gender Inequality: The Politics of Women's Rights in India' in Mala Khullar and Ihwa Taehakkyo (eds), *Writing the Women's Movement: A Reader* (Zubaan, New Delhi 2005) 126.

seems, is not (somewhat counter-intuitively) discrimination on the basis of religion, but discrimination on the basis of sex.

6.3 CONCLUSION

This chapter considered the implications of the PLS for an important precondition of religious autonomy: self-respect, especially respect for one's own religious identity. It first considered a defence of the PLS based on its supposed recognition and validation of religious identities. It concluded that this defence fails. Next, it considered whether the PLS harms religious autonomy because of its discriminatory nature. It concluded that its discriminatory recognition of religious identity and its gender-based discrimination of the PLS does harm religious autonomy. This chapter thus debunks an important potential defence of the PLS and points out new implications of the discrimination of the PLS based on religious identity and gender. The next chapter considers a further problem that the PLS raises for religious autonomy.

PART III

7. REFORM PROPOSALS

The PLS interferes with the religious autonomy of those subject to it by affecting their options (by interfering with their freedom from religion and their freedom to practice religion) and by harming their self-respect (by misrecognising their religious identities and by discriminating on the grounds of sex and religion). The PLS cannot be defended in the name of religious autonomy based on the possibility of exit from the system, the advantage of having the 'option of personal law', the power it gives people to bind their future selves, the expressive potential of the personal laws, the contribution the PLS supposedly makes to membership in a religious community, the contribution it supposedly makes to religious group autonomy, or the recognition or validation it supposedly provides for religious identities. These findings imply that concerns relating to religious autonomy constitute an important set of objections to the PLS and that there is reason to believe that the system needs to be reformed in order to address these concerns.

This thesis aims to contribute to the question of what ought to be done with the PLS. Many reform proposals have been made in the literature on the PLS.[1] Many argue that the PLS be abolished. But this raises the question of what, if anything, should replace it. Rolling back all state regulation of the matters covered by the PLS is not a politically feasible proposal, and may raise significant concerns for women and vulnerable persons. This chapter therefore considers this thesis' implications for four important avenues for reform of the PLS in India: modification of the PLS, a change to a *millet* system, 'internal' reform of each personal law, the enactment of a Uniform Civil Code and the use of religious alternative dispute resolution.

[1] JA Redding, 'Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law' (2006) 4 Nw U J Hum Rts 436, 468.

In considering these avenues for reform, a few qualifications should be borne in mind. First, it is important to acknowledge both the limitations of this thesis and the work that remains to be done on this subject. This thesis is not an all-things-considered evaluation of the PLS. Given the breadth of issues that the PLS raises – concerns about gender, national integration, the rule of law, secularism and freedom – such an evaluation would be beyond the scope of any work of this length. This thesis is limited to the question of how the PLS affects religious autonomy. Prominent proposals for reform, such as those mentioned above, often aim to be an all-things-considered response to 'the personal law question'. The ground covered by this thesis is therefore not adequate to completely evaluate these proposals. Second, the prominent proposals considered here reflect the research questions usually studied in relation to the PLS, those connected to gender-discrimination by the PLS and especially Muslim Personal Law,[2] while this thesis studies a different aspect of the PLS. These proposals thus often do not contain enough information on key features that affect religious autonomy to conclude on this thesis' implications for the proposals. Third, since space constraints preclude discussing every conceivable reform proposal, what follows is neither an exhaustive list of proposals, nor a complete evaluation of each of them. Fourth, the proposals considered below are not mutually exclusive; they could be combined and fused together in various ways. Finally, for reasons that will be explained below, and because it has been virtually ignored in the debates on reform in India, this chapter pays particular attention to one particular route to reform: religious alternative dispute resolution. With these qualifications in mind, a few tentative observations about these proposals will be made in this chapter.

[2] Text to note 31 to 34 of the Introduction.

7.1 A MODIFIED PLS

Given the findings of this thesis, one obvious route to reform might be to maintain the essential features of the PLS, but tweak some of the problematic features described in this thesis. Some of these problematic features stem from the fact that the PLS currently misrecognises, or fails to recognise, individuals and does not respect individual self-identification (§6.1.2). It might seem relatively easy to change this feature. The rules relating to how individuals enter and exit particular personal law groups (§2.4) could be changed so that entry and exit are based purely on self-identification. So a person could declare which personal law group they preferred to associate with, perhaps by filling in a form and submitting it to a government office. This would certainly be an improvement on the current system. It is likely to address some of the concerns raised in §4.2 relating to the option of religious practice; if it were combined with an option of a Uniform Civil Code, it could also address concerns relating to freedom from religion.[3] It is also likely to bolster the potential defence of the PLS tested in Chapter Five. That defence was that the PLS enhanced religious community life (including community worship) and religious group autonomy. This defence would certainly be stronger with respect to this modified version of the PLS than it was for the PLS as it stands. (This is not to say that it would necessarily be successful even for the modified PLS.) A modified PLS might also mitigate the current PLS' effects on the religious autonomy of women (from gender-discriminatory norms) outlined in §6.2.3, by accommodating and recognising heterodox norms which are not discriminatory.

[3] Subject to the concerns with the Uniform Civil Code raised below.

While such a modified PLS would certainly be an improvement, it would not completely address the concerns raised in this thesis. First because of the social pressure that the PLS elicits to choose certain personal laws, described in §4.1.4, the formal option of exit from the personal laws or even living by heterodox religious norms is insufficient to ensure that choices will be uncoerced. Moreover, such a modified system could not completely address concerns relating to the nonrecognition and misrecognition of some religious groups and individuals. 'Outsiders' to the PLS – those it neither mentions nor recognises – as well as heterodox religious persons[4] would still fail to be recognised by the PLS, as the current categories would not accommodate them. The PLS could certainly be expanded to include new categories to accommodate religions like Baha'ism, for example. In principle, it could also be expanded to accommodate each heterodox version of every conceivable religious tradition. While possible in principle, this would be a highly impractical solution. Given the possibility (and existence) of an extremely wide range of interpretations of each religious tradition,[5] it would be practically impossible to create a separate personal law group for each heterodox group or individual and to document the norms of that group or religion relating to family matters. Such a change to the system would make it unworkable.

[4] By heterodox here is meant anyone whose religious beliefs do not coincide with those in the personal laws.

[5] §3.6.1.

7.2 THE *MILLET* SYSTEM

As the Introduction to this thesis mentioned, under a *millet* system, religious groups are governed in some matters by a religious leadership recognised by the state,[6] whereas in a personal law system, the state itself applies a version of religious doctrine to citizens whom it identifies as belonging to different religious groups.[7] So one direction that reform could take is to move towards a *millet* system. This might appear to be an improvement over the PLS. For instance, the defences of the PLS tested in Chapter Five – that the PLS could enhance religious group autonomy – failed mainly because the religious group under the PLS has no control either over group membership or the norms applied to the group. Whether such a defence would apply to the *millet* system depends on a number of factors. The religious group in a millet system could be more or less powerful vis-à-vis the state. The group could have limited or extensive power over the boundaries of group membership or the norms to be applied to the group. Moreover, religious leaders could be chosen in a variety of different ways. The state could itself appoint the religious leader and thus govern the religious group with the 'leader' as its proxy. Alternatively, it could give the religious group the power to select its own leader. If the state did give the religious group autonomy through a *millet* system, such a system would, on this axis, represent an advance over the PLS. However, there is reason to doubt that any state would administer a *millet* system in such a manner. Traditionally, the state retained a great deal of control over the religious groups in the *millet* system.[8] The state

[6] Kymlicka (n 10).

[7] M Galanter and J Krishnan, 'Personal Law and Human Rights in India and Israel' [2000] 34 Israel L Rev 101, 103.

[8] Ayelet Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 Journal of Political Philosophy 285, 295–96.

of Israel, for instance, which administers a version of the *millet* system, itself appoints the religious leaders of some *millets*,[9] which is a part of the reason that it is difficult to justify its system based on group autonomy.[10] Given our discussion in §2.7 about the Indian state's involvement in the working of religious groups as well as religious doctrine, it is unlikely that it would administer any *millet* system in a way that promotes religious group autonomy. It is unlikely that any *millet* system administered by the Indian state would represent an advance on the PLS from the point of view of religious autonomy based on its contribution to religious group autonomy.[11]

Besides failing to promote religious group autonomy, any *millet* system administered by the Indian state is likely to suffer from some of the same problems as the PLS, identified earlier in this thesis. A *millet* system is likely to affect the options of religious practice and freedom from religion (§4.2) as the range of interpretations within each religion would mean that many are likely to have religious beliefs which deviate from that of the *millet* leadership. These heterodox individuals are likely to have their options of religious practice curtailed by the laws applied to their *millet* as a whole. While in theory the *millet* system could recognise and enforce evey interpretation of every religion, as discussed in the previous section, this would be highly impractical. *Millet* systems also generally do not make movement or exit easy.[12] So freedom from religion is also unlikely to be an option. Further, any *millet* system administered by the Indian state

[9] Michael Karayanni, 'The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel' (2006) 5 Northwestern Journal of International Human Rights 41.

[10] ibid 62–68.

[11] That is to say it would not benefit from the potential defence outlined in §5.2.

[12] Karayanni (n 9) 66.

is likely to affect self respect in a similar manner and for similar reasons as the PLS does. That is, it is likely to fail to appropriately recognise and is likely to misrecognise heterodox members of religious groups[13] just as the PLS does (§6.1.2.2). It is also likely to display some of the discriminatory features that §6.2 described with respect to the PLS, thus affecting self-respect. Further, there is good reason to think that the *millet* system leads to the reinforcement of group hierarchy and stagnation of the group's norms.[14] Replacing the PLS with a *millet* system does not therefore appear to be a promising avenue for reform.

7.3 INTERNAL REFORM

Others propose that the personal laws should be reformed 'internally', that is, that campaigns for reform (especially for greater gender-equality) should be held within the religious community in question and that any legal change should occur with their approval or even encouragement. Earlier in this thesis it was argued that the *content* of many of the personal laws harmed religious autonomy, because they harm the self-respect of women (§6.2.3).[15] Any amelioration of these harmful aspects of the content of the personal law would thus be welcomed, given this thesis' conclusions. However even such amelioration would not completely address the concerns raised in this thesis, as many of them relate to, for example, the PLS' interference with the option of religious practice

[13] That is to say religious persons whose beliefs deviate from those imposed by the millet leadership.

[14] Y Tamir, 'Siding With the Underdogs' in SM Okin and others (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press, Princeton, 1999); A Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 J Pol Phil 285; M Sunder, 'Cultural Dissent' (2001) 54 Stan L Rev 495.

[15] The content of personal laws also defeated a potential defense of the PLS in §4.2.3.

(§4.2) and the harm to self respect from non-recognition and misrecognition (§6.1.2.2), which would remain even if each of the personal laws were less gender-unjust.[16]

There has been some success with internal reform. The reform of Christian personal law through the Indian Divorce (Amendment) Act 2001 has been credited to this approach.[17] There are some signs that this approach could work in other communities. In recent years feminist interpretations of Islam have grown in prominence and influence in India.[18] For instance, the All India Women's Muslim Personal Law Board, as part of its efforts to remedy problems raised by Muslim personal law,[19] drafted and publicised its version of a *nikahnama*, a potentially legally-binding marriage contract.[20] While these are promising developments, as one writer puts it, proposals for internal reform in general 'never really had much prospect of widespread success considering, among other factors, the size and diversity of India's religious communities and the relatively meager financial resources of Indian feminists and their allies.'[21] However, internal reform movements

[16] Veit Bader, 'Legal Pluralism and Differentiated Morality' in Ralph D Grillo (ed), *Legal Practice and Cultural Diversity* (Ashgate Publishing 2009) 50–53.

[17] Redding (n 1) 468; Cyra Choudhury, '(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India' (2007) Georgetown University Public Law & Legal Theory Research Paper No. 969020, 60–66 <ssrn.com/abstract=969020> accessed 19 November 2011. On the internal reform of Muslim personal law see Tahir Mahmood, 'Personal law, Social Myths' *The Indian Express* (7 September 2007) <www.indianexpress.com/news/personal-law-social-myths/513767/> accessed 19 November 2011.

[18] Sylvia Vatuk, 'Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law' (2008) 42(2/3) Modern Asian Studies 489. The development of the All India Muslim Women Personal Law Board, AIMWPLB, 'About Us' <muslimwomenpersonallaw.com/aboutus.html> accessed 19 November 2011 is another sign of the prominence of feminist interpretations.

[19] As well as Muslim organisations it perceives as insensitive to the problems of women, such as the All India Muslim Personal Law Board. Flavia Agnes, 'Law and Gender Inequality: The Politics of Women's Rights in India' in Mala Khullar and Ihwa Taehakkyo (eds), *Writing the Women's Movement: A Reader* (Zubaan, New Delhi 2005) 126.

[20] 'Women Personal Law Board Unveils New "Nikahnama"' (Mar 17, 2008) *The Hindu* <www.hindu.com/2008/03/17/stories/2008031759171700.htm> accessed 20 November 2011.

[21] Redding (n 1) 468.

remain important both as a stopgap until another reform proposal can be settled upon, and for their potential to be combined with other reform proposals.

7.4 UNIFORM CIVIL CODE

Many argue that the PLS be replaced by a Uniform Civil Code.[22] Several proposals along these lines have been put forward in the political and academic debates.[23] But there are fears that any Uniform Civil Code would essentially incorporate Hindu norms to the exclusion of the others.[24] It seems unlikely that this kind of Uniform Civil Code would address our concerns for religious options, self-respect, or enhance group life. It is possible that such a Code would exacerbate our concerns relating to religious autonomy. It might for instance interfere with the options of religious practice and refraining from religious practice, much as the PLS was accused of doing in §4.2. Nor is this a concern limited to proposals based on Hindu norms. A 'secular' Code could just as easily interfere with the option of religious practice. Besides prohibiting religious practice outright (which might be unlikely in family law), such a code could, by insisting that people organise their lives according to certain rules, prevent or make it very difficult for them to live according to the religious norms that they would like to follow.

[22] This approach also has constitutional support: Constitution of India 1950, art 44.

[23] For an overview of different proposals on the content of the Uniform Civil Code, see Flavia Agnes, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP 2011) 170–83.

[24] Text and note 44 in the Introduction.

These potential concerns are not limited to a compulsory Code.[25] If the Uniform Civil Code were made optional, it would come up against the problems discussed in §4.1.4 and §4.2.3, in particular the problem that it will not genuinely be an option for many vulnerable persons. If it were made compulsory, there would be the concern that vulnerable persons mentioned in §4.1.4 and §4.2.3 who are in danger of being coerced into following personal law will instead be coerced into unofficial dispute settlement[26] arrangements that might harm their religious autonomy even more than the PLS would. In other words, if personal law is abolished, secular law is not the only option. Religious or cultural communities or families could serve as informal forums of dispute resolution. There are worrying signs that some vulnerable people would, in the absence of personal law, have to accept the 'verdict' of their husbands, families or communities.[27] It is difficult to say much in the abstract about how these unofficial dispute settlement arrangements impact religious autonomy, but it can be noted that they would lack some important (though minimal) safeguards – access to courts, natural justice and prospective rules – available to those governed by personal law.

Another major limitation of the Uniform Civil Code proposals is that they are pragmatically and politically speaking unfeasible, and likely to remain so for a while to

[25] Agnes (n 23) 182; Redding (n 1) 469–70. There is also the problem of what the default option is: see Working Group on Women's Rights, 'Reversing the Option: Civil Codes and Personal Laws' (1996) 31 Economic and Political Weekly 1180.

[26] By this is meant something other than 'RADR' discussed below. RADR is typically recognised by the state, but the unofficial dispute resolution mentioned here is conducted 'under the radar' of state courts. Bader (n 16) 50–53.

[27] Because while using personal law was acceptable to their communities or families, using a secular Uniform Civil Code would not be acceptable. The coercive pressure to choose personal law described in §4.1.4 and §4.2.3 is likely to turn into coercive pressure to abide by such unofficial dispute settlement decisions in the absence of the personal laws.

come.[28] This is not a reason in itself to stop those who believe in these proposals from campaigning for their greater acceptance. But it is a reason to consider alternative proposals, at least as stopgap, regardless of the merits of any Uniform Civil Code. Finally, and most importantly, again regardless of the merits of any proposed Uniform Civil Code, the social and political subtext of any move towards a Uniform Civil Code might harm religious autonomy. In particular, the message that some groups are barbaric, hated or unworthy of respect is likely to have a detrimental effect on their self-respect.[29] This worry leads some academic commentators to argue that the legal reform of Muslim personal law would be an instance of Hindu oppression.[30]

7.5 RELIGIOUS ALTERNATIVE DISPUTE RESOLUTION

As we have seen, the reform proposals mentioned above might represent an improvement over the PLS in some respects, but also have significant limitations. It is important to keep in mind that these proposals are not mutually exclusive. Rather, they can be combined in different ways. For instance, the modified PLS proposal might be coherently combined with an optional Uniform Civil Code. These proposals, or some combination of them, despite their limitations deserve to play a part in the current conversation about reform of the PLS, as a stopgap, if not as a long-term solution. But another avenue to reform which also deserves a prominent role in discussions about reform in India,

[28] See text to note 46–50 of the Introduction to this thesis; NR Madhava Menon 'Uniform Civil Code and Gender Justice' *The Hindu* (29 May 2007) <www.hindu.com/br/2007/05/29/stories/2007052900571500.htm> accessed 5 January 2012.

[29] See text to note 39–40, 49–50 of the Introduction to this thesis and §6.1.2.

[30] If it did not have the support of the Muslim community. See, eg, J Spinner-Halev, 'Feminism, Multiculturalism, Oppression and the State' (2001) 112 Ethics 84, 94–99.

although it has not played such a role so far, is religious alternative dispute resolution. While the use of alternative dispute resolution, in general, is a potential avenue of reform, the focus here is on *religious* alternative dispute resolution ('RADR') as the use of religious norms (and possibly religious authorities) in dispute resolution makes RADR in particular a potential (though partial) alternative to the PLS. Further, as we will see below, RADR has been controversial as compared to alternative dispute resolution in general. So it is worth focussing on it here.

In this chapter, RADR is used to refer to arbitration, mediation or conciliation conducted according to religious norms. RADR is generally agreed to by the parties in a contract. Arbitration is normally binding on the parties, but mediation and conciliation are normally nonbinding.[31] However, even parties to a mediation or conciliation may choose to sign a further contract binding them to the terms of their (otherwise) nonbinding mediation or conciliation settlement; this contract would then be legally enforceable.[32] There are limits on RADR. The state might require additional conditions – for instance that natural justice be followed[33] and that the decision not be contrary to public policy[34] – prior to its recognition or enforcement of any product of a RADR. *Statuses* such as marriage, divorce or adoption are not usually subject to RADR.[35] Thus even if RADR were adopted as a *via media* between the PLS and a 'secular' Uniform Civil Code, the

[31] Nancy Atlas, Stephen Huber and Wendy Trachte-Huber, *Alternative Dispute Resolution: the Litigator's Handbook* (American Bar Association 2000) 5–6, 309–11.

[32] Text to n 75 to 76.

[33] Arbitration And Conciliation Act 1996, s 34(2)(a)(iii).

[34] ibid s 34(2)(b)(ii). For further conditions, see safeguards at text to note 75 and 76.

[35] *Malka v Sardar* AIR 1929 Lahore 394.

question of what kind of law applies to matters outside the scope of RADR remains open. However, RADR could be used to settle many disputes currently governed by the PLS such as the terms of a divorce, disputes relating to maintenance and the division of marital property as well as disputes relating to inheritance.[36] The contractual norms governing the RADR – the procedure to be followed, the person(s) who will arbitrate, mediate or conciliate, and the norms by which the dispute will be resolved – could be decided privately by the parties. But the parties could also approach RADR institutions, which are discussed in more detail below, which will often have standard-form contracts and access to arbitrators, mediators and conciliators.

The debates on the accommodation of religious norms in family law in many Western jurisdictions[37] – Canada,[38] Australia,[39] the United Kingdom,[40] the Netherlands,[41]

[36] *Chiranjilal Srilal Goenka v Jasjit Singh* (2000) Supp 5 SCR 313.

[37] See generally Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010).

[38] Bruce Ryder, 'The Canadian Conception of Equal Religious Citizenship' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (Vancouver 2008) 87, 105; Trevor C W Farrow, 'Re-Framing the Sharia Arbitration Debate' (2006) 15 Constit Forum 79, 80; Natasha Bakht, 'Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective' (2006) 40th anniv ed Ottawa L Rev 67; Lorraine Weinrib, 'Ontario's Sharia Law Debate: Law and Politics under the *Charter*' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (Vancouver 2008) 239.

[39] See, eg, Australian Federation of Islamic Councils Inc, *Submission No 81 to Australian Parliament Joint Standing Committee on Migration* (Parliament of Australia 2011) <www.aph.gov.au/house/committee/mig/multiculturalism/subs/sub81.pdf; Tim Soutphommasane, 'Avoid the Hysteria but Reject Sharia' *The Australian* (21 May 2011) <www.theaustralian.com.au/news/opinion/avoid-the-hysteria-but-reject-sharia/story-e6frg6zo-1226059621354> accessed 10 October 2011; Patricia Karvelas, 'Imam Wants Sharia Law Here, but A-G Says No Way' *The Australian* (18 May 2011) <www.theaustralian.com.au/national-affairs/imam-wants-sharia-law-here-but-a-g-says-no-way/story-fn59niix-1226057823890> accessed 10 October 2011; 'Even Muslim Jurists are Divided about what Sharia is' *The Australian* (23 May 2011) <www.theaustralian.com.au/news/opinion/letters-to-the-editor/story-fn558imw-1226060688189> accessed 10 October 2011.

[40] S Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in C Mallat and J Connors (eds), *Islamic Family Law* (Graham and Trotman 1990); Rowan Williams, 'Archbishop's Lecture – Civil and Religious Law in England: A Religious Perspective' (2008) <www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective#Lecture> accessed 9 November 2011; Lord Chief Justice Phillips,

Europe generally,[42] and the US[43] – have focussed on RADR as a mode of accommodation of religious norms in family law. At the same time, RADR has been given very little attention in the academic and political debates on the reform of the PLS in India. The experience of those other jurisdictions can thus contribute to the question of how the PLS could be reformed. While this thesis evaluated the PLS in India partly because of the contribution that such an evaluation can make to the debates in other jurisdictions, it is fitting that it also considers how debates in other jurisdictions can contribute to debates on the PLS in India.

RADR is worth exploring more closely in the debates on reform in India because its potential for allowing parties to resolve disputes based on religious norms very closely aligned to their beliefs probably reflects the concerns of this thesis more acutely than the other reform proposals considered above. Moreover, given the problems referred to earlier with completely abolishing the PLS, the RADR might represent a *via media* between the PLS and a compulsory code which does not recognise religious identity at

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'Equality before the law' (East London Muslim Centre, 3 July 2008) <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equality_before_the_law_030708.pdf> accessed 9 October 2011.

[41] Maurits Berger, 'Sharia Law in Canada – Also Possible in the Netherlands?' in P van der Grinten and T Heukels (eds), *Crossing Borders: Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden* (Kluwer 2006) 173.

[42] Mathias Rohe, 'Alternative Dispute Resolution in Europe under the Auspices of Religious Norms' (January 2011) Religare Working Paper No 6 <www.religareproject.eu/content/alternative-dispute-resolution-europe-under-auspices-religious-norms> accessed 9 October 2011.

[43] Eugene Volokh, 'May American Court Appoint Only Muslim Arbitrators, Pursuant to an Arbitration Agreement?' (*The Volokh Conspiracy*, 3 January 2011) <volokh.com/2011/01/03/may-american-court-appoint-only-muslim-arbitrators-pursuant-to-an-arbitration-agreement/> accessed 9 October 2011, outlining a debate in the US on the appointment of Muslim arbitrators as specified in a contract. In Oklahoma, a 2010 ballot initiative resulted in a constitutional amendment prohibiting the courts from 'look[ing] to the legal precepts of other nations or cultures' in their decisions, specifically prohibiting them from 'consider[ing] international law or Sharia law'. See Oklahoma Constitution art VII §1-C. See also Ann Laquer Estin, 'Embracing Tradition: Pluralism in American Family Law' (2004) 63 Md L Rev 540.

all. It might also, for this reason, be more politically feasible.[44] Yet another reason that RADR deserves to be taken seriously as a reform proposal is that it already exists, and has historical variants in Indian law. State courts or tribunals do not hold a monopoly on dispute settlement in India. Arbitration, conciliation and mediation are recognised, facilitated and encouraged in many areas of law – including, to some degree, in family law.[45] Judicial decisions reveal a range of family law disputes that have been referred to binding arbitration.[46] Members of the Parsi community, at one point, campaigned for a system of arbitration for Parsis.[47] Moreover, other unofficial forms of dispute resolution which could be converted to RADR systems are also well-entrenched in many Indian societies. For instance, *khap panchayats* (caste-based village councils) are both a widespread and controversial forum for dispute resolution.[48] Religious bodies such as the *Dar ul Qaza* settle some disputes between Muslims.[49] While these bodies have little or no

[44] That is not to say that it will be unopposed. An early legislative attempt to provide an Adoption Law which would give Muslims the *option* of adoption was opposed. F Agnes, 'Law and Gender Inequality: The Politics of Women's Rights in India' in M Khullar and IY Taehakkyo (eds), *Writing the Women's Movement: A Reader* (Zubaan 2005) 120–21. This might suggest that any effort to give individuals the option of choosing their own norms is likely to meet with some opposition.

[45] Malhotra and Malhotra (n 51); *Aviral Bhatla v Bhawna Bhatla* 2009 (2) KLJ 116 (SC) <www.indiankanoon.org/doc/320406/> accessed 9 October 2011. The *Bhatla* judgment notes how effective the Delhi Mediation Centre (www.delhimediationcentre.gov.in) was at helping the parties reach a settlement.

[46] E.g. *Chiranjilal Srilal Goenka v Jasjit Singh* (2000) Supp 5 SCR 313; *Syed Ghouse Mohiuddin v. Syed Quadri* AIR 1971 SC 2184.

[47] Mitra J Sharafi, 'Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925' (PhD dissertation, Princeton University 2006) 192.

[48] Maarten Bavinck, 'Caste Panchayats and the Regulation of Fisheries along Tamil Nadu's Coromandel Coast' (2001) 36 Economic and Political Weekly 1088; Pratiksha Baxi, Shirin M Rai and Shaheen Sardar Ali, 'Legacies of Common Law: "Crimes of Honour" in India and Pakistan' (2006) 27 Third World Quarterly 1239.

[49] *Vishwa Lochan Madan v Union of India* Writ Petition (Civil) No. 386/2005; see Jeffrey A Redding, 'Institutional v Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems' (2010) 6(1) Journal of Islamic State Practices in International Law 1.

interaction with the state,[50] other modes of alternate dispute resolution such as *Lok Adalats* are overseen by the state.[51] There is therefore scope for replacing the PLS with clearer and better-publicised provisions for alternative dispute resolution based on religious norms. It is therefore worth considering how far this alternative mode of accommodating religious norms in family law ameliorates the concerns raised in this thesis.

To be clear, however, the claim made in this chapter is *not* that RADR is the ideal replacement for the PLS, either by itself or in combination with any of the reform proposals discussed above, or even that it addresses all the concerns related to religious autonomy raised in this thesis. All that is being claimed here is that it is deserving of closer attention in the debates on reform than it has received until now, especially because of its potential in ameliorating some of the concerns of this thesis. The sections that follow will review the main concerns for religious autonomy that this thesis raised in Chapters Four–Six, and will consider whether RADR ameliorates these concerns.

7.5.1 RADR and an adequate range of options

Section 4.1.4 outlines how the PLS affects religious autonomy by adversely affecting the option of practicing religion and the option of not practicing (a particular) religion. This is partly because the PLS applies religious norms to individuals who may not want those

[50] Or have a hostile relationship with the state.

[51] Legal Services Authorities Act 1987. See Anil Malhotra and Ranjit Malhotra, 'Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities and Necessities' (2010) 3 Journal of the International Academy of Matrimonial Lawyers.

norms applied to them, and who may in fact want to live by other norms. The PLS's 'cookie-cutter' approach to religion affects the freedom of religious practice of those religious persons who do not fit the PLS's moulds. Using RADR, however, individuals can have religious norms closely-tailored to their religious beliefs applied to them. Members of New Religious Movements or heterodox members of older religions could use RADR to order their lives according to their religious beliefs. They can use RADR to ensure that their disputes are settled according to their own religious norms, and by those they trust to interpret those norms. In the absence of religious arbitration, the family lives of religious people are likely to be regulated by general state law. General state law is likelier to be discordant or incompatible with their religious beliefs than any religious norms that they choose themselves. Since RADR facilitates religious practice by allowing people to order their lives according to religious norms, it might even have the potential to enhance religious autonomy compared to general state law. Further, those who reject religion or have no religious beliefs would be free to make ADR arrangements based on other norms or indeed follow any secular family code, if it should be enacted. Yet another advantage of RADR is that its expressive potential – as a commitment to one's religion or as having other symbolic meaning – is likely to be stronger than the expressive potential of the PLS described in § 4.2.3.3. Much of this expressive potential, after all, stems from the individual having chosen the norms by which she will live. Thus, RADR ameliorates many of the concerns with the PLS raised in Chapter Four of this thesis.

This is not to say that RADR raises none of the problems of the PLS. The problem of transparency raised by the PLS, discussed in §4.2.2, might apply to RADR as well since being bound by a contract constitutes an alternate reason for religious practice which in turn can lead to opaqueness of motivations. Further, RADR raises concerns

relating to women and vulnerable persons – that they will be coerced into RADR or that they will be subjected to norms which harm their religious autonomy. If RADR were an option, there are worries that they would be coerced by their families and their religious communities into agreeing to RADR.[52] One indication that strong pressure would be exerted on women to choose religious law is the following report of a comment by Syed Mumtaz Ali of the Islamic Institute of Civil Justice in Canada:

> Asked why Muslim women would go near Sharia arbitrations when their rights are covered by Canadian law, he reportedly replied, "*[t]o be a good Muslim you must*." Such pronouncements engendered moral outrage at the very idea of Sharia courts for family disputes with its seemingly bogus sense of "no pressure."[53]

Even assuming that a person chooses to be governed by RADR freely, there are concerns relating to being bound by a contract of this nature.[54] For instance, if this person's religious views, or his desire to be governed by religious norms change, this might raise concerns similar to those raised in §4.2 on the options of religious practice and refraining from religion. However, the greater likelihood of true consent in RADR (which would require an opt-in), as opposed to the PLS (which often applies by default, and does not always allow an opt-out) still places RADR ahead.

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[52] Rather than arbitration based on other norms, or the general family law.

[53] Larry Resnick, 'Family Dispute Arbitration and Sharia Law' (BC Civil Liberties Association, 2007) <www.bccla.org/othercontent/07Sharialaw.pdf> accessed 9 October 2011; see also M Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney-General, Ontario 2004) 3; Bakht (n 38) 74–76.

[54] §4.2.3.2; Michael A Helfand, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders' (2011) 86 NYU L Rev 1287–1303 (forthcoming) <works.bepress.com/michael_helfand/3/> accessed 29 September 2011.

Moreover, RADR is usually subject to safeguards which mitigate concerns relating to coercion. The common law rules about contracts, including doctrines of unconscionability, coercion, undue influence, and duress, may be used to invalidate an ADR agreement, or any contract arising out of the ADR.[55] Further safeguards, such as those used by Canadian courts in family law contracts, would allow courts to intervene even in circumstances that do not rise to the level of unconscionability.[56] For instance, the Supreme Court of Canada has held that courts are to consider 'circumstances of oppression, pressure, or other vulnerabilities' when reading family law agreements, and to 'assess the extent to which enforcement of the agreement still reflects the original intention of the parties'.[57]

Thus while RADR is not a panacea for the worries identified in Chapter Four, it certainly seems either not to raise those worries, raise them to a diminished degree, or show some features which might actually enhance religious autonomy.

7.5.2 RADR and group life

Chapter Five argued that religious autonomy might be enhanced by (1) membership and socialisation in a religious community and, especially, (2) membership in an autonomous religious community. That chapter considered whether the PLS contributes to either of

[55] See, generally, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women' (2004) 1 Muslim World J of Human Rights 3.

[56] *Miglin v Miglin* [2003] 1 SCR 303 [82].

[57] ibid [81], [87].

these factors, and concluded that it did not. RADR, on the other hand, could perhaps enhance religious autonomy, by contributing to (1) or (2).

7.5.2.1 RADR and membership and socialisation in a religious community

It is significant that religious *institutions*, such as the Islamic Institute of Civil Justice in Canada and the Muslim Arbitration Tribunal in the UK, play a large part in the debates on RADR. If a group of individuals with similar religious views wish to be governed by common religious norms via RADR, these *institutions* might form the locus of such a religious group. This religious community could have the characteristics that §5.1 describes as enhancing religious autonomy of members, such as supporting the option of religious practice – particularly communal religious practice. Section 5.1.2 argued that any religious community built or supported by the PLS would be too thin to enhance autonomy. But a community supported by RADR institutions might be thicker. While there are usually limits on the norms that can be used in ADR,[58] RADR could be conducted according to detailed and 'thick' norms. So RADR institutions might attract enough members to form a thick religious community, which in turn has a greater potential to enhance religious autonomy. Section 5.1.2 also pointed out that since the PLS often applies religious norms to those who neither subscribe to those norms nor wish to be governed by them, it is difficult to think of the PLS as a basis for the building or support of religious communities.[59] But as discussed above, since RADR norms can be closely tailored to meet the parties' religious beliefs and require parties to specifically

[58] See text to note 75 and 76 and 33 to 35.

[59] §4.2.1 and §2.2.

opt-in, RADR provides better support for the formation and support of religious communities. It is important to clarify however that no necessary connection between RADR and the formation of such religious communities (or indeed religious autonomy) is being proposed here. At best, RADR shows the *potential* for the facilitation of such communities. The important point is that RADR shows a stronger potential than the PLS does.

7.5.2.2 RADR and group autonomy

Section 5.2.1 argued that religious group autonomy can enhance individual religious autonomy in some circumstances. Section 5.2.4 concluded that since the PLS leaves the religious group with little control over its norms, leaders and members, it cannot be said to promote, or be a form of, religious group autonomy. But RADR does not share many of these features of the PLS. Through RADR institutions, religious groups can have a reasonable degree of control over both the norms which it will apply to its members as well as who ultimately settles the dispute.[60] When a religious group has members that consent to these ADR arrangements, it can be said to govern itself or be autonomous at least over matters amenable to ADR. Section 5.2.3 elaborated on some of the conditions under which religious group autonomy promotes religious autonomy – namely, where such religious group autonomy facilitates religious practice, enhances representation, enhances deliberation or promotes political autonomy. We shall briefly consider whether RADR meets any of these conditions.

[60] But most jurisdictions would place some limits on who can act as an arbitrator, mediator or conciliator. The rule against bias would be one such common limit.

RADR and religious practice

In §5.2.3.1, autonomous religious tribunals – including RADR institutions – were said to facilitate, and in the case of some religions make possible, individual religious practice,[61] and therefore religious autonomy.[62] It is not difficult to see how dispute resolution according to religious norms, by persons belonging to (or holding a particular status) within a religion, might be regarded as an aspect of religious practice.[63] Autonomous RADR institutions could facilitate this practice and thus religious autonomy. As §5.2.3.1 argued, if these institutions were not autonomous, their decisions would not hold the same weight for their members.

RADR and representation

Section 5.2.3.2 argued that granting greater autonomy to minority groups that are alienated from the state might enhance their religious autonomy. But §5.2.4.2 also found that the PLS could not be said to enhance representation, given that the PLS does not have *representatives* of religious groups at all and that religious groups have no control over boundaries of membership. In comparison, RADR institutions have the potential (but only the potential) to benefit their members through better representation. This can occur at two levels. The first is at the level of the religious group as a whole. That is,

[61] Jane Norton, *Law and Religious Organizations: Exceptions, Non-interference and Justification* (DPhil thesis, University of Oxford, 2011) 241–68.

[62] §4.1.4, especially §4.2.1.

[63] R Shippee, 'Blessed are the Peacemakers: Faith-Based Approaches to Dispute Resolution' (2002) 9 ILSA J Int'l & Comp L 237.

RADR facilitates each group that can be identified as a religious group – e.g. Muslims, Buddhists, Sikhs, etc – to form a RADR institution, which could later develop into an institution of governance. For instance, the All India Muslim Personal Law Board, which initially was concerned only with the preservation of Muslim Personal Law, has developed into a powerful lobbying group on general issues relating to Indian Muslims.[64] The group's representatives in these institutions might give group members the opportunity to be governed, at least in some matters, by those who share their values, have more in common with them, and who therefore represent them better. When collective decisions have to be made, at least about family matters, RADR therefore might preserve religious autonomy by giving those affected better representation on matters that concern their religious life.

RADR also has the potential to provide better representation at a second level. Each of these religious groups comprises competing sects, schools and interpretations. Each group is large and diverse. It might be true that someone with Christian values might represent Christian constituents better than anyone else. But, extending that reasoning, someone affiliated with not just the Christian religion but also the same denomination or church of her constituents would represent these constituents even better. RADR, unlike the PLS, makes this possible. Anver Emon, a commentator on the Ontario debate, for instance, offers a proposal for how RADR can be used to allow Muslims to develop new and heterodox forms of *sharia*:

[64] Not to say that this is a good model. This board has been criticised precisely as being unrepresentative, leading to the development of the All India Muslim Women Personal Law Board, AIMWPLB, 'About Us' <muslimwomenpersonallaw.com/aboutus.html> accessed 19 November 2011.

> Imagine a political spectrum of Muslim family service organizations. Those on the left might critically engage the Islamic legal tradition, concluding, for instance, that the Sharia can accommodate same-sex marriage and divorce and offer those services to gay and lesbian Muslims. Those on the right might instead follow a more traditional or even patriarchal Sharia law regime. Other Muslim family service organizations might advocate positions between these poles. Ultimately, Muslims who desire religiously-based family law services would have different organizations to choose from, thereby giving them a choice between competing visions of Islamic law.[65]

Emon's proposal, of course, could equally be applied to other religious groups. RADR, unlike PLS, can thus allow religious persons to be governed (at least in family matters) by religious institutions whose values closely fit their own. So giving greater autonomy to these RADR institutions would have the potential for better preserving the individual autonomy of group members than would leaving them to be governed by the state.

RADR and deliberation

Section 5.2.4.3 concluded that the PLS does not provide an opportunity for deliberation. Rather, it ossifies the religious norms of religious groups, leaving very little space for deliberation by the groups themselves. RADR, on the other hand, has the potential to make deliberation more effective at preserving autonomy. As suggested in §5.2.3.3, deliberation might be more effective in (smaller) religious groups than it is in the state at

[65] Anver E Emon, 'Islamic law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation (2008) 87 Canadian Bar Review 391, 423.

large. It is also likely to be more effective in a group with shared norms (such as a religious group) since those affected by a decision can appeal to reasons in defence of their position based on these shared values, goals and norms.[66] RADR institutions could therefore serve as a forum for effective deliberation among group members. By improving the quality of deliberation RADR could thus help preserve religious autonomy.

RADR and political autonomy

Religious groups in India might serve as an important context for individual political autonomy. While §5.2.3.4 argued that greater religious group autonomy might help accomplish individual political autonomy, §5.2.4.4 observed that the PLS does not, since it gives religious persons no control over the PLS, no leaders and no way of choosing leaders, and no way of making collective decisions about the matters that PLS governs. Again, RADR might be different. If RADR institutions might form the locus of a religious group with some amount of autonomy,[67] their smaller size might provide a more conducive forum for Constant's kind of political autonomy.[68] But the smaller size of these religious groups will not promote individual political autonomy if group members are not given an opportunity to influence group norms, play a role in their execution, choose group leaders and hold them to account. There has been a wave of recent interest

[66] Of course, the values themselves might be contested and subject to interpretation.

[67] This is not to say that the institutions *as they exist now* preserve individual autonomy. This is only to indicate that religious groups are already starting to form institutions around RADR, which has the potential to preserve individual autonomy.

[68] Benjamin Constant, 'The Liberty of the Ancients Compared to That of the Moderns' in David Boaz, *The Libertarian Reader* (The Free Press 1997).

in how RADR institutions work.[69] Regardless of how they actually do work, it is clear that unless members are allowed to participate, they cannot be said to enhance political autonomy. The fact that RADR allows group norms and leaders to be chosen and developed by the groups means that RADR has the *potential* at least for enhancing religious autonomy by granting individuals greater political autonomy in their religious groups.

7.5.3 RADR and self-respect

Section 6.1.2 concluded that the PLS harmed self-respect and thereby harmed religious autonomy because of the misrecognition that it showed those subject to it. RADR is less likely to lead to this kind of misrecognition. If we take the possibility outlined by Anver Emon above[70] seriously, RADR institutions of all religions, of all schools, sects and versions of each religion, as well as ADR institutions of all or any agnostic or atheistic beliefs or ways of life are likely to develop. Since this would be an opt-in system, an individual would only be associated with a particular institution if they chose to. Not only would this minimise misrecognition, it might also provide a means of valuable recognition. Heterodox individuals or 'micro-minorities' – Rastafarians, Gay Muslims or Wiccans – might find in these RADR institutions both the locus of a religious group and a

[69] See, eg, G Douglas and others, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff University 2011) <www.religionandsociety.org.uk/uploads/docs/2011_07/1310467350_Social_Cohesion_and_Civil_Law_Full_Report.pdf> accessed 12 November 2011; S Bano, 'In Pursuit of Religious and Legal Diversity: A Reply to the Archbishop of Canterbury and the "Sharia Debate" in Britain' (2008) 8 Ecc LJ 283; Sonia Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation 2001).

[70] Text to note 65.

means of valuable recognition. RADR is unlikely therefore to harm autonomy through misrecognition of religious identities.

However, another concern about the PLS raised in §6.2, its discrimination on the grounds of sex and religion, might apply to RADR. An underlying but often unsubstantiated assumption in the debates on RADR seems to be that these norms disadvantage women.[71] Critics of RADR might point to religious norms that deny women equal inheritance rights,[72] that make it difficult for them to get a religious divorce[73] or that treat them as the wards of men. But RADR still represents an improvement over the PLS. First, under the PLS such discriminatory norms were enforced by the state *as law*. These discriminatory norms thus appeared to have the imprimatur of the state – which contributes to some of the harms that §6.2 describes. While RADR awards are also enforced by the state, this is by virtue of their status as a contract between the parties. Any discriminatory norms therefore carry less of the state's imprimatur.

Second, while there are fears that such discriminatory norms will be used, it is not necessary that they will be. Rather, as §3.6.1 argued, there are likely to be great differences in the practices and beliefs (and therefore the norms of RADR) between even people who are affiliated with the same religion. Some of these interpretations will *not* have the attitudes to women that insult or harm their autonomy. Assuming that the norms

[71] It is partly for this reason that many feminist writers focus on strategies to '*Charter*-proof women's equality rights from the ravages of fundamentalism': Beverley Baines, 'Equality's Nemesis?' (2006) 5 JL & Equality 57, 58.

[72] Under Islamic inheritance law, male heirs in the same relationship to the deceased as female heirs inherit more: Asaf AA Fyzee and Tahir Mahmood, *Outlines of Muhammadan Law* (5th edn, OUP 2008) 316.

[73] Jewish women, for instance, have approached courts in relation to the *get*. See, eg, Tanina Rostain, 'Permissible Accommodations of Religion: Reconsidering the New York *Get* Statute' (1987) 96 Yale LJ 1147–71.

used in RADR track these differences in interpretation, there is no reason to think that RADR would *necessarily* be based on patriarchal or gender-unjust norms.[74] Rather we would expect to see organisations such as Women Living Under Muslim Laws and others with gender-just readings of religion offering RADR. Such 'competition' between RADR based on different readings of religious doctrine might open up dialogue within religious communities, and further encourage the kinds of readings which do not harm women's religious autonomy.

Finally, RADR could be administered with safeguards that would prevent the enforcement of such discriminatory norms. For instance, in the Canadian case *Miglin v Miglin*,[75] the Supreme Court, faced with a spousal separation agreement, assessed not just whether the agreement was entered into freely but also the substance of the agreement. It assessed the extent to which the agreement was in compliance with the objective of the Divorce Act, which is essentially a piece of social welfare legislation. The court thus acknowledged the need to 'recognize economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown; apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time."[76] If it is a condition for the enforcement of an agreement, including a RADR agreement, that it be substantially compliant with the

[74] Emon (n 65).

[75] *Miglin* (n 56).

[76] ibid [20]; Divorce Act 1985 (Canada), RSC 1985 c 3 (2nd Supp) s 17(7).

conditions identified by *Miglin*, agreements which are discriminatory are highly unlikely to be enforced.

7.5.4 RADR and access to religious knowledge

The previous sections showed how RADR could ameliorate some of the concerns for religious autonomy raised by the PLS. But RADR might even have advantages from a religious autonomy standpoint. RADR might actually promote religious autonomy by promoting a religious citizen's access to religious expertise. Those conducting RADR are likely to be experts on at least one interpretation of a religion. Recognising RADR could result in the representation of competing interpretations of religion (including gender-just ones) through different RADR institutions. This would give the religious citizen access to a number of experts on a number of religious interpretations, ranging from patriarchal or conventional interpretations to gender-just, feminist, queer or heterodox interpretations.

Before this argument is expanded, a preliminary question must be addressed: can expertise be said to *contribute* to religious autonomy? There is one obvious way in which it does. The expertise of others allows us to accomplish that which we otherwise would be unable to – build houses, recover from illness, or fix cars. Why should religious expertise not play the same role in religious autonomy? Could we say, for instance, that if someone considered a particular ritual necessary for successful worship, but did not know how to perform the ritual, her religious autonomy would be enhanced by relevant expertise? Could we say that having consulted the expert, armed with the necessary knowledge, she has more power over her religious life? Furthermore, rituals appear to be only one instance of the role that expertise can play in religion. For many who practice

religion, speaking a particular sacred language is so essential to religious practice that communication with a deity is impossible in any other language. One study quotes a woman who says: 'I do not know how to pray. If God were able to understand Shigwamba I would try, for I cannot speak to him in Sesotho.'[77] Those who know the sacred language then enable the believer to practice her religion in a way that would otherwise have been impossible.[78]

Similarly, some believers might think that some priests, gurus, imams or theologians are simply more likely than they are to come to the correct conclusions on what they *ought*, as a matter of religious doctrine, to do on any number of questions. Should they leave money to the poor, or to their relatives? Should they spend more time in prayer or in charitable works? Should they wear a hat to church? As long as the 'should' in these questions refers to 'should, as a matter of religious doctrine', many religious adherents may opt to consult those whom they believe to be more knowledgeable about the topic than themselves.[79] Access to these experts might enhance their religious autonomy just as access to the architect, doctor and car mechanic in our general examples above enhances personal autonomy more generally. It is important to note however that this argument would not apply to all religions, or all religious persons. Certainly there will be those for whom there is no 'correct' religious doctrine beyond

[77] Patrick Harries, 'The Roots of Ethnicity: Discourse and the Politics of Language Construction' (1988) 87 African Affairs 25, 32.

[78] While the belief of the woman quoted just now might seem like an unusual (perhaps even an unreasonable) one, even in religious traditions which do not assume that speaking in a sacred language is *necessary* for religious practice, a sacred language might make a significant contribution to the practice. A prayer might be more authentic, powerful or 'pure' when said in the sacred language.

[79] In this, religious expertise differs from moral expertise, where there is much more skepticism about whether others can be better qualified. See Peter Singer, 'Moral Experts' in Evan Selinger and Robert Crease (eds), *The Philosophy of Expertise* (Columbia University Press 2006).

their own understanding of beliefs, attitudes and actions associated with their religion. Such people do not think that anyone (else) qualifies as a religious expert of their religion, or that anyone is likelier than they are to come to the correct conclusions on what they *ought*, as a matter of religious doctrine, to do. The argument in this section does not apply to such religious persons. However, among the features of religions described in section §3.2, was the importance of text, scriptures, rituals and practices of worship. Not every religious person will have advanced knowledge (or even some knowledge) of these. For a significant number of religious persons and traditions, it will be important to act according to 'correct' religious doctrine – i.e. according to their sacred text, scripture or custom – by utilising religious expertise. The argument in this section applies to such persons.

If religious expertise does generally enhance religious autonomy for some, another question that might be raised in response to our argument is what value a state-recognised system of RADR could add to expertise. Presumably such experts exist even without the state-regulated system of RADR. Someone seeking advice on a religion could, at any time, visit a theologian or a religious organisation. It is important to note, while gauging the potential of RADR, that the state would act not as an expert on religious matters but as a *selector-of-experts*. It is in this role that the state, through RADR, could make a contribution to the religious autonomy of citizens. In order for expertise to benefit religious autonomy, the expert must act in good faith (i.e. not be fraudulent or biased), and the religious citizen must subjectively have an attitude of trust towards the expert. RADR arrangements could facilitate these preconditions for expertise

to enhance religious autonomy,[80] and in doing so could offer the religious citizen a service that neither state courts nor religious experts acting outside a RADR situation can.

Let us begin with the first precondition: that the expert acts in good faith. Expertise enhances autonomy when it gives people access to religious knowledge that they can use to practice (or better practice) religion. But if the expert is biased or fraudulent, she might not provide religious knowledge, but false information which is indistinguishable from religious knowledge from the standpoint of the religious citizen. Can the state separate experts acting in good faith from others, when regulating arbitration? It might seem that to do so, the state must be an *expert* selector-of-experts, rather than a *novice* selector-of-experts. For it might seem that uncovering fraud or bias in an expert requires that the selector-of-experts be an expert herself. Arguably, only a person in such a position can trawl through the arguments presented by the supposed experts to discover which ones are motivated by fraud or bias and which ones are made in good faith. An *expert* selector-of-experts could perform this function, thus helping achieve the first precondition for expertise to enhance religious autonomy. But it is unlikely that the state is an *expert* selector-of-experts, especially as opposed to the citizen who is herself a practitioner of the religion in question.

In fact, though, despite not being an *expert* selector-of-experts, the state can perform a very useful role in checking that those conducting RADR are sincere and not fraudulent. For instance, the state could stipulate that a biased or fraudulent ADR is invalid.[81] The state could punish those conducting RADR who misrepresent their

[80] This list of preconditions is not meant to be exhaustive.

[81] As many jurisdictions do – e.g. Arbitration Act 1991 (Ontario) s 46(1)(8).

expertise or qualifications, or the state could license expert arbitrators, conciliators and mediators with appropriate qualifications. The state is used to making these checks on other experts, such as real estate agents or doctors or lawyers. So by eliminating those who conduct biased and fraudulent RADR, the state can promote the religious citizen's access to religious expertise, thereby enhancing religious autonomy.

Now take the second precondition: that the religious citizen *actually* trusts the expert. The expertise that the expert makes available to the religious citizen is useless if she does not put her trust in the expert. This is again where the state may serve the religious citizen. People rely on the state. Medication approved by government drug regulation agencies are generally considered safe. Nutritional information provided on food packaging is generally relied upon. Meteorological predictions by state-run agencies are generally trusted. None of this is to say that the state has any *special* expertise when it comes to any of these matters; there may well be more trustworthy sources of information. But people tend to trust the state on these matters. This apparent trustworthiness might 'rub off' by association on those arbitrators, mediators and conciliators whom the state checks, endorses or licenses in the manner described in the paragraph above. Citizens might well think of the state as having the resources and experience to evaluate the good faith of those conducting RADR.[82] By enabling citizens to (subjectively) trust these arbitrators, conciliators and mediators, the state would enable

[82] This might be helped by the fact that unlike religious organisations, a state might be *seen* as impartial. Religious denominations have an interest – spiritual or temporal – in proselytising and propagating their interpretation of religious doctrine. The state, not being in the business of saving souls, might *appear* not to. So, in the eyes of religious citizens the state might claim a greater impartiality about religious matters than most religious experts. Certainly, any claim that a state is impartial between religious interpretations might be met with skepticism. It is not denied that a state has an important interest in which religious interpretations succeed. It is in the state's interest, for instance, to see that religious interpretations advocating violence against the state do not succeed. But if the state is *perceived* as more or less impartial, it might be the case that it has the advantage of already having gained citizens' trust, which overall helps citizens to access expertise.

them to access the religious expertise that they possess. Access to this expertise can enhance their religious autonomy.

This section argued that the religious autonomy of religious citizens is enhanced by access to religious expertise. This is subject to at least two preconditions – that the expert act in good faith and that the religious citizen actually trust the expert. The state, in recognising RADR, could facilitate these two preconditions. RADR could therefore promote religious autonomy by enhancing the religious citizen's access to religious expertise.

7.6 CONCLUSION

This chapter does not argue that RADR should replace the PLS; whether it should or it should not requires an all-things-considered evaluation of both, while this thesis is confined only to the value of religious autonomy. Nor does this section prove that RADR promotes religious autonomy. It does not even prove that it does not harm religious autonomy. A RADR scheme could be administered in many different ways, with different implications for religious autonomy. We cannot come to any conclusive verdict on whether RADR represents an advance over PLS from the viewpoint of religious autonomy without a fine-grained RADR proposal with details of all features pertinent to religious autonomy. Such a proposal is unavailable in the current debates and is beyond the scope of this thesis to construct from scratch. Further, as noted above, RADR as currently conceived in most jurisdictions cannot even cover all the ground currently covered by the PLS. The conclusions of this chapter on RADR are therefore necessarily limited. This section does suggest, though, that RADR has certain features that

distinguish it quite sharply from the PLS. Since it is based on contract, it carries less of the imprimatur of the state; it could be designed with safeguards that ensure that parties are not coerced; it allows parties to resolve disputes based on religious norms very closely aligned to their beliefs; and, instead of imposing a single interpretation of a set of religions, it allows religious persons with vastly differing interpretations of any particular religion to organise certain aspects of their lives according to its norms. These features have the potential to ameliorate the problems that the PLS raises for religious autonomy. RADR thus deserves to be taken seriously in debates on the reform of the PLS.

This chapter focussed on RADR partly because it has been largely ignored in the literature on the reform of the PLS. This is not to downplay the importance of the other reform proposals considered here – changes to the PLS, the *millet* system, internal reform and a Uniform Civil Code. Many of these avenues to reform show some features which represent potential advances over the current PLS. They could also be combined in different ways. The PLS could be replaced by the modified PLS supplemented with an optional Uniform Civil Code, an optional Uniform Civil Code could be coupled with RADR arrangements, a change to a modified PLS could be combined with efforts at internal reform and so on. As promising as many of these avenues of reform are, as discussed in the beginning of this chapter, this thesis cannot come to a final conclusion on the best route of reform of the PLS. The scope of the thesis – which only considers the value of religious autonomy, not every relevant value – as well as the limitations of the reform proposals available in the current debates – which focus to a large degree on concerns relating to gender – make such a conclusion impossible. However, this thesis can conclude, as the next chapter more fully recapitulates, that concerns relating to religious autonomy constitute an important set of objections to the PLS.

8. CONCLUSION

The PLS is an important mode of accommodation of religious norms in family law. This thesis studied the implications that the PLS has for religious autonomy. The foundational part of this thesis outlined the key features of the PLS (Chapter Two) as well as the conditions and contributory factors of religious autonomy (Chapter Three). Religious autonomy is the value of shaping one's own religious life. This thesis focussed on three broad conditions and factors which have implications for religious autonomy – religious options (Chapter Four), group life (Chapter Five) and self-respect (Chapter Six).

Chapter Four considered how far the PLS affected the precondition of having an adequate range of religious options. This is a precondition of religious autonomy because without adequate options, events overtake the agent, instead of being chosen by her. Without adequate options, she can no longer claim self-authorship or self-creation in the religious sphere. Chapter Four found that the PLS harmed the option of religious practice and the option of refraining from religious practice. The PLS was found to interfere with religious practice because it obliges people to organise their lives according to certain religious norms; this means that those who endorse other religious norms are prevented from organising their lives in accordance with their own religious norms. The PLS was also found to harm the option of religious practice because the PLS, in some situations, makes the motivations behind religious acts opaque, affecting agents' ability to successfully practice their religion. It was found to harm the option of refraining from religious practice because when some people subject to the personal law do the things that most people do during their life-times, they often *have* to do them (if they are to do them at all) in accordance with religious norms.

Several defences of the PLS's effect on the range of available religious options were considered. The possibility was raised that having the option of personal law in addition to general family law enhances the option of religious practice, and thus the religious autonomy of some subject to the PLS. The chapter further considered whether conceiving of the choice of personal law as a promise suggests that the PLS enhances the option of religious practice. It finally considered whether the symbolic value of being governed by the personal laws enhances the option of religious practice. These attempted defences of the PLS, based on their supposed contribution to the option of religious practice, all failed.

Chapter Five considered two defences of the PLS based on its contribution to religious communities and to religious group autonomy. The first defence was that religious communities can contribute to the religious autonomy of their members and that the PLS might help build or strengthen religious communities which have this potential. However, the chapter concluded that any religious community built or supported by the PLS would be too thin to promote religious autonomy. The second defence was that the PLS contributes to, or is a form of, religious group autonomy, and that religious group autonomy under some circumstances promoted religious autonomy. This defence relied on the argument that religious group autonomy promotes religious autonomy by facilitating religious practice, by enhancing representation, by enhancing deliberation and by promoting political autonomy. The chapter concluded that the PLS cannot be defended on this basis because it does not promote religious group autonomy. It was found that, even assuming that the PLS promotes religious group autonomy, it does not thereby facilitate religious practice, enhance representation, enhance deliberation or promote political autonomy. The chapter therefore concludes that both defences of the PLS fail.

The precondition of self-respect, especially respect for one's own religious identity, was the focus of Chapter Six. This chapter considered one defence and one criticism of the PLS based on self-respect. The defence considered was that the PLS provides minority religions with recognition and validation, which supports their self-respect; this is particularly important because adherents of minority religions in India face threats to their self-respect, including threats based on religious hatred directed towards them. This defence failed because it was found that the PLS subjected many to misrecognition and non-recognition which harmed their self-respect and that it did not always validate, but rather sometimes underscored, the negative attitudes faced by some religious groups. The attempted defence of the PLS based on self-respect thus failed. The chapter also considered a criticism of the PLS based on self-respect. Discrimination can harm self-respect and the PLS is often criticised for its discrimination on the ground of sex and on the ground of religion. This chapter argued that the PLS's discrimination in recognising religious identity harms the self-respect of those who were misrecognised or not recognised. The chapter also argued that discrimination against women by the PLS affects their self-respect *as* women belonging to those religious groups. This chapter thus identified an important criticism of the PLS and found a potential defence of it wanting.

Having considered the problems that the PLS raises for religious autonomy, this thesis turned in Chapter Seven to avenues of reform. This chapter evaluated several reform proposals including certain modificiations of the PLS, a move towards a *millet* system, 'internal' reform of individual personal laws and the introduction of a Uniform Civil Code. It particularly focussed on one reform possibility – religious alternative dispute resolution – which has not been considered closely in the Indian context, despite

the attention given to it in other jurisdictions. However, due to the limitations both of this thesis and of current reform proposals, this chapter did not advocate any particular route to reform. It merely indicated how the main considerations outlined in this thesis would apply to these proposals.

While this thesis has important implications for reform of the PLS in India, it has further implications still. Its findings are likely to prove useful for research and practical problems beyond the Indian context – including those raised by the many variations of the *millet* and personal law systems found in Pakistan, Bangladesh, Sri Lanka, Singapore, Malaysia, Israel, South Africa and many other jurisdictions.[1] There are connections between these distinct *millet* and personal law systems. Different jurisdictions sometimes share personal laws – the Dissolution of Muslim Marriages Act 1939 is in force in Pakistan and Bangladesh, with some modifications and alterations, as well as in India.[2] Some aspects of the Indian PLS have influenced the personal law systems of other states – Pakistan,[3] Uganda and Kenya, for instance.[4] Debates on each of the personal law systems feed into debates on the others. For instance, those in favour of reform of the

[1] For a more comprehensive list, see MJ Raisch, 'Religious Legal Systems: A Brief Guide to Research and Its Role in Comparative Law' (February 2006) <www.nyulawglobal.org/Globalex/Religious_Legal_Systems.htm#_Articles_5> accessed 9 November 2011.

[2] J Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 IJLPF 108, 121; R De, 'Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act' (2009) 46 Indian Economic & Social History Review 105.

[3] E.g. 'Hindu Community Leaders Disagree on Divorce Clause' *The Express Tribune* (17 October 2011) <tribune.com.pk/story/275674/hindu-community-leaders-disagree-on-divorce-clause/> accessed 9 November 2011.

[4] PK Virdi, *The Grounds for Divorce in Hindu and English Law: A Study in Comparative Law* (Motilal Banarsidass 1972) 39–42; Prakash A Shah, 'Attitudes to Polygamy in English Law' (2003) 52 ICLQ 369, 371.

PLS in India, point to reform in Pakistan[5] and other Muslim-majority states such as Tunisia, Jordan, Iraq, Indonesia, and Malaysia.[6] Commentators on the South African personal law system learn from aspects of the (Indian) PLS.[7] Comparisons between the PLS of India and the *millet* system in Israel are thought to be helpful in addressing the human rights concerns raised by both.[8] The academic (and to some extent judicial) dialogue between countries with *millet* and personal law systems has reached such a level of development that scholars have started talking of 'transnational Islamic law'[9] and the globalisation of personal laws.[10] Thus the similarities between different *millet* and personal law systems and the development of this transnational dialogue mean that the conclusions of this thesis could have a bearing on the evaluation and reform of *millet* and personal law systems in jurisdictions outside India.

[5] Asghar Ali Engineer, *Dossier 20: Indian Islam and Reform Movements in Post-Independence India* (WLUML 1998) <www.wluml.org/node/311> accessed 10 October 2011; Syed Tahir Mahmood, *Personal Law in Islamic Countries: History, Text, and Comparative Analysis* (Academy of Law and Religion 1987) <www.getcited.org/pub/102682745> accessed 10 October 2011.

[6] *Danial Latifi v Union Of India* (2001) MANU/SC/0595/2001; Narendra Subramanian, 'Legal Change and Gender Inequality: Changes in Muslim Family Law in India' (2008) 33 L & Soc Inquiry 631, 648.

[7] Christa Rautenbach, 'Phenomenon of Personal Laws in India: Some Lessons for South Africa' (2006) 39 CILSA 241.

[8] M Galanter and J Krishnan, 'Personal Law Systems and Religious Conflict: A Comparison of India and Israel' in G Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgement* (Indiana UP 2001).

[9] Narendra Subramanian, 'Legal Change and Gender Inequality: Changes in Muslim Family Law in India' (2008) 33 L & Soc Inquiry 631, 637.

[10] See generally Prakash Shah, 'Globalisation and the Challenge of Asian Legal Transplants in Europe' (2008) 3 Belgrade Law Review 180; Werner F Menski, *Hindu Law: Beyond Tradition and Modernity* (OUP 2003) 592.

Moreover, even states that do not have personal laws sometimes recognise them, notably through private international law.[11] English courts have had to adjudicate on personal laws, including Indian personal laws, especially with respect to the family matters of immigrants from Asia and Africa.[12] French courts are frequently called upon to adjudicate upon the validity of marriage,[13] divorce,[14] *mahr* and maintenance[15] under the personal law of Algeria and Morocco. The German[16] and Dutch[17] courts have faced similar issues. Many jurisdictions limit the reception of personal laws to those which do not contravene public policy, public order and international conventions.[18] This thesis points out features of a PLS which are problematic from the point of view of religious autonomy. It might therefore suggest further limits to the reception of personal laws through private international law and contribute to the question of when jurisdictions which recognise personal laws should and should not do so.

[11] P Fournier, *Dossier 27: The Reception of Muslim Family Laws in Western Liberal States* (WLUML 2005) <www.wluml.org/node/504> accessed 9 November 2011; A Parashar, 'Polygamous Marriage in Conflict of Laws' (1982) Islam & Comp LQ 187, 192–93; Shah, 'Attitudes to Polygamy' (n 4).

[12] Shah, 'Attitudes to Polygamy' (n 4).

[13] Fournier, *Reception of Muslim Family Laws* (n 11) 68.

[14] Gilles Cuniberti, 'French Muslims Getting Divorced Back Home' (*Conflict of Laws .net*, 12 February 2008) <conflictoflaws.net/2008/french-muslims-getting-divorce-back-home/> accessed 9 November 2011.

[15] Pascale Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate 2010) 52.

[16] Fournier, *Reception of Muslim Family Laws* (n 11) 70–72.

[17] Maurits Berger, 'Sharia Law in Canada – Also Possible in the Netherlands?' in P van der Grinten and T Heukels (eds), *Crossing Borders: Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden* (Kluwer 2006) 173–84.

[18] Fournier, *Reception of Muslim Family Laws* (n 11).

Beyond personal law systems, as the previous chapter indicates, the conclusions of this thesis are significant for recent debates in the West on RADR and religious 'tribunals'. The debate in Ontario, Canada on *sharia* arbitration is still live in policy and academic circles.[19] A similar debate played out recently in the UK following remarks of the Archbishop of Canterbury, Rowan Williams,[20] and Lord Chief Justice Phillips[21] on the place of RADR in the UK legal system.[22] Currently a Private Member's Bill[23] motivated by concerns about religious tribunals[24] has been introduced in the House of Lords. The same controversy arose in Australia in 2011 following a call from a Muslim group for greater recognition of *sharia*.[25] It is clear therefore that these debates about

[19] M Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney-General, Ontario 2004) 3.

[20] Rowan Williams, 'Archbishop's Lecture – Civil and Religious Law in England: A Religious Perspective' (2008) <www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective#Lecture> accessed 9 November 2011.

[21] Lord Chief Justice Phillips, 'Equality before the Law' (East London Muslim Centre, 3 July 2008) <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equality_before_the_law_030708.pdf> accessed 9 October 2011.

[22] This debate goes back to the 1970s, and continued into the 1990s: S Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in C Mallat and J Connors (eds), *Islamic Family Law* (Graham and Trotman 1990) 147. See Fournier, *Reception of Muslim Family Laws* (n 11) 72–74 for an overview.

[23] Arbitration and Mediation Services (Equality) HL Bill (2010–11).

[24] K McVeigh and A Hill, 'Bill Limiting Sharia Law is Motivated by "Concern for Muslim Women"' *The Guardian* (London, 8 June 2011) <www.guardian.co.uk/law/2011/jun/08/sharia-bill-lords-muslim-women> accessed 9 November 2011.

[25] See, eg, Australian Federation of Islamic Councils Inc, *Submission No 81 to Australian Parliament Joint Standing Committee on Migration* (Parliament of Australia 2011) <www.aph.gov.au/house/committee/mig/multiculturalism/subs/sub81.pdf>; Tim Soutphommasane, 'Avoid the Hysteria but Reject Sharia' *The Australian* (21 May 2011) <www.theaustralian.com.au/news/opinion/avoid-the-hysteria-but-reject-sharia/story-e6frg6zo-1226059621354> accessed 10 October 2011; Patricia Karvelas, 'Imam Wants Sharia Law Here, but A-G Says No Way' *The Australian* (18 May 2011) <www.theaustralian.com.au/national-affairs/imam-wants-sharia-law-here-but-a-g-says-no-way/story-fn59niix-1226057823890> accessed 10 October 2011; 'Even Muslim Jurists are Divided about what Sharia is' *The Australian* (23 May 2011) <www.theaustralian.com.au/news/opinion/letters-to-the-editor/story-fn558imw-1226060688189> accessed 10 October 2011.

RADR and religious tribunals in Western jurisdictions are not ending any time soon. Rather it is to be expected that such demands for the accommodation of religious norms (and the accompanying controversies) will continue to grow in other Western liberal countries. While there are important differences between the PLS on one hand and RADR or religious tribunals on the other, they are both forms of accommodation of religious norms in family law. There is the temptation to think that the problems surrounding the accommodation of religious groups in family law are relatively new – the result of recent patterns of immigration. But the extensive experience of the PLS, and therefore the conclusions of this thesis, hold lessons for current debates in Western liberal states. This is reflected in the attention that writers on RADR in Western jurisdictions are starting to pay to the literature on the PLS in India.[26] Thus this thesis and its conclusions contribute to the broader question of whether *all* states which value religious freedom should accommodate the norms of religious groups in family law, as well as the question of what form any accommodation should take.

More generally, the PLS is often cited as a model of toleration[27] and as a model for integrating minorities.[28] Commentary on how multiculturalism affects women often uses the (Indian) PLS – particularly the *Shah Bano* case – as a case study. It is used to

[26] John Eekelaar, 'From Multiculturalism to Cultural Voluntarism: A Family-Based Approach' (2010) 81 The Political Quarterly 344, 349; Bas Tönissen and Jochem Gerritsen, 'The Road Not Taken – Islamic Shari'a Courts in the Netherlands' (14 December 2010) <www.scribd.com/doc/49194046/The-Road-Not-Taken-Islamic-Shari-a-Courts-in-the-Netherlands> accessed 10 October 2011.

[27] Wendy Brown, *Regulating Aversion: Tolerance In The Age Of Identity And Empire* (Princeton University Press 2006) 9, 33, 44; Michael Walzer, *On Toleration (Castle Lectures in Ethics, Politics, and Economics)* (Yale University Press 1997) 14–19.

[28] Bhiku Parekh, 'Integrating Minorities' in Tessa Blackstone, Bhiku Parekh and Peter Sanders (eds), *Race Relations In Britain: A Developing Agenda* (Routledge 1998) 5.

illustrate the dangers that multiculturalism poses for women.[29] It is used to illustrate the importance that personal law can have for religious identity.[30] It is used to argue that a majority should not force an oppressed group to confirm to human rights norms.[31] It is used to illustrate how a deliberative model of multiculturalism would work.[32] Clearly then, the (Indian) PLS occupies an important space in the background of key debates on multiculturalism. A better understanding of the PLS would then contribute to these debates. This thesis is therefore significant for the literature on multiculturalism insofar as it sheds light on the nature of the PLS.

This thesis adopts an autonomy-based conception of religious freedom and, to some extent, develops this conception. By doing so, it makes a contribution to the literature on religious autonomy. This thesis also explains religious autonomy's implications for the PLS. Religious freedom clearly has a bearing on the broader question of the accommodation of religious norms in family law. As noted earlier, calls for such accommodation are often made in the name of religious freedom.[33] This thesis therefore makes a contribution to our understanding of religious freedom by shedding light on how the law should be designed in order to conform to it.

[29] Seyla Benhabib, *The Claims Of Culture: Equality And Diversity In The Global Era* (Princeton University Press 2002) 100.

[30] Jeff Spinner-Halev, 'Feminism, Multiculturalism, Oppression, and the State' (2001) 112 Ethics 84, 99.

[31] ibid.

[32] Siobhan Mullally, 'Feminism and Multicultural Dilemmas in India: Revisiting the *Shah Bano* Case' (2004) 24 OJLS 671; Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001) 81–83.

[33] Text to note 51 to 55 of the Introduction.

While the conclusions of this thesis are significant, they are also limited. Its scope and methodological limitations meant that, as indicated at various points, there were important avenues of inquiry that had to be left unexplored. These limitations suggest some future lines of enquiry for further research. While there is some scholarship on how the PLS operates in practice,[34] more research on how the system is perceived and operated by its users would be useful. In particular, at this point, there is very little information available on 'micro-minorities' – Baha'is, small religious sects, heterodox in India – how they fit into the PLS, how their family matters are legally regulated and their attitude towards the PLS. More research is certainly needed on such individuals, some of whom currently appear to 'fall between the cracks' of the PLS. As this thesis argues, the PLS could have detrimental effects on their religious autonomy, and there is a need for much more research on them. Similarly, there are 'cross-over' cases where an individual straddles more than one personal law, e.g. because of an inter-religious marriage or conversion. While there are a few prominent cases on this,[35] the PLS's treatment of these individuals is also in need of closer study.

As this thesis notes at several points, the religious beliefs of many of those subject to the PLS deviates from the religious doctrine that the PLS applies to them. The extent of this deviation has not been mapped. This is a gap in the literature that should be filled, especially given the consequences of this deviation for religious autonomy noted in this thesis. Moreover, as §2.5 indicates, it is likely that the PLS, as influential and prominent as it is in India, has an effect on religious beliefs. Given the worries raised in this thesis

[34] Sylvia Vatuk, '"Where Will She Go? What Will She Do?" Paternalism Toward Women in the Administration of Muslim Personal Law in Contemporary India' in GJ Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press 2001).

[35] E.g. *Sarla Mudgal v Union of India* 1995 AIR 1531, 1995 SCC (3) 635.

for religious autonomy, the subject would benefit from more empirical information on its precise effect.

This thesis uses an autonomy-based conception of religious freedom for this reasons outlined earlier.[36] But there are competing accounts of religious freedom and it might be worth evaluating the PLS against other accounts of religious freedom. More research is also needed on how the PLS affects personal freedom and personal autonomy.[37] The value of research on the gender-implications of the PLS, which is by far the primary research question in the area, should not obscure the importance of these other questions.

Finally, Chapter Seven tried to briefly indicate what the conclusions of this thesis mean for the reform of the PLS. But, as noted earlier, insufficient attention has been paid to religious autonomy in the debates on the PLS. This lack of attention is reflected in prominent proposals for reform, most of which seek to mostly address the problems that the PLS raises for women. There is therefore much more work to be done in taking religious autonomy into account in designing proposals for how the PLS ought to be reformed.

[36] Text to note 63 to 67 of the Introduction.

[37] Pratap Bhanu Mehta, 'Obscuring the Real Issues' *The Hindu* (30 July 2003) <www.hindu.com/2003/07/30/stories/2003073001431000.htm> accessed 15 November 2011.

APPENDICES

BIBLIOGRAPHY

——, ‘Centre Says No to Separate Sikh Marriage Act, SAD to Meet PM’ *Indian Express* (New Delhi, 31 August 2011) <www.indianexpress.com/news/centre-says-no-to-separate-sikh-marriage-act-sad-to-meet-pm/839594/> accessed 6 October 2011

——, ‘China and the Vatican: Your Billion or Ours?’ *The Economist* (London, 20 August 2011) <www.economist.com/node/21526402> accessed 14 November 2011

——, ‘Even Muslim Jurists are Divided about what Sharia is’ *The Australian* (23 May 2011) <www.theaustralian.com.au/news/opinion/letters-to-the-editor/story-fn558imw-1226060688189> accessed 10 October 2011.

——, ‘Even Online, the Neocortex is the Limit’ *The Economist* (26 February 2009) <www.economist.com/node/13176775?story_id=13176775> accessed 20 November 2011

——, ‘Hindu Community Leaders Disagree on Divorce Clause’ *The Express Tribune* (17 October 2011) <tribune.com.pk/story/275674/hindu-community-leaders-disagree-on-divorce-clause/> accessed 9 November 2011

——, ‘No Access to Quota Benefits after Conversion: Court’ *The Deccan Herald* (7 March, 2011) <www.deccanherald.com/content/143863/no-access-quota-benefits-conversion.html> accessed 20 November 2011

——, ‘Oklahoma Candles for 4000: A Virtual Vigil for Peace’ (24 March 2008) <peacearena.org/4000candles> accessed 4 October 2011

——, ‘Pagan Beliefs’ (BBC, 2 October 2002) <www.bbc.co.uk/religion/religions/paganism/beliefs/beliefs.shtml> accessed 7 August 2011

——, ‘Plea against Muslim Personal Law Board Setting Up Parallel System,’ *The Hindu* (Chennai, 17 August 2005) <www.thehindu.com/2005/08/17/stories/2005081703311300.htm> accessed 14 November 2011

——, ‘Q&A: The Ayodhya dispute’ (*BBC News*, 30 September 2010) <www.bbc.co.uk/news/world-south-asia-11435240> accessed 14 November 2011

——, ‘Women Personal Law Board Unveils New “Nikahnama”’ (Mar 17, 2008) *The Hindu* <www.hindu.com/2008/03/17/stories/2008031759171700.htm> accessed 20 November 2011

Adams RM, ‘Symbolic Value’ (1997) 21 Midwest Studies in Philosophy 1

Agnes F, ‘Conjugality, Property, Morality and Maintenance’ (2009) 44 Economic and Political Weekly 58

Agnes F, ‘Hindu Men, Monogamy and Uniform Civil Code’ (1995) 30 Economic and Political Weekly 3238

Agnes F, ‘Shah Bano to Shabana Bano’ *The Indian Express* (15 December 2009) <www.indianexpress.com/news/shah-bano-to-shabana-bano/554314/0> accessed 18 July 2011

Agnes F, *Law and Gender Inequality*: *The Politics of Women’s Rights in India* (Law in India Series, OUP 1999)

Agnes F, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (OUP 2011)

Ahdar R and Aroney N (eds), *Shari’a in the West* (OUP 2010)

Ahdar R and Leigh I, *Religious Freedom and the Liberal State* (OUP 2005)

Ahuja R, ‘Religion of the Bhils: A Sociological Analysis’ in Priyaram Chacko (ed), *Tribal Communities and Social Change* (Sage 2005)

al-Ahsan A, ‘The Quranic concept of Ummah’ (1986) 7 Journal of Muslim Minority Affairs 606

Ali SA and Whitehouse E, ‘The Reconstruction of the Constitution and the Case for Muslim Personal Law’ (1992) 13 Can J Muslim Minority Aff 156

All India Muslim Personal Law Board, ‘Introduction’ <www.aimplboard.org/introduction.html> accessed 15 November 2011

All India Muslim Personal Law Board, ‘Introduction’ <www.aimplboard.org/introduction.html> accessed 15 November 2011

Allport G, ‘The Religious Context of Prejudice’ (1966) 5 Journal for the Scientific Study of Religion 447

Anderson MR, *Islamic Law and the Colonial Encounter in British India* (WLUML 1996) <www.iiav.nl/ezines/web/WomenLivingUnderMuslimLawsOP/1996/No7June.pdf> accessed 12 November 2011

Anderson S, ‘Coercion’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/archives/fall2008/entries/coercion/> accessed on 7 October 2011

Appiah KA, *The Ethics of Identity* (Princeton University Press, Princeton 2005)

Armstrong K, ‘The Curse of the Infidel’ *The Guardian* (20 June 2002) <www.guardian.co.uk/world/2002/jun/20/religion.september11> accessed 15 November 2011

Armstrong K, *The Spiral Staircase: My Climb Out Of Darkness* (Random House 2004)

Arnold D and Robb P (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press 1993)

Atiyah PS, *Essays on Contract* (Clarendon Press 1990)

Atkin WR (ed), *The International Survey of Family Law 2007* (Jordans 2007)

Atlas N, Huber S and Trachte-Huber W, *Alternative Dispute Resolution: The Litigator's Handbook* (American Bar Association 2000)

Australian Federation of Islamic Councils Inc, *Submission No 81 to Australian Parliament Joint Standing Committee on Migration* (Parliament of Australia 2011) <www.aph.gov.au/house/committee/mig/multiculturalism/subs/sub81.pdf>

Bader V, 'Legal Pluralism and Differentiated Morality' in Ralph D Grillo (ed), *Legal Practice and Cultural Diversity* (Ashgate Publishing 2009)

Baines B, 'Equality's Nemesis?' (2006) 5 JL & Equality 57

Bajpai R, 'The Conceptual Vocabularies of Secularism and Minority Rights in India' (2002) 7 J Pol Ideologies 179

Bakht N, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women' (2004) 1 Muslim World J of Human Rights 3

Bakht N, 'Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective' (2006) 40th anniv ed Ottawa L Rev 67

Bano S, 'In Pursuit of Religious and Legal Diversity: A Reply to the Archbishop of Canterbury and the "Sharia Debate" in Britain' (2008) 8 Ecc LJ 283

Barak-Erez D and Shapira R, 'The Delusion of Symmetric Rights' (1999) 19 OJLS 297

Barker E, 'Thus Spake the Scientist: A Comparative Account of the New Priesthood and its Organisational Bases' (1979) 3 Review of the Social Sciences of Religion 79

Barry B, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001)

Bavinck M, 'Caste Panchayats and the Regulation of Fisheries along Tamil Nadu's Coromandel Coast' (2001) 36 Economic and Political Weekly 1088

Baxi P, Rai SM and Ali SS, 'Legacies of Common Law: "Crimes of Honour" in India and Pakistan' (2006) 27 Third World Quarterly 1239

Benhabib S, *The Claims Of Culture: Equality And Diversity In The Global Era* (Princeton University Press 2002)

Berger B, 'Law's Religion: Rendering Culture' 45(2) Osg Hall LJ 277

Berofsky B, *Liberation from Self: A Theory of Personal Autonomy* (Routledge 1995)

Berofsky B, 'Identification, the Self and Autonomy' [2003] Soc Phil & Pol'y 199

Bharatiya Janata Party, *Vision Document 2004* <www.bjp.org/index.php?option=com_content&view=article&id=136&Itemid=548> accessed 15 November 2011

Bhargava R (ed), *Secularism and its Critics* (OUP 1998)

Bhargava R, 'What is Secularism For' (1994) 9 <www.law.uvic.ca/demcon/victoria_colloquium/documents/WhatisSecularismforPreSeminarReading.pdf> accessed 20 November 2011

Bhargava R, *The Promise of India's Secular Democracy* (OUP 2010)

Bhattacharjee AM, *Hindu Law and the Constitution* (2nd edn, Eastern Law House 1994)

Bhattacharjee AM, *Muslim Law and the Constitution* (2nd edn, Eastern Law House 1994)

Blackstone T, Parekh B and Sanders P (eds), *Race Relations In Britain: A Developing Agenda* (Routledge 1998)

Blake M, 'Distributive Justice, State Coercion and Autonomy' (2001) 30 Phil & Pub Aff 257

Blumenfeld DC, 'Freedom and Mind Control' (1988) 25 Am Phil Q 215

Boaz D, *The Libertarian Reader* (The Free Press 1997)

Boehnlein J (ed), *Psychiatry and Religion: The convergence of Mind and Spirit* (American Psychiatric Press 2000)

Bokser B, *The Origins of the Seder: The Passover Rite and Early Rabbinic Judaism* (University of California Press 1984)

Boyd M, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney-General, Ontario 2004)

Bromley D (ed), *Teaching New Religious Movements* (OUP 2007)

Bromley D and Richardson J, *The Brainwashing/Deprogramming Controversy: Sociological, Psychological, Legal, and Historical Perspectives* (E Mellen Press 1983)

Brown W, *Regulating Aversion: Tolerance In The Age Of Identity And Empire* (Princeton University Press 2006) 9

Bunnin N and Yu J (eds), *The Blackwell Dictionary of Western Philosophy* (Blackwell Publishing 2004)

<www.blackwellreference.com/subscriber/tocnode?id=g9781405106795_chunk_g978140510679517_ss1-271> accessed 16 November 2011

Burke E, 'Speech to the Electors of Bristol' (3 November 1774) <press-pubs.uchicago.edu/founders/documents/v1ch13s7.html> accessed 20 November 2011

Buss S, 'Personal Autonomy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/entries/personal-autonomy/#2> accessed 31 July 2011

Carens JH, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (OUP 2000)

Carroll L, 'Muslim Women and 'Islamic Divorce' in England' (1997) 17 Journal of Muslim Minority Affairs 97

Carter, I, 'Positive and Negative Liberty', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/archives/fall2008/entries/liberty-positive-negative/> accessed 4 January 2012

Chakrabarty D, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2007)

Chang J, *Wild Swans: Three Daughters of China* (Simon and Schuster 2003)

Chapman JW and Shapiro I (eds), *Democratic Community* (New York University Press 1993)

Charland L, 'Cynthia's Dilemma: Consenting to Heroin Prescription' (2002) 2 The American Journal of Bioethics 37

Choper J, 'Defining "Religion" in the First Amendment' (1982) 3 U Ill L Rev 579

Choudhury C, '(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim Personal Law Reform in India' (2007) Georgetown University Public Law & Legal Theory Research Paper No 969020, 15 <ssrn.com/abstract=969020> accessed 19 November 2011

Christman J (ed), *The Inner Citadel: Essays on Individual Autonomy* (OUP 1989)

Christman J and Anderson J (eds), *Autonomy and the Challenges to Liberalism: New Essays* (CUP, Cambridge 2005)

Christman J, 'Autonomy and Personal History' [1991] Canadian Journal of Philosophy 1

Christman J, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2009) <plato.stanford.edu/entries/autonomy-moral> accessed 9 August 2011

Christman J, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99 Ethics 109

Christman J, ‘Liberalism and Individual Positive Freedom’ (1991) 101 Ethics 343

Church of South India Newsletter, <csinewsletter.com/newsrack12.asp> accessed 20 November 2011

Clothey Fred, Religion in India: A Historical Introduction (Routledge 2006) 10-11.

Cohen GA, ‘Freedom and Money’ (2001) *Revista Argentinade Teoría Jurídica*

Cohen J, ‘Reflections on Habermas on Democracy’ (1999) 12 Ratio Juris 407

Concerned Citizens Tribunal, *Crimes against Humanity: Incidents and Evidence Vol I* (Gujarat 2002) <www.sabrang.com/tribunal/volI/index.html> accessed 5 October 2011

Constituent Assembly of India Debates (4 November 1948) <www.indiankanoon.org/doc/843976/>

Cooke M, ‘Five Arguments for Deliberative Democracy’ (2000) 48 Political Studies 957

Crossman B and Kapur R, *Secularism’s Last Sigh?* (OUP 2001)

Cuniberti G, ‘French Muslims Getting Divorced Back Home’ (*Conflict of Laws .net*, 12 February 2008) <conflictoflaws.net/2008/french-muslims-getting-divorce-back-home/> accessed 9 November 2011

Cuypers SE, ‘Is Personal Autonomy the First Principle of Education?’ [2006] J Phil Education 5

Darwall S, ‘The Value of Autonomy and Autonomy of the Will’ [2006] Ethics 263

Darwall SL, ‘Two Kinds of Respect’ (1977) 88 Ethics 36

De R, ‘Mumtaz Bibi’s Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act’ (2009) 46 Indian Economic & Social History Review 105

de Vries H (ed), *Religion: Beyond a Concept* (Fordham University Press 2008)

Dennett D, *Brainstorms* (Branford Books 1978)

Derrett D, ‘Jewish Law in Southern Asia’ (1964) 13 ICLQ 288

Derrett D, ‘The Administration of Hindu Law by the British’ (1961) 4 Comp Stud Soc & Hist 10

Derrett D, *Religion, Law and the State in India* (OUP 1999) 39

Derrett D, *The Death of a Marriage Law* (Carolina Academic Press 1978)

Dhavan R, ‘Codifying Personal Laws’ *The Hindu* (Chennai, 1 August 2003) <www.hinduonnet.com/2003/08/01/stories/2003080100521000.htm> accessed 14 November 2011

Dhavan R, ‘Religious Freedom in India’ (1987) 35 Am J Comp L 209

Dhavan R, ‘The Right to Disbelieve’ (PILSARC Blog, 8 July 2009) <pilsarc.blogspot.com/2009/07/right-to-disbelieve.html> accessed 20 November 2011

Diwan P and Diwan P, *Muslim Law in Modern India* (8th edn, Allahabad Law Agency 2000)

Dostoevsky F, *The Brothers Karamazov* (Wordsworth Editions 2007)

Douglas G and others, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff University 2011) <www.religionandsociety.org.uk/uploads/docs/2011_07/1310467350_Social_Cohesion_and_Civil_Law_Full_Report.pdf> accessed 12 November 2011

Dugger CW, ‘47 Suspected Militants in India Charged in Missionary’s Death’ *The New York Times* (New York, 25 January 1999) <www.nytimes.com/1999/01/25/world/47-suspected-militants-in-india-charged-in-missionary-s-death.html> accessed 5 October 2011

Dutta M and others (eds), *The Nation, the State, and Indian Identity* (Popular Prakashan 1996)

Dworkin G, ‘Is More Choice Better than Less?’ (1982) 7 Midwest Studies in Philosophy 47

Dworkin G, *The Theory and Practice of Autonomy* (CUP 1988)

Dworkin R, ‘Comment on Narveson: in Defense of Equality’ (1983) 1 Social Philosophy and Policy 24

Dworkin R, *Freedom’s Law: The Moral Reading of the American Constitution* (OUP 1996)

Edge P, *Religion and Law: An Introduction* (Ashgate 2006)

Eekelaar J, ‘From Multiculturalism to Cultural Voluntarism: A Family-Based Approach’ (2010) 81 The Political Quarterly 344

Eisenberg AI and Spinner-Halev J (eds), *Minorities Within Minorities: Equality, Rights and Diversity* (CUP 2004) 170

Eisenberg MA, ‘The World of Contract and the World of Gift’ (1997) 85 Cal L Rev 821

Eisgruber CL and Sager LG, ‘Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct’ (1994) 61 U Chi L R 1245

Elster J, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (rev edn, CUP 1984)

Emon AE, 'Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation (2008) 87 Canadian Bar Review 391

Engineer AA, *Dossier 20: Indian Islam and Reform Movements in Post-Independence India* (WLUML 1998) <www.wluml.org/node/311> accessed 10 October 2011

Esbeck CH, 'The Lemon Test: Should It Be Retained, Reformulated or Rejected?' (1990) 4 Notre Dame J L Ethics & Pub Pol'y 513

Esposito JL and DeLong-Bas NJ, *Women in Muslim Family Law* (Syracuse University Press 2001)

Esposito JL, *What Everyone Needs to Know about Islam* (2nd edn, OUP 2011)

Estin AL, 'Embracing Tradition: Pluralism in American Family Law' (2004) 63 Md L Rev 540

Evans C, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001)

Evans, C 'Legal Aspects of the Protection of Religious Freedom in Australia' (2009) 19-21 <www.hreoc.gov.au/frb/papers/Legal_%20Aspects.doc> accessed 23 December 2011

Farrow TCW, 'Re-Framing the Sharia Arbitration Debate' (2006) 15 Constit Forum 79

Feinberg J, 'Non-Comparative Justice' (1974) 83 Phil Rev 297

Fischer JM and Ravizza M, *Perspectives on Moral Responsibility* (Cornell University Press 1993)

Forbes GH, *Women in Modern India* (CUP 1996)

Fournier P, *Dossier 27: The Reception of Muslim Family Laws in Western Liberal States* (WLUML 2005) <www.wluml.org/node/504> accessed 9 November 2011

Fournier P, *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate 2010)

Frankfurt H, 'Freedom of the Will and the Concept of a Person' [1971] Journal of Philosophy 5

Freeman GC, 'The Misguided Search for the Constitutional Definition of "Religion"' (1983) 71 Geo LJ 1519

Fried C, *Contract As Promise: A Theory of Contractual Obligation* (Harvard University Press 1981)

Fyzee AAA and Mahmood T, *Outlines of Muhammadan Law* (Law in India Series, 5th edn, OUP 2008)

Gabriel Y, 'An Introduction to the Social Psychology of Insults in Organizations' (1998) 51 Hum Relations 1

Galanter M and Krishnan J, 'Personal Law and Human Rights in India and Israel' (2000) 34 Is LR 101

Galanter M, 'The Displacement of Traditional Law in Modern India' (1968) 24 J Social Issues 65

Galston W, *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State* (CUP 1991)

Gani HA, *Muslim Politics and National Integration* (Sterling 1978)

Gardner J, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167

Gardner P, 'Hand on Religious Upbringing' (2004) 38 J Phil Education 121

Gardner P, 'Religious Upbringing and the Liberal Ideal of Religious Autonomy' (1988) 22 J Phil Education 89

Gargan EA, 'Hindu Rage Against Muslims Transforming Indian Politics' *New York Times* (New York, 17 September 1993) <www.nytimes.com/1993/09/17/world/hindu-rage-against-muslims-transforming-indian-politics.html> accessed 15 November 2011

Garvey JH, 'An Anti-Liberal Argument for Religious Freedom' [1996] Journal of Contemporary Legal Issues 275

Garvey JH, 'Free Exercise and the Values of Religious Liberty' (1985/1986) 18 Conn L Rev 779

Garvey JH, 'Freedom and Equality in the Religion Clauses' (1981) 17 Sup Ct Rev 193

Garvey JH, *What are Freedoms For?* (Harvard University Press 1996)

Giannella DA, 'Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee' (1967) 80 Harv L Rev 1381

Gillon R, 'Ethics Needs Principles – Four can Encompass the Rest – and Respect for Autonomy should be "First Among Equals"' (2003) 29 Journal of Medical Ethics 307

Gillon R, 'Refusal of Potentially Life-saving Blood Transfusions by Jehovah's Witnesses: Should Doctors Explain that Not all JWs Think it's Religiously Required?' (2000) 26 Journal of Medical Ethics 299

Goodin R and Pettit P (eds), *A Companion to Contemporary Political Philosophy* (Blackwell Publishers 1993)

Goodin RE, ‘Liberal Multiculturalism: Protective and Polyglot’ (2006) 34 Pol Theory 289

Green L, ‘Rights of Exit’ (1998) 4 Legal Theory 165

Green L, ‘Two Worries about Respect for Persons’ (2010) 120 Ethics 212

Greenawalt K, ‘Hands Off! Civil Court Involvement in Conflicts over Religious Property’ (1998) 98 CLR 1843

Greenawalt K, ‘Religion as a Concept in Constitutional Law’ (1984) 72 Calif L Rev 753

Greenawalt K, *Religion and the Constitution: Free Exercise and Fairness, Volume 1* (Princeton University Press 2006)

Greenawalt K, *Religion and the Constitution: Establishment and Fairness, Volume 2* (Princeton University Press 2008)

Guha R, *India After Gandhi: The History of the World’s Largest Democracy* (Picador 2007)

Hallaq WB, *The Origins and Evolution of Islamic Law* (CUP 2005)

Halsbury’s Laws of India (Family Law)

Hansen T, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (Princeton University Press 1999)

Harries P, ‘The Roots of Ethnicity: Discourse and the Politics of Language Construction’ (1988) 87 African Affairs 25

Harrison P, ‘*Religion’ and the Religions in the English Enlightenment* (CUP 1990)

Hare I and Weinstein J, *Extreme Speech and Democracy* (OUP 2009)

Hart HLA, *The Concept of Law* (2nd edn, Clarendon 1994)

Hasan M, *Legacy of a Divided Nation: India’s Muslims Since Independence* (OUP 2001)

Hasan Z (ed), *Forging Identities: Gender, Communities and the State in India* (Westview 1994)

Hasan Z, ‘Minority Identity, Muslim Women Bill Campaign and the Political Process’ (1989) 24 Economic and Political Weekly 44

Hauerwas S, ‘America’s God is Dying’, (*ABC Religion and Ethics*, 20 Jul 2010) <www.abc.net.au/religion/articles/2010/07/20/2947368.htm> accessed 14 November 2011

Helfand MA, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders' (2011) 86 NYU L Rev (forthcoming) <works.bepress.com/michael_helfand/3/> accessed 29 September 2011

Hidayatullah M and Hidayatullah A (eds), *Mahomedan Law* (18th edn, Tripathi 1977)

Hirschman AO, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970)

Hizb ut-Tahrir Britain, 'Islam demands the Political Unity of this Ummah' (16 August 2008) <www.hizb-ut-tahrir.org/PDF/EN/en_w_pdf/160808UK.pdf> accessed 20 November 2011

Human Rights Watch, *Politics by Other Means: Attacks against Christians in India* (October 1999) <www.hrw.org/reports/1999/indiachr/christians8-04.htm> accessed 13 November 2011

Hurka T, 'Why Value Autonomy?' (1987) 13 Soc Theory & Prac 361

Hyun I, 'Authentic Values and Individual Autonomy' (2001) 35 Journal of Value Inquiry 195

Ilbert C, *The Government of India: Being a Digest of the Statute Law Relating Thereto* (2nd edn, Clarendon 1907)

Pennock J and Chapman J (eds), *Liberal Democracy* (NYU 1983)

Jaising I (ed), *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited 2005)

Jeffay N, 'Invoking Rosa Parks, Haredi Women Move to Back of the Bus' (The Jewish Daily Forward, 1 August 2008) <www.forward.com/articles/13821/> accessed 7 August 2011

Jeffery P and Basu A, *Appropriating Gender: Women's Agency, the State, and Politicized Religion in South Asia* (Routledge 1998)

Jenkins LD, 'Legal Limits On Religious Conversion in India' (2004) 71 L & Contemp Prob 109

Jones JT, Pelham BW and Mirenberg MC, 'Name Letter Preferences Are Not Merely Mere Exposure: Implicit Egotism as Self-Regulation' (2002) 38 Ohio St U J Experimental Soc Psych 170

Kadushin J, *Jewish Code of Jurisprudence* (Talmud Society 1921)

Kahoe RD and Meadow MJ, 'A Developmental Perspective on Religious Orientation Dimensions' (1981) 20 J Religion & Health 8

Kane R, *Free Will and Values* (State University of New York Press 1985)

Kapoor C, ‘Act of Vigilantism’ *The Indian Express* (18 April 2007) <www.indianexpress.com/news/act-of-vigilantism/28598/> accessed 14 November 2011

Kapur R and Crossman B, *Subversive Sites: Feminist Engagements with Law in India* (Sage, New Delhi 1996)

Kapur R, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 Harvard Human Rights Journal 1

Karayanni M, ‘The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel’ (2006) 5 Northwestern Journal of International Human Rights 41

Karvelas P, ‘Imam Wants Sharia Law Here, but A-G Says No Way’ *The Australian* (18 May 2011) <www.theaustralian.com.au/national-affairs/imam-wants-sharia-law-here-but-a-g-says-no-way/story-fn59niix-1226057823890> accessed 10 October 2011

Kaviraj S, ‘On Thick and Thin Religion: Some Critical Reflections on Secularisation Theory’ (Department of Middle East and Asian Languages and Cultures Colloquium, Columbia University, April 2009)

Kent J, ‘Malaysia “apartheid” row deepens’ *BBC News* (London, 11 March 2006) <news.bbc.co.uk/1/hi/world/asia-pacific/4795808.stm> accessed 13 November 2011

Khaitan T, ‘Adoption Rights of non-Hindus and Constitutionality of Personal Laws’ (*Law and Other Things*, 28 February 2010) <lawandotherthings.blogspot.com/2010/02/adoption-rights-of-non-hindus.html> accessed 24 July 2010

Khaitan T, ‘An Autonomy-Based Foundation for Legal Protection against Discrimination’ (DPhil thesis, University of Oxford 2010)

Khullar M (ed), *Writing the Women’s Movement: A Reader* (Zubaan 2005)

Khullar M and Taehakkyo I (eds), *Writing the Women’s Movement: A Reader* (Zubaan 2005)

Kimel D, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003)

Kirpal BN (ed), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000)

Kirsch J, ‘What’s So Great about Reality?’ (2005) 35 Canadian J Phil 407

Kishwar M, ‘Codified Hindu Law: Myth and Reality’ (1994) 29 Economic and Political Weekly 2145

Koenig H, *Is Religion Good for Your Health?* (Routledge 1997)

Koppelman A, ‘Is It Fair to Give Religion Special Treatment’ [2006] U Ill L Rev 571

Koppelman A, ‘Religious Establishment and Autonomy’ (2008) 25 Constitutional Commentary 291

Korteweg AC, ‘The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women’s Agency’ (2008) 22 Gender & Society 434

Kukathas C, *The Liberal Archipelago: A Theory of Diversity and Freedom* (OUP 2003)

Kymlicka W and Norman WJ, *Citizenship in Diverse Societies* (OUP 2000)

Kymlicka W, ‘Two Models of Pluralism and Tolerance’ (1992) 14 Analyse & Kritik 33

Kymlicka W, *Liberalism, Community, and Culture* (Clarendon Press 1989)

Kymlicka W and He B (eds), *Multiculturalism in Asia* (OUP 2005)

Larsen E and Rainie L, ‘CyberFaith: How Americans Pursue Religion Online’ (December 2001) <www.pewinternet.org/~/media//Files/Reports/2001/PIP_CyberFaith_Report.pdf.pdf> accessed 4 October 2011

Larson G (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Social Science Press, Delhi 2001)

Lavin M, ‘Ulysses Contracts’ (1986) 3(1) Journal of Applied Philosophy 89

Law Commission of India, *Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform: Report No. 211* (October 2008) <lawcommissionofindia.nic.in/reports/report211.pdf> accessed 6 October 2011

Laycock D, ‘Religious Liberty as Liberty’ [1996] Journal of Contemporary Legal Issues 313

Levey G, ‘Equality, Autonomy, and Cultural Rights’ (1997) 25(2) Political Theory 215

Lifton RJ, *Thought Reform and the Psychology of Totalism: A Study of ‘Brainwashing’ in China* (UNC Press 1989)

Lijphart A, ‘The Puzzle of Indian Democracy: A Consociational Interpretation’ (1996) 90 The American Political Science Review 258

Locke J, *A Letter Concerning Toleration* (William Popple tr, 1689)

Loewy AH, ‘Rethinking Government Neutrality Towards Religion Under the Establishment Clause: the Untapped Potential of Justice O’Connor’s Insight’ (1985) 64 North Carolina Law Review 1049

MacKinnon CA, ‘Sex Equality under the Constitution of India: Problems, Prospects, and “Personal Laws”’ (2006) 4 ICON 181

Madan TN, *Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (2nd edn, OUP 2010)

Mahajan G, *Identities and Rights: Aspects of Liberal Democracy in India* (OUP 1998)

Mahmood ST, *Personal Law in Islamic Countries: History, Text, and Comparative Analysis* (Academy of Law and Religion 1987) <www.getcited.org/pub/102682745> accessed 10 October 2011

Mahmood T, ‘Personal Law, Social Myths’ *The Indian Express* (7 September 2007) <www.indianexpress.com/news/personal-law-social-myths/513767/> accessed 19 November 2011

Mahmood T, *Personal Laws in Crisis* (PB Gajendragadkar Endowment Lectures, 1st edn Metropolitan 1986)

Mahmood T, *The Muslim Law of India* (Law Book Co 1980)

Malhotra A and Malhotra R, ‘Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities and Necessities’ (2010) 3 Journal of the International Academy of Matrimonial Lawyers

Malik, M ‘“Progressive Multiculturalism”: Minority Women and Cultural Diversity’ (2010) 17 International Journal on Minority and Group Rights 447

Mallat C and Connors J (eds), *Islamic Family Law* (Graham and Trotman 1990)

Margalit A and Raz J, ‘National Self-Determination’ (1990) 87 The Journal of Philosophy 439

Mason E, ‘Value Pluralism’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2011) <plato.stanford.edu/archives/fall2011/entries/value-pluralism/> accessed 20 November 2011

May T, ‘The Concept of Autonomy’ [1994] American Philosophical Quarterly 133

McCabe D, ‘Joseph Raz and the Contextual Argument for Liberal Perfectionism’ (2001) 111 Ethics 493

McConnell M, ‘The Problem of Singling Out Religion’ (2000) 50 DePaul L Rev 1

McLaughlin TH, ‘Peter Gardner on Religious Upbringing and the Liberal Ideal of Religious Autonomy’ (1990) 24 Journal of Philosophy of Education 107

McVeigh K and Hill A, ‘Bill Limiting Sharia Law is Motivated by “Concern for Muslim Women”’ *The Guardian* (London, 8 June 2011)

<www.guardian.co.uk/law/2011/jun/08/sharia-bill-lords-muslim-women> accessed 9 November 2011

Mehta P, 'On the Possibility of Religious Pluralism' in Thomas Banchoff (ed), *Religious Pluralism, Globalization, and World Politics* (OUP 2008)

Mehta P, 'Obscuring the Real Issues' *The Hindu* (30 July 2003) <www.hindu.com/2003/07/30/stories/2003073001431000.htm> accessed 15 November 2011

Mehta P, 'Passion and Constraint' (2003) 521 Seminar <www.india-seminar.com/2003/521/521%20pratap%20bhanu%20mehta.htm> accessed 20 November 2011

Mele AR, *Autonomous Agents: From Self-Control to Autonomy* (OUP 1995)

Menski W, 'Postmodern Hindu Law' (2001) SOAS Law Department Occasional Papers 7 <www.casas.org.uk/papers/pdfpapers/pomolaw.pdf> accessed 19 November 2011

Menski W, 'The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda' (2008) 9 German LJ 211

Menski W, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (CUP 2006)

Menski W, *Hindu Law* (OUP 2008)

Menski W, *Hindu Law: Beyond Tradition and Modernity* (OUP 2003)

Menski W, *Modern Indian Family Law* (Routledge 2001)

Metcalf B, *Islam in South Asia in Practice* (Princeton University Press 2009)

Meyers DT, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 The Journal of Philosophy 619

Mielziner M, *Jewish Law of Marriage and Divorce in Ancient and Modern Times* (Bloch Publishing Company 1901)

Mill JS, *On Liberty* (first published 1859, Cosimo 2005)

Miller D (ed), *The Liberty Reader* (Edinburgh University Press 2006)

Milli Gazette <www.milligazette.com/> accessed 20 November 2011

Minault G, *The Khilafat Movement: Religious Symbolism and Political Mobilization in India* (OUP India 1999)

Ministry of Education and Social Welfare, *Towards Equality: Report of the Committee on the Status of Women in India* (Government of India 1974)

Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2010: Events of 2009* (Minority Rights Group International 2010)

Moberg DO, 'Holy Masquerade: Hypocrisy in Religion' (1987) 29 Review of Religious Research 3

Modi A, 'Tailoring History' *The Hindu* (India, 21 October 2001) <www.hindu.com/thehindu/2001/10/21/stories/0521134h.htm> accessed 5 October 2011

Modi A, 'The Shah Bano Legacy' *The Hindu* (Chennai, 10 August 2003) <hindu.com/2003/08/10/stories/2003081000221500.htm> accessed 15 November 2011

Modood T, 'Anti-Essentialism, Multiculturalism and the "Recognition" of Religious Groups' (1998) 6 J Pol Phil 378

Moody-Adams MM, 'Culture, Responsibility, and Affected Ignorance' (1994) 104 Ethics 291

Moon R (ed), *Law and Religious Pluralism in Canada* (Vancouver 2008)

Morgenbesser S, Suppes P and White M (eds), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1969)

Mulla DF and Desai SA, *Principles of Hindu Law* (17th edn, Butterworths India 2000)

Mullally S, 'Feminism and Multicultural Dilemmas in India: Revisiting the *Shah Bano* Case' (2004) 24 OJLS 671

Naik Zakir, *The Qu'ran and Modern Science: Compatible or Incompatible?* (Islamic Research Foundation) <www.scribd.com/doc/20171525/Islam-Modern-Science-by-Dr-Zakir-Naik> accessed 4 August 2011

Nandy A, 'A Billion Gandhis' *Outlook* (New Delhi, 21 June 2004) <www.outlookindia.com/article.aspx?224252> accessed 4 October 2011

Nandy A, 'The Twilight of Certitudes: Secularism, Hindu Nationalism, and other Masks of Deculturation' (1997) 22 Alternatives: Global, Local, Political 157

National Commission for Minorities, Government of India, 'Research Project Report on All India Birth Rate of Parsi – Zoroastrians from 2001 till 15th August, 2007' (2008) <ncm.nic.in/pdf/Parsi%20%20Report.pdf> accessed on 20 November 2011

National Human Rights Commission, *Proceedings* (31 May 2002) <nhrc.nic.in/guj_finalorder.htm> accessed 16 November 2011

Nedelsky J, 'Reconceiving Autonomy: Sources, Thoughts, and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7

Newbigin E, ‘The Codification of Personal Law and Secular Citizenship: Revisiting the History of Law Reform in Late Colonial India’ (2009) 46 Indian Economic and Social History Review 83

Nickel JW, ‘Review: Why Basic Liberties Are Bilateral’ (1998) 17 L & Phil 627

Noorani AG, ‘RSS and Christians’ (1998–1999) 15(26) *Frontline* <www.hindu.com/fline/fl1526/15261230.htm> accessed on 4 October 2011

Norton J, *Law and Religious Organizations: Exceptions, Non-Interference and Justification* (DPhil thesis, University of Oxford, 2011)

Note, ‘Towards a Constitutional Definition of Religion’ (1977) 91 Harv L Rev 1056

Nussbaum M, ‘Beyond Toleration to Equal Respect’ [2008] 581 Seminar <www.india-seminar.com/2008/581/581_martha_nussbaum.htm> accessed 6 October 2011

Nussbaum M, ‘India Implementing Sex Equality Through Law’ (2004) 2 Chi J Intl Law 35

Nussbaum M, ‘Personal Laws and Equality: The Case of India’ (Comparative Constitutional Design conference, University of Chicago Law School, 17 October 2009) <www.law.uchicago.edu/audio/nussbaum101709> accessed 13 November 2011

Nussbaum M, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (Basic Books 2008)

Nussbaum M, ‘India Implementing Sex Equality Through Law’ (2004) 2 Chicago JIL 35

Office of the Registrar-General & Census Commissioner of India, *Census Data: Religious Composition* (2001) <www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx> accessed 6 October 2011

Okin SM and others, *Is Multiculturalism Bad for Women?* (Princeton UP 1999)

Omvedt G, *Dalit Visions: The Anti-Caste Movement and the Construction of an Indian Identity* (Orient Longman, 2006)

Oshana M, ‘How Much Should We Value Autonomy?’ [2003] Soc Phil & Pol’y 99

Oshana M, ‘The Misguided Marriage of Responsibility and Autonomy’ (2002) 6 The Journal of Ethics 261

Parashar A, ‘Polygamous Marriage in Conflict of Laws’ (1982) Islam & Comp LQ 187

Parashar A, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage, New Delhi 1992)

Pennock JR and Chapman JW (eds), *Privacy* (Atherton Press 1971)

Phillips LCJ, ‘Equality before the Law’ (East London Muslim Centre, 3 July 2008) <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equality_before_the_law_030708.pdf> accessed 9 October 2011

Philpott D, ‘In Defense of Self-Determination’ (1995) 105 Ethics 352

Pintens W (ed) *International Encyclopaedia of Laws (Family and Succession Law)* (Kluwer 2003)

Press Information Bureau (Government of India), ‘Status of Jain Community’ (7 May 2007) <pib.nic.in/newsite/erelease.aspx?relid=27576> accessed 20 November 2011

Prime Minister’s High Level Committee, ‘Social, Economic and Educational Status of the Muslim Community of India’ (2006) <minorityaffairs.gov.in/sachar> accessed 20 November 2011

Ptolke D, ‘Representation is Democracy’ (1997) 4 Constellations 19

Qureshi MN, *Pan-Islam in British Indian Politics: A Study of the Khilafat Movement, 1918–1924* (Brill 1999)

Radden J, ‘Second Thoughts: Revoking Decisions Over One’s Own Future’ (1994) 54 Philosophy and Phenomenological Research 787

Raisch MJ, ‘Religious Legal Systems: A Brief Guide to Research and Its Role in Comparative Law’ (February 2006) <www.nyulawglobal.org/Globalex/Religious_Legal_Systems.htm#_Articles_5> accessed 9 November 2011

Rajan RS, ‘Women between Community and State: Some Implications of the Uniform Civil Code Debates in India’ (2000) 18 Social Text 55

Rajan RS, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Duke University Press 2003)

Rautenbach C, ‘Phenomenon of Personal Laws in India: Some Lessons for South Africa’ (2006) 39 CILSA 241

Rawls J, *A Theory of Justice* (Clarendon 1972)

Raz J, ‘Liberalism, Autonomy and the Politics of Neutral Concern’ [1982] Midwest Studies in Philosophy 89

Raz J, *The Morality of Freedom* (Clarendon Press 1986)

Raz J, *Authority* (New York University Press 1990)

Raz J, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994)

Raz J, *Engaging Reason: On the Theory of Value and Action* (OUP 2000)

Réaume D, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 UBC L Rev 117

Redding JA, 'Human Rights and Homo-Sectuals: The International Politics of Sexuality, Religion, and Law' (2006) 4 Nw U J Hum Rts 436

Redding JA, 'Institutional v Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems' (2010) 6(1) Journal of Islamic State Practices in International Law 1

Redding JA, 'Slicing the American Pie: Federalism and Personal Law' (Yale Law School Faculty Scholarship Series Paper 10, 2007) <lsr.nellco.org/yale/fss/papers/10> accessed 15 November 2011

Reddy V and Nagaraj V, 'Arbitrability: The Indian Perspective' (2002) 19 J Intl Arb 117

Rehman J, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 IJLPF 108

Resnick L, 'Family Dispute Arbitration and Sharia Law' (BC Civil Liberties Association, 2007) <www.bccla.org/othercontent/07Sharialaw.pdf> accessed 9 October 2011

Richards D, 'Rights and Autonomy' (1981) 92 Ethics 3

Rohe M, 'Alternative Dispute Resolution in Europe under the Auspices of Religious Norms' (January 2011) Religare Working Paper No 6 <www.religareproject.eu/content/alternative-dispute-resolution-europe-under-auspices-religious-norms> accessed 9 October 2011

Roland JG, *The Jewish Communities of India: Identities in a Colonial Era* (2nd edn, Transaction Publishers 1998)

Rostain T, 'Permissible Accommodations of Religion: Reconsidering the New York *Get* Statute' (1987) 96 Yale LJ 1147–71

S Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain' (2007) 1 Law, Social Justice & Global Development Journal <www.go.warwick.ac.uk/elj/lgd/2007_1/bano>

Sandel M, 'Religious Liberty – Freedom of Conscience or Freedom of Choice' [1989] Utah Law Review 597

Sandel MJ, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press 1996)

Sangari K, 'Gender Lines: Personal Laws, Uniform Laws, Conversion' (1999) 27(5/6) Social Scientist 17

Sapir G and Statman D, 'Why Freedom of Religion Does Not Include Freedom from Religion' (2005) 24 Law & Phil 467

Sarkar T, *Hindu Wife, Hindu Nation* (Permanent Black 2000)

Saxena P, *Family Law Lectures: Family Law II* (LexisNexis 2007)

Schmidt SL, 'Black Hats in the Front of the Bus' *The Jerusalem Post* (Jerusalem, 19 March 2007) <www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=55239> accessed 7 August 2011

Seervai HM, *Constitutional Law of India: A Critical Commentary* (4th edn, Tripathi 1991)

Selinger E and Crease R (eds), *The Philosophy of Expertise* (Columbia University Press 2006)

Sen R, 'The Indian Supreme Court and the Quest for a "Rational" Hinduism' (2010) 1 *South Asian History and Culture* 86

Sen R, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (OUP 2010)

Sengupta S, 'Hindu Threat to Christians: Convert or Flee' *The New York Times* (New York, 12 October 2008) <www.nytimes.com/2008/10/13/world/asia/13india.html?_r=1&pagewanted=1> accessed 5 October 2011

Shachar A, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 J Pol Phil 285

Shachar A, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001)

Shah P, 'Globalisation and the Challenge of Asian Legal Transplants in Europe' (2008) 3 Belgrade Law Review 180

Shah PA, 'Attitudes to Polygamy in English Law' (2003) 52 ICLQ 369

Shaheed F, 'Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws' (1994) 19 Signs 997

Shah-Kazemi S, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation 2001)

Sharafi MJ, 'Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925' (PhD dissertation, Princeton University 2006)

Sher G, 'Liberal Neutrality and the Value of Autonomy' [1995] Soc Phil & Pol'y 136

Shippee R, ‘Blessed are the Peacemakers: Faith-Based Approaches to Dispute Resolution’ (2002) 9 ILSA J Int’l & Comp L 237

Smith D, *India as a Secular State* (Princeton University Press 1963)

Soutphommasane T, ‘Avoid the Hysteria but Reject Sharia’ *The Australian* (21 May 2011) <www.theaustralian.com.au/news/opinion/avoid-the-hysteria-but-reject-sharia/story-e6frg6zo-1226059621354> accessed 10 October 2011

Spinner-Halev J, ‘Feminism, Multiculturalism, Oppression and the State’ (2001) 112 Ethics 84

Spinner-Halev J, ‘Hinduism, Christianity, and Liberal Religious Toleration’ (2005) 33 Pol Theory 28

Stark R, Iannaccone LR and Finke R, ‘Religion, Science and Rationality’ (1996) 86 Am Ec Rev 433

Stein B, *A History of India* (Blackwell 2010)

Stott JRW, *Why I Am a Christian* (Intervarsity Press 2004)

Strawson J, ‘Islamic Law and English Texts’ (1995) 6 Law and Critique 21

Subramanian N, ‘Legal Change and Gender Inequality: Changes in Muslim Family Law in India’ (2008) 33 L & Soc Inquiry 631

Sullivan D, ‘Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution’ (1991–1992) 24 NYU J Intl L & Pol 795

Sunder M, ‘Cultural Dissent’ (2001) 54 Stan L Rev 495

Sunder M, ‘Piercing the Veil’ (2003) 112 Yale LJ 1399

Sweetman W, ‘“Hinduism” and the History of “Religion”: Protestant Presuppositions in the Critique of the Concept of Hinduism’ (2003) 15 Method and Theory in the Study of Religion 329

Taliaferro C, ‘Philosophy of Religion’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <plato.stanford.edu/archives/fall2008/entries/philosophy-religion/> accessed 16 November 2011

Tambiah SJ, ‘Reflections on Communal Violence in South Asia’ (1990) 49 The Journal of Asian Studies 741

Tamir Y, *Liberal Nationalism* (Princeton 1993)

Taylor C, Gutmann A and Habermas J, *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, Princeton 1994)

Thapar R, ‘Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity’ [1989] Modern Asian Studies 209

Tönissen B and Gerritsen J, ‘The Road Not Taken – Islamic Shari’a Courts in the Netherlands’ (14 December 2010) <www.scribd.com/doc/49194046/The-Road-Not-Taken-Islamic-Shari-a-Courts-in-the-Netherlands> accessed 10 October 2011

Tribe L, *American Constitutional Law* (3rd edn, Foundation Press 2000)

Upadhyay R, ‘Muslim Personal Law: Should it be politicised?’ (South Asia Analysis Group, Paper no 666) <www.southasiaanalysis.org/papers7/paper666.html> accessed 9 October 2011

van der Grinten P and Heukels T (eds), *Crossing Borders: Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden* (Kluwer 2006)

van der Veer P, ‘God must be Liberated! A Hindu Liberation Movement in Ayodhya’ [1987] Modern Asian Studies 283

Vatuk S, ‘Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law’ (2008) 42(2/3) Modern Asian Studies 489

Venkata Subbarao GC, *Family Law in India: Hindu law, Mahomedan law, and Personal Law of Christians, Parsis, etc., including Law of Testamentary and Intestate Succession* (3rd edn, C Subbiah Chetty 1979)

Virdi PK, *The Grounds for Divorce in Hindu and English Law: A Study in Comparative Law* (Motilal Banarsidass 1972)

Volf M, *After Our Likeness: The Church as the Image of the Trinity* (WB Eerdmans 1998)

Volokh E, ‘May American Court Appoint Only Muslim Arbitrators, Pursuant to an Arbitration Agreement?’ (*The Volokh Conspiracy*, 3 January 2011) <volokh.com/2011/01/03/may-american-court-appoint-only-muslim-arbitrators-pursuant-to-an-arbitration-agreement/> accessed 9 October 2011

Waldron J, ‘Autonomy and Perfectionism in Raz’s *The Morality of Freedom*’ (1989) 62 S Cal L Rev 1097

Waldron J, ‘Moral Autonomy and Personal Autonomy’ in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (CUP, Cambridge 2005)

Walzer M, *On Toleration (Castle Lectures in Ethics, Politics, and Economics)* (Yale University Press 1997)

Walzer M, *Spheres of Justice: A Defense of Pluralism and Equality* (Blackwell 1985)

Washbrook DA, ‘Law, State and Agrarian Society in Colonial India’ (1981) 15 Mod Asian Stud 649

Watson G, ‘Free Agency’ [1975] Journal of Philosophy 205

Weirtheimer A, *Coercion* (Princeton University Press 1987)

Wellman C, ‘The Paradox of Group Autonomy’ (2003) 20 Social Philosophy and Policy 265

Werbner P, ‘Divided Loyalties, Empowered Citizenship? Muslims in Britain’ (2000) 4 Citizenship Studies 307

Westra H, ‘Custom and Muslim Law in the Netherlands East Indies’ (1939) 25 Trans Grotius Soc 151

Williams R, ‘Archbishop’s Lecture – Civil and Religious Law in England: A Religious Perspective’ (2008) <www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective#Lecture> accessed 9 November 2011

Williams RV, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (OUP 2006)

Wilson R, *Anglo-Muhammadan Law: A Digest Preceded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as such by the Civil Courts of British India, with Full References to Modern and Ancient Authorities* (first published 1895, 4th edn W Thacker & Co 1912)

Wolff RP, *In Defense of Anarchism* (Harper & Row 1970)

Working Group on Women’s Rights, ‘Reversing the Option: Civil Codes and Personal Laws’ (1996) 31 Economic and Political Weekly 1180

Wright TP, ‘Universal Human Rights vs Muslim Personal Law: The Shah Bano Begum Case in India’ (1999) 1 Stud Contemp Islam 44

Zelliot E and Berntsen M (eds), *The Experience of Hinduism: Essays on Religion in Maharashtra* (SUNY Press 1988)