

# MINORITY LEGAL ORDERS IN THE UK



Minorities, Pluralism and the Law

**Maleiha Malik**



BRITISH  
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# Executive summary

This overview is a selective rather than a comprehensive analysis of minority legal orders. Its aim is to open up, re-frame and encourage not only academic and policy research but also public debate about minority legal orders in liberal democracies. Although it draws on international experiences, its primary focus is the United Kingdom.

## 1. Pluralism and minority legal orders

- Minority legal orders (MLO) are often misleadingly presented as ‘parallel legal systems’, and as constituting an ominous threat to liberal democracies. They have become a topic of interest in the UK because of post 9/11 and 7/7 concerns about Islam and sharia law; they have also become more important because of increased migration, demographic change and cultural diversity.
- Minority legal orders are not a new phenomenon. As early as the medieval period, Europe had ‘overlapping bodies of law with different geographical reaches; coexisting institutionalised systems, and conflicting legal norms within a system’ (Tamanaha, 2008: 378).
- Research carried out in this area has focused on the practices of Jews, Christians and Muslims but Roma, Hindu and Sikh communities could also be considered to have minority legal orders.
- The liberal nature of the state, as well as constitutional and human rights commitments to protect minorities, mean that it is not viable to openly adopt policies that lead to persecution, exclusion or discrimination against a minority group. Moreover, it is now considered to be reasonable for minorities to make requests for the accommodation of some of their cultural or religious practices, including some practices that they consider to be part of their community based ‘law’.

## 2. What is a minority legal order?

### *Law in a minority legal order*

- A MLO can be defined around two aspects: first, by its distinct cultural or religious norms; second, by some 'systemic' features that allow us to say that there is a distinct institutional system for the identification, interpretation and enforcement of these norms. Whether or not a community has a MLO may be a matter of degree rather than a clear cut issue.

### *Legal order of a minority*

- In terms of political power, the state is the sovereign legal system. Other forms of normative social regulation (promoting particular common values or standards of behaviour) that exercise authority over the lives of individuals are 'subordinate' or a 'minority legal order', and are subject to regulation by the state legal system. Nevertheless, there may be some situations where the minority legal order commands greater legitimacy and authority within the minority community than state law.
- The minority legal order may have a large number of diverse traditions; however, this internal plurality may be hidden to those outside the MLO, when those with the most power within the MLO back one solution which is then presented as the one and only governing norm that is authentic and legitimate.
- MLO in the UK, mainly, accept the supremacy of the state system. There is also a high degree of interaction between MLO and the state system. So, it may be more accurate to describe MLO as a 'minority' or 'subordinate' legal order.

## 3. Minority legal orders in a liberal democracy

- Membership of groups in liberal democracies is becoming more complex. There is fluidity and hybridity of cultural exchange, with constant movement of individuals between different cultural and religious communities as well as different social spheres.
- It is increasingly accepted that individuals have choices about their identity and group membership, but the reality is that groups can exercise considerable power over their individual members. Special attention needs to be paid to the right to exit to ensure that individuals do not come within the control of a minority legal order without their consent. There are also more complex situations where

individuals want to remain members of a minority group, but they also want to renegotiate the terms of that membership.

- Some 'minorities within minorities' such as women, the young and elderly, gays and lesbians, will require special attention because they may face social pressure to comply with norms within their social group, but they lack the power to secure their best interests. Women may need special attention; minority legal orders often focus on family law precisely because these norms control women and enable the preservation of group identity through child-rearing. The liberal state is under an obligation to act to protect vulnerable persons, such as women, from harm. A focus on threshold criteria such as 'significant harm' could provide a guide as to when the state should intervene in a minority legal order.

#### 4. Possible UK state responses to minority legal orders

A liberal state faced with a minority legal order can choose from either one, or a combination, of the following approaches, which will often overlap:

- A. Prohibition of a minority legal order. This may not be a valid option for several reasons: out of principle, because the MLO may be important for the individual's exercise of autonomy. It also may not be practical. The state system may not have the power to ensure compliance and the MLO may continue to defy the state despite prohibition.
- B. Non-interference with a minority legal order. This may be problematic where the MLO causes significant harm that justifies regulation by the state. A right to exit will often not be a sufficient guarantee that the rights of individuals within minority legal orders, especially the more vulnerable such as women, gays and lesbians, are protected.
- C. Recognition of the minority legal order through granting minority group rights or establishing a personal law system. This has the disadvantage of entrenching the MLO as an 'identity marker' that is resistant to dynamic cultural change. It makes it more difficult for individuals to move between different cultural and religious communities and social spheres.
- D. Transformative Accommodation (TA). This is a system of joint governance that allows individuals to be both citizens with state



protected rights and members of a minority group who can choose to enjoy their cultural or religious group membership. Jurisdiction may be divided between the state and the MLO in matters such as family law. This institutional design can, in turn, also ensure internal change through mutual influence between the state and minority legal order. However, it has limits. TA requires a definition of group membership, power structures and group norms in advance so that institutional arrangements such as TA reversal points can be clearly delineated; this is not always possible. It also requires a complex system of incentives and penalties to ensure the MLO changes its entrenched norms rather than lose its members. In turn, the state has to allocate resources to develop a regulatory mechanism that it enforces, especially to safeguard vulnerable individuals such as women who lack power in a system of self-regulation.

- E. Cultural Voluntarism. This allows the minority legal order to function but maintains the right of state law to pick and choose whether, and how, it wants to recognise and accommodate the MLO, when enforcing its own liberal norms. Unlike transformative accommodation, it does not put into place a complex institutional system of joint governance that requires a clear and static delineation of group membership or group norms in advance. The state can use the principle of severance to decide which substantive issues conform to state 'liberal' public policy and which do not. (Severance involves the separation of the different norms and rules of behaviour that are contained within a minority legal order so that each can be assessed and evaluated independently of the whole system.) However, this flexibility can create uncertainty as to when and how the state will intervene.
- F. Mainstreaming goes one step further than cultural voluntarism. It actively endorses, incorporates or adopts the social norm of the minority legal order within the state legal system, and is based on the assumption that the norm does not conflict with fundamental constitutional principles. This could be done through techniques such as widening existing legal concepts, designing legislative solutions or granting an exemption. Mainstreaming can be successful where it is the result of active cooperation between the state and the minority legal order to solve a particular problem. For example, the Divorce (Religious Marriages) Act 2002 has assisted in providing a solution for those Jewish women who are unable to gain a divorce where their husbands do not give consent. The disadvantage of

this system is that minorities would have to convince the state system or a majority of their co-citizens that their cultural or religious practice should be accommodated. This can be difficult if minorities lack political power and are not able to participate in democratic processes. The advantage is that majorities would feel that they have been part of any process to grant recognition or accommodation to the MLO, giving the MLO greater credibility in the eyes of all citizens.

## 5. Concluding comments

We know that minority legal orders are already operating in the UK, but future academic research is required to identify which communities, other than Christians, Jews and Muslims, can be said to have MLO. Academic research also needs to focus on: the experience, and impact, of MLO on women users; the impact of state policies on the procedures and substantive rules of the MLO; and ways in which MLOs may offer principles or procedures that have some perceived advantages over the state system.

Future policy research could focus on identifying areas of co-operation between the state system and the MLO. For instance, devising solutions for greater recognition of religious marriages and religious divorce within the mainstream system which obviates the need for women to use the MLO.

Although there are good reasons to encourage cooperation between the state and minority legal orders, research needs to consider the impact of the current extreme financial pressures on public funding for access to justice. For instance, mediation services run by untrained mediators might fail to accommodate the distinct needs of users from minority groups. This could result in individuals turning to minority legal orders, and leave them without the protection that they would enjoy within the state system. Statutory bodies such as the Equality and Human Rights Commission are ideally placed to examine the impact of minority legal orders on users such as women. They are also well placed to develop a system for regulatory oversight to support users, such as women seeking a religious divorce, who want to challenge the procedures or decisions of a minority legal order.

# Introduction

Minority legal orders have become a controversial topic in recent years. Archbishop Rowan Williams' statement in February 2008 that some religious communities such as British Muslims could share jurisdiction with state law has been a catalyst for subsequent public debates. The statement was followed by public denunciations of Islamic (sharia) law and 'decontextualisation, exaggeration and misinformation' (Moore, Mason and Lewis, 2008: 32).

Since 9/11 and 7/7, public debate about minority legal orders has focused on Islamic law (sharia) and Muslims. Muslims have often been presented as an aggressive threat to liberal democracies because they want unilaterally to impose their values on the majority population. This assumption is encouraged by the popular association of the sharia with cruel criminal punishments, such as the stoning of women or the amputation of limbs, which are sometimes implemented by some Muslim majority countries (Moore, Mason and Lewis, 2008: 32–34). Although these extreme examples relate to foreign countries, the international context continues to have a considerable influence on the domestic debate. In this context, minority legal orders have been misleadingly presented as 'parallel legal systems' that are an ominous threat to liberal democracies. The framing of the contemporary debate as a problem of stoning or the amputation of limbs not only distorts an analysis of the claims of British Muslims,<sup>1</sup> but also has detrimental consequences for other cultural and religious minorities, even if they are not the ultimate targets of concerns, anxieties or legal regulation. A reasonable public

1 Moore, Mason and Lewis concluded, 'We found journalists' discussion of Sharia law in Britain regularly and consistently focused on violence, barbarism and irrationality. In 52% of stories, we found the dominant frame to be either concerned with Islamic threat to British culture, the delegitimation of Williams, or the construction of Islam as violent. [...] In our analysis of the acts that newspapers associated with Sharia Law, we found that the three most frequent were stoning (26%), limbs/limb removal (16%) and beheading/execution (11%) [...] This emphasis on brutality was underpinned visually in news reports, which depicted stoning, flogging and beheading in Iran and Afghanistan.' (Moore, Mason and Lewis, 2008: 32-33).

debate about the relationship between minority legal norms and state law has not been possible. This is unfortunate because minority legal orders do not exist in a 'parallel' social world that is unrelated to state law or the lives of mainstream populations. They raise questions about a wide range of issues that should be debated because they are of critical importance, not only for minorities but for all citizens within increasingly diverse liberal democracies.

In the UK, there are religious institutions that interpret, apply and enforce some aspects of religious law. Courts of the Church of England are treated as part of the state legal system. Jews, Muslims and Catholics have established religious councils that deal with civil disputes but these are not recognised by state law. Any person who commits a criminal offence is liable to be prosecuted for that offence when it is in the public interests to do so irrespective of the norms of religious law or the decision of a religious council. In some civil matters, individual members of religious communities have the option of voluntarily following the decisions of their own community based institutions. These decisions are subject to state law and they cannot be automatically enforced through the state legal system.

In some situations, religious based law and religious institutions have provided a more efficient service for the regulation of disputes. For example, the application of sharia based principles to develop financial products such as Islamic mortgages has now been mainstreamed through the work of leading financial institutions such as HSBC Amanah, which is the global Islamic financial services division of the HSBC banking group. At a community level, there are also examples of non-Muslims using Muslim religious arbitration to resolve their commercial disputes because they perceive them to be cheaper and more efficient than seeking a remedy through the state legal system.<sup>2</sup>

Minority legal order is a non-state normative field of social action that shares some of the characteristics of state law. Section two sets out a detailed definition of what is meant by minority legal order. Here it is worth noting that 'minority legal order' may refer to cultures or religious groups that regulate their social life by reference to norms that are coherent and consistent, rather than random or arbitrary. 'Law'

<sup>2</sup> The Muslim Arbitration Tribunal (MAT) has stated that there had been a 15% rise in the number of non-Muslims using sharia arbitration in commercial cases in 2010. See Afua Hirsch, 'Fears over non-Muslims' use of Islamic law to resolve disputes' *Guardian*, 14 March 2010.

used in the context of minority legal orders is a cause for considerable controversy and confusion. In some situations, the state legal system may recognise or incorporate the minority legal order's norms, with the consequence that these norms become law in the ordinary sense because they become part of the official state legal system. On the other hand, some individuals or groups such as Jews and Muslims may refer to themselves as having distinct 'law' or a 'legal tradition'. This self-understanding, however, may be a very different concept of 'law' as compared with state law.

For some minority groups 'law' is a term that refers to a 'folk concept': that is, it refers to norms that permit guidance and regulation of individual and community conduct. Different cultural communities, and especially religious communities, may have a different perception of what is meant by 'law' within their own traditions. In some situations, there may be no necessary tension or conflict between their understanding of themselves as having 'law' and the state's claim that the national legal system is 'sovereign'. Moreover, the claim by a cultural group that they have 'law' or a 'legal system' does not have to be, necessarily, seen as a threat to the state's sovereignty over all its citizens. In many situations, the cultural group's claim to have 'law' or a 'legal system' will not be an ideological claim to political or legal power. Many of these cultural or religious groups do not seek to compete with the state, or to control public policy or social arrangements for the whole political community. In most cases, the claims of 'law' or 'legal system' by minority cultural or religious groups are strictly limited to a concern with their own group members, usually seeking to define and perpetuate their cultural, religious or ethical custom over a period of time. For instance, the group may seek to define how to create or dissolve families within their community rather than imposing these norms on all citizens. This focus on perpetuation and preservation of culture does, however, raise an issue about the control over the individuals within these communities. Where these cultural or religious customs cause harm to individuals within the group, it may be justified for the state to intervene in order to safeguard individual constitutional or human rights. A concern with the harmful consequences of minority legal orders, especially for women, has recently led to the introduction of the Arbitration and Mediation Services (Equality) Bill that completed its first reading in the House of Lords on 7 June 2011 (Eekelaar, 2011).

Although questions about minority cultural or religious norms also arise when we discuss the accommodation of cultural and religious

minorities, the claim by some minorities that they have their own system of 'law' raises a distinct set of problems. Some of these issues are often discussed under the rubric of multiculturalism, when we consider state attitudes towards diversity and non-state legal forms, or the quality, reach and relevance of state law for minorities. Minority legal orders also raise practical questions for political and legal institutions about the impact of privatisation of legal services and reduction of public expenditure in the provision of justice to minority communities. The mainstream legal system also has to take this issue seriously because it needs to be able to communicate to all citizens to command their loyalty, respect and compliance. The topic of minority legal orders raises deeper theoretical problems about the appropriate balance of power between the state, civil society and private individuals: whether political and other forms of authority (such as religious authority) should share power or whether one has to 'trump' the other. Where the norms of the minority legal order conflict with cherished liberal values or where there is a 'strong' political claim to 'opt out' it will also be important to decide what we mean by liberalism. Should we impose a 'muscular' politics in which minorities have some space to pursue their own way of life but are explicitly bound by liberal values, or is it preferable to adopt a 'pluralist' liberalism that provides a more expansive space for other ways of living?

This overview is a selective rather than a comprehensive analysis of minority legal orders. Its aim is to open up, re-frame and encourage not only academic and policy research but also public debate about minority legal orders in liberal democracies. Comparative experience, especially the Canadian debate about banning religious arbitration in Ontario, is important (Macklin, 2005; Shachar, 2008), but although this overview draws on international experiences, its primary focus is the United Kingdom. The transnational context is increasingly important and it is discussed throughout the report, but the analysis does not engage directly with the question of the recognition of foreign laws. This overview also does not focus on examples of private regulation and quasi-legal activity such as commercial arbitration, private policing, judging or privately run prisons that create a body of rules.

State law can itself sometimes be 'plural'. All political communities have a number of different sources of law. Every social order also has a multiplicity of legal norms and orders from the local to the global level. For instance, municipal (local) laws will co-exist with national state laws or international and transnational laws. In the UK, national state-based

law is one predominant form. We are also comfortable discussing other types of legal system as operating within the national jurisdiction, such as European Law, Public International Law and Private International Law. Scotland and Northern Ireland have their own distinct systems of law. More recently, devolution has led to Scotland and Wales reserving jurisdiction over some matters.

This overview does not focus on European Union law, Private International Law or devolved sources of plurality within the UK legal system. Rather, minority legal orders are discussed in the context of, and related to, increasing cultural, ethnic and religious diversity. This overview frames the topic of minority legal orders in a new way to increase understanding and provide one way for policymakers to analyse contemporary social problems. It discusses a range of minority communities including, but not limited to, Muslims. It does not provide new empirical evidence about minority legal orders, although it does draw on existing research. More specifically, the analysis develops through a discussion of four inter-related themes. First, it discusses the experience of pluralism that gives rise to minority legal orders in the UK. Second, it proposes a definition of a minority legal order that is relevant for liberal democracies. Third, it sets out a liberal framework for evaluating minority legal orders. Fourth, it explores the advantages and disadvantages of different state responses to minority legal orders. Finally, in concluding comments, the overview considers priorities for future research about minority legal orders in the UK.

# 1 Pluralism and minority legal orders

In the UK, minority legal orders are not a wholesale import or transplant of a foreign legal system. Rather, minority legal orders have evolved organically out of the beliefs and voluntary conduct of minority communities. Cultural diversity, which in this paper also includes ethnic and religious diversity, has always been a feature of social life in the UK. Post-war immigration, especially from non-Western cultures, has intensified the scale and nature of this diversity. Britain has a wide range of cultural, religious and social groups. These include Christian traditions, as well as minorities such as Jews, Roma and a Muslim presence since the early modern period. Although the predominant focus of the debate about minority legal orders has been on religious arbitration for Jews, Christians and Muslims, a range of other 'micro' minorities – such as Baha'is, Buddhists, Hindus, Jains, Rastafarians, Roma, Sikhs and Zoroastrians – also have systems for normative social regulation. An analysis of minority legal orders needs to be especially alert to the fact that these 'micro' minorities, as well as heterodox groups within larger recognised minorities, are not able to influence general legislation and public debates as effectively as more powerful minorities.

## Legal pluralism – past and present

Recent experience of cultural diversity, associated with twentieth century migration, has led to concern about minority legal orders. Yet, as Brian Z Tamanaha notes, drawing on the work of legal historians such as Raoul van Caenegem, Harold Berman and Walter Ullmann, minority legal orders are not a sudden and new phenomenon:

*'[...] the mid to late medieval period was characterised by a remarkable jumble of different sorts of law and institutions, occupying the same*



*space, sometimes conflicting, sometimes complementary, and typically lacking any overarching hierarchy or organisation. These forms of law included local customs (often in several versions, usually unwritten); the law merchant – or lex mercatoria – the commercial law and custom followed by merchants; canon law of the Roman Catholic Church; and the revived roman law developed in the universities’. (Tamanaha, 2008: 377).*

Significantly, in the past a single judge had great flexibility in resolving disputes by applying different legal rules depending on the nature of the dispute because as well as separate and co-existing legal systems, a single system or judge could apply distinct bodies of law. In some instances, under the ‘personality principle’, the personal identity of the litigants could be relevant, so that a judge could apply different laws depending on whether the individual was Frankish, Burgundian or a descendent of a Roman Gaul. In Europe, ‘The mid through late Middle Ages thus exhibited legal pluralism along at least three major axes: overlapping bodies of law with different geographical reaches; coexisting institutionalised systems, and conflicting legal norms within a system’ (Tamanaha, 2008: 378).

This historical experience challenges the dominant view in modern nation states that law is a uniform system administered by a centralised state. The Ottoman-Turkish ‘millet’ system is often used as a historical comparison to illustrate the viability of a plurality of legal orders co-existing with state law within one political community. Another comparison is the European historical experience, which also confirms that minority legal orders could co-exist with state law. The assumption that there must be ‘one law for all’ is testimony to the success of the modern state-building project within which a unified law and legal system are crucial components of the state-building process. This vision of the nation state as a unified hierarchical legal system is one, but not the only, possible way to organise political communities. During this process, especially during the consolidation of the nation state in the seventeenth and eighteenth centuries, the various forms of law that flourished during the medieval period were gradually absorbed or eliminated into a unified centralised law and legal system that extended over vast geographical areas. Nevertheless, this system did not eliminate the diversity of legal norms associated with cultural diversity. Customary norms and religious law did not disappear altogether but were, rather, banished to the private realm. There was a transformation in their status by the state legal system, from previously recognised autonomous legal status that enjoyed equal recognition in important aspects, to norms that were socially influential and enforceable

but which carried a different (subordinate) status as compared with state law. Crucially, law itself went through a transformation, from being viewed as reflecting an enduring natural order or an established custom, to increasingly becoming understood in utilitarian terms as an instrument to pursue social or collective objectives. Other cultures continued to have concepts of law (natural law or folk law) that were viewed as relevant for the private sphere, but state law increasingly came to dominate the field as the only legitimate public expression of what was legitimate ‘law’ or a legal system (Tamanaha, 2008: 381).

## Which minorities?

An historical perspective allows us to understand how minority legal orders have emerged organically from the beliefs and practices of minority communities in the UK. Jews, Christians and Muslims are the three religious groups most commonly assumed to have a ‘legal order’. Courts of the Church of England are a clear case of ‘legal order’ because they are considered to be part of the state court system. Denominations such as Methodists, United Reformed Churches and Baptists also have systems for normative regulation which either operate like canon law or which are linked to local churches. Other Christian religious communities such as Catholics and non-conformists also established their own decision-making structures, such as the courts associated with Roman Catholic dioceses that are governed by their Code of Canon Law.

Jews have been present in the UK from around the eleventh century. Jews, like Muslims, are a religious community that has a strong sense that they have their own distinct legal tradition, although this ‘law’ may be different from the modern conception of state law. Jewish religious rulings on personal issues of faith are not centralised for British Jews. Each branch of Judaism has its own rabbinic authority with its own interpretations of Jewish Law. The oldest Jewish authority, the London Beth Din, established in the eighteenth century, is an Orthodox authority representing a significant section of the Jewish community. There are also other Orthodox, ultra Orthodox and liberal Jewish religious movements that run their own separate decision-making bodies.<sup>3</sup> A key

<sup>3</sup> One recent example of applying Jewish law within a defined territorial space was the claim by some members of the North London Jewish community to establish an eruv (a ritual enclosure that some Jewish communities construct in their residential neighborhoods). For a discussion of this incident see chapter 6 of Davina Cooper (1998), *Governing Out of Order*, (London, Rivers Oram Press).

function of these Batei Din is the supervision of religious divorce according to Jewish law, without which an Orthodox Jewish spouse cannot remarry irrespective of the grant of a civil divorce. Though the Beth Din supervises this process, the religious divorce remains an act of the husband. This is different to the situation in an Islamic divorce granted by a religious tribunal, where the religious authority can grant a divorce irrespective of the consent of the husband (Jackson *et al.*, 2009).

Muslims, who share a common view of religious law with Jews, have gradually over a period of time established dispute resolution structures that have usually emerged around local mosques. These institutions have emerged organically as Muslims have become a more settled religious minority, in order to meet the needs of local communities, especially the need for rulings and guidance on family and civil matters. These bodies are sometimes labelled 'sharia tribunals'. They are not centralised and reflect plurality within the British Muslim community. They range from small informal 'one man' service providers to well-established tribunals, such as the Sharia Council of the Birmingham Central Mosque or the Muslim Arbitration Tribunal, providing religious-based arbitration in complex institutions. These community-based institutions deal with a wide range of subject matter about religious matters, as well as providing more general advice, mediation and conciliation. These 'sharia tribunals' are not recognised by state law. Although individuals may voluntarily choose to follow the decisions of these tribunals, their decisions are not automatically enforced in state courts. Sharia tribunals have no powers to pass judgments on criminal law matters. Any person who commits a criminal offence is liable for prosecution in the normal way irrespective of the decision of a sharia tribunal.

Significantly, the religious leader in these 'sharia tribunals' can grant a Muslim woman a divorce without the permission or consent of her husband. A significant function of these institutions, therefore, is to grant Muslim women a divorce despite recalcitrance or refusal by their husbands. Given this function of religious tribunals it is not surprising that research has concluded that there is considerable demand for Muslim religious tribunals granting a religious divorce amongst Muslim women (Shah Kazemi, 2001; Bano, 2007). The Muslim women who are users of these tribunals are a diverse group including both settled women and newer immigrants. These women are usually seeking a practical resolution to their need for a religious divorce rather than making an 'all or nothing' ideological decision to choose Islamic law or sharia tribunals to govern all aspects of their lives (Bano, 2007; Bowen, 2009).

Bano has observed in relation to the Muslim women she interviewed that they were very sophisticated in using councils for their particular purpose, including taking their case to another council if they did not like a decision (Glazer, 2012: 12).

Jews and Muslims are closely associated with religious law. They are also religious minorities who are at risk of prejudice because of their attachment to religious law and the public perception that they are separating themselves from mainstream institutions to follow their own legal system. In the past, a recurrent stereotype about Jews was that their attachment to the Old Testament and their religious law was evidence of 'barbaric' customs surrounding diet, slaughter of animals and the treatment of women (Herman, 2010). Similar processes can be observed in the context of Muslim minorities, especially after 9/11 and 7/7. In public debates and in the media, British Muslims are often presented as a threatening and 'barbaric' social group because of their religious attachment to Islamic legal norms (Moore, Mason and Lewis, 2008: 32–34; Bamforth, Malik, O'Conneide, 2008: chapter 12).

Since 9/11 and 7/7, Islamic law has become a focus for political extremism by Muslims and non-Muslims. A vicious cycle has emerged in which Muslim extremist groups such as Islam4UK and Al Muhajiroun demand implementation of the sharia and a 'Islamic state', thereby adding fuel to the prevailing discourse of racist far right groups that object to 'Islamic law in the UK' and the 'Islamisation of Britain'. There is no evidence that groups such as Islam4UK or Al Muhajiroun have any substantial following within the Muslim community.<sup>4</sup> Yet, in media discourses and the popular imagination it is often misleadingly assumed that significant numbers of British Muslims are seeking the wholesale import of a foreign legal system that requires amputation of limbs or the stoning of women, and which will be imposed on all British citizens.<sup>5</sup>

Jews, Christians and Muslims have well developed institutional systems for resolving disputes. It is not surprising that academic and policy

4 Muslim leaders at one of Birmingham's largest mosques supported the Home Secretary's ban on Islam4UK and its parent organisation Al-Muhajiroun, which both call for the establishment of an Islamic state and the implementation of sharia law. See 'Muslim Leaders support the Home Secretary's ban on Islam4UK', 16 January 2010, *Birmingham Mail*.

5 Maulana Shahid Raza (Chair of the Mosques and Imams National Advisory Body), a leading Muslim scholar, stated that 'We are not asking for the introduction or the acceptance of Islamic criminal law in this country'. See ul Hoque, A., and Shah, P., *Religare: UK Report on Fieldwork* 25–26, December 2011 (copy on file with the author).

research has focused on these groups. Nevertheless, there is increasing evidence that other social groups are involved in forms of normative social regulation or dispute resolution that could be classified as a minority legal order. These groups may be custom-based rather than including 'law' traditions as in the case of Jews, Catholics or Muslims, but they will often have frameworks for normative social regulation that are based on kinship and communal networks. One example is the Roma (gypsy) community, which has been present in Britain since around the thirteenth century. Roma communities avoid recourse to national state and legal structures. They manage conflict within their own communities without recourse to formal systems of justice by applying a Romani code that is often enforced via an informal gathering of clan leaders or a more formal Kris (or Kris Romani), a traditional court for conflict resolution (Weyrauch, 2001). Hindu and Sikh communities also have normative social regulation that requires internal consultation, interpretation and decision-making. The Hindu Council of the UK has an online advisory service called 'Ask The Pundit' which regularly interprets Hindu norms for those who ask questions. Hindu and Sikh communities also have 'panchayat' (a decision-making body for their community), which deals with a wide range of community and advisory issues.

## The challenge of diversity

Whilst it is true that there have always been minority legal orders, the present context is different in significant respects. At a descriptive level, there has been a change in the nature of diversity in the UK. Although the experience of immigration is not new, the scale and intensity of the global movement of people in large numbers from one nation to another has become more intense. Moreover, the fact that this movement is from non-Western into Western nations means that a country such as the UK now has to also address issues of diversity that emerge because of the presence of non-Western traditions. Although developing a sharp distinction between Western and non-Western can be problematic, it is relevant to an analysis of minority legal orders because it increases the complexity of understanding and accommodating cultural and religious practices. The increasing presence of non-Western communities exaggerates the 'geographical reach' between state law and non-state law. UK nationals may refer to non-UK law in the Middle East, Africa or South Asia to resolve their disputes, thereby increasing the likelihood of the 'import' of foreign legal concepts, as well as the co-existence of state and non-state legal concepts, norms and institutions. For instance, a

Muslim religious tribunal may refer to precedents in Pakistan or Malaysia, or a Jewish religious tribunal may refer to decisions from Israel.

There have been significant changes in the nature of the state's response to cultural and religious diversity. During earlier historical periods, it was not considered to be problematic that state law and policy were openly hostile towards some minorities. In relation to Jews in Britain, for instance, by the mid to late thirteenth century they had the legal status of the King's chattel and there was a set of laws in place that resulted in persecution, exclusion and discrimination against Jews. These laws included restrictions on land ownership and the employment of Christian servants. Jews were also not allowed to pray at a volume audible to Christians, and they could be required to wear a yellow badge and pay special taxes (Herman, 2011: 10). Herman has summarised the consequences of state policy during this period as 'By the 1270s and 80s, Jewish communities in England were largely impoverished, undergoing coerced conversion, subject to violence, or in exile'. (Herman, 2011: 10; Moore, 2007).

Now, however, the liberal nature of the state, as well as constitutional and human rights commitments to protect minorities, mean that it is not viable to openly adopt policies that lead to persecution, exclusion or discrimination against a minority. This shift means that minority groups now frequently claim that some of their legal norms or legal systems should be 'recognised' or 'accommodated'. One consequence is that the power of the state to assimilate minorities into majoritarian norms, by force if necessary, may be resisted. Moreover, it is now considered to be reasonable for minorities to make requests for the accommodation of some of their cultural or religious practices, including their 'law'.

## 2 What is a minority legal order?

### Law in a minority legal order?

The term 'law' in the context of minority legal orders is a cause for considerable confusion. It is of crucial importance for public debates to recognise that in a large number of situations a cultural or religious community is using a 'folk' concept of law to describe its normative practice rather than competing with, or displacing, state law. Therefore, despite the public anxiety that minorities are following their own 'parallel' laws that could be a threat to the unity of the state, there is no necessary tension or conflict between a minority community's understanding of itself as having 'law' and the state's claim that the national legal system is 'sovereign'. In many situations, the cultural group's claim to have 'law' or a 'legal system' is neither an ideological claim nor a claim for political or legal power.

One reason that the term 'law' or 'legal system' is now often applied to non-state norms and communities is because of the emerging body of scholarship on legal pluralism, law and anthropology and socio-legal studies. These academic fields have plausibly argued that the term 'law' does not necessarily depend on state recognition for its validity. 'Law', it is argued, can also refer to the incorporation of customary law into state law or customary norms and institutions that co-exist with state law. More recently, legal pluralism has become popular in different academic disciplines ranging from human rights to feminism and international trade. The focus on legal pluralism has, in turn, opened the way for arguing that a single nation state may contain within it not only state law, but a range of diverse legal norms, orders and systems that exist along with the state law (Griffiths, 1986 and 2003; Moore, 1973; Merry, 1998). Yet, state law remains important and distinct for a number of reasons, especially because of its claim to be sovereign over all its citizens irrespective

of their culture or religion. State law has not only economic and political power but also immense symbolic significance. This makes it important to examine the relationship between state law and the minority legal order rather than treating them as 'parallel' systems that are not in a process of communication and interaction.

Legal pluralists have suggested that the term 'law' can be understood as including the norms, rules and institutions of a minority group that allow them to realise the goals of social interaction and social change. One approach is to say that law is defined as those mechanisms that maintain normative order within the group. Sally Falk Moore described this as social fields that have the capacity to produce and enforce rules (Moore, 1973; Merry, 1998; 2006a; 2006b). On this analysis, because all groups have normative regulation, they also have 'law' irrespective of the presence or absence of institutions for identification, change and enforcement. This is a useful definition because it allows us to understand the different ways in which groups contain within themselves non-state-based social norms that are analogous to law, especially norms that exercise authority over the lives of individuals. There is, however, a significant problem with this wide definition because it may become so expansive as to cover nearly all aspects of social life. In these situations, the social group may have a normative (moral) code: this may be adopted voluntarily; an individual may be criticised for breach of the code; or there may be social pressure or ostracism if a person refuses to comply. However, the classification of this normative (moral) code as 'law' would lead to a conception of law so broad that it would be virtually indistinguishable from social relations (Moore, 2009). This approach is problematic because it makes it impossible to distinguish law from normative social order or social relations.

A second approach focuses more closely on the issue of authority, as well as the institutional aspects of law. H. L. A. Hart and Max Weber, for example, define law in terms of the institutionalised enforcement of norms. Hart's idea of primary rules (that emerge out of normative social obligations) and secondary rules (that allow a determination of whether primary rules are valid, interpreted and enforced) is a good example of this approach to law. On this analysis, we can say that institutions with authority for the creation, interpretation and enforcement of norms are crucial to the existence of law. From the point of view of defining a field of minority legal orders this approach may be a more attractive definition of law. However, a minority legal order may have a large number of institutional mechanisms for enforcing norms and there may be no easy



way to distinguish between them. Moreover, in some situations there may be important groups or cultures or societies that have normative social order, but that lack delineated institutionalised mechanisms or a centralised mechanism for control. A definition that takes a strict approach to the requirement for an institutionalised system may be too narrow to cover important types of phenomenon that are related to minority legal orders.

Minority legal orders could be defined to include both legal norms (where an individual or group can point to distinct norms that regulate normative social order) and legal orders (that indicate that there are mechanisms for institutionalised norm enforcement). Legal norms can be said to emerge to determine how individuals should or should not act, as well as to specify the consequences of non-compliance. By way of contrast with the state legal system, the minority legal order may not be deliberately designed as a system that has a centrally organised mechanism to impose authority and enforce sanctions. The minority legal order may be diverse because it does not have an overall control mechanism and, unlike the state legal system, it will not have a monopoly over the use of coercive power to enforce its norms. The minority legal order may, however, be able to communicate effectively thereby creating a relationship of reciprocity with its subjects which is also an important aspect of effective legality (Fuller, 1969). Moreover, in some situations the norms of a minority legal order may be organised into a reasonably coherent institution, with a dynamic and coherent character, which has sufficient stability and consistency to enable identification, change and enforcement of social norms. This allows us to say that there is something akin to a legal order. If there is some mechanism, albeit informal, for resolving disputes about validity, interpretation and enforcement, then this institutional aspect will make it more likely that there is a minority legal order.

There are two aspects to the concept of a minority legal order. First, we need to consider the substantive norms of a minority group. Second, we need to take into account whether the group has a sufficiently coherent institutional order to enable identification, change and enforcement of these norms. To be classified as a minority legal order, norms need to be sufficiently distinct, widespread and concrete to ensure that they are distinguishable from general social relationships. In some cases, there may be a moral code that establishes control through social pressure or the threat of ostracism. However, to be a legal order there needs to be some additional mechanism for exercising authority through decisions,

interpretation and implementation. This definition provides objective criteria for classifying certain types of social phenomenon as a minority legal order. It includes a full spectrum of concrete patterns of social behaviour, organised in a coherent institutional order, that are often part of the self-understanding of minorities that they have 'law'. However, the definition excludes diffuse mechanisms for normative regulation even if their adherents insist that these are 'law'. There will be a continuum ranging from the clearest form of a minority legal order that displays almost all the characteristics of state law through to more informal forms of social control. Whether or not there is a minority legal order will depend on where it falls on a spectrum rather than being a clear issue.

### Legal order of a minority

The hierarchical sovereignty of state law and the subordination of all other legal orders within the nation state is one way in which the state can consolidate its own power and national identity, especially in relation to minorities. The development of a uniform state law was one crucial aspect of the drive towards the formation of the nation state, as suggested in the previous discussion of the history of minority legal orders. This drive towards unity and centralisation of power may be in tension with the factual reality that the state cannot always control the normative conduct of all the individuals and groups within its jurisdiction. Nevertheless, in terms of political power, the state is the sovereign legal system, whilst other forms of normative social regulation that exercise authority over the lives of individuals are 'subordinate' or a 'minority legal order', subject to regulation by the state legal system. The use of the term 'minority' in this context denotes that although the norms associated with minority communities co-exist with state law they are ultimately subordinate. In the UK, state law is the official legal norms that are promulgated by the legislature and the judiciary. Minority legal order refers to those norms and systems that cannot be traced back to the legitimating sources of political and legal authority of the state such as the UK Parliament or the UK Supreme Court.

In some situations the national legal system may be stronger than the minority legal order, which will make it easier to ensure compliance with the state legal system. Nevertheless, there may be other situations where the minority legal order commands greater legitimacy and authority within the minority community than state law, despite its formal sovereignty and monopoly over the use of coercion. Consequently,

it will become difficult to ensure compliance with the national legal system. Despite the strong drive towards unity, control, centralisation and homogenisation of state law, there will invariably be areas of social life where there are competing non-state normative systems in the form of minority legal orders.

Just as there is a plurality of normative ordering within the nation state, there will also be diversity within the minority group. The term 'minority legal order' should not be taken to suggest that a non-state legal order is homogenous and unified because, in reality, the minority legal order may itself have a large number of diverse traditions. This plurality may be institutional. For instance, although Jewish or Islamic law may seem to be defined categories, in reality there are a large number of different institutions within the Jewish and Muslim communities (Douglas *et al*, 2011: 42). This plurality may also provide a meaningful choice between different normative solutions, all of which can be said to be part of the minority legal order. For instance, a minority legal order's approach relating to marriage or divorce may seem clear from an external point of view. Yet, there may in reality be a choice about the rules or norms that a minority legal order can apply in a specific fact situation (Douglas *et al*, 2011: 42-22).

This flexibility could be the basis for providing greater choice for individuals within a minority legal order who can 'forum shop' in different institutions within their community to find a solution that suits their personal preference. In the context of Muslim family law, Anver Emon has developed this vision by arguing: 'Ultimately, Muslims who desire religiously-based family law services would have different organisations to choose from, thereby giving them a choice between competing visions of Islamic law. By advertising their services, reaching out to the community, disclosing their philosophical approaches to Islamic law, and effectively 'competing for market-share', the family service organisations would contribute to a 'marketplace' of Islamic legal ideas' (Emon, 2009: 424).

Often, however, this internal plurality may be masked by asymmetries of power that allow those with power within a minority legal order to impose a solution which, once chosen by an authority backed by overwhelming power, takes on the aura as the one and only governing norm. Yet, the same concern with autonomy and pluralism that motivates a liberal state to recognise a minority legal order also justifies preserving choice and pluralism within a minority legal order.

## 3 Minority legal orders in a liberal democracy

### Choosing minority legal orders

In the past, state law could make space for minority legal orders without constitutional legal impediments or public criticism. Now, the 'liberal' nature of the state means that it is bound by constitutional norms that safeguard the individual rights of all its citizens. The UK has a liberal constitutional framework that entrenches key individual rights such as freedom of speech, freedom of religion and belief and equality on the grounds of gender, race and sexual orientation. This 'liberal' framework is created through legislation such as the Human Rights Act and the Equality Act 2010. The contemporary liberal paradigm changes the framework for analysing and evaluating minority legal orders, because whether or not a minority legal order secures individual autonomy or equal protection for its members becomes a crucial issue. The classic example of this challenge is the question of whether or not a minority legal order can comply with the constitutional guarantee of equality for women.

Some liberal political theory acknowledges that membership of a cultural or religious group is important for the well being of individuals as well as for their rights, and a liberal state can legitimately provide space for groups and associations (Kymlicka, 1995; List and Pettit, 2011). This provides a distinctly liberal argument in favour of cultural membership because it treats individuals as agents with choice rather than beings who are determined by cultural norms or, as Anne Phillips puts it, 'as agents, not as captives of their culture or robots programmed by cultural rules' (Phillips, 2007). On this analysis, the key issue is not to give rights that vest in groups, but rather to accept that in some situations individuals are able to lead more valuable lives through their membership of groups.

In the past, it may have been assumed that individuals would remain members of their social group for most of their lives. This may have justified the use of the ‘personality principle’: that is, the application of a legal regime or rule based on the permanent allocation of an individual to a cultural or racial group. Now, it is increasingly accepted that an individual has choices about their identity and group membership. These choices can arise in a number of ways. Some individuals may choose to leave the cultural or religious group of their birth whilst others may convert to join another group. Many individuals are mixed race by birth or choose to define themselves by reference to hybrid identities. These complexities suggest the need for a fluid understanding of membership of a cultural or religious group rather than assuming that a person is born into, or will remain a member of, one cultural or religious group for all purposes or for the whole of their lives. This complexity about assigning individuals to a cultural or religious group raises difficult questions about minorities and minority legal orders: How is membership defined? Do individuals have a real option to opt in and out? Do the young and women have a real choice about the beliefs and practices of the group? The reality is that groups can exercise considerable power over their individual members. In these situations, the exercise of power and influence by groups over individuals can remain obscure and concealed from public debates. Clashes between normative systems such as the liberal state and minority legal orders are often controversial precisely because they explicitly reveal the exercise of power by non-state actors.

In the context of a minority legal order, special attention needs to be paid to the right to exit to ensure that individuals do not come within the control of a minority legal order without their consent. Of course, a liberal analysis recognises the ‘right to exit’ of individuals from a minority community. This is unproblematic. There are also more complex situations where individuals want to remain members of a minority group, but they also want to renegotiate the terms of that membership. The solution that an individual who does not agree with the norms of the minority group must exercise their ‘right to exit’ does not address this problem.

### **‘Minorities within minorities’**

Some ‘minorities within minorities’ such as women, the young and elderly, gays and lesbians, will require special attention because they may face social pressure to comply with norms within their social group, but they will lack the power to secure their interests. Where a minority

legal order exists, and especially where it is officially recognised by the state through a system of minority group rights or a personal law system, this social pressure may be more intense because the refusal to use that option may be interpreted as a sign of disloyalty ('Having a religious option may increase the perceived disloyalty of pursuing the state option', Ahmad, 2011: 302). Young people who are born into minority groups may face social pressures to comply with norms that they would prefer to either reject or renegotiate. Therefore, the position of children and young people who may not have chosen to be members of the minority community requires special attention. Eekelaar summarises the need for vigilance in this context by concluding: 'Perhaps we should acknowledge that, at least normally, (that is outside cases of persecution), communities may have no specific interests as communities. Their individual members most certainly do, and this includes the interest in passing on their culture to their children. But that interest is limited, and it is limited first and foremost by the interests of the communities' own children.' (Eekelaar, 2004).

Although 'minorities within minorities', such as women, gays and lesbians, may be at risk from the norms of a cultural or religious group, it is important to pay special attention to the 'multicultural vulnerability' of women. There is a special risk of harm to women because traditional cultures and religions focus on women as a way of controlling group membership and the perpetuation of group norms. Women's sexuality is often a focus for minorities that are concerned with the preservation and transmission of their culture or religion, because it is women who recreate collective identity through the reproduction and socialising children. From this perspective, it becomes a critical matter that women should enter into their most intimate relationships in a way that preserves the identity of the whole community. For these reasons the control of women, especially in areas such as sexuality, marriage, divorce, and in relation to their children, is a recurring feature of traditional cultural and religious communities (Moller Okin, 1999).

Minority legal orders often focus on family law precisely because these norms control women and enable the preservation of group identity. There is also special concern about the vulnerability of women who are 'religious', because they often have no choice except to use a minority legal order if they want to secure a religious divorce ('adherents to a particular faith must make use of the religious tribunal if they are to obtain 'sanction to remarry within their faith' (Douglas *et al.*, 2011: 44). This explains why there is demand amongst Muslim women in religious communities for a service that will grant them a religious divorce (Bano, 2007; Bowen, 2009;

Shah-Kazemi, 2001). There is also evidence to suggest that Muslim women are using these tribunals voluntarily rather than as passive victims who are being manipulated or misled by conservative Muslim men (Glazer, 2012: 12–13). In many situations, therefore, securing autonomy for these religious women may require making minority legal orders, especially institutions such as sharia tribunals or the Batei Din, which supervise religious divorces, more ‘women friendly’ rather than prohibiting them.

It is often argued that many women choose to remain members of a group despite the fact that the rules and practices of their community undermine their interests. ‘They have a right to exit but they freely choose to remain’ is the response to any challenge. But this right to exit argument is not always a realistic solution. It offers an ad hoc and extreme option to what is often a systematic and structural problem within traditional cultures and religions. It puts the burden of resolving these conflicts on individual women and relieves the state of responsibility for the protection of the fundamental rights of its citizens. Most significantly, the right to exit argument suggests that an individual woman at risk from a harmful practice should be the one to abandon her group membership, her family and community. The stark fact is that emotional attachment, economic circumstances and religious commitment often mean that exit is an unrealistic choice for many women.

Some versions of multiculturalism suggest that the state should unconditionally accommodate minority groups. A ‘progressive multiculturalism’, on the other hand, must return to first principles and ask: what is at stake in the accommodation of minorities? (Malik, 2009) One of the most powerful arguments for multiculturalism is that there are power hierarchies between minority groups, majorities and the state that should be renegotiated. However, this recognition of external hierarchies should not blind us to the fact that there are also power hierarchies within groups. Internal inequalities of power may cause vulnerable individuals such as women to bear a disproportionate cost of any policy of accommodation of cultural or religious practices. These costs can include entering into a marriage without the right to divorce, inadequate financial compensation in the case of divorce, giving up the right to custody over children and restriction on the right to education, employment or participation in the public sphere. Although minority women are members of a cultural or religious community, they are also full citizens of a liberal political community. Therefore, the liberal state is obliged to safeguard female citizens from harm even if they choose membership of non-liberal cultures or religious communities. Women’s consent to

a minority legal order requires a more complex analysis that takes into account these complex asymmetries of power. Although women may choose to be members of a minority group, they are not necessarily also consenting to the choice of group leaders or even the choice of group norms that will be applied to them.

Gender equality is sometimes misused to attack minorities. As Anne Phillips has noted, '[...] principles of gender equality were being deployed as part of the demonisation of minority cultural groups. Overt expressions of racism were being transformed into a more social acceptable criticism of minorities said to keep their women indoors, marry off their young daughters to unknown and unwanted partners [...]' (Phillips, 2007: 2). This process of racialisation may also misleadingly represent minorities as patriarchal whilst majority cultures are represented as exemplars of gender equality. This risk suggests that special care needs to be taken to avoid the demonisation of minority legal orders. At the same time, the vulnerability of some persons, such as women or young children, has to be taken seriously. There are also limits to consent in these contexts because the state, where there is a risk of significant harm, is under an obligation to act to protect vulnerable persons irrespective of voluntary membership of a cultural or religious community or consent to a minority legal order.

A focus on threshold criteria such as 'significant harm' could provide a guide as to when the state should intervene in a minority legal order. There may be more agreement about what constitutes harm than is sometimes assumed in popular debates. For instance, in one study of those child protection cases which involve minority ethnic households, it was found that: cultural conflicts caused by diversity of norms and values were rarely pivotal in care applications; there were no 'single issue' cases where allegations of significant harm rested unequivocally on behaviours/attitudes viewed as culturally acceptable by a parent but which professionals argued were unacceptable within Western European assessments of ill treatment; and that a general category of 'significant harm' could incorporate a diverse range of cultural practices and contexts (Brophy *et al.*, 2003: paras 7.25–7.36). Contrary to popular perceptions, which may be distorted by the demonisation of minority legal orders, there may be agreement between the state legal system and minority legal order about what constitutes harm. This agreement can, in turn, provide the foundations for developing principles that guide when, how and on what terms there should be state intervention to safeguard vulnerable persons within a minority legal order.



## Individuals, groups and the evolution of minority legal orders

Membership of groups in liberal democracies is becoming more complex. There is fluidity and hybridity of cultural exchange, with constant movement of individuals between different spheres. Individuals and groups are constantly introducing new elements into their identity, whilst at the same time maintaining older recognisable traditions. There is an understandable focus on established minority communities identified by language, ethnicity, culture or religion. However, this assumption of stability needs to be balanced by greater attention to individuals who often move in and out of more than one group. It is, therefore, important to ask questions about the impact of policies on the individuals who choose to remain members of that community. This approach focuses on the dynamics of cultural change within the minority legal order. How is culture or religion being defined? Who has the power to decide? Who is being excluded from this process? Will state intervention promote values such as individual autonomy or participation within the minority legal order? Will individuals have the power to choose the leaders who represent them or the norms that govern them? Will decisions be made impartially through processes of accountability, deliberation and transparency that involve all the participants rather than through the imposition of the will and authority of a few individuals?

Often, it will be difficult for 'outsiders' to have the knowledge to evaluate the impact of a particular state intervention or policy. In these situations, neglect or a badly designed intervention may cause the minority legal order to become ossified in ways that continue to harm its individual members, especially 'minorities within minorities'. Cultural change can take different directions that need to be tracked at both the individual and the group level. On the one hand, group representatives may refuse to adapt their norms to reflect social change or to share power. For instance, where the minority legal order starts to function as a static non-negotiable marker for group 'identity' it may cease to be a dynamic system of normative social regulation that responds to social change. On the other hand, group representatives may be willing to take an imaginative approach towards developing their norms in order to meet the needs of their individual users, including 'minorities within minorities'.

## 4 State responses to minority legal orders in the UK

A 'liberal' framework for analysing a minority legal order will focus on individual choice. It also requires an evaluation of whether or not, and to what extent, the minority legal order is able to promote autonomy or greater democratic participation for its individual users. In the UK, the debate about minority legal orders has been dominated by debates about the use of religious arbitration to settle family law disputes. Some of these tribunals are able to offer dispute resolution under the Arbitration Act 1996 and many of them also offer mediation services. There is particular concern that the use of these non-state forms of dispute resolution in areas of family law is detrimental to women. The debate has tended to veer between those critics who advocate total prohibition of these institutions (arguing they harm women) and those supporters who claim that there should be non-interference (arguing this safeguards religious freedom). There are, however, a number of intermediate positions that use different mechanisms for the recognition or accommodation of a minority legal order such as minority group rights and personal law systems, transformative accommodation and cultural voluntarism. Finally, a liberal state could adopt a strategy of mainstreaming some cultural and religious practices of minorities into state law and social policy. This may also be a way of obviating the need for individuals to use a minority legal order.

Although it is sometimes argued that any form of normative regulatory order can be classified as 'law', too wide a definition of minority legal orders will lead to a collapse of the difference between law and normative social regulation. Consequently, state institutions may be wary of classifying all aspects of the cultural life of minorities as a minority legal order. In some situations, although the norms cannot be said to belong to a minority legal order (with a reasonable level of authority and

organisation), they may be sufficiently distinct and specific to allow the minority group to make a claim for accommodation. Mainstreaming, as well as cultural voluntarism, avoids the problem of classification of normative social regulation as a minority legal order. It would allow the accommodation of the social norm even if the normative social regulation of the minority group lacked the qualities that allow it to be classified as a minority legal order.

A liberal state faced with a minority legal order can choose from either one, or a combination, of the following approaches, which will often overlap:

- Prohibition of a minority legal order
- Non-Interference with a minority legal order
- Recognition of the minority legal order through granting minority group rights or establishing a personal law system
- Transformative Accommodation of the minority legal order through a system of shared governance between state law and the minority community.
- Cultural Voluntarism that allows the minority legal order to function but maintains the right of state law to intervene at any point to enforce its own norms.
- Mainstreaming by accommodation of the cultural or religious practice of an individual within state law, assuming that it does not conflict with fundamental constitutional norms. This could be done through techniques such as widening existing legal concepts, designing legislative solutions or granting an exemption

## A. Prohibiting minority legal orders

At one end of the spectrum is the option of absolute prohibition or criminalisation of the minority legal order, with the state using all its coercive power to eliminate any competing normative system. Organisations that demand 'one law for all' and the criminalisation of religious based arbitration often make these demands.<sup>6</sup> There are a number of reasons, of principle and policy, why this is not a viable option. There are reasons of principle for a liberal state to make some space for other

6 See for example the new organisation 'One Law for All' ([www.onelawforall.org.uk](http://www.onelawforall.org.uk) – accessed 20 February 2012).

normative systems. Minorities cannot always gain voice through a system of universal individual rights (Ahmed, forthcoming 2012). If it is assumed that not all individuals and groups in a liberal political community have to be 'liberal', and that tolerance and pluralism are important political values, there are good arguments for making a more expansive space for other ways of living. More specifically, in some situations the state legal system will not be able to provide individuals with the service that they want. For example, there is clear evidence that religious women insist that they want a religious divorce 'in the sight of God' that is important from both a spiritual and religious legal perspective (Douglas *et al.*, 2011: 48). For these women, their minority legal order is providing them with an invaluable service that cannot be provided by the national state legal system.

There are also pragmatic reasons for not prohibiting a minority legal order. Law does not exist in a vacuum but, rather, emerges out of and depends upon existing social, cultural and religious norms. Custom and culture, especially religious belief and practice, are powerful resilient norms that are resistant to external pressures for change. This may be especially true where cultural norms flourish within minority communities that feel that the state legal order does not reflect their concerns. Some individuals or sub-groups within a political community may have fewer opportunities to influence state systems than others. These marginalised individuals and groups are likely to see the law as not representing their interests, even if some members of the group are involved in mainstream processes. An official state system may want to eliminate, prohibit or criminalise these norms. Yet, despite the power of the state, its edicts are likely to be ignored or resisted if there is no internal good will for change. In these circumstances, the state will have to expend significant resources to monitor and enforce compliance. Where there is deep commitment by an individual to a non-state norm it is likely that the lived norm will continue to govern social action. The state will lack the resources to accomplish the desired normative change. Social actors may either implicitly or even openly defy the state system. This, in turn, will expose the limited power of the state legal system. Ultimately, this inability to secure the desired change will not only alienate minorities, it will also undermine the state's claim to possess sovereign power to control its citizens.

## B. Non-interference with minority legal orders

At the other end of the spectrum, the state could refuse to interfere with the minority legal order. In some situations, this may be benign

neglect where the state does not feel that there are sufficient interests at stake to justify regulating the minority legal order. It is often argued that there are cynical reasons for non-interference. Yet, there are also reasons of principle for taking this 'hands off' approach that are based on foundational liberal values such as tolerance. On this view, there may be good reasons to assume that all political communities are made up of a variety of different communities, some of which may be liberal but others may be non-liberal. Rather than viewing these different communities as a hierarchy of superior and subordinate authorities, they would be understood as an archipelago of competing and overlapping jurisdictions (Kukathas, 2003). Minority legal orders could, on this analysis, be given a very wide space within which to operate. The liberal state would use reasoned debate to encourage normative change, but it would not intervene using coercion or the force of law. In this context, it is argued that the right to exit from a community should be a sufficient safeguard of individual choice and rights. A policy of non-interference will be problematic for a number of reasons. It may be true that some minorities are seeking total exclusion so that they can live as separate 'islands' within a liberal political community. Nevertheless, there are also many situations in which minorities are not seeking exclusion. They are, crucially, seeking inclusion that simultaneously allows them to be members of both a political community and their cultural or religious group.

In these situations, the liberal state cannot ignore harm or the infringement of the rights of individuals by a minority legal order. Moreover, a right to exit will often not be a sufficient guarantee that the rights of individuals within minority legal orders are protected. For instance, a right to exit in this context will not sufficiently take into account the economic and social constraints that are often obstacles to individuals (such as women, gays and lesbians) refusing to be bound by the norms of a minority legal order.

### C. Minority group rights and personal law systems

Moving beyond absolute prohibition or non-interference, one option is to allow the minority legal order to operate by granting minority group rights or by recognising a system of personal laws. This approach would allow the state to be actively involved in deciding which social group is recognised as having a minority legal order. The state could allow some legal cases (for example in relation to marriage and divorce) to be resolved under a totally different legal process with its own distinct

jurisdiction. Minority group rights and personal law systems were used in the past in the Ottoman ‘millet’ system. They still operate in countries in the Middle East and countries such as Malaysia. In Western Europe, Western Thrace in Greece has delegated jurisdiction to allow its Muslim minorities to maintain their own religious and legal institutions. In the UK, it could be argued that there should be a similar system of either exclusive jurisdictions for a personal law system in some family law matters (for example, for recognition of marriage or divorce) or a ‘shared concurrent jurisdiction’ between the state and a group (for example, to agree financial agreements about matrimonial property).

Minority group rights or systems of personal laws have considerable disadvantages in a liberal democracy (Cumper, 2011). Minority group rights and personal law systems do not sufficiently encourage processes of deliberation because they ‘fix’ issues such as group membership, group representatives and group norms in advance (Ahmed, 2011). There is also an additional concern that by allocating minority rights in this way, the issue of minority legal orders may become entangled with the dynamics of minority identity politics. One consequence of this may be that individuals and groups are more resistant to re-negotiating the norms within their minority legal order. Minorities may develop a ‘reactive’ approach to what constitutes their distinctive norms, especially if they feel that their identity is under threat from the majority or the state. This, in turn, may lead them to define their own identity and social norms as a reaction to, and in opposition to, majoritarian state norms (Ahmed, 2011). A system of minority group rights or personal laws may lead to ossification because it is not able to generate the dynamic cultural change that allows the minority legal order to respond to new social conditions. Samia Bano has argued against recognition of personal law systems. She described the risk of a ‘freezing’ of cultural and religious boundaries and noted that a personal law system could limit the autonomy of women by legitimising their role as ‘producers’ of the community (Bano, 2000). These disadvantages make the recognition of minority group rights and personal law systems an inappropriate response to minority legal orders in a liberal democracy.

#### D. Transformative Accommodation (TA)

Non-interference relies heavily on a right to exit that may be unrealistic for some individuals in a minority legal order. Minority group rights and a personal law system may concede too much power to the existing

decision-makers within a minority community. Transformative accommodation (TA) is proposed as an alternative to both these strategies (Shachar, 2001). TA is a system of joint governance. It sets up institutional arrangements that take seriously the fact that individuals are members of both the state law system (a political community) and the minority legal order (their preferred cultural or religious community). This allows individuals to be both citizens with state protected rights and members of a minority group who can choose to enjoy their cultural or religious group membership. TA sets up a system of dividing power in certain areas such as family law. For example, the state could retain jurisdiction over financial settlements whilst the minority legal order has authority over the ceremonies and rituals of marriage and divorce. TA introduces a system of checks and balances by establishing 'reversal points' that allow an individual to opt out of one system in favour of the other. These reversal points are fixed in advance through negotiation between the state and the minority legal order; they establish in advance the criteria that both the state and the minority legal order have to meet to maintain authority over the individual and, therefore, to retain the allegiance of the individual to that system. The right to opt out at key reversal points gives the individual power. The ability to shift between the jurisdictions of the state and the minority legal order will provide a strong motivation to administer the system in a way that meets the needs of individual users. This division of authority constrains both the state and minority legal order and seeks to make them more responsive and accountable to individuals.

TA sets up a system of competition between the state and the minority legal order so that each adapts itself to meet the choices and needs of individuals. TA therefore has two major advantages. Minorities can enjoy rights as members of the wider political community along with other citizens, whilst at the same time being members of their preferred religious or cultural group. This institutional design can, in turn, also ensure internal change through mutual influence between the state and minority legal order.

In the UK, religious arbitration, or alternative dispute resolution, could be designed to facilitate transformative accommodation. The declaration of a marriage or divorce (the status aspect) of family formation could be dealt with by the minority legal order, but the children aspect could be reserved to the state system. State courts could enforce private arbitrated agreements through mechanisms such as the UK's Arbitration Act 1996. There could be negotiation between the state legal system and

the main minority legal orders about how to arrange when, where and on what conditions they share jurisdiction or lose control at a 'reversal point'. The advantage of this system is that it allows individuals to resolve their disputes in areas such as family law where it may be important for the governing norm to reflect personal identity or membership of a cultural or religious group. This, in turn, could enhance the liberal value of individual autonomy. It could also secure greater participation if state law is not meeting the needs of individuals within the minority community.

There are limits to transformative accommodation. TA assumes that the availability of clearly delineated reversal points (which are negotiated in advance, thereby saving women the need to negotiate with groups as individuals) will allow women to exercise sufficient power to secure more favourable outcomes. One problem with this approach is that it requires a definition of group membership, power structures and group norms in advance so that institutional arrangements such as TA reversal points can be clearly delineated. This approach may underestimate controversy about precisely these issues within the minority legal order, especially if there is great diversity about what constitutes the appropriate governing norm within that minority community. This problem will be exacerbated where the norms that are being applied by the minority legal order are uncertain or unclear. Moreover, although the delineation of TA reversal points may be motivated by a desire to protect minority women's agency, it may itself reflect assumptions by majorities that are not shared by the women themselves. As Samia Bano has noted in relation to Muslim women, negotiations over competing voices for power and representation often 'ignore the internal voices of dissent and change, most often the voices of women' (Bano, 2010: 154). In this way, TA could weaken the agency of minority women by precluding them from expressing their own preferences and acting to shape their own lives.

Most importantly, TA requires effective regulation as well as incentives and penalties, 'carrots and sticks', to ensure that minorities transform their entrenched norms rather than lose jurisdiction over their members. There may not be the motivation for non-state systems to develop a more 'dynamic, context-sensitive, and moderate interpretation of the tradition that is acceptable to the faithful, as endorsed by the religious authorities themselves' (Shachar, 2009: 131). It may not always be possible for the state system to force change through incentives or penalties. One reason for this may be that the minority legal order may resist change even at the cost of losing control over its members (Eekelaar, 2010). Another reason may be that the state system itself may not have



a strong reason to ensure compliance. The liberal state may symbolically condemn practices such as the breach of the rights of minority women, gays and lesbians, but it may be ambivalent about invoking its power and devoting resources to ensure monitoring and compliance. This is particularly true if the group in question is a small ‘minority within a minority’ that has neither the political, social or economic power nor the political alliances to safeguard its own interests by requiring the state to secure a fair system of joint governance with the minority legal order.

## E. Cultural Voluntarism

Cultural voluntarism is another form of recognition of a minority legal order. It provides a ‘third way’ alternative to the stark choice between prohibition and non-interference. It recognises that individuals want to be members of both the state legal system and the minority legal order. Unlike transformative accommodation, however, it does not put into place a complex institutional system of joint governance that requires a clear and static delineation of group membership or group norms in advance. There may be some overlap between cultural voluntarism and transformative accommodation. One crucial difference is that under cultural voluntarism, the state and the minority group representatives do not negotiate to allocate jurisdiction between the state and the minority legal order, or to exercise choice at reversal points. Rather, cultural voluntarism is based on the idea that in some situations, depending on the particular facts and context, there may be good ‘instrumental’ reasons, from within a liberal paradigm, for recognising and accommodating the minority legal order. Unlike transformative accommodation, there is no need for a fixed allocation of jurisdiction between the state and the minority legal order, nor for individuals to choose between the two systems. At all times, individuals have the right to move into or out of social groups, the minority legal order and the state system. Any participation in the minority legal order has to be voluntary and respect the ‘right to exit’ from the group. This means that the state does not concede sovereignty to the minority legal order. Nor does the state reach any agreements or ‘deals’ with minority representatives in advance. In the past the ‘personality principle’ allowed judges to vary legal rules based on the ethnicity or regional identity of the litigant. In the present, individuals move into and out of groups in a more fluid way. Cultural voluntarism recognises this fluidity. It does not assign individuals to groups, thereby ensuring the maximum freedom to move into and out of groups. Cultural voluntarism is prepared in principle to permit some group practices

without withdrawing the jurisdiction or applicability of state law to which all individuals can have resort at any time (Eekelaar, 2010).

Cultural voluntarism is made possible when state law is willing to apply the technique of severance to the norms of the minority legal order. It is sometimes assumed that recognition or accommodation involves the wholesale adoption of a minority legal order. Yet, as recent decisions of the UK Supreme Court confirm, it is possible to apply ‘severance’ to pick and choose those norms of the minority legal order that can be accommodated.<sup>7</sup> These acceptable norms can be distinguished from those norms that should be rejected, often because they conflict with liberal constitutional norms. The ‘severance’ approach is in marked contrast with the decision of the European Court of Human Rights in the *Refah Partisi v Turkey* that Islamic law as a whole is incompatible with democracy.<sup>8</sup> The UK Supreme Court, however, has held that they are willing to consider issues on a case by case basis and distinguish between those norms of a minority legal order that can be accommodated and those that must be rejected or prohibited.<sup>9</sup>

Severance allows the state legal system to scrutinise the public policy implications of the minority legal order. Some norms of a minority legal order can be allowed to operate by the state without contradicting public policy, whilst others cannot. Some norms may attract legal consequences such as the enforcement of an agreement to pay a sum as an Islamic dowry.<sup>10</sup> Other norms may not be applied because they contradict public policy principles. For instance, UK judges have refused to recognise a Muslim marriage ceremony involving an autistic man who lacked the capacity to give consent.<sup>11</sup> Rather than an ‘all or nothing’ approach to a minority legal order, this is a pragmatic and incremental method that allows some norms of the minority legal order to operate whilst rejecting or prohibiting others.

7 *Em (Lebanon) (Fc) (Appellant) (Fc) v Secretary of State For The Home Department Appellate Committee* [2008] UKHL 64; *KC and NNC v City of Westminster Social and Community Services Department* [2008] EWCA Civ 198

8 *Refah Partisi (The Welfare Party) and Others v. Turkey*, Judgment of the European Court of Human Rights, Strasbourg, February 13, 2003

9 *Em (Lebanon) (Fc) (Appellant) (Fc) v Secretary of State For The Home Department Appellate Committee* [2008] UKHL 64; *KC and NNC v City of Westminster Social and Community Services Department* [2008] EWCA Civ 198

10 *Uddin v Choudhry* [2009] EWCA Civ 1205.

11 *KC and NNC v City of Westminster Social and Community Services Department* [2008] EWCA Civ 198.

Cultural voluntarism, supported by severance, encourages a focus on the consequences of accommodation of the minority legal order on individuals and minority groups as well as on the whole political community, without compromising the values of liberal constitutionalism. Cultural voluntarism leaves both the state and individuals the maximum flexibility to examine the substantive normative content and ultimate consequences of the minority legal order. In some situations there may be good reasons for the state to endorse, adopt or incorporate the normative rule of the minority legal order. For instance, rules relating to religious worship or religious dress may be unproblematic: their accommodation would promote the liberal value of religious freedom and may encourage the integration of minorities. However, this flexibility means that it is also possible for the state to prohibit a norm of the minority legal order where it conflicts with a core value of the state system or where it causes harm to an 'insider' within the group – for instance, where a minority legal order requires a woman to give up her right to custody over her child.

Cultural voluntarism is an approach which permits a pluralist approach and the accommodation of a diverse range of social practices. The willingness of British judges to use cultural voluntarism is illustrated by their attitudes towards family law arbitration in religious tribunals.

John R. Bowen, who has undertaken research on the status of sharia in England, describes his interview with Justice Peter Singer. Bowen concludes:

*Moreover, it is not clear that English courts would enforce the outcomes of binding arbitration if finances or children were involved. As Justice Peter Singer of the High Family Court explained to me last July: 'We are very paternalistic on money, likely to say 'that's not fair' even if the wife has agreed to it'. This is not an area of contractual certainty; the adults are not competent to bind the court, and the courts will be reluctant to agree to a settlement where the wife surrenders her right to come back and ask for maintenance, or for more maintenance, at a later stage, should conditions change. (Bowen, 2009)*

Bowen also notes that:

*'The Justice [Peter Singer] was even more categorical when children were in question: all agreements, even those signed under a*

*solicitor's aegis, are inspected to see whether they meet the best interests of the child.' (Bowen, 2009)*

A major advantage of cultural voluntarism is that it allows maximum flexibility: for the state, which can decide when and how to intervene; and for individuals, who can move between different minority groups or minority legal orders, as well as having the option to rely on the general law. This approach also provides a more expansive deliberative space within which a minority legal order can respond to social change, because it is not required to define its social norms as a fixed rule that binds all its members.

This flexibility may, however, also be a disadvantage. A disadvantage of cultural voluntarism is that it may create uncertainty, because it will be difficult to predict when and how the state legal system will intervene. Individuals may be unsure about whether or not an important cultural or religious practice, such as their marriage or divorce, will be recognised, enforced or carry legal consequences. In practice, the likely response of the state legal system in clear situations, such as the use of coercion or violence, will be easy to predict. Moreover, as a body of decisions develops, it will become easier to predict the response of state law to a specific norm of the minority legal order. In borderline cases, the state legal system will need to scrutinise the minority legal order's norm and consider its impact on not only the individual parties and the minority community, but also the wider general public interest.

Although cultural voluntarism may create uncertainty, it can also provide opportunities for transformations within the minority legal order. Dialogue between mainstream institutions and the minority legal order can be used to encourage a religious group to reconsider its own religious norms in the light of liberal constitutional principles such as equality. One recent example that illustrates this process is the negotiation between the Disability Rights Commission and Muslim religious authorities that led to a restatement of Muslim norms that prohibited contact with dogs. The restatement made it clear that Muslims could come into contact with guide dogs in order to provide services (such as taxis or restaurants) to the blind and partially sighted. This particular dialogue was so successful in permanently shifting Muslim norms towards guide dogs that some mosques have now allowed entry to guide dogs (Malik, 2008: 15–16).

This example also confirms the importance of cultural voluntarism as a strategic choice. In these situations, the focus is not just on the final

outcome such as ensuring that taxi drivers allow access to guide dogs. The choice of cultural voluntarism as the preferred strategy also focuses on the benefits of a dialogical process. In this situation, the desired outcome of ensuring that the blind or partially sighted have equal access to Muslims taxis and restaurants was achieved after voluntary mediation with a statutory agency (between the Disability Rights Commission and Muslim religious leaders) rather than through the enforcement of the criminal law (which the Muslim taxi drivers had clearly breached by refusing access to the blind) in the magistrates' courts. The focus on voluntarism ensured that there was willing compliance by the Muslim taxi drivers and restaurant owners, as well as a permanent shift in wider Muslim attitudes towards guide dogs. In this way, the use of cultural voluntarism led to a convergence between Muslim norms and equality legislation.

Cultural voluntarism can also provide opportunities for less powerful individuals within minorities. For instance, the lack of a formal system of hierarchy within Muslim religious institutions allows individuals to move between different institutions until they find a solution that suits them (Douglas *et al.*, 2011: 43). Women who are members of cultural or religious minorities may lack the power to challenge norms that cause them harm from within their communities, but they can turn for support to mainstream political and legal institutions. In this way, cultural voluntarism provides an opportunity for the minority legal order to develop internal normative solutions that cohere with liberal constitutionalism, without granting official legal power to a particular group representative or officially recognising one group norm rather than another (Ahmed, 2001; Emon, 2009).

Cultural voluntarism, unlike transformative accommodation, does not explicitly use the power of the state to force change in a minority legal order, through direct negotiations or the grant of official legal power to group representative subject to reversal points. Nevertheless, cultural voluntarism endorses the idea that where the liberal state lawfully exercises power over its citizens, it has a responsibility to secure individual rights for everyone – minorities as well as majorities. It is, therefore, consistent for a policy of cultural voluntarism to include support for 'minorities within minorities' that may lack power to advance their own interests in a minority legal order. Support for 'minorities within minorities', such as women, can be put into place in a number of ways. Mainstream legal and social services should be available to users such as women who seek redress through the state system or who want to

challenge the minority legal order itself as having breached the requirements of procedural justice.

The Arbitration Act 1996 is insufficient to provide these safeguards because it relies on a system of regulation that does not take into account asymmetries of power. It allows the parties themselves to apply to the court (High Court or county court) to challenge the decision of the arbitrator. This is inappropriate to resolve problems for 'minorities within minorities' such as women, who lack the power to call attention to breaches. In these circumstances, there is still a need for a stronger form of regulation that puts into place a higher degree of monitoring and enforcement. These forms of tougher regulation could co-exist with the ordinary rights and remedies available in the state legal system. Additional safeguards for less powerful users of a minority legal order could include: subjecting mediators or adjudicators to a training or registration process; keeping records about evidence presented and notes taken at hearings; and ensuring that each party receives adequate counselling by an independent legal advisor before entering into the arbitration process. This stronger form of monitoring may reduce asymmetries of power between individuals (Shachar, 2010).

In the UK, the Equality and Human Rights Commission is well placed to play a greater role to safeguard women who use minority legal orders, because it has a mandate to operate across the fields of both cultural equality (safeguarding the rights of cultural and religious minorities, including the religious freedom of minority women), and gender equality (to secure the equality and human rights of women). For example, the EHRC could include the impact of minority legal orders in the UK on equality and human rights in its 'Triennial Review' of fairness, equality and human rights in Britain. This could provide the evidence base for considering further policy interventions to strengthen the position of 'minorities within minorities' in a minority legal order.

## F. Mainstreaming minorities

Mainstreaming the norms of a minority legal order within the state legal system may also be a possible option in some situations. Cultural voluntarism is a permissive way of achieving this aim because it indirectly allows an existing social norm of a minority legal order to operate. Mainstreaming is more explicit and goes one step further by

actively endorsing, incorporating or adopting the social norm of the minority legal order within the state legal system. Mainstreaming can also be regarded as one rather than the only solution. So, for example, the availability of a mainstream solution to some minorities need not be inconsistent with allowing other individuals in that minority legal order to pursue religious arbitration in a special tribunal.

One disadvantage of mainstreaming for adherents of the minority legal order may arise where there is a perceived conflict between a cultural or religious norm and a core value of the state legal system. In this situation, the state legal system will need to very explicitly prohibit an unjust arrangement, even if this is a significant norm of the minority legal order or was the result of a binding arbitration. Minorities will, in this situation, come into a direct confrontation with state power. In less extreme situations, however, there could be advantages.

There are a number of ways in which the state system could mainstream the minority legal order. A discrete principle of the minority legal order may be recognised within state law where this is necessary or justified for independent reasons. For instance, in *Uddin v Choudhry*<sup>12</sup> the Court of Appeal recognised the Islamic law concept of the payment of a marriage dowry to a woman as part of an action for the enforcement of a valid contract. The payment of the marriage dowry to women, on this analysis, would be recognised within English law not because it is part of a religious legal or social norm (sharia) that governs Muslims, but rather because it is part of the factual context that the individual parties have determined through their own choices.

Mainstreaming can also be achieved by granting an exemption from a universally applied legal rule. In the past, exemptions based on conscientious objection were granted to religious minorities such as Quakers from universal requirements such as military service. Concepts such as race or religious discrimination are now recognised as a legitimate technique used in human rights and discrimination law to accommodate racial, cultural and religious difference. For instance, a Sikh schoolgirl was able to challenge a refusal by her school to allow her to wear a religious ceremonial bangle, by relying on the concept of indirect discrimination in the Race Relations Act 1976.<sup>13</sup> Litigation is not the only way to secure

<sup>12</sup> [2009] EWCA Civ 1205.

<sup>13</sup> *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWHC 1865.

this type of mainstreaming of norms through the accommodation of cultural or religious difference. Codes of practice can also be used, as an alternative to litigation, to encourage employers to accommodate norms of a religious group, such as the need for time off from work for religious holidays (ACAS, 2005).

Exemptions can also be granted through legislation. For example, the Motor-Cycle Crash Helmets (Religious Exemptions) Act 1976 exempts Sikhs from the requirement to wear a crash helmet when driving a motorcycle (Poulter, 1998). The Finance Act 2003 provides another example of how a legislative solution can mainstream the norms of a minority legal order. That legislation abolished an excessive and double stamp duty on mortgages that comply with the Islamic legal norms prohibiting the charging of interest. As most UK mortgages involve the house-buyer borrowing money, the regime of a double stamp duty on those mortgages that complied with Islamic legal norms was a significant barrier to the development of more widespread home finance for Muslims. The abolition of this penalty by the Treasury laid the foundation for cheaper mortgages for those Muslims who are unable to buy normal financial products because their faith prohibits it. This legal change had short-term results in terms of greater financial stability through making home ownership easier for British Muslims. It should make the mortgage market operate in a fair and accessible way. There are also longer-term and more subtle benefits. Such moves have the potential to reduce the gap between the experiences of Muslims in their daily and practical lives and their experience of mainstream legal and political institutions. This in turn can encourage the meaningful identification of minorities such as British Muslims with mainstream political and legal institutions. These types of modest concessions can yield considerable and magnified political benefits for minorities because 'small changes can have large democratising effects' (Vermeule, 2007: 3).

Mainstreaming may not be sufficient where an individual voluntarily wants to resort to a non-state procedure or ceremony within the minority legal order because this is part of their self-understanding as a member of a community that has a distinct 'legal' tradition. The AHRC Social Cohesion and Civil Law research found that although the Birmingham Shariah Council recognised the civil law divorce as sufficient to also denote a 'religious divorce', individual female and male users wanted an 'Islamic' solution within a distinct 'Islamic legal order' to confirm the end of their marriage: 'for the Shariah Council, this [the civil law divorce] is conclusive, such that it does not deem it necessary to grant a religious



divorce to enable the parties to remarry under Islamic law (although it will do so to reflect the parties' wishes for "recognition" by the Council of the ending of their marriage)' (Douglas *et al.*, 2011: 47–48).

Nevertheless, mainstreaming can be successful where it is the result of active cooperation between the state and the minority legal order to solve a particular problem. The Clandestine Marriages Act 1753 (which exempted Quakers and Jews from state regulation of their marriage ceremonies) illustrates that the state can be flexible about how it classifies marriages within smaller religious groups (McLean and Peterson, 2011). Another example of the way in which the state and minority legal order can cooperate is the Divorce (Religious Marriages) Act 2002 which has assisted in providing a solution for those Jewish women who are unable to gain a divorce where their husbands do not give consent. Solutions may need to be developed for the Muslim community. The significant diversity of what constitutes an Islamic marriage or an Islamic divorce means that a 'one size fits all solution' may not be possible. (Bowen, 2011). Government intervention in favour of one form of Islamic marriage may have the unintended consequence of 'taking sides' rather than maintaining a pluralist approach about what constitutes an authentic Islamic marriage practice.

One practitioner has reported that there are significant problems, especially for women, in the context of the formation and dissolution of Muslim marriages.<sup>14</sup> A large number of Muslim marriages are not registered, with the consequence that women are treated as co-habittees with lower legal safeguards over financial assets than if they were in recognised civil marriages. The practitioner has also noted that Muslim religious bodies such as sharia councils, which lack resources and are often staffed by volunteers, are not able to cope with the growing demand from Muslim women for a religious divorce in addition to any civil law divorce that they may have obtained. This suggests a pressing need to consider more flexible approaches towards the civil registration of Muslim marriages within the state legal system, or the availability of public support to Muslim women who are seeking a religious as well as a civil divorce.

The AHRC Social Cohesion and Civil Law research suggested that 'it could be said that the Shariah Council (Birmingham) has a view of the

<sup>14</sup> See the conclusions of Aina Khan, Senior Consultant Solicitor of Islamic Legal Service at Russell Jones and Walker. Lecture and Research Seminar in London, 13 December 2011 (notes on file with author).

process closest to the basis of current English divorce law as both focus on whether the marriage has ‘irretrievably broken down’ (Douglas *et al.*, 2011: 45). This council was also willing to consider the civil divorce as sufficient evidence of a breakdown of the marriage. Similarly, most Muslim religious councils require mediation before they are willing to move on to consider the grant of a religious divorce. Some Muslims may prefer a convergent process that allows solicitors and religious bodies to cooperate so that a civil as well as religious divorce or mediation can be obtained in a coordinated, quick and efficient way. There is now a requirement that anyone who wishes to apply for a child or financial order in the family courts must first attend a Mediation Information and Assessment Meeting (MIAM) with an approved mediator. The Courts will refer all potential applicants to see a mediator before any application is made. It is worth considering whether there is scope for relating requirements about marriage and divorce within family law to processes that are already operating within a minority legal order, so that some users who prefer a mainstream solution are able to access a fair, efficient and integrated system of recognition of marriage, mediation and divorce as part of their membership of both the state and their preferred minority legal order.

Accommodation through mainstream law and legal institutions provides an alternative to recognition of a minority legal order. It is sometimes argued that individuals may be turning to minority legal orders precisely because they cannot achieve active participation in the state legal system, either because of direct discrimination or because the system is not designed to cater to their specific needs. For example, the mainstreaming of solutions in relation to Muslim marriages and divorce may obviate the need for large numbers of Muslim women to use religious-based arbitration or mediation. Greater diversity within the mainstream state system through the accommodation of cultural or religious difference, which is also an instrumental way of promoting autonomy, may be a viable alternative to formal recognition of a minority legal order. This option would allow accommodation of the cultural practice of an individual within state law, assuming that it does not conflict with fundamental constitutional norms, through techniques such as widening existing legal concepts, designing legislative solutions or granting an exemption. Mainstreaming avoids the assumption that minority groups cannot participate in mainstream political, legal and social processes whilst remaining part of their own social group. It also bypasses some of the problems faced by ‘minorities within minorities’, because mainstreaming need not empower the most powerful reactionary voices in the group at the expense of others.

There are advantages to mainstreaming, not only for minorities but also for the whole political community. This approach allows the issue of whether or not to grant accommodation (either through legislation, a judicial response or through social policy) to be introduced into the mainstream democratic debate rather than being reserved for negotiation between elite representatives of the state and minority communities. For minorities this means that their demands depend on the attitudes of the whole society. This may mean that their demands have to be more modest until they can persuade a sufficiently large number of their fellow citizens that recognition or accommodation of their norms is justified. Nevertheless, the advantage of this approach is that the accommodation of the minority norm gains greater legitimacy in the eyes of the majority of the population, who know that the concession or accommodation is the outcome of mainstream democratic processes in which all citizens have participated (Malik, 2000; Waldron, 2010).

## Concluding comments

A liberal democracy can follow different approaches to minority legal orders ranging from absolute prohibition through to mainstreaming. In some situations the norms of a minority legal order may cause harm to individual. This will justify the use of the criminal law. In other contexts it may be possible to incorporate minority legal norms within the mainstream system. These different approaches provide practical strategies that can be applied to various situations. It is, therefore, important to have detailed and reliable factual information about minority legal orders in the UK.

We know that minority legal orders exist and operate in the UK. Research published by Samia Bano, Nurin Shah Kazemi, the Agunah Project in Manchester and the AHRC Social Cohesion and Civil Law project allows us to understand Jewish, Christian and Muslim minority legal orders, predominantly in the context of family law. Although we have some information about Jewish, Christian and Muslim communities, we know very little about other minorities in the UK. Further research is necessary to establish whether other minority communities, such as Hindus, Sikhs and the Roma, have normative social regulation that is sufficiently institutionalised to be classified as a minority legal order.

The AHRC Social Cohesion and Civil Law research examined five research questions about the organisational structure, jurisdiction and decision-making of three religious courts: the Catholic National Tribunal for Wales in Cardiff; the Jewish London Beth Din, Family Division; and the Sharia Council of the Birmingham Central Mosque. Although it limited itself to three tribunals rather than examining a wider range of religious institutions, its findings indicate interesting similarities, as well as some divergences, between Jewish, Catholic and Muslim religious courts. The research confirms that within these three tribunals there is flexibility about whether and how to use the religious courts, as well as flexibility within the religious courts about the preferred choice of

legal norms that will be applied. The findings also confirm that there is a dynamic relationship between religious courts and the civil law. Both systems are impacting on each other rather than running on 'parallel' tracks (Douglas *et al.*, 2011: 47–9).

Future research is needed to examine whether there is accurate understanding and cooperation between the state legal system and minority legal orders. For instance, are members of the judiciary in the state legal system in a position to understand the cultural practice of the minority legal order? Do adjudicators within the minority legal order understand the relevance and context of state law and mainstream social services? It is also important to understand the way in which the minority legal order is interacting with the wider provision of mainstream legal and social services. We know that a large number of female users of minority legal orders want to obtain a religious divorce. We need to understand how this voluntary participation in the minority legal order intersects with the legal requirements for parties to use mediation before they use the state legal system. We also need more information about the advice and services provided by solicitors, counsellors and social workers in mainstream institutions to individuals who are participating in both the state legal system and the minority legal order.

The AHRC Social Cohesion and Civil Law research focused on the operation of the institutional structure and issues of jurisdiction, rather than the experience of users or the substantive norms enforced by the religious courts. Further research is needed to capture the experience of users, especially the treatment of 'minorities within minorities' such as women who give their consent but have no realistic option other than to use the minority legal order to obtain a religious divorce. It is also important to understand how state recognition or policy impacts on the substantive norms of the minority legal system. Some sub-groups within a community may develop a more defensive stance, whilst others are willing to adopt a more convergent approach. It is important for research and state intervention to capture this diversity. A defensive stance may be adopted, for instance, because the minority is defining its norm in opposition to, or by explicitly eschewing, the norms associated with the state. Does the state policy towards the minority legal order lead to a dynamic process of interpreting norms to adapt to social change? Or does the intersection with the state system lead to a more 'defensive' approach in which the norms of the minority legal order develop in stark contrast to the mainstream?

Further analysis is also necessary to understand whether mainstreaming is a viable alternative to recognition or accommodation of a minority legal order. Mainstreaming could include legislative solutions that involve cooperation between the state system and the minority legal order. The increasing privatisation of family law, especially in the context of a legal requirement to use mediation before turning to the family courts, may provide some useful opportunities for developing solutions for minorities that have their own distinct way of defining marriage and divorce. A tailor-made solution that accommodates the needs of minorities within the mainstream legal system may obviate the need for users such as women to turn to religious courts.

A move towards greater recognition of minority legal orders may have some advantages, such as promoting autonomy for minorities, or a greater coalescence between the experiences of individuals in their private lives and their experience of normative political and legal institutions. Significantly, the AHRC Social Cohesion and Civil Law research confirmed that the religious tribunals that it studied 'provide an important service for those Jews, Muslims and Christians for whom a religious divorce 'in the sight of God' is important from both a spiritual and religious legal perspective' (Douglas *et al.*, 2011: 48). None of the three tribunals examined had legal status or were seeking state recognition. Their authority derived from their religious status and it extended only to those who chose to submit to those institutions. Nevertheless, there will still be a need for safeguards to protect vulnerable individuals who voluntarily participate in the minority legal order but who may suffer harm. Statutory bodies such as the Equality and Human Rights Commission are ideally placed to examine the impact of minority legal orders on users such as women. They are also well placed to develop a system for regulatory oversight to support users, such as women seeking a religious divorce, who want to challenge the procedures or decisions of a minority legal order.

Although there are good reasons to encourage cooperation between the state and minority legal orders, research needs to consider the impact of the current extreme financial pressures on public funding for access to justice. For instance, financial constraints may motivate the state to offer mediation services by untrained mediators within a minority legal order as a 'cheaper' option for some minority communities. In practice, the financial pressures on legal aid funding and the capacity of the EHRC may mean that vulnerable individual users of the minority legal order are left with no redress in those situations where they have

been victims of injustice: for instance, when they want to resile from an enforceable but unfair arbitration agreement, or when they have been subjected to unjust group norms that they later want to renegotiate or challenge. Lack of access to mainstream legal justice or the failure of the mainstream legal system to accommodate minorities may drive users towards minority legal orders without the protections available within state law.

At present, there are considerable empirical gaps in our understanding of the way in which the substantial norms are being adapted, interpreted and applied in minority legal orders. We know very little about the experience of users of minority legal orders. Crucially, we do not have enough information to evaluate whether a minority legal order is entrenching unjust outcomes or whether it is securing autonomy for individual users. Further research is necessary to allow the design of appropriate law and social policy by the state, non-state actors and minority legal orders. This body of knowledge can also provide the basis for future public debates about minority legal orders in the UK.

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Minority legal orders – the systemic, distinct, religious or cultural norms of groups such as Jews, Christians, Muslims, and others – are often misleadingly described as ‘parallel legal systems’. Since 9/11 and 7/7 they have been mainly discussed in the context of Islam and sharia law, and more often than not as an ominous threat to UK liberal democracy.

In *Minority Legal Orders in the UK: Pluralism, Minorities and the Law*, Maleiha Malik argues that a liberal democracy such as the UK has a responsibility to consider the rights and needs of those from minority groups who want to make legal decisions in tune with their culture and beliefs; it also has a responsibility to protect those ‘minorities within minorities’ who are vulnerable to pressure to comply with the norms of their social group.

*Minority Legal Orders in the UK: Pluralism, Minorities and the Law* discusses the origins of minority legal orders in the UK and defines what constitutes a minority legal order in a liberal democracy. Finally, the overview explores the advantages and disadvantages of the practical ways in which the state can respond to and work with minority legal orders in the UK, and identifies the gaps in the research around them.

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