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## RELATIONAL AUTONOMY AND RELIGIOUS TRIBUNALS

RUSSELL SANDBERG<sup>1</sup> AND SHARON THOMPSON<sup>2</sup>

**Abstract:** *Academic writing on the place and status of religious tribunals in western societies has focused upon the ‘minorities within minorities’ debate: the extent to which States should intervene to ensure that the citizenship rights of female group members are protected and that religious tribunals do not discriminate on grounds of sex. In a number of recent publications following the Cardiff research on Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts, it has been suggested that the concept of consent should be a key focus in determining whether the State should intervene. However, this article asks instead whether the focus should be on the question of autonomy. In particular, this article examines the need to understand the debate concerning religious tribunals within the wider context of changes within family law where an emphasis has been placed upon individual autonomy. It also compares, explores and critiques the concept of ‘relational autonomy’ as discussed by Jonathan Herring in the context of family law. We agree that developing a concept of autonomy based on the forming of relationships rather than the usual focus on the autonomy of the religious group or on the individual autonomy of those who use religious tribunals provides a way forward. However, we propose a modification of relational autonomy using relational contract theory to employ a relational approach that is ultimately rooted in contract theory. We conclude that Feminist Relational Contract Theory (FRCT) – a theory previously applied to prenuptial agreements – provides, the most appropriate framework in which power imbalances within religious tribunals can be recognised.*

### **Introduction: The Story so Far**

In recent years, the operation of religious tribunals in Western societies has proved to be controversial. A lecture on the topic by the then Archbishop of Canterbury, Dr Rowan Williams, was the watershed moment.<sup>3</sup> In that lecture, Williams raised the question of ‘what it is like to live under more than one (legal) jurisdiction’ and how (and how far) the civil law

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<sup>1</sup> Head of Law and Reader in Law, School of Law and Politics, Cardiff University.

<sup>2</sup> Lecturer in Family Law, School of Law and Politics, Cardiff University.

<sup>3</sup> R Williams, ‘Civil and Religious Law in England – A Religious Perspective’ (2008) 10 *Ecclesiastical Law Journal* 262.

of the land should recognise or accommodate a legal pluralism based on religious adherence. He suggested that ‘we have to think a little harder about the role and rule of law in a plural society of overlapping identities’. This caused uproar: a succession of senior figures came out to condemn Williams’ thinking,<sup>4</sup> while the television news graphically illustrated the item with footage of stonings. However, the heat of the immediate media and political coverage, gave way over time to light shed thanks to a number of academic studies.<sup>5</sup> The debate concerning Sharia law has come to focus on the ‘minorities within minorities’ issue: the concern that deference to the religious group may reduce the rights and obligations that a person would ordinarily enjoy by virtue of their citizenship of the State, particularly where the polity of the group differs from that of the State as regards gender roles.<sup>6</sup> A question that has emerged is whether and, if so, when the State should intervene in the decision of a religious tribunal in order to ensure that there is no discrimination or other unlawful treatment on grounds of sex.

One answer to this question that has often been given is that the focus should be on the issue of consent. Religious tribunals should only operate a consensual jurisdiction. This has arisen in the work of Ayelet Shachar, particularly her monograph *Multicultural Jurisdictions* which calls for the recognition of ‘joint governance’, that is, the recognition that ‘minorities within

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<sup>4</sup> The then Prime Minister Gordon Brown was said to be clear that ‘in Britain, British laws based on British values applied’. Though, as time as gone by the Archbishop has received some support, most notably in a much less reported lecture by the Lord Chief Justice: Lord Phillips of Worth Matravers, ‘Equality Before the Law’ (2008) 161 *Law and Justice* 75.

<sup>5</sup> For an analysis of the media reaction to the Archbishop’s lecture, see N A Kabir, *Young British Muslims* (Edinburgh University Press 2010) chapter 7 and for the general debate see R Grillo, *Muslim Families, Politics and the Law* (Ashgate, 2015). Empirical studies have included S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001) S Bano *Muslim Women and Shari’ah Councils* (Palgrave, 2012) and the ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts’ Research Project at Cardiff University, funded by the AHRC/ESRC Religion and Society Programme. <<http://www.law.cf.ac.uk/clr/research/cohesion.html>>

<sup>6</sup> As Malik has noted, the term ‘minorities within minorities’ has been used to describe members within a minority group who themselves make up a separate minority group within society ‘such as women, the young and elderly, gays and lesbians’ within religious and ethnic groups. Although it may be contested whether women are a minority group, we agree with Malik that ‘it is important to pay special attention to the “multicultural vulnerability” of women ... because traditional cultures and religions focus on women as a way of controlling group membership and the perpetuation of group norms’: M Malik, *Minority Legal Orders in the UK* (British Academy, 2012) 27-28. Shachar has referred to this as the ‘paradox of multicultural vulnerability’, that is, the way in which ‘the same policy that seems attractive when evaluated from an inter-group perspective can systematically work to the disadvantage of certain group members from an intra-group perspective’: A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge University Press, 2001) 3. While *inter*-group equality is concerned with establishing equal treatment between cultural and religious *intra*-group inequalities is concerned with establishing equality within cultural and religious groups.

minorities' (like all group members) owe allegiance to both the group and the State and therefore should be able to rely upon the legal rights, privileges and obligations that they enjoy by virtue of their membership of the group *and* their citizenship of the State. One variant of joint governance is 'consensual accommodation', the notion that religious tribunals should only operate where that is the choice of the group members and that they have the freedom and capacity to make that choice. For Shachar, consensual accommodation functions 'to permit individuals with multiple affiliations to exercise choice and make their own determinations about which legal authority – the state or the group, for example – will have their jurisdiction over their personal affairs'.<sup>7</sup> This raises the issue of how such consent can be established. Shachar argued that 'consensual accommodation must still provide an institutional setting that can ensure that vulnerable group members will have the resources to choose'.<sup>8</sup> This not only requires that there is sufficient information and education; it also requires action where the group member is deemed incapable of making that choice because they are too young, are under duress or are suffering from a mental illness, for instance.<sup>9</sup> This issue was raised immediately following the lecture by Rowan Williams when he was asked the question of how it could be ensured that consent to the jurisdiction of a religious tribunal was genuine. Williams responded that:

'I am not postulating a detailed scheme but raising a question about what the most fruitful kinds of relationship might be between the law of the state and what I have been calling "supplementary jurisdiction". But I think – and I regard this as an open question – were there to be further forms of accommodation, then there would need to be, I think, some element of transparency of monitoring that expressed a co-operative relationship rather than just parallel tracks'.<sup>10</sup>

Recent literature resulting from the 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts' Research Project at Cardiff University (hereafter 'the Cardiff research') has

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<sup>7</sup>Ibid 103.

<sup>8</sup>Ibid 105.

<sup>9</sup> As Shachar observes, 'the issue of consent becomes more complex when we think of children who are too young to express their jurisdictional preferences': *ibid* 106.

<sup>10</sup>R Williams, above n 1, 276.

explored further the question of what form such ‘monitoring’ could take.<sup>11</sup> The project examined the divorce jurisdiction of three religious tribunals in detail: a Jewish Beth Din; a matrimonial tribunal of the Roman Catholic Church; and a Muslim Shariah Council. The Cardiff research found that the different religious tribunals studied had much in common in relation to marital disputes in that each of the tribunals firmly recognised and supported the ultimate authority of civil law processes when it came to marriage and divorce and none sought greater ‘recognition’ by the State. Developing the work of Shachar in light of empirical findings, it was demonstrated that the religious tribunal personnel themselves claimed that their jurisdiction is consensual.<sup>12</sup> One interviewee at the Beth Din stated that ‘People in high places seem to think that we’ve got some sort of official status when we’ve got no status whatsoever; it’s consensual for our clients coming here’. The impression given was that religious tribunals operate a voluntary jurisdiction and their authority extended only to those who choose to submit to them. As one interviewee at the Shariah Council commented: ‘Obviously some people may not decide to come to the Council thinking we’re divorced anyway but others feel that they still have to resolve it in the eyes of God and they come [to] the Shariah Council’.

Although the Cardiff research primarily called for greater education and contemplated a registration / inspection system for religious tribunals, the work subsequently developed Shachar’s call for joint governance drawing primarily upon her notion of consensual accommodation (alongside temporal and contingent accommodation).<sup>13</sup> In particular, it was suggested that the understanding of consent as found in the Sexual Offences Act 2003 could be drawn upon to develop a draft Bill that would outlaw decisions of religious tribunals where the parties did not consent. Pursuant to the 2003 Act, there is an absence of consent when a person intentionally causes another to engage in an activity without reasonable belief that they have consented.<sup>14</sup> Two particular cases would be unlawful regardless of consent,

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<sup>11</sup> These three case studies should not, of course, be considered to be ‘typical’ or ‘representative’ of Jewish, Christian or Islamic tribunals in general. The research team was led by Professor Gillian Douglas and also included Professor Norman Doe, Professor Sophie Gilliat-Ray, Dr Russell Sandberg and Asma Khan.

<sup>12</sup> R Sandberg *et al*, ‘Britain’s Religious Tribunals: “Joint Governance” in Practice’ (2013) 33(2) *Oxford Journal of Legal Studies* 263.

<sup>13</sup> See *ibid* and R Sandberg, ‘Conclusion: In Pursuit of Pluralism’ in R Bottoni, R Cristofori and S Ferrari (ed) *Religious Rules, State Law, and Normative Pluralism – A Comparative Overview* (Springer, 2016) 395.

<sup>14</sup> Sexual Offences Act 2003, section 4(1).

namely where the parties have committed or been charged with a criminal offence and where the tribunal attempts to exercise jurisdiction over a child under the age of 16.<sup>15</sup>

This focus on consent may be criticised. It may be questioned whether religious tribunals actually operate a voluntary jurisdiction given that many members are born into a religion and community pressure may be a significant factor in keeping people within that group. The appropriation of the understanding of consent found in the Sexual Offences Act 2003 may be inappropriate in the context of religious tribunals given the different context and relationship between parties and the fact that provisions concerning consent and their application have proved controversial in their original context of sexual offences law. This article will therefore seek to explore whether the focus should be on the issue of autonomy rather than consent. The meaning of autonomy has been the subject of recent scrutiny in the area of family law, and so this context is also considered and applied to the minorities within minorities debate. Following this, an argument is made for a reconceptualisation of autonomy pursuant to ‘relational autonomy’.<sup>16</sup> Relational autonomy, according to Mackenzie and Stoljar, is designated by a range of perspectives which are, they say:

‘[P]remised on a shared conviction, the conviction that persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender and ethnicity’.<sup>17</sup>

It is influenced by different feminist critiques of autonomy, and as is outlined below, it is premised on the idea that current understandings of autonomy in law do not represent the ways in which people exercise autonomy. As Jennifer Nedelsky puts it: ‘If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but

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<sup>15</sup> R Sandberg and F Cranmer, ‘Appendix: Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Bill in R Sandberg (ed.) *Religion and Legal Pluralism* (Ashgate, 2015) 273.

<sup>16</sup> For a complete overview of relational autonomy in different contexts and from different philosophical viewpoints, see C Mackenzie and N Stoljar (eds.), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000).

<sup>17</sup>C Mackenzie and N Stoljar, ‘Autonomy Refigured’, in *ibid* 3, 4.

relationships'.<sup>18</sup> In the context of religious tribunals, placing these relationships front and centre provides a different perspective on the way in which tribunals are engaged with by individuals. This article will argue that relational autonomy is therefore a useful approach to employ and considers Jonathan Herring's application of the concept to family law matters. Applying relational autonomy to the issue of religious tribunals for the first time, it will be argued that relational autonomy ultimately focuses on the limitations on an individual's ability to exercise autonomy as a result of various pressures in relationships, or other wider contextual constraints. This is a major step forward but is not by itself sufficient. As a result, it is argued that elements of relational autonomy should be merged with another theoretical approach known as relational contract theory. The combined approach is named Feminist Relational Contract Theory (FRCT) and was initially developed in *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* as a theory that emphasises the contractual elements of relationships and the way power is exercised in such relationships.<sup>19</sup> We close by exploring the possibility of applying FRCT to religious tribunals and the minorities within minorities debate.

### **Different Understandings of Autonomy**

The word 'autonomy' (or variants of) was not mentioned by Rowan Williams in his lecture. To date, the concept has mostly arisen in the context of the religious tribunal debate in relation to the autonomy of the religious group. The question of whether State interference with the affairs of religious groups in order to ensure the protection of rights secured under State law would undermine the autonomy of religious groups has arisen in various different contexts.<sup>20</sup> A recent US Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*<sup>21</sup> on the employment status of ministers provides the clearest example of the deference to the autonomy of religious

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<sup>18</sup>J Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', (1989) 1 *Yale Journal of Law and Feminism* 7, 12.

<sup>19</sup>S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart/Bloomsbury 2015).

<sup>20</sup>See, e.g., *Shergill v Kharia* [2014] UKSC 33. For a useful summary of the position see *R (on the Application of E) v JFS Governing Body* [2009] UKSC 15 paras 157-158.

<sup>21</sup>(2012) 132 S.Ct 694

groups justifying State inaction.<sup>22</sup> Chief Justice Roberts held that, ‘the interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission’.<sup>23</sup> He held that to treat ministers of religion as employees ‘interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs’ and that this was a line that the Supreme Court was unwilling to cross.<sup>24</sup> This focus upon the autonomy of religious groups has been developed to suggest that their autonomous nature can be seen as a definitional attribute suggesting that the use of the term HALOs (Heterogeneous Autonomous Legal Orders) in place of religious law on the basis that the term religious law excludes non-religious systems of law and often gives the impression of referring to only to the ‘revealed’ laws found in sacred texts and not the norms, rules and laws generated, interpreted and applied by religious groups as a means to facilitate and order their day to day life.<sup>25</sup>

In family law, however, the concept of autonomy has arisen in a different way. One of the most important recent developments has been the focus on individual autonomy as a proxy for modern family justice because it is assumed that it is better for individuals to control the legal consequences of their own relationships. Jonathan Herring has highlighted this traditional ‘individualist conception of autonomy’ as involving ‘a claim that individuals should be allowed to make decisions for themselves and that those decisions should be respected by others, unless the decision involves harming someone else’.<sup>26</sup> He argued that such notions of autonomy have become prevalent in government policy, popular culture and in family law given the liberalisation of divorce laws and development of other forms of

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<sup>22</sup>The existence of a ‘ministerial exception’ was unanimously approved meaning that ministers of religion were not to be treated as employees and therefore could not benefit from legal rights that employees enjoy such as anti-discrimination laws.

<sup>23</sup>*Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 132 S.Ct 694. .

<sup>24</sup> See further J Waltman, ‘*Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*: Defining the “Ministerial Exception” in US Employment Law’ (2012) 169 *Law & Justice* 210 and M Hatzis, ‘The Church-Clergy Relationship and Anti-Discrimination Law’ (2013) 15(2) *Ecclesiastical Law Journal* 144.

<sup>25</sup> See R Sandberg, ‘The Impossible Compromise’ in R Sandberg, above n 13, 1. For a defence of the term religious law see R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 9. The ‘order’ and ‘facility’ functions of religious law are identified and discussed by Norman Doe in different contexts see e.g., N Doe, *The Legal Framework of the Church of England* (Clarendon Press, 1996) 33-47.

<sup>26</sup>J Herring, *Relational Autonomy and Family Law* (Springer, 2014) 1.

mediation and alternative dispute resolution in place of family disputes in court.<sup>27</sup> This increased focus on individual autonomy is epitomised, however, by recent case law concerning prenuptial agreements ('prenups').<sup>28</sup> Following the UK Supreme Court decision in *Radmacher v Granatino*<sup>29</sup> in which it was held that 'the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement',<sup>30</sup> the lower courts have said that:

'At the heart of that significant change, is the need to recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage. ... The new respect to be given to individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made'.<sup>31</sup>

This 'new respect' for individual autonomy, found not only in relation to prenups but also in other family law reforms,<sup>32</sup> represents a shift whereby family disputes are increasingly treated as private matters where the role of the law is to enable and encourage the couple to reach an agreement.<sup>33</sup> For Herring, there are a number of reasons for this shift towards autonomous decision making including the Government's drive to reduce expenditure, the 'heat from complaints about the way courts and state bodies make decisions in relation to family matters and the rise of the 'human rights era with an emphasis on respect for private life'.<sup>34</sup> Although these points would also apply in relation to religious disputes, interestingly such disputes provide an exception to what Gillian Douglas has referred to as 'the general de-juridification of family matters and the drive to encourage alternative dispute resolution'.<sup>35</sup> For Douglas,

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<sup>27</sup> In terms of popular culture he rather oddly refers to the way in which 'many of the fictional heroes of our day: Jack Bauer, James Bond, Jason Bourne fight alone against the wicked powers that be: they are the epitome of the isolated autonomous man': *ibid* 2.

<sup>28</sup> On which see S Thompson, above n 17.

<sup>29</sup> [2010] UKSC 42.

<sup>30</sup> *Ibid.*, [78].

<sup>31</sup> *V v V* [2011] EWHC (Fam) 3230, [36.]

<sup>32</sup> See A Diduck, 'Autonomy and Family Justice' (2016) 28(2) *Child and Family Law Quarterly* 133.

<sup>33</sup> J Herring, above n 24, 7.

<sup>34</sup> *Ibid* 7-8.

<sup>35</sup> G Douglas, 'Who Regulates Marriage? The Case of Religious Marriage and Divorce' in R Sandberg above n 13, 53, 61.

the reluctance to accept the role of religious tribunals in determining disputes is perplexing. She wrote that:

‘Given this trend away from court adjudication (and even lawyer-assisted bargaining in the shadow of the court), it is hard to see why religious tribunals should not be as suitable as any other potential mediator or arbitrator to assist the parties in reaching a settlement that suits them, even if that settlement is one that reflects cultural or religious norms at odds with those of secular society’.<sup>36</sup>

For Douglas, the neo-liberal roll back of the State and the active role religious groups have in a number of areas, such as education, render the controversy surrounding the use of religious tribunals for dispute resolution surprising. She went as far as to argue that ‘it would be both hypocritical and paradoxical to single out religious groups and religious tribunals to be barred from assisting their adherents from obtaining the remedies that the State’s legal system is no longer prepared to provide for them’.<sup>37</sup> Douglas’ work underscores how the debate on religious tribunals can be enhanced by placing it ‘within the context of wider social developments concerning the family, and policy initiatives for the de-juridification of family disputes’.<sup>38</sup> The next two sections of this article will explore this claim further: the next section will explore the benefit of placing the religious tribunals debate within trends in family law generally, while the section following that will return to the work of Herring exploring his notion of ‘relational autonomy’ and its potential application in relation to religious tribunals.<sup>39</sup>

### **Religious Tribunals in the Context of Changes in Family Law**

Family law is always an area in flux, more so than most areas of law. This is because social, political and legal understandings and expectations of the family mutate generation to generation and indeed even year to year, shaped by changing understandings of the public-private divide and the role of the State. However, the social, political and legal changes in the early twenty-first century have been especially rapid. There is now much uncertainty as to

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<sup>36</sup>Ibid 62.

<sup>37</sup>Ibid 64.

<sup>38</sup>Ibid 54.

<sup>39</sup>J Herring, above n 24,1.

which personal relationships the law should recognise and what the proper role of the State should be in terms of dealing with family disputes. Marriage has been extended to same sex couples but significant exceptions have been carved out allowing religious groups to apply the older heterosexual definition of marriage.<sup>40</sup> There has been little attempt to modernise the law on marriage and divorce with recent work by the Law Commission underlining the need to revisit the current law on the formalities required for marriage.<sup>41</sup> Differences between marriages and civil partnerships are maintained without clear explanation.<sup>42</sup> And despite a long-standing drive by the Law Commission and others to improve the legal protection of unmarried cohabitants, it remains the case that cohabitants have relatively few legal rights. Controversies rage about the extent to which and how State authorities should deal with family disputes as shown by controversies over whether divorce should be based on fault, the extent to which prenuptial agreements should be upheld and how the rights of children should be protected. The severe cuts to legal aid for family law disputes as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have reduced the legal assistance available in family law disputes, with the effect that people increasingly represent themselves or seek solutions out of court.<sup>43</sup>

These significant changes provide a context in which the debate about religious tribunals needs to be placed. The Cardiff research found that Muslims, Jews and Christians all made use of religious tribunals in order to obtain licence to remarry within their faith. Typically, those who approached the religious tribunals were seeking a termination of their religious marriage. Those who were married under English civil law usually had already sought a termination of their civil marriage through the civil law of divorce. All three institutions expected the parties to obtain a civil divorce, if applicable, before seeking a religious termination. It appeared that religious tribunals studied were carrying out a form of alternative dispute resolution. This was most clearly the case at the Sharia Council where the

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<sup>40</sup> See further, e.g., J Garcia Oliva and H Hall, 'Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?' (2014) 3 *Oxford Journal of Law and Religion* 25 and R Ahdar, 'Same-Sex Marriage: Exemptions for Celebrants and Religious Freedom' Tensions' in W C Durham Jr and D Thayer (eds.) *Religion and Equality: Law in Conflict* (Routledge, 2016) 91.

<sup>41</sup> Law Commission, *Getting Married: A Scoping Paper* (Law Com, 17 December 2015). On which see C Barton, 'Weddings: The Law Commission's "Scoping" Paper' [2016] *Family Law* 719.

<sup>42</sup> See, e.g., R Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157.

<sup>43</sup> See, further, e.g., L Trinder and R Hunter, 'Access to Justice? Litigants in Person before and after LASPO' [2015] *Family Law* 535; E Hitchings and J Miles, 'Mediation, Financial Remedies, Information Provision and Legal Advice: The Post-LASPO Conundrum' (2016) 38(2) *Journal of Social Welfare and Family Law* 175..

focus was on determining whether the marriage was no longer workable and there was a mandatory mediation stage prior to a ruling being given to see if the marriage could be saved, conducted by a Family Support Service. The similarities between religious tribunals and other forms of mediation and alternative dispute resolution suggest that the use of religious tribunals needs to be understood within the context of the move towards quasi-legal and non-legal means of solving family disputes. The literature on the minorities within minorities issue has raised the important question of whether, and if so when, the State should intervene in the decision of a religious tribunal, in order to ensure that there is no discrimination or other unlawful treatment on grounds of sex.<sup>44</sup> It is true that this question needs to be addressed in relation to religious tribunals. However, it is also the case that concerns about gender equality are likely to not only apply to religious forms of mediation. The gender biases across different legal and quasi-legal systems need attention. Assumptions that individuals are equally free to reach mutually beneficial agreements can be especially harmful to women because research shows that economic dependencies created by unpaid work in the home (which is still disproportionately undertaken by women) is not appropriately addressed in private agreements.<sup>45</sup> There may be a need to revisit the regulation of mediation and alternative dispute resolution but the need for such reform is not constrained only to religious tribunals.

A further finding of the Cardiff research underscores the need to place the discussion of the religious tribunals within the context of family law reform. In line with other research,<sup>46</sup> it was found that over half of the cases dealt with by the Sharia Council studied involved couples who had either not married under English civil law or had married abroad and whose marital status in English law was unclear.<sup>47</sup> Such litigants have very limited remedies under

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<sup>44</sup>Individuals from minority ethnic/religious backgrounds who are discriminated against on the grounds of sex are examples of minorities within minorities because they can experience multiple and intersecting forms of oppression. This can lead to disparities of power between the parties when religious tribunals (or indeed other forms of private ordering) are used to resolve intimate arrangements, and in particular family disputes. See, e.g., S M Okin et al. (eds), *Is Multiculturalism Bad for Women* (Princeton University Press, 1999) 7; A Phillips, *Multiculturalism without Culture* (Princeton University Press, 2007)

<sup>45</sup>See S Thompson, above n 17, M Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004), G Brod, 'Premarital Agreements and Gender Justice' (1993) 6(2)*Yale Journal of Law and Feminism* 229.

<sup>46</sup>S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001) and S Bano, above n 3.

<sup>47</sup>Recognition of an overseas marriage depends on capacity and domicile and some marriages (e.g. potentially polygamous) might not have been recognized as valid.

English civil law and often did not realise that this was the case: they assumed that their religious marriage had legal effect under State law. The Cardiff research called for greater awareness and education concerning the requirements of marriage law, explaining the procedural requirements for a civil law marriage and the rights that are accrued as a result of marriage. However, this is needed not only in relation to religious tribunals. Those who have a religious marriage but are not married under civil law have the same legal status as other cohabiting couples. Unmarried cohabitants also often assume that they have more legal rights than they do. The problem of the non-registration of Islamic marriages is, therefore, related to the problem of the prevalence of the myth of ‘common law marriage’. It follows that there is a need for general reform as to the current law on the formalities required for marriage and the legal protection of unmarried cohabitants. The Cardiff research underscores that it would be insufficient to seek to reform religious tribunals in isolation. The issues raised are larger than that. It follows that there is a need to view the minorities within minorities issue within the context of developments in family law generally. This is not to say that the use of religious tribunals is a new issue. The Cardiff research underscored that it is not. Religious tribunals have existed in this country for a considerable time and have done so mostly non-contentiously. The reason for the controversy now is in part the result of sociological changes concerning the position of religion in society,<sup>48</sup> but is also in part symptomatic of a wider ill-ease concerning the role of the State in relation to family justice matters. That context means that it is appropriate to place the religious tribunals debate within the wider family law scholarship on the ‘de-juridification of family disputes’<sup>49</sup> and the prevalent individualised conception of autonomy.

### **The Argument for Relational Autonomy**

The work of Herring proposes an alternative conceptualisation of autonomy which he claims is more suitable for family law matters. While he notes that ‘independence and freedom have become the icons of our age’, he claims that ‘in the context of family law they are false gods’.<sup>50</sup> He suggests an alternative conceptualisation of autonomy – ‘relational autonomy’ – which is defined in opposition to individualised autonomy: it stresses how our identities are

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<sup>48</sup> On which see R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014).

<sup>49</sup> G Douglas, above n 33, 54.

<sup>50</sup> J Herring, above n 24, 2.

constantly shaped and re-shaped through the relationships we form with others.<sup>51</sup> Approaches based upon relational autonomy have been employed (particularly by feminists) for some time.<sup>52</sup> Herring, applying the concept in relation to family law, emphasises how ‘we find our identity and meaning through relationships’ and those seemingly autonomous choices (concerning ‘our wishes for our lives’) ‘can only be found by sharing our ideas, aspirations and hopes with others’.<sup>53</sup> It is ‘a model of autonomy which is built around the support of relationships’.<sup>54</sup> Such an approach rejects the modern emphasis upon individualised autonomy where ‘the law’s role is to enable to be free from outside interference, to only be subject to those obligations that they have chosen to undertake’.<sup>55</sup> Rather: ‘people are understood as relational, interconnected and interdependent. The law’s job is to uphold and maintain relationships and to protect people from the abuses that can occur within them’. Herring argues that ‘relational autonomy will seek an active role for the state in forging policies that bolster and support relationships’.<sup>56</sup>

Herring argues that relational autonomy is particularly applicable in relation to family life which ‘is not about separation and self-sufficiency. It is about pooling talents and resources to work together for the good of the family’.<sup>57</sup> He writes that in relation to family law ‘we need a law which fosters relationships; which acknowledges that relationships, particularly relationships of care, are essential to our societal well-being; and protects people from the disadvantages that flow from relationships’.<sup>58</sup> This could also apply to religious relationships. Traditional religion law approaches that focus on the autonomy of religious groups are insufficient since they focus on the group and ignore individual members: they give little protection to the agency of those who use religious tribunals and risk discriminating against minorities within minorities. Conventional family law approaches stressing individual autonomy would also be deficient for the opposite reason in that they focus on individual members and ignore their status and constraints as group members: they protect only the right

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<sup>51</sup>Ibid 11. For further discussion of the nature of identities in the context of religion and legal pluralism see R Sandberg, above n 23, 1.

<sup>52</sup>See C Mackenzie and N Stoljar, above n 14.

<sup>53</sup>J Herring, above n 24, 12. This does not reject the notion of the self but sees the self as being ‘constituted by interactive relationships with others’: *ibid* 21.

<sup>54</sup>*Ibid* 59.

<sup>55</sup>*Ibid* 13.

<sup>56</sup>*Ibid* 27.

<sup>57</sup>*Ibid* 21.

<sup>58</sup>*Ibid* 59-60.

of individuals to choose between the group and the State, with the State's role being confined to ensuring the 'right to exit'.<sup>59</sup> This approach is inadequate given that it does not recognise the power relationships and inequalities that exist. By contrast, an approach based on relational autonomy focuses on the relationship between the group members and the group. It recognises that those who use religious tribunals have a relationship with the religious group but also have a relationship with the State. Such an approach states that members should not be given an either-or choice between the group and the State. Moreover, the role of the State should be to support and maintain the member's relationship with the group by facilitating religious freedom whilst simultaneously protecting against possible abuse. Herring's application of relational autonomy to family law matters can, therefore, be extended to religious tribunals. It provides another route to arriving at Shachar's concept of joint governance because it does not simply view relationships (and the obligations created by such relationships) as being confined to the religious group; it focuses upon the individual and the group as well as the wider social context in which this relationship takes place. This, in turn, ensures the State and religious group are both concurrently responsible for individuals.

Relational autonomy can also be seen as protecting the rights of minorities within minorities, particularly women in minority ethnic and/or religious groups. For instance, relational autonomy is useful in deconstructing orthodox notions of autonomy and consent, and in doing so, highlights the problems mainstream individualist notions of autonomy present for gender equality. As Herring has put it, 'privileging individualist autonomy can operate in a way that disadvantages women' by 'putting central value on the autonomy of the parties to leave their relationship and pursue their own life goal'.<sup>60</sup> The 'right to exit' argument can be understood as a product of this context. Phillips, for example, denounces the 'right to exit' rationale as being based on a 'constructivist account of culture and universalist account of human nature' while Levy points out that 'to have a culture whose exit is entirely costless ...

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<sup>59</sup> This argues that the role of the state should be limited to ensuring that at-risk group members are able to leave if they do not like their group's practices. See, e.g., the chapters by Reitman and Weinstock in A Eisenberg and Spinner-Halev (eds), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press, 2005).

<sup>60</sup> J Herring, above n 24,17.

is to have no culture at all'.<sup>61</sup> By contrast, an approach based on relational autonomy goes further than protecting the 'right to exit' by determining additional situations when the State should intervene. However, Herring argues that a relational perspective should not respect all relationships that people may choose to enter.<sup>62</sup> Rather, two criteria should be employed: first, the law should not protect 'oppressive relationships which undermine autonomy by depriving a party of the opportunity to form their own aspiration and visions of their life' and second, the law should only protect 'thick' relationships, that is, those 'marked by care and deep interdependence'. Relational autonomy, therefore, emphasises the need to take into account gender inequalities and the need not to protect oppressive relationships. As Herring points out, 'a relational autonomy perspective is more aware than traditional autonomy of the way relationships can impair autonomy' and this raises the challenge 'to define how we determine which relationships a model of autonomy should promote and which it should regard as destructive of autonomy'.

Once oppressive relationships are excluded, the question remains of which relationships should be supported. In the context of religious tribunals, a debate can be had as to whether all forms of religion should be protected and whether the protection ought to be extended to non-religious and cultural groups.<sup>63</sup> One could take the view that all non-oppressive religious relationships can be supported unless they deal with matters outside the group's competence (such as matters concerning criminal sanctions or children).<sup>64</sup> Herring's suggested test of determining where relationships are 'thick' would, however, shift the focus away from the status of the tribunal (including the nature of the decision) towards the relationship between the member and the group. That said, it is likely that the relationship will be seen as sufficiently thick in most cases where there has been a long-term interdependence by virtue of the member's adherence. The question of *which* relationships (or which tribunals / legal actions), therefore, remains a major unresolved aspect that would need to be developed if relational autonomy was to be applied to the religious tribunals debate.

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<sup>61</sup> A Phillips, above n 43, 135; J T Levy, *The Multiculturalism of Fear* (Oxford University Press 2000) 112.

<sup>62</sup> J Herring, above n 24, 22.

<sup>63</sup> See R Sandberg, 'The Failure of Legal Pluralism' (2016) 18 *Ecclesiastical Law Journal* 137 and A Hussain, 'Legal Pluralism, Religious Conservatism' in R Sandberg above n 13, 151.

<sup>64</sup> This is the approach taken in R Sandberg and F Cranmer, above n 13, 273.

There are two further unresolved issues with Herring's application of relational autonomy. The first is terminological. From Herring's work it is clear that the key word in the phrase 'relational autonomy' is 'relational' not 'autonomy'. Discussion of autonomy is clearly preferable to talking of consent in that there can be grades of autonomy but it remains an imperfect term. The prevalent understandings of autonomy in religion law and family law pollute the term. Moreover, as a matter of logic it cannot be said that both the group and the member are completely autonomous. The term 'relational autonomy' is in a sense a paradox: it instantly recognises by definition that complete autonomy cannot be achieved since we are all shaped and limited by our social interactions with one another. The second unresolved issue relates to application. In *Relational Autonomy and Family Law*, Herring explained how relational autonomy could be usefully applied within family law with particular reference to the laws on prenups, adolescent medical decision making and domestic abuse. Surprisingly, in so doing Herring depicted relational autonomy as a rather blunt instrument.<sup>65</sup> In a brief mention to mediation, he strangely argued that relational autonomy would oppose unregulated mediation (despite the fact that it is unclear who would favour completely unregulated mediation).<sup>66</sup> He then asserted correctly that a relational autonomy approach would highlight whether there were power inequalities within the process. He wrote that 'an understanding of the power relationships between the parties mean that we have to acknowledge the vulnerabilities of the parties to manipulation and exploitation within the mediation process'. However, he then seems to suggest that any suspicion of the possibility of an adverse power relationship would mean that agreements would not be enforced: 'A strong argument against the enforcement of prenuptial agreements can be made from the perspective of relational autonomy'.<sup>67</sup> He writes that this is because 'only very rarely can

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<sup>65</sup> That said, his application in the context of adolescent decision-making and domestic abuse raise a number of useful points such as the acknowledgment that 'the interests of parents and children are intertwined' and that the response needed should come down 'a response which is sensitive to the particular child and relational context' and that domestic abuse should be regarded 'not as a series of discreet acts of violence, but a relationship marked by coercion and control' and this explains 'why an intervention is justified, even when the victim of abuse is not seeking official protection': J Herring, above n 24, 56, 60. However, even here, relational autonomy seems to amount to little more than placing the issue in context.

<sup>66</sup> He wrote, 'An approach based on relational autonomy would, therefore, have some scepticism about the move to unregulated mediation. To be clear, it would not oppose negotiation by parties advised by lawyers seeking to find an agreement within the parameters of what a court is likely to order. However, it would reject an argument that family disputes should simply be resolved by the parties themselves': *ibid* 30.

<sup>67</sup> *Ibid* 36.

there be an equality of bargaining power between parties contemplating marriage<sup>68</sup> and ‘intimate relationships are in their nature fluid’. Applying Herring’s understanding of relational autonomy would mean that prenups would not be recognised. An agreement is rarely made in the mutual best interests of the parties, because in most cases, one of the spouses is relinquishing the provision to which she would otherwise be entitled in the event of divorce.<sup>69</sup> This approach is not only contrary to the direction of English law as shown in *Radmacher v Granatino*<sup>70</sup> but seems to suggest that any agreement made some time ago where the relationship is likely to change and where there is a basic inequality between the parties will never be enforced under a relational autonomy approach. The benefit of relational autonomy is that it appreciates the one-sided nature of agreements like prenups. However, Herring’s application of relational autonomy is too blunt. Setting an agreement aside because an individual’s circumstances have rendered them ‘non-autonomous’ is not compatible with feminist aims to promote agency and to appreciate that individuals can be autonomous even in oppressive circumstances.<sup>71</sup> Whilst a relational autonomy approach can recognise parties as being autonomous in different aspects of their lives, the focus of this perspective still operates with a binary understanding of autonomy. And so even when applied in nuanced ways, in practice the question is still whether someone has or has not been autonomous in a given situation.

Furthermore, different theories of relational autonomy suggest that not everyone would apply this approach to family law in the way Herring has. This is because relational autonomy is an ‘umbrella term’ used in reference to any perspective that looks to the wider context in which autonomy is exercised.<sup>72</sup> This highlights the shortcomings with traditional views of autonomy that are based on consent, but the fact that relational autonomy can be used to reach disparate outcomes demonstrates a major flaw with the approach; it is elusive in practice, can mean different things to different people, and can produce different narratives.<sup>73</sup> In the context of

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<sup>68</sup> This is substantiated by empirical research by Thompson, which found that prenuptial agreements are almost always based on inequality of bargaining power: S Thompson, above n 17.

<sup>69</sup> This was noted by Lady Hale in *Radmacher v Granatino* above n 27[137].

<sup>70</sup> Ibid.

<sup>71</sup> See D T Meyers, ‘Intersectionality Identity and the Authentic Self?: Opposites Attract!’ in C Mackenzie and N Stoljar above n 14, 151.

<sup>72</sup> C Mackenzie and N Stoljar, above n 15, 4.

<sup>73</sup> L Buckley, ‘Relational Theory and Choice Rhetoric in the Supreme Court of Canada’ (2014-2015) 29 *Canadian Journal of Family Law* 251, 256.

minorities within minorities, it might not have the desired practical impact of both facilitating agency and recognising relational inequalities, because it depends on what relational autonomy means to the individual applying it.<sup>74</sup> There is evidence to suggest that a relational autonomy approach does not lead to significantly different outcomes in practice.<sup>75</sup> Therefore, relational autonomy is not entirely appropriate when applied to the context of religious tribunals. Indeed, these issues raise the larger question of what is distinctive about an approach based on relational autonomy. Herring contended that it ‘provides an important tool of analysis in family law’.<sup>76</sup> However, Herring’s application suggests that it is a somewhat blunt tool that simply amounts to a call for contextualisation. It may, therefore, be necessary to look elsewhere.

### **Towards Feminist Relational Contract Theory**

Herring’s major contribution in his work on relational autonomy is its emphasis upon the importance of relationships. The reason the concept of relationships is of central importance in family law is that it provides a framework in which responsibilities, obligations, rights and entitlements are both created and reinforced. This, in turn, impacts on the legal consequences of distinct categories of relationship, such as the relationship of parent and child, or spouses. This is equally true of religion law. Indeed, it has been argued elsewhere that religion law can be defined in the same way as family law. For Gillian Douglas, ‘the essence of family law is that part of the law which is concerned with the recognition and regulation of certain family relationships and the implications of such recognition’.<sup>77</sup> Following this, religion law has been defined as the part of the law concerned with the recognition and regulation of certain religious relationships.<sup>78</sup>

Focusing upon relationships raises the question of whether other relational approaches such as relational contract theory could be applied to religious tribunals instead of relational autonomy. Like Herring’s explanation of relational autonomy, relational contract theory brings the relationships of the parties to the fore. At first glance these approaches are

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<sup>74</sup> Buckley (ibid.) found in a study of case law in Canada that cases which had been influenced by relational autonomy did not have significantly different outcomes.

<sup>75</sup> L Buckley, above n 73.

<sup>76</sup> J Herring, above n 24, 60.

<sup>77</sup> G Douglas, *An Introduction to Family Law* 2<sup>nd</sup> edn (Clarendon Press, 2004) 3.

<sup>78</sup> R Sandberg, above n 23, 10-11.

conceptually similar, but importantly an application of relational contract theory to religious tribunals could potentially produce a very different outcome. This is because of the theory's focus on contract instead of autonomy. When relational autonomy is the starting point for assessing arrangements in the context of religious tribunals, arrangements are less likely to be upheld as a result of the many pressures and circumstances that taint one's ability to exercise autonomy. At first glance, this would seem to be a preferable approach to one based on contract. As Herring argues, 'we cannot reduce caring obligations or compensation for losses caused by caring into some rigid formula, such as contract.'<sup>79</sup> However, this is assuming a legalistic understanding of contract. A relational approach to contract actually enables the flaws with orthodox contractual approaches to be highlighted, which in turn allows the assumptions made about the way individuals make decisions to be questioned.

Moving away from orthodox legalistic approaches to contract allow the potential of contract to be harnessed. As Martha Fineman has put it:

'[O]ne of the primary devices for understanding individual and institutional relationships is the concept of contract. Contract is the term we apply to all sorts of relationships, be they formally established or implied'.<sup>80</sup>

In the words of Carole Pateman, an analysis focusing on contract need not focus narrowly on contract law but can extend instead to 'contract as a principle of social association and one of the most important means of creating social relationships'.<sup>81</sup> As a result, contract is arguably a useful means of understanding relationships and arrangements made in the context of religious tribunals because it can be used to highlight the constellation of relationships and connections that exist both within religious groups and society as a whole. Instead of rejecting contract for being imbued with flawed notions of autonomy, relational contract theory instead repurposes contract in a way that recognises the relational context in which individuals make decisions. This section will first outline this approach, and then introduce a new perspective (Feminist Relational Contract Theory) that combines feminist elements of

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<sup>79</sup>J Herring, above n 24, 17.

<sup>80</sup>M Fineman, 'Contract and Care' (2001) 76(3) *Chicago-Kent Law Review* 1403, 1413.

<sup>81</sup>C Pateman, *The Sexual Contract* (Polity Press, 1988) 5.

relational autonomy with relational contract theory to produce a new approach that is focused on the power dynamic between parties to an agreement and between individuals and the wider institutions to which they belong.

### *Relational Contract Theory*

Relational contract theory was primarily developed by Ian Macneil.<sup>82</sup> He criticised orthodox contract for its focus on agreements as discrete one-off transactions, and for failing to recognise the relationships between the parties, as he argued that these relationships significantly influence the ways in which decisions are made. For Macneil, highlighting the parties' relationship necessitated a focus on important contextual factors in commercial transactions, such as duration and trade customs. This shift in emphasis transforms contract into a useful tool. By replacing neo-liberal assumptions that depict contracting parties as being purely self-interested and disconnected individuals with a relationship-orientated approach, relational contract theory appreciates what Linda Mulcahy refers to as the 'lived world of contracts'.<sup>83</sup> It highlights what Pateman has referred to as the 'fictions of original agreements',<sup>84</sup> placing legal contractual concepts such as offer and acceptance within the circumstances of the relationship as a whole.

Applied to the context of religious tribunals, the concept of relational contract facilitates discussion of the institutional relationships within (and surrounding) religious groups.<sup>85</sup> These relationships could be interpreted as contractual when contract is perceived in Fineman's terms as a 'process whereby individuals are given the means to voluntarily and willingly assume obligations and gain entitlements'.<sup>86</sup> Indeed, according to English law, the organisational structure of many religious groups already depends on a contractual legal framework. Legally, religious groups other than the Church of England are understood to operate a contractual jurisdiction. They are usually treated as voluntary associations. The

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<sup>82</sup> See, e.g., I R Macneil, 'Relational Contract: What we do and do not Know' (1985) *Wisconsin Law Review* 484; I R Macneil, 'The New Social Contract: An Inquiry into Modern Contractual Relations' (1996) 15(1) *Journal of Public Policy & Marketing* 157 and the essays in D Campbell (ed.) *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001).

<sup>83</sup> L Mulcahy, 'Telling Tales about Relational Contracts: How do Judges Learn about the Lived World of Contracts?' in D Campbell, L Mulcahy and S Wheeler (eds.), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan, 2013), 193.

<sup>84</sup> C Pateman, above n 81.

<sup>85</sup> M Fineman, above n 80, 1408.

<sup>86</sup> *Ibid.*

relationship of members as between themselves is governed by quasi-contract and the organisations are treated as a matter of law as members of clubs or unincorporated associations. These exist where two or more people voluntarily agree to be bound together for common purposes and to undertake mutual duties and obligations. The powers of the religious body derive from the agreement of its members. The relationship of the members as between themselves is governed by quasi-contract. This contractual bond may be styled the doctrine of ‘consensual compact’.<sup>87</sup> As Lord Kingsdown acknowledged in *Long v Bishop of Capetown*<sup>88</sup>, members ‘may adopt rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them.’ In the Australian case of *Scandrett v Dowling*<sup>89</sup> it was held that ‘the binding effect of the “voluntary consensual compact”... arises from ‘a willingness to be bound to it because of shared faith’ rather than ‘the availability of the secular sanctions of State courts of law’. In relation to the Church in Wales, this consensual compact actually takes the form of a statutory contract. Section 3(2) of the Welsh Church Act 1914 provided that the existing law of the Church of England would continue to bind members of the Church in Wales ‘in the same manner as if they had mutually agreed to be so bound’, subject to modification or alteration, according to the constitution and regulations of the new institutional Church in Wales. Collective religious freedom is already understood in terms of contract under English law.

This means that, although the courts of the State are reluctant to become involved in adjudicating internal disputes within religious groups, they will exceptionally intervene to enforce the laws of a religious group where there is a financial interest and in relation to the disposal and administration of property. This exception to the rule may be styled the *Forbes v Eden* exception, after the leading case.<sup>90</sup> As Sir Robert Phillimore noted in *Brown v Curé of Montréal*<sup>91</sup>, although religious groups are to be regarded ‘as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or

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<sup>87</sup>See R Sandberg, above n 23,72 *et seq.*

<sup>88</sup>(1863) 1 Moore NS Cases 461.

<sup>89</sup>[1992] 27 NSWLR 483.

<sup>90</sup>*Forbes v Eden* (1867) LR 1 Sc & Div 568. It was also recently re-articulated in *Shergil lv Khaira*[2014] UKSC 33 at para 45 *et seq.*

<sup>91</sup>(1874) LR 6 PC 157.

authority which has inflicted the alleged injury.’ Moreover, due to the doctrine of consensual compact, where the secular courts do this they will adjudicate the matter by reference to the rules and regulations of the religious group. As Lord Cranworth held in *Forbes v Eden*<sup>92</sup>, where courts intervene with regard to the disposal and administration of property they ‘must necessarily take cognizance of ... the rules of a religious association’. In *Shergill v Khaira*<sup>93</sup> the Supreme Court stated that: ‘The governing bodies of a religious voluntary association obtain their powers over its members by contract. They must act within the powers conferred by the association’s contractual constitution’. This suggests that a relational contract approach to religious tribunals would be fitting given that the member’s agreement to comply with the rules and rulings of the religious group is already understood under State law to be contractual.

There are examples of civil courts not only applying religious rules as terms of a contract but also applying religious agreements as contracts. The Cardiff research found that the religious tribunals studied were determining questions of religious status and Bowen has correctly said that ‘granting an Islamic divorce has no legal effect in and of itself, and so the language of contracts and enforcement does not belong there’.<sup>94</sup> However, as he notes, there has been ‘a partial opening of courts towards private arbitration of divorce, and even to arbitration conducted by religious bodies’.<sup>95</sup> Civil courts have approved agreements reached by arbitration that covers financial and property disputes arising from relationship breakdown. In *S v S*<sup>96</sup> the court approved an agreement between a divorcing couple and recognised this as part of the ‘strong policy argument in favour of the court giving effect to an agreement that the parties have come to themselves for the resolution of their financial affairs following divorce’.<sup>97</sup> Sir James Munby, President of the Family Division, stressed that such agreements would only be enforced if they were decided in accordance with the law of England and Wales and provided that there was no reason to believe that ‘there may have been gender-

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<sup>92</sup>(1867) LR 1 Sc & Div 568

<sup>93</sup> [2014] UKSC 33 at [47].

<sup>94</sup> J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari’a Councils* (Princeton University Press, 2016) 155.

<sup>95</sup>Ibid 178.

<sup>96</sup>[2014] EWHC 7 (Fam).

<sup>97</sup> [7]. The arbitration was conducted under the IFLA (Institute of Family Law Arbitrators) Scheme on which see P Singer, ‘Arbitration in Family Financial Proceedings: the IFLA Scheme: Part 1’ [2012] *Family Law* 1353 and P Singer, ‘Arbitration in Family Financial Proceedings: the IFLA Scheme: Part 2’ [2012] *Family Law* 1496.

based discrimination'.<sup>98</sup> He left open the question of what would happen 'where an arbitral process is based on a different system of law'. That question was seemingly answered in *AI v MT*<sup>99</sup> where the High Court accommodated and buttressed the parties' wish for their matrimonial dispute to be arbitrated under rabbinical law at the New York Beth Din. Baker J held that this would give 'regard to the parties' devout religious beliefs and wish to resolve their dispute through the rabbinical court' and acknowledged 'that it [is] always in the interests of parties to try to resolve disputes by agreement wherever possible'.<sup>100</sup> The High Court endorsed the parties proposal on the basis that 'the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude either party from pursuing applications to this court in respect of any of the matters in issue'.<sup>101</sup> The subsequent arbitration agreement was upheld by the court but Baker J was insistent that this did not 'necessarily follow that a court would be content in other cases to endorse a proposal that a dispute concerning children should be referred for determination by another religious authority. Each case will turn on its own facts'.<sup>102</sup>

Civil courts have also enforced nuptial agreements made in a religious context. Bowen discusses two cases that concern whether agreements to give a marriage gift can be enforced following the breakup of the marriage.<sup>103</sup> In the first case, *Shahnaz v Rizwan*<sup>104</sup> a couple married in India with a marriage agreement that stipulated payment on divorce. Winn J held that 'the right to dower, once it has accrued as payable, is a right in action, enforceable by a civil action without taking specifically matrimonial proceedings' and could be enforced as a 'proprietary right'.<sup>105</sup> Bowen argues that framing it as a proprietary right 'insulated the mahr agreement' against the objection that 'the agreement was a kind of pre- or ante-nuptial contract'.<sup>106</sup> For Bowen, this was unsatisfactory since regarding it as a contractual obligation would require judges 'to know the parties's understandings, including whether the parties

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<sup>98</sup> [2014] EWHC 7 (Fam) [27].

<sup>99</sup>[2013] EWHC 100 (Fam).

<sup>100</sup> [12].

<sup>101</sup> [15]. It was also stressed that 'the court's jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, cannot be ousted by agreement' [12] and that the respect for cultural practice and religious beliefs 'does not oblige the court to depart from the welfare principle' [29].

<sup>102</sup> [33].

<sup>103</sup>J Bowen, above n 92, 184-193.

<sup>104</sup>[1965] 1 QB 390.

<sup>105</sup>At 401.

<sup>106</sup>J Bowen, above n 92, 189.

intended to be enforceable in law'. In the second case, however, the court did enforce the marriage gift as a contractual obligation. *Uddin v Choudhury*<sup>107</sup> concerned a religious (and legally unregistered) marriage. The Court of Appeal refused the application of the father-in-law for his wedding gift to be returned it was held that gifts were gifts and did not need to be returned.<sup>108</sup> However, the bride succeeded in her counter-claim for payments of dowry, which she said had been agreed prior to the marriage, but had not been paid. Mummery LJ held that 'This was not a matter of English law. There was no ceremony which was recognised by English law, but it was a valid ceremony so far as the parties were agreed and it was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry'.<sup>109</sup> Crucially, he noted that 'as a matter of contract arising out of the agreement which the parties had made, ... the judge was entitled in law to say that this was an enforceable agreement.'<sup>110</sup> As Bowen has noted:

'a number of important acts - giving jewellery to relatives, promising mahr to the wife, writing a marriage contract, dissolving a marriage - were taken as having a clear Islamic content and an English legal effect in the law of contracts. ... In this sense the civil judges recognized, not shari'a, but contractual acts taken in an Islamic context'.<sup>111</sup>

These cases suggest that civil courts are increasingly applying a contractual approach to enforce religious agreements. As Bowen puts it, rather than recognising Sharia *per se*, courts have conceptualised religious agreements 'in terms of English contract law'.<sup>112</sup> This would underscore the need for a contractual analysis. This approach has been adopted by the Law Commission which has recommended that qualifying nuptial agreements (that is, marital agreements such as prenups that comply with a number of procedural requirements) to be made legislatively binding,<sup>113</sup> and deliberately did not make any separate proposals for

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<sup>107</sup>[2009] EWCA Civ 1205.

<sup>108</sup> [13].

<sup>109</sup> [11].

<sup>110</sup> [15].

<sup>111</sup>J Bowen, above n 92,187.

<sup>112</sup>*Ibid* 193.

<sup>113</sup>The Law Commission recommended a number of procedural requirements for qualifying nuptial agreements. Both parties must have provided material disclosure of their assets, signed the agreements at least 28 days before the wedding and obtained legal advice. The precise nature of the legal advice is not prescribed, but each party must be advised independently (by different lawyers). The parties must also sign a statement to confirm they understand that their prenup will prevent financial provision from that specified in the agreement (unless

‘religious marriage contracts’,<sup>114</sup> noting that such agreements would be enforceable in the same way prenups meeting the qualifying criteria would be. The Law Commission justified their reluctance to give religious agreements special protection on the basis that providing more or less legal protection by virtue of being a member of a faith group ‘would be discriminatory’ and that ‘Those who wish to make, and to abide by, religious marriage contracts will always be free to do so subject to the constraints of the legal obligations and to society as a whole’.<sup>115</sup>

However, Bowen criticises the adoption of a contractual analysis on the basis that it takes ‘Islamic law to be a set of contract-orientated rules, independent of social context’.<sup>116</sup> This further suggests the need for an approach based on relational contract theory. Such an approach can apply to religious groups generally in that membership of religious groups is seen as contractual (both legally and socially) but can also be applied in relation to religious agreements which now seem to be capable to be enforced in the same way as a prenup. However, just because religious agreements are legally treated as being contractual, that does not mean that a contractual analysis is necessarily the best way of understanding them. Since relational contract theory was developed by Macneil in the commercial sphere, it is arguably not entirely appropriate for application to religious tribunals. For instance, relational contract theory might not be sensitive enough to the numerous power imbalances experienced by minorities within minorities, particularly on gender lines. As a result, Feminist Relational Contract Theory is arguably more appropriate in this context, because it combines feminist perspectives that highlight power imbalances with Macneil’s relational contract approach. Focusing on gender creates ‘disturbances in the field - that inverts or scrambles familiar narratives of stasis, recovery or progress’ and ‘advances rival perspectives’.<sup>117</sup>

### *Feminist Relational Contract Theory*

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the needs of the parties have not been met). These recommendations have not been implemented. See Law Commission, *Matrimonial Property, Needs and Agreements*, (Law Com No 343, 2014).

<sup>114</sup> Law Commission, *Marital Property Agreements* (Law Com No 198, 2011) para. 1.35.

<sup>115</sup> *Ibid.*, para. 1.36.

<sup>116</sup> J Bowen, above n 92, 189.

<sup>117</sup> Cf. R Gordon, ‘The Arrival of Critical Historicism’ (1997) 49 *Stanford Law Review* 1023, 1024.

Feminist Relational Contract Theory (FRCT) is an approach developed by Thompson<sup>118</sup> and incorporates feminist perspectives that explicitly address power imbalances (especially those that are gendered), where relational contract theory otherwise would not. Feminism in this context is a tool that enables recognition of particular inequalities on gender lines. This is particularly useful when thinking about power because feminism directs critical fire at how social and legal structures reinforce power imbalances. By choosing to explicitly recognise this, in other words, to not be silent on the gendered dimensions of the minorities within minorities debate, issues of power are placed at the core of the discussion instead of on the margins. An explicitly feminist perspective is has often been applied to the minorities within minorities debate and is one of the most important aspects of a relational approach. This might not be obvious at first, as women in minority communities arguably are just as susceptible to religious or racial discrimination as they are to discrimination based on gender. But a feminist approach does not only emphasise the gendered power inequalities faced by minorities within minorities; rather, it emphasises the diversity of individuals in these positions.<sup>119</sup> In doing so, individuals are able to resist the assumption that as members of a religious group or community, they are automatically replicating that group or community's interests and identities.<sup>120</sup> An emphasis on relational autonomy recognises this intersectional context, but FRCT is able to build on this perspective by focusing on contract instead of on individual autonomy. FRCT, therefore, builds upon the strengths of both relational autonomy and relational contract theory.

The minorities within minorities context provides an opportunity to demonstrate the scope of a contractual approach when employing FRCT. By focusing on contractual relationships rather than solely on the individual, religious tribunals can be viewed as comprised of contractual relationships on multiple levels. First is the 'consensual compact' between an individual and the religious group they are a member of. Secondly, a contractual relationship underpins the arrangements affecting individuals within religious groups. Thirdly, FRCT can appreciate the relationship between a religious group and the state, which could be conceived

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<sup>118</sup>S Thompson, above n 17.

<sup>119</sup>See S M Okin above n 43, 7; A Phillips, above n 43.

<sup>120</sup>C Mackenzie and N Stoljar, above n 15, 12; D T Meyers, above n 71.

as a type of social contract.<sup>121</sup> The advantage of recognising contractual relationships in these different ways is that FRCT opens up the possibility for the *system* in which the law legitimises agreements to be challenged. This is particularly important in light of Carol Smart's observation about the power law has to arrive at its own version of truth, based on norms that may not reflect the experiences of the parties to an agreement.<sup>122</sup> Therefore, it is not enough to employ relational autonomy in a way that highlights gendered power imbalances between parties; FRCT is needed in order to recognise that law is in part responsible for these imbalances, because as Smart has said law is 'structured on patriarchal precedents'.<sup>123</sup> In short, FRCT does not simply aim to operate *within* law to produce solutions to issues of power in contract, because it recognises that law might be part of the problem.

FRCT is required since current approaches are shaped by and perpetuate notions and values of individualist autonomy. By focusing on the autonomy of the parties, the resolution of the matter at hand still resides in the private sphere. This is arguably one of the reasons that relational autonomy is not successful in practice, because as Martha Fineman has put it, 'the characterisation of the family as the preeminent private space carries with it a set of assumptions about family relationships'.<sup>124</sup> The contractual approach taken by civil courts does not refer to any preference or intention expressed by the parties, rather, the parties are deemed autonomous simply because they have consented to an arbitral award being made. Indeed, Sir James Munby's view is that, '[t]here is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them'.<sup>125</sup> Respectfully, this plainly does not appreciate the context in which decisions are made. Indeed, the 'new respect' for autonomy pursuant to the Supreme Court decision *Radmacher v Granatino* appears to rule out the need for any further scrutiny by the court, as the President also noted that the judge 'will not need to play detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award'.<sup>126</sup> Thus, in cases such as *AI v*

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<sup>121</sup>Martha Fineman explains the idea of social contract as 'a way of approaching the relationship between the individual and the systems of coercion and authority within which he or she lives: M Fineman, above n 44, 212.

<sup>122</sup>C Smart, *Feminism and the Power of Law* (Routledge, 1989) 11.

<sup>123</sup>*Ibid.*

<sup>124</sup>M Fineman, above n 44, 208.

<sup>125</sup>*S v S (Financial Remedies: Arbitral Award)*95 [19].

<sup>126</sup>*Ibid.*

*MT*,<sup>127</sup> the determination of all of the parties' affairs on divorce by a New York Beth Din was approved by the court for being 'unobjectionable'.<sup>128</sup> Commentators such as Alison Diduck are critical of this approach because "unobjectionable" is a far cry from "fair", the objective in English law'.<sup>129</sup> By failing to consider fairness in this case, the parties were denied access to the opportunity in English law to have their dispute resolved in a way that ensures the outcome is fair for both parties.<sup>130</sup> Diduck also comments on other factors missed as a result of superficial judicial analysis of private arbitration:

'The fact that it is ... staffed by what could be seen as a self-regulated bench, accountable only to its own professional organisation and the parties who hire it, and whose decisions are confidential and reviewable by courts only on the narrowest of grounds, appears unimportant [to the court]'.<sup>131</sup>

A focus on autonomy, even relational autonomy, is not the most effective way of emphasising contextual factors such as these. There are multiple levels of contractual relationships in this situation. There is a need to focus on the individual's agreement for the religious tribunal to decide the matter within the wider context of multiple power relationships. This involves exploring in detail not just the agreement and the conditions surrounding it but a number of interlocking relationships over a much longer period: this would include looking at the entire relationship between the individual member and the group, the relationship between the two parties the case is concerned with, as well as family and community pressures and the gendered aspects of the decision-making process and court personnel. Another important consideration would be the context spanning the whole period in which the parties were members of the religious community, as focusing on the discrete moment in which the arbitration was elected potentially leaves important contextual factors out.<sup>132</sup> The factors highlighted by Diduck above, such as who the religious authority figures are, to whom they are accountable and so forth would also be significant pursuant to FRCT,

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<sup>127</sup> Above n 97.

<sup>128</sup> [37].

<sup>129</sup> A Diduck, above n 30, 141.

<sup>130</sup> Pursuant to *White v White* [2000] UKHL 54, which says the overall objective is fairness.

<sup>131</sup> A Diduck, above n 30, 140.

<sup>132</sup> See I R Macneil, above n 82, for a detailed discussion on why viewing contracts as discrete moments in which decisions are made does not reflect the reality in which long term contracts are entered into.

because they provide an important contextual basis for understanding the power dynamic between the parties and arbitrators, and also facilitate a critical discussion of the power of religious law in reaching particular conclusions. Taking *AI v MT*<sup>133</sup> as an example, a major difference in application between FRCT and other approaches is that the former would consider the different, yet interconnected (legal and social) contractual relationships at play: between the parties in electing orthodox Jewish faith-based arbitration, between the parties and the New York Beth Din, and between the Beth Din and English court. Focusing on the way in which power is exercised in these contractual relationships would lead the court to ask different questions. For instance, an FRCT approach would not assume that each individual party had chosen all of the consequences decided by the Beth Din because they are a member of that religious community. A FRCT based approach would mean that the answer to the question of whether State authorities should enforce or intervene into the agreements made by or at religious tribunals will always be fact specific taking into account not just the agreement and its context but also the wider and multiple power relationships that are in play. To date, the concern about minorities within minorities has focused mostly upon the relationship between the religious group and the State. Recent work originating from the Cardiff research has broadened this to extend the focus to group members who in Shachar's work are jointly governed by the group and the State but who also enjoy social agency.<sup>134</sup> However, there is a need to go much further than this.

FRCT provides a means by which this could be achieved. Relational autonomy by itself is insufficient. The best relational autonomy can do is to conclude that one of the parties was not autonomous as a result of pressure from the other party, the religious group or other contextual factors, and so the agreement should not be given effect. This is too blunt an instrument of analysis since it would mean that agreements would be set aside denying the agency of the parties. It is important to not presume a lack of individual autonomy when there is evidence of oppression or systematic subordination. Diana Meyers argues that individuals experiencing multiples forms of oppression and structural inequality can still be partially autonomous and it should not be assumed they are unable to be autonomous because of

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<sup>133</sup>Above n 97.

<sup>134</sup>R Sandberg above n 10.

structural constraints.<sup>135</sup> This is why a feminist approach needs to be applied to relational contract theory. A contractual approach that brings the relationship, and in particular, issues of power to the fore can potentially facilitate a more nuanced conclusion and solution. There should be other options beyond simply approving or rejecting the agreement or decision. In *AI v MT*<sup>136</sup>, Baker J commented that the case illustrated the principle in Rowan Williams' lecture that 'citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship'.<sup>137</sup> Baker J noted that 'at a time when there is much comment about the antagonism between the religious and secular elements of society, it was notable that the court was able not only to accommodate the parties' wish to resolve their dispute by reference to their religious authorities, but also buttress that process at crucial stages'. This is to be welcomed but more can be done and FRCT provides a way by which this can be achieved.

### **Conclusion: The Relative Importance of Autonomy**

The hyperbolic reaction to Rowan Williams' lecture has been repeated at regular intervals in recent years whenever any aspect of sharia law becomes newsworthy.<sup>138</sup> This has been reflected in headlines like 'Sharia courts "as consensual as rape", House of Lords told'.<sup>139</sup> However, as the academic literature resulting from the Cardiff research has shown, religious tribunals are actually as consensual as sex: the use of religious tribunals is sometimes consensual and sometimes not consensual.<sup>140</sup> This has led to a focus on what Shachar referred to as consensual accommodation:<sup>141</sup> the understanding that religious tribunals should only be permitted to operate where their jurisdiction is consensual in that parties have the freedom

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<sup>135</sup> D Meyers, above n 71.

<sup>136</sup> Above n 97.

<sup>137</sup> [35]

<sup>138</sup> Bowen notes that not all Islamic institutions seem to be so deeply troubling and discusses examples of 'banal sharia' such as the existence of mosques, halal certification, and Sharia finance: J Bowen, above n 92, chapter 11.

<sup>139</sup> *Daily Telegraph*, 20 October 2010, <<http://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rape-House-of-Lords-told.html>>. Baroness Donaghy actually expressed her concern that 'the definition of mutuality is sometimes being stretched to such limits that a woman is said to consent to a process when in practice, because of a language barrier, huge cultural or family pressure, ignorance of the law, a misplaced faith in the system or a threat of complete isolation, that mutuality is as consensual as rape': HL Deb (2012) c 1687.

<sup>140</sup> R Sandberg, 'Religious Law as a Social System' in R Sandberg, above n 13, 268.

<sup>141</sup> A Shachar, above n 4.

and capacity to make that choice. This article, however, has explored whether the focus ought to be on the issue of autonomy rather than consent. It was found that both the focus on group autonomy in religion law and individualised autonomy in family law were insufficient but that the second did point to the need to place concerns about religious tribunals within the broader context of significant changes within family law. This family law context presented a further and preferable notion of autonomy: the idea of relational autonomy as applied in the family law context by Herring.<sup>142</sup>

Herring's work is important in that it provides an understanding of autonomy based on the forming of relationships rather than the usual focus on the autonomy of the religious group or on the individualised autonomy of those who use religious tribunals. However, this does not go far enough, and there is evidence to suggest that a relational autonomy approach does not lead to significantly different outcomes in practice.<sup>143</sup> By applying relational autonomy to the context of religious tribunals, a number of shortcomings with the application of Herring's work were identified. In particular, it was suggested that the term was a paradox and that important word was 'relational' rather than 'autonomy'. This led to a discussion of relational contract theory as an alternative relational approach. The way in which English law regards collective religious freedom as contractual and the trend whereby religious agreements are increasingly being regarded as contractual showed the value of a contractual approach. However, relational contract theory was considered to pay insufficient attention to the power (im)balances that exist. This led to the adoption of an approach that builds upon both relational autonomy and relational contract theory employing a feminist perspective to direct critical fire at the power relationships that exist and are perpetuated at multiple levels.

Feminist Relational Contract Theory is preferable to the narrowly constrained notion of consent and the focus upon autonomy, even Herring's notion of relational autonomy. There is a desperate need for a change of approach in this area. The court's fixation on consent perpetuates an individualist notion of autonomy which is blind to all but the most blatant gender inequalities. As the President of the Family Law Division has said, 'it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the

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<sup>142</sup>J Herring, above n 24.

<sup>143</sup>L Buckley, above n 73.

[award]’.<sup>144</sup> This means that there is a very high threshold before the court will inspect agreements and decisions made. Feminist Relational Contract Theory could provide a way forward that uses contract to uphold and legitimise decisions made within religious tribunals, whilst recognising the instances in which individuals are not able to exercise power in decision making. This approach, created and applied in relation to prenups,<sup>145</sup> could be potentially applied to a number of other agreements and relationships within and outside family law. It has the potential to encourage judges (both religious and civil) to place the claim before them into its wider context, taking into account a number of interlocking relationships over a period of time and playing particular attention to the power dynamic to reach conclusions and solutions that are more ambitious than the existing binary outcomes. In an age where the concept of the family and the role of family law are in flux, Feminist Relational Contract Theory even has the potential to demarcate the boundaries of family law, determining which relationships are subject to regulation by being the product of relational contracts and providing an ambitious way by which disputes can be resolved that recognises that relationships are both legal and social constructs.

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<sup>144</sup>S v S (*Financial Remedies: Arbitral Award*) above n 94 [21].

<sup>145</sup>S Thompson, above n 17.