



The Arbitration and Mediation Services (Equality) Bill

A briefing from the British Academy Policy Centre

On 19 October 2012 this Private Members' Bill, introduced by Baroness Cox of Queensbury, will have its second reading in the House of Lords. The Bill is intended to prevent discrimination against women, in sharia courts or councils in the UK, and to criminalise anyone falsely claiming or implying those courts or councils have legal jurisdiction over family or criminal law.

The precise reach of the Bill is unclear. However, it raises a number of wider issues about how the state should react to the presence of law-like institutions which are used by members of minority groups within society. These law-like institutions are misleadingly called 'parallel legal systems' but they are more accurately described as 'minority legal orders'. They have become a topic of importance in the UK because of post 9/11 and post 7/7 media attention and popular concern about Islam and sharia law.

In April 2012 the British Academy Policy Centre published [Minority legal orders in the UK](#), a report written by Professor Maleiha Malik, which provides a detailed academic examination of those issues, possible strategies that may be used by the state in dealing with them, and the research evidence available.

All Policy Centre publications put rigorous, peer reviewed academic evidence into the public sphere to open up and inform policy and public debate. Views expressed in the report are those of the author and, while not necessarily endorsed by the British Academy, are commended as contributing to public debate.

This briefing highlights, with page referencing, the areas of the report [Minority legal orders in the UK](#) that are particularly pertinent to the Bill.

About minority legal orders

1. There are substantial gaps in our understanding of how minority legal orders are being adapted, interpreted and applied, and we know very little about the experience of their users (53). There is need for research on the interrelationship between these orders and the state legal system (51). This argues for extreme caution in proposing legislation that can significantly impact on any of these orders.
2. While attention is often focused on the role of Islamic law and institutions, there are a number of similar legal orders, for example, those used by Jews, Catholics (10) other Christian denominations (16), and the Hindu and Sikh communities (19). In the case of Islamic law and

institutions, there is a wide variety of institutions (17, 25), and this creates the possibility that users can exercise a degree of freedom in choosing which best suits their needs (18, 25).

3. Sharia tribunals are not recognised by state law, no legal authority has been conferred on them by state law, and their decisions are not automatically enforced by the state's courts (17). Where a sharia tribunal decision is in conflict with state law, including criminal law, the state law has precedence and can be enforced in the normal way. In the sharia tribunals that have been studied by academic researchers, none of them claimed to be applying state law or were seeking state recognition or exemption from the application of the state law including criminal law (52).

The demand for religious tribunals

4. There is evidence that religious tribunals provide an important service for Jews, Muslims and Christians (52) and that there is considerable demand for Muslim religious tribunals which can grant Muslim women religious divorce and the permission to remarry within their faith (28), despite recalcitrance or refusal by their husband (17).
5. There is evidence that Muslim women use these tribunals voluntarily rather than as passive victims (29) although the research also confirms that Muslim women want significant improvements in the services and treatment that they receive.
6. Religious tribunals, including sharia tribunals, provide a religious and spiritual service to religious women that cannot be provided by state law and state institutions. To this end, religious institutions enhance the individual and collective religious autonomy of some women for whom it is important that their marriage and divorce is recognised 'in the eyes of God' (28-29, 52).

Are tribunals in women's interests?

7. The UK has a constitutional framework that recognises key individual rights such as religious freedom under Article 9 of the European Convention on Human Rights. It also safeguards the right to gender equality that is protected by international, European and domestic law. Therefore, although individual women may consent to using religious tribunals it is also important to ask the question whether the tribunals safeguard their interests. As the report puts it, 'whether or not a minority legal order secures individual autonomy or equal protection for its members becomes a crucial issue.' (26)
8. As a 'minority within a minority', women (as well as other groups) can be at risk because 'control of women ... is a recurring feature of traditional cultural and religious communities' (28), and there are power hierarchies within groups (29). As minority women are also full citizens of the state, the state is obliged to protect them from such harms even if they voluntarily participate in the minority legal order (29).

What should the UK state do?

9. In considering how the UK state might respond to minority legal orders, the report considers six approaches, which will often overlap: prohibition, non-interference, recognition through

10. Prohibition or criminalisation of minority legal orders is not considered a viable option, for principled and pragmatic reasons. The liberal state's values demand that space be given for people to express their identity, and religious divorce is an invaluable service, as well as an aspect of religious freedom, that the state cannot provide. Furthermore, attempts at such prohibition are likely to be evaded, to be expensive to implement and alienate substantial numbers of Christians, Jews, and Muslims (33-34).
11. The preferred option is to apply cultural voluntarism and mainstreaming on a pragmatic basis. These build on current legal structures and allow minority groups to operate their legal order among themselves, without giving them the endorsement of state law, but providing opportunities for individuals to access the state system where it applies to them or where their actions have legal consequences under the ordinary law (39-40). The state retains the power to withhold such consequences from activities that conflict with liberal constitutional norms and some such activities may be completely prohibited particularly if they cause harm (40-41). But any use of the criminal law must rest on a clear understanding of the practice, its role within the community, and consideration whether alternative strategies might be more appropriate and successful.
12. This allows flexibility: for the state, to decide on a case-by-case basis whether to intervene, and to individuals, to move between groups, and between such groups and the state system (42). In many cases, religious women want to stay members of their group, and they want to use the services provided by a minority legal order. Nevertheless, they also want a better service, to renegotiate the terms of their membership and to exercise greater power to criticise and interpret the religious rules within the minority legal order.
13. Cultural voluntarism can be supplemented by a degree of 'mainstreaming' whereby state courts directly apply elements of minority legal activity, for example by incorporating marriage practices of the group into its provisions for entering legally recognised marriage (47), or incorporating some Islamic mediation procedures into the procedures to be followed before making an application to a state court in a family matter (48). There is evidence that a large number of Muslim marriages are not formally registered. They will not be legally recognised and the parties will have limited access to the state's family justice system (47). If more Muslim marriages were legally recognised, the opportunities for the parties to access that system alongside their religious system would be enhanced, and this could influence the way the religious system is operated (43).
14. The state has an obligation to support those religious women who voluntarily choose to use a minority legal order but who are caused harm, who want subsequently to resile from an unfair agreement or who want a better service. There are a number of legal remedies that are already available to these women: they can challenge decisions made under the Arbitration Act 1996; discrimination law, and the public sector equality duty introduced by the Equality Act 2010,

already covers the situation of these religious women users of minority legal orders (43-44).

15. The key challenge is to understand and support women users of minority legal orders rather than introducing new legislation that replicates existing state law. Where a minority legal order has caused religious women harm there should be full enforcement of state law, including the existing criminal law. The Equality and Human Rights Commission (EHRC), as the national statutory body with responsibility to safeguard both religious freedom and gender equality, is the appropriate body to regulate this issue.

Future policy

16. The EHRC should introduce a benchmark within its Equality Measurement Framework to capture the experience of women users of minority legal orders. The results should be published as part of the Triennial Review which monitors progress on equality, dignity and respect for UK citizens (44). This could form the basis for considering whether the EHRC has a role in supporting religious women who are users of minority legal orders, as suggested by the EHRC's recent research on understanding equality and human rights in relation to religion and belief.¹

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[Download *Minority legal orders in the UK*](#)

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¹ Alice Donald *et al.*, *Religion or belief, equality and human rights in England and Wales* (EHRC, 2012).