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MUSMINE - Muslim Minorities in Europe

MUSLIM LEGAL NORMS AND THE INTEGRATION OF
EUROPEAN MUSLIMS

Maleiha Malik

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
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Muslim Legal Norms and the Integration of European Muslims

MALEIHA MALIK

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MUSMINE - Muslim Minorities in Europe

MUSMINE is an innovative research programme set up by the European University Institute (RSCAS) in collaboration with Ethnobarometer/Consiglio italiano per le Scienze Sociali (CIS). The Programme is co-directed by Valérie Amiraux and Alessandro Silj.

MUSMINE seeks to set up permanent research and training initiatives in relation to the presence of Muslim minorities in Europe. It serves as a meeting place and laboratory for experts and scholars in Europe currently addressing these questions, offering opportunities for systematic inter-disciplinary or cross-national exchanges. It also seeks to identify emerging problems and to stimulate research where information is lacking or incomplete.

The Programme aims at establishing itself as the European-level reference point and information repository for work in this area, taking as its task the diffusion of data and information on the Muslim minority presence in Europe to a wide range of interested audiences: academics, the media, the political sphere, NGOs, and relevant institutions at the local, national, and European levels.

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Abstract

This paper examines the potential for accommodating Muslim legal and ethical norms within European liberal democracies. It focuses on areas of personal life such as family norms and ethics. The main argument of the paper is that in some areas - such as divorce or contract law - there is potential for accommodating Muslim legal and ethical norms within mainstream political and legal institutions. The advantage of this strategy is that it can encourage Muslims to identify with national political and legal institutions. This strategy can, in turn, encourage the integration of Muslims into mainstream European institutions and promote the goals of social cohesion. However, the accommodation of some religious and cultural norms in this way can create a risk of harm to women. Therefore, there need to be special processes to ensure that Muslim women's autonomy is safeguarded. The paper includes a case study and discussion of Muslim family law arbitration, and the use of 'sharia tribunals', in Great Britain.

Keywords

Accommodating Muslim Legal and Ethical Norms - Muslim Family Law - Sharia Tribunals in Europe

Summary and Overview

The general argument of this paper is that European Muslims are following, and will continue to follow, norms that are derived from their understanding of religious texts, religious law and their religious culture.¹ Any analysis of this topic needs to distinguish between public/constitutional law issues and private matters. The constitutional framework of liberal democracies provides a basic framework within which the analysis must take place, and there is almost no scope for the accommodation of Islamic public law or political principles within this framework. Yet, at the same time, in some areas of private life - such as marriage and divorce - there is a strong argument that the liberal commitment to autonomy requires that the rules by which individuals live their daily lives should reflect their deepest religious commitments. In other areas, such as contracts, inheritance or finance, there is considerable scope for allowing private individuals to choose the norms that will govern their freely chosen relationships. In these limited situations, a European liberal democracy can legitimately accommodate Muslim norms as a requirement of the commitment to freedom and equality for minorities. The accommodation of the most pressing demands of Muslims can yield the benefits of greater identification of Muslims with mainstream political and legal institutions which can, in turn, promote the goals of integration and social cohesion. However, any policy of accommodation needs to pay special attention to the fact that Islam like all traditional religions – Christianity and Judaism – contain practices that may cause harm to women. Therefore, policies of the accommodation of any religious practice, including Muslim norms, must pay special attention to the need to safeguard the principle of gender equality. This paper includes a British case study which discusses the increasing use of ‘religious arbitration’ by some Muslims.

More specifically, the paper is structured in the following way. Part I is a general discussion of the framework within which calls for the accommodation of Islamic law and ethics arise in the European public sphere. Part II of the paper sets out a ‘liberal democratic’ model of state policy towards minorities. The paper adopts a model of ‘progressive multiculturalism’ and ‘legal pluralism’ which encourages the accommodation of some of the most pressing minority demands to follow their own cultural and religious norms, whilst at the same time safeguarding key liberal values such as gender equality. This section also identifies the way in which increasing anti-Muslim prejudice is a barrier to policies of public accommodation of Muslim legal and ethical norms in the European public sphere. The main conclusion of Part II is that the limited public accommodation of some Muslim legal and ethical norms can ensure that European Muslims are treated according to the liberal principles of freedom and equality, whilst at the same time as safeguarding the increasing concern with community cohesion and integration. Part III discusses the particular challenge posed by Islamic legal norms in the European public sphere.. The main argument in this section is that the European public sphere provides a limited rather than unconditional space within which some Muslim legal and ethical norms can be accommodated. This process of accommodation is limited by the internal constraints that are inherent within the European public sphere which include the need to respect the equality and non-discrimination rights of not only religious and racial minorities (such as Muslims) but also other protected groups such as women. Part IV of the paper is a case study of Muslim Family Justice in Great Britain. Empirical studies on Muslim Family Arbitration, and the experience of British Muslim women, suggests that there is significant demand for ‘religious arbitration’ in some areas such as family law. The British experience also suggests that it may be possible to design institutional frameworks that allow Muslim communities to apply their own religious norms in areas such as family law and inheritance, whilst at the times being subject to supervision by mainstream legal and political institutions.

1 For a detailed discussion of the theoretical, legal and social policy relating to this topic see Nicholas Bamforth, Maleiha Malik and Colm O’Cenneide, *Discrimination Law: Theory and Context*, (London: Sweet and Maxwell, 2008).

Part I – Accommodating Islamic Law in Europe

I.1. 'Islamic Law' in the European Public Sphere

The status and contribution of 'Islamic law' within the European public sphere, and its interaction with state based and EU legal systems, has recently come under intense scrutiny. Some of this interest has been motivated by the increasing recognition that the presence of significant Muslim minorities in many European liberal democracies will require understanding the norms which these individuals and communities follow - and treat as authoritative - in their daily lives. The issue of Islamic law, however, has also been polemicised and politicised by the post September 11 link between Islam, Muslims and political violence. The Madrid and London bombings have also made the anti-terrorism 'security agenda' an essential factor in the discussion of Muslims in Europe.² This paper discusses Islamic law in its European context, whilst at the same time recognising that the international and transnational context remains important.

In the European context, many commentators continue to use the term 'sharia' or 'fiqh' to describe the norms which European Muslims follow in their daily lives. The unproblematic use of well established terminology such as 'sharia' and 'fiqh' to describe the situation of European Muslims needs to be questioned. The term Islamic law does not fully capture the nature of the claim for accommodation that is often made by European Muslims in this context.. This paper assumes that the main concern with the accommodation of Islamic law (*sharia* or *fiqh*) arises because some European Muslims base their own belief or conduct on these norms. The concern with Islamic legal and ethical norms can be said to be instrumental, and a part of the more general concern with minority protection and the integration of European Muslims.

One way of capturing the nature of Muslim demands is to avoid the use of the generic term *sharia* in favour of use the category *Muslim legal and ethical norms*. The term *Muslim legal and ethical norms* (or *Muslim norms*) also captures the fact that some Muslims are calling for the accommodation of norms that derive from their understanding of their religion. These include not only standards derived from the *sharia* and *fiqh* but also general ethical principles derived from Islamic religious culture. In the European context, therefore, it is more accurate to categorise 'Islamic law', 'sharia' and 'fiqh' as aspects of religious 'norms' or 'values' rather than 'law'. This approach makes clear that the accommodation of Muslim norms is subject to the ultimate regulation of national constitutional and legal systems rather than operating as a separate 'parallel' legal system. The focus on Muslims rather than Islam makes it crystal clear that the main motivation for the accommodation of these norms is to maximise individual autonomy and minority protection, rather than because they reflect an essential true Islam or 'sharia' which needs to be 'imported' into Europe. Therefore, the concern with Islamic law and ethics – particularly in private and family law matters – derives from the fact that these religious norms have point, value and significance for European Muslims.

It is also often assumed that the choice of Islamic law by European citizens will always be a second choice or default position. Many of the discussions in this paper challenge that assumption. For example, many of the most vocal defenders of the right to 'sharia councils' are Muslims. Moreover, although there has been great emphasis on the sex discriminatory impact of some Islamic law rules on marriage or divorce, there are some situations where a woman may be able to gain a more favourable financial settlement under Islamic law rules than she can under 'mainstream' state law. In these situations it is interesting to consider whether Muslim women should have the choice of the more favourable rule that discriminates in their favour. The choice of an Islamic law rule may be both favourable, rational and a self-interested commitment. Whether or not the Islamic law rule can be accommodated will depend on its content as well as its effect when it is applied in a contemporary

2 See the work of Professor Didier Bigo and the European Liberty and Security Project (ELISE). See www.libertysecurity.org (accessed on 1 February 2009).

European context: for example, it may be necessary to distinguish between the accommodation of legal norms that may result in harm or coercion from those who impact is benign or even positive.³

Although the main focus of this paper is on Muslim communities, it is also important to take into account contemporary developments in the European public sphere. The emergence of European norms of human rights and non-discrimination (through instruments such as the European Convention on Human Rights, the EU Charter of Fundamental Rights and EU discrimination law) means that European Muslims are increasingly required to integrate into European – as well as domestic - paradigms of rights, responsibilities and citizenship.¹ The European Court of Human Rights, in the *Refah Partisi* decision⁴, suggested that the sharia was not compatible with European democracy and the values of the rule of law. This case could be distinguished on its particular facts because it arose in the context of a political crisis in Turkey (a Muslim majority) country where Islamists have political power. Arguably, this is different to the use of Islamic legal and ethical norms by smaller Muslim communities, in other European liberal democracies where they are small minorities with no prospect of exercising political power.

In some situations, the term ‘minority fiqh’ (*fiqh al aqalliyat*) is used to describe the development of Islamic law (*fiqh*) in the specific context where Muslims are a minority. There are also differences between Muslim majority and Muslim minority contexts so that European Muslim are likely to develop different social norms, as well as different religious norms, to regulate their individual and collective lives. Nevertheless, there are also connections between these two contexts. The increasing ‘transnational migration’ of legal norms is encouraged by a number of factors: e.g. global debates about topics such as the Islamic headscarf affair⁵; the increasing mobility of scholars between Europe and the Islamic World⁶; and the importance of discussions and decisions about Islamic law on the internet which is a global space that transcends the geographical boundaries between Europe and the Islamic world.⁷

1.2. The challenge of religious diversity

It is important to locate any discussion of ‘religion’ or ‘Islamic law’ in the European public sphere within the context of ‘diversity’. There is no sign that struggles about the ‘recognition’ of minority cultures and religions will dissipate in the near future. On the contrary, the movements of people that is triggered by processes of globalisation, as well as the process of de-colonisation that challenges existing hegemonies of dominant cultures, will ensure that this remains a crucial issue. Yet, European liberal constitutionalism remains wedded to ideas of liberty, religion and secularism that makes it difficult to adapt to new challenges presented by the presence of new forms of culture and religion in the European public sphere.

‘Culture’ is a wide-ranging term that can include a range of attitudes, beliefs and practices. Sometimes the terms ‘diversity’ and ‘multiculturalism’ are used to include differences based on gender or sexuality, or differences that are a fundamental ‘lifestyle’ challenge to the predominant values that govern public life such as the anti-globalisation or environmental movements. This is

3 I am grateful to Professor Mohammad Fadel (University of Toronto) for discussions on this issue.

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

5 See for example the discussion of the ‘public career of the Islamic veil in France’ and its migration to countries such as Canada in Claire DE GALEMBERT, ‘*L’Affaire du Foulard in the shadow of the Strasbourg Court: Art. 9 ECHR in the public career of the veil in France*’ (draft copy with author).

6 See the discussion of the impact of Tariq Ramadan in the Europe and the ‘Muslim heartlands’ in Alexandre Caeiro, ‘European Islam and Tariq Ramadan’, (June 2004) 14 *ISIM Newsletter* 57.

7 See for example Islam Online.net (www.islamonline.net) that hosts ‘fatwas’ (juristic decisions about Islamic legal norms) by Sheikh Yusuf Qaradawi which includes a section on Euro Muslims as part of a wider discussion about Islam.

diversity which is based on different beliefs about lifestyle and values. Bhikhu Parekh sets out a detailed distinction between wide definitions of cultural diversity which include challenges to the public structure by feminists or gays and lesbians (perspectival diversity), and 'narrow' definitions which limit the use of the term multiculturalism to factors such as race, ethnicity, religion and language, as well as groups who are organised as distinct cultural communities (communal diversity).⁸ In this paper, the term 'culture' includes a number of sources of diversity. It includes the 'differences' that are associated with marking out a social group such as Muslims as a distinct minority within a larger political community: e.g. religion, as well as colour, race and ethnicity, and language.

In addition to the diversity that results from increasing '*cultural and religious pluralism*', there has also been a political shift in the claims that are made by cultural and religious minorities such as Muslims that has been described as the '*politics of recognition*'. Individuals claim that their status as political right bearers is no longer a sufficient guarantee of freedom and equality. They now want their personal identity to be more substantially recognized by the State. Minorities are no longer willing for their differences to be a matter of 'tolerance' in the private realm: they now demand political rights, accommodation and recognition in the public sphere. Theories about minority protection and integration also need to connect with, and respond to, the reality of minority claims in practice.⁹

This new politics raises an urgent point of principle: how should a liberal democratic state respond to claims by its citizens that their religion should move from its designated place in the private realm towards positive accommodation in the public sphere? This demand for the 'accommodation of difference' as a pre-condition of equality can be labelled 'normative multiculturalism'.¹⁰

Any analysis that treats 'religion' as an essential category risks creating 'communalism' through law and social policy. The difficulty here is that the priority given to certain characteristics within law and the public sphere tends to 'freeze' these categories. This process of 'reification' of religion puts the category beyond critical discussion and re-negotiation by insiders and also outsiders to the religious group. In the context of race we argued that treating race as an idea rather than a biological category is one way of avoiding this trap. In the context of religion, similarly, a focus on social construction rather than essentialism can be an advantage because it ensures that religion does not become immune from critique.

A method which treats religion as a social rather than an essential category can also justify a shift of focus away from religious belief and on to religious needs in their wider social and political context. An essentialist approach fails to recognise the diversity that can exist within a social group. It can also create a risk of communalism. Nevertheless, there is a need to take seriously the way in which religion can operate as a source of discrimination and disadvantage. Therefore, an approach that can give some place to religion within the analysis, without treating it as an immutable characteristic.¹¹ This strategy encourages a more comprehensive approach to tackling religious discrimination: one which uses law where necessary but which is also supplemented by the use of other strategies such as education and dissemination of information to challenge stereotypes about religions generally (but especially minority religions) that can manifest themselves as discrimination in the distribution of important goods and spheres. This focus does not treat 'religious identity' as a fixed category deserving legal protection and recognition per se. Rather, the key issue can be reformulated as follows: how is the

8 See Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, (Palgrave Macmillan: London, 2006) at pp. 3 -4.

9 See Maleiha Malik, 'Minorities and Human Rights' in Campbell, Ewing et al eds., *Sceptical Approaches to Human Rights*, (Oxford: Oxford University Press, 2000).

10 For a discussion of some of these issues see Tariq Modood, *Multicultural Politics: Racism, Ethnicity and Muslims in Britain*, (Minnesota: University of Minnesota Press, 2005).

11 Tariq Modood, for example, makes the point that although there is diversity within a social group, such as Christian, Belgian or Muslim, this does not make it either impossible or meaningless to identify the social group, see Tariq Modood, 'Muslims and the Politics of Difference' (2003) 74(1) *Political Quarterly* 100 – 115.

category ‘religion’ being used to discriminate against individuals or disadvantage them in their access to key goods or resources.

Part II. The European ‘Public Space’ for Accommodating Islamic Law

A key feature of the European Public Sphere within which claims for the accommodation of Muslim legal norms arise is colonialism and racism in the past that continues to operate in the present. The consequent social problems of anti-Muslim racism or Islamophobia act as a significant barrier to a reasonable analysis of Muslim claims for accommodation, as well as being a barrier to Muslim integration into Europe. Part II of this paper, therefore, starts (section II.1) by discussing the problems of anti-Muslim racism and Islamophobia. The paper goes on to argue (section II.2) that ‘progressive multiculturalism’ can provide a model for accommodating the demands of minorities such as Muslims thereby encouraging their identification with mainstream democratic institutions. In terms of law and society, the paper argues (section II.3) that the accommodation of some Muslim legal and ethical norms can encourage Muslim integration into the European public sphere, thereby strengthening mainstream legal and political institutions.

II.1. Anti-Muslim Racism and Islamophobia

One significant obstacle to any policy discussion accommodating Muslim legal and ethical norms in the European public sphere is the problem of prejudice about Islam and Muslims. Any attempt to discuss religion (e.g. Islam or Muslims) without recognising the links between race, religion and culture under-estimates the extent to which racist ideas can operate simultaneously within different categories such as race, culture and religion to racialise individuals and groups (e.g. Muslims) as the inferior ‘other’.

Moreover, ideas about racial or cultural inferiority can sometimes shift through a process of the transfer of ideas from older to contemporary racialised group. An important historical precedent for current processes of racialisation of Muslims is the treatment of Jews who are one of Europe’s earliest racial and religious minority. As Didi Herman has noted, this precedent is important for understanding the way in which processes of racialisation are transferred rather than extinguished. Herman writes: “However, given Jews were amongst the earliest ‘raced’ peoples in England, there is a debt that all contemporary racialisation processes owe to these earlier ones that has remained largely unexplored, and that is not adequately accounted for in work that roots ‘race’ or ‘strangers’ or ‘alterity and difference’ in imperial and colonial projects.”¹² For example, it is noteworthy that a recurrent stereotype about Jews in the 1910 – 1940 in the East End of London was their attachment to a religious text (the Old Testament) and foreign law (the Talmud) which would result in their following ‘barbaric customs’ about diet, slaughter of animals and with regard to the status and treatment of women. Didi Herman notes that “in relation to Jews and Jewishness, understandings of race were also complicated by a traditional Christian ideology identifying Jews as the ‘people’ of the ‘Old Testament’.”¹³ Similar processes and trends can be observed in the context of Muslim minorities, especially after the ‘crisis’ incidents of September 11 and July 7: the assumption in the media and public culture is that Muslims in Britains are necessarily unassimilable as a group because of their religious attachment to a scriptural text (the Quran) and foreign law (the Sharia).¹⁴

12 See Didi Herman, “An Unfortunate Coincidence”: Jews and Jewishness in 20th Century English Judicial Discourse” (2006) 33(2) *Journal of Law and Society*, 277 – 301

13 Ibid. at p. 284

14 The representation of this issue in the press is especially significant. There are different ways in which the issue of ‘religious law’ can be presented in the mainstream media. See for examples headlines in a number of newspapers during this period including The Sunday Telegraph of 24 February 2006, ‘Poll reveals 40pc of Muslims want sharia law in UK’. That analysis (a) fails to distinguish between those legal principles within the sharia which are entirely compatible with

Jews, and now Muslims, have been and are the targets of cultural racism: differences arising from their religious culture are pathologised and systematically excluded from definitions of "being British".¹⁵ Both anti-Semitism and anti-Muslim racism focus on belief in religious law to construct Jews and Muslims as a threat to the nation. Pnina Werbner, professor of social anthropology at Keele University, argues that Jews are predominantly racialised as an assimilated threat to national interests emerging at moments of crisis. Muslims are now being represented as a different kind of "folk devil" - a social group that is openly and aggressively trying to impose its religion on national culture. This partially explains the recent concerns about multiculturalism.¹⁶

More specifically, Pnina Werbner has also noted that there are three specific tropes that are deployed in the contemporary racialisation of Muslims. First, they are racialised like other 'colonised persons' as disobedient slaves when they resist the power of the majority. Second, like some minorities such as the Chinese and Jews, Muslims are sometimes treated as an 'enemy within' whose difference remains hidden but can emerge at times of conflict. Finally, Muslims are treated as a distinctly aggressive 'other' whenever they emerge into the public sphere to claim rights for accommodation of difference as 'visible' Muslims.

Werbner concludes that in relation to Muslims there is a coalescence between both traditional 'racists' and also public intellectuals writing in the media. She writes "He [Muslims] is a figure constructed by fearful elites, which may nevertheless legitimise far cruder forms of biological racism. Anti-fundamentalist images provide these racists with a legitimising discourse against Muslims, [...] What we have, then, uniquely in the case of the representations of contemporary Islam in the media and the public sphere, is an oppositional hegemonic bloc which includes intellectual elites as well as 'real' violent racists."¹⁷ Werbner also writes that "these prejudices about Islam can also recur in discussions about, and in defense of, secularism in liberal democracies"¹⁸

It is worth emphasising this last category because it maps on to a long established construction of Islam as a threat to Western civilisation, which can be found in the medieval discussions of Islam when it was a viable alternative to European civilisation. The writer of a study on the representation of Islam in the West, Norman Daniels, has noted that these medieval tropes about Islam from the past continue to haunt Europeans in the present. Daniels concludes: "Most recently we have seen the application of still newer methods by men of a particular mental or scholastic discipline, such brilliantly effective scholars as Maxine Rodinson and Jacques Berquem both writing in the shadow of colonialism, conscious of it and sensitive to Muslim feeling. [...] Although I personally believe in the 'scientific' historical ideal of objectivity, I think it certain that it has been infiltrated by subjective

(Contd.) _____

existing British law and liberal democracy (e.g. laws of contract, wills, family law and some aspects of the criminal law) and those that are incompatible such as criminal sentencing. A more complex treatment of this issue can be found in *The Guardian*, 'British Muslims want Islamic law and prayers at work' by Alan Travis and Madeleine Bunting, Tuesday November 30, 2004. That commentary makes clear that although Muslims want to be governed by the sharia where it does not contradict with British law but they also at the same want seek integration into mainstream British society: "Muslims in Britain want greater recognition of their faith with the introduction of Islamic law for civil cases and time off for prayers during the working day, but are equally committed to greater participation in British life. A special *Guardian/ICM* poll based on a survey of 500 British Muslims found that a clear majority want Islamic law introduced into this country in civil cases relating to their own community. Some 61% wanted Islamic courts - operating on sharia principles - "so long as the penalties did not contravene British law".

15 For a summary of these arguments see Maleiha Malik, 'Muslims are now getting the same treatment that Jews had one hundred years ago', *The Guardian*, 2 February 2007.

16 Pnina Werbner, 'Islamophobia: Incitement to Religious Hatred - Legislating for a New Fear' 21(1) (February 2005) *Anthropology Today* 5 -9.

17 Ibid.

18 Ibid.

ideas of cultural, political and social prejudice. [...] For us the chief lesson may be that ‘scientific methodology’ never did truly escape from its bundle of inherited prejudices of all kinds.”¹⁹

These categories are important because they may explain some of the contemporary causes of the racialisation of European Muslims, e.g. the way in which discussions over events such as the Madrid or London bombings may racialise Muslims as a whole group as the enemy within.²⁰ Within this analysis, the trope of ‘religious law’ which was previously used to racialise Jewish minorities is now also used to represent Muslim minorities as an internal ‘threat’. The focus on ‘religious law’ as a racist trope is particularly relevant in the context of this paper, because it means that reasonable demands by Muslims for the accommodation of their legal norms are often ‘racialised’ as an attempt to impose a foreign system of law on all citizens.²¹

The issue of accommodation of religious norms raises important questions about protecting women, as well as secularism and the proper role of religion in the public sphere. However, these legitimate concerns are exaggerated and distorted in debates which exceptionalise and demonise Islam and Muslim minorities. Public discussion has sometimes presented these challenges of accommodation of Muslim religious norms as widespread and intractable. High profile media coverage of these issues has contributed to this image. There are, however, a number of ways in which this picture of a ‘vast and intractable’ conflict between Muslims and mainstream communities is an exaggeration of the problem.

One reason for this exaggeration is the role of racism, which has played a part in misrepresenting the nature of some types of social problems, e.g. forced marriages or ‘honour’ killings. Although in some situations there may be a potential tension or conflict between gender and racial or religious equality, what is often presented is an intractable conflict of values. Anne Phillips has summarised this particular problem in the following terms: ‘[...] 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 socially acceptable criticism of minorities said to keep their women indoors, marry off their girls young to unknown and unwanted partners and to force their daughters and wives to wear veils’.²²

The exaggeration of the problem of ‘conflict’ between different groups – and especially races, cultures and religions – gives rise to an assumption that there is a radical difference of values between different social groups in society. This source of ‘competing interests’ is likely to continue as past and present patterns of migration into Western Europe from non-Western cultures are mapped on to majority/minority asymmetries of power. The representation of social problems such as forced marriage or ‘honour’ killings as deeper problems of culture also dovetails with state policies in areas such as immigration. In the area of forced marriage, for example, a number of commentators have noted that presenting these issues as part of a problem of minority cultural values has provided a justification for the introduction of more restrictive immigration rules, which may in fact exacerbate problems for minority women.²³ Yet, in many cases, what seem to be deep-seated conflicts about

19 Norman Daniel, *Islam and the West: The Making of an Image* (Oneworld Publications: Oxford, 1993) at p. 324.

20 See for example, Valerie Amiraux, “Expertises, savoir et politique. La constitution de L’Islam comme problème public en France et en Allemagne” in Benedict Zimmerman (Dir.), *Les Science Sociale a l’Epreuve de l’action*, Paris, EHESS, 2004, pp. 209-245.

21 See for example the ‘One Law For All’ campaign which was established to ‘remove the Sharia from Britain’, cf: www.onelawforall.org (accessed on 11 February 2009).

22 Anne Phillips, *Multiculturalism Without Culture*, (Princeton: Princeton University Press, 2007) at p. 2. On Multiculturalism see Tariq Modood, *Multiculturalism*, (London: Polity Press, 2007).

23 Zohra Moosa (ed.), *Seeing Double: Race and Gender in Ethnic Minority Women’s Lives*, (London: Fawcett Society, 2008) p. 46; Moira Dustin, *Gender Equality, Cultural Diversity: European Comparisons and Lessons*, (London: The Nuffield Foundation, 2007), at p. 8.

fundamental rights or values are in fact issues about how best to design policy responses to what is recognised by all those involved (including the minority culture) to be a harmful social practice.

For example, the problem of ‘honour’ killings or forced marriages are often presented as being an example of a deep value conflict between the rights of women and cultural or religious equality. This assumes that there is a wide ranging consensus within the cultural or religious group that the use of violence or coercion against women or young girls is justified. This, in turn, is based on a definition of the cultural or religious group which takes the viewpoint of some of the most extreme members as being representative of the group as a whole. This is problematic because it does not recognise the diversity within racial, cultural or religious groups. Moreover, this approach under-estimates the extent to which there is often a great deal of consensus about the value of consent or the rights of women in minority cultural or religious groups, although there may be disagreement about the appropriate public policy response to problems such as ‘honour’ killings or forced marriages.²⁴ This common agreement about values provides the basis for the accommodation of Muslim religious norms – including legal norms – within a framework which safeguards core values such as the protection of women. The next section discusses and endorses ‘progressive multiculturalism’ as one potential state policy for accommodation of Muslim religious norms in liberal democracies.

II.2. Political Institutions and Progressive Multiculturalism

Concepts such as ‘cultural pluralism’ and ‘multiculturalism’ are now being deployed to describe such a wide range of phenomenon that they are at risk of losing their intellectual power. Nevertheless, these terms convey the important social changes that have taken place in European liberal democracies in the last fifty years. At a descriptive level ‘cultural pluralism’ or ‘multiculturalism’ usefully describe the increasing diversity of culture, race and religion of citizens in liberal democracies.²⁵ Some, although not all, of this diversity is the result of increased migration into European liberal democracies of people from non-Western cultures. A key challenge for the European public sphere is to accommodate the newly emerging minority cultures and religion that seek recognition, often through liberal constitutional politics. Yet, traditional liberal politics seems ill-equipped to respond. At first sight, the principle of uniformity of rights, and equal distribution of liberties, makes it difficult to accommodate these new claims. At their most basic, these claims for ‘recognition’ are akin to traditional claims for self-rule. Although they seem to be masked within the ‘politics of post-colonial politics’ they also share much in common with other claims for self-determination which draw on ideas of liberty, autonomy and s cultures raises a much more profound question about the nature of the guarantee of liberty that is promised by liberal constitutionalism. In James Tully’s terms, the issue of cultural diversity also, at the same time, raises the question of “the foundation of democracy, and, at the same time, subject to democratic discussion and change in practice.”²⁶ This increasing diversity is relevant for state policy, as well for how we think about law and society.

24 For a detailed discussion see Anne Phillips, *Multiculturalism Without Culture*, (Princeton: Princeton University Press, 2007), at pp. 65-67.

25 For an overview of these demographic and social changes in the context of Islam and Muslims see Joel S. Fetzer and J. Christopher Soper, *Muslims and State in Britain, France and Germany* (Cambridge: Cambridge University Press, 2005) at chapter 1. For Britain, see Tufyal Choudhry (ed.), *Muslims in the UK: Policies for Engaged Citizens* (New York: Open Society Institute, 2005). For France, see Jonathan Laurence and Justin Vaisse, *Integrating Islam: Political and Religious Challenges in Contemporary France* (Washington D.C: The Brookings Institution, 2006). For an overview of the French approach to these social changes see Valerie Amiraux and Patrick Simon, ‘There are not Minorities Here’: Cultures of Scholarship and Public Debate on Immigrants and Integration in France’, *International Journal of Comparative Sociology* 47 (3-4) (2006) pp.191 – 215

26 James Tully, *Strange Multiplicity: Constitutionalism In An Age of Diversity*, (Cambridge: Cambridge University Press, 1995), page 29.

Popular ‘myths’ about multiculturalism also make it difficult to delineate a precise definition for this form of minority protection. There are a number of ways in which the term multiculturalism can be used. Multiculturalism is a term that is used in the British context in two ways. First, at a descriptive level it is used to describe the factual changes that have occurred in Britain which have resulted in a more marked racial, ethnic and cultural diversity. Second, at a normative level, multiculturalism describes a state response to this increasing diversity which advocates policies of ‘recognition’ and ‘accommodation of difference’. In this normative sense, multiculturalism is one possible policy response to the presence of these increasingly diverse social groups and ‘minorities’ within its political community. At a normative level, therefore, ‘cultural pluralism’ or ‘multiculturalism’ are terms suggesting that the correct legal and political response to increasing cultural diversity of European citizens is to adopt policies of public accommodation.

Claims for accommodation vary greatly: the categories range from race, culture and religion through to gender and sexual orientation and disability. Legal regulation – at the domestic, EU and constitutional level – covers all of these various grounds.²⁷ This has been especially true of Muslims who are a new religious minority within European liberal democracies. One of the key demands of European Muslim minorities has been that there should be public accommodation of their normative practices where they follow the guidance of Islamic law in their daily lives. There may be distinct challenges with policies of multiculturalism that encourage the public accommodation of religious practices, e.g. Islamic law and ethics. Religion, unlike grounds such as gender or disability, raises distinct challenges for liberal democracies and the principles of freedom, equality and non-discrimination. Claims by traditional religious groups, e.g. for the public accommodation of their private religious identity, cause special difficulties. These types of claims challenge the most fundamental beliefs of secular liberals for whom the public-private dichotomy is especially important: traditional liberals vigorously defend an individual right to religion in the private sphere whilst at the same time vigilantly guarding the public sphere as a neutral religion-free zone. Religious tolerance which ensures freedom of religion in the private sphere but ensures a neutral public sphere maintains this traditional liberal settlement of religious claims.

‘Progressive Multiculturalism’ is based on a concern with the ‘accommodation of difference’ as a requirement of the core values of liberal politics. Therefore, ‘Progressive Multiculturalism’ replicates the liberal concern with ensuring a minimum guarantee of tolerance for minorities in the private sphere through safeguarding individual rights; and it also includes the right to non-discrimination which ensures that minorities have access to key public goods such as employment or education. The focus on ‘respect’ and ‘participation’ for all citizens ensures that ‘Progressive Multiculturalism’ remains a model of integration: e.g. its goals include securing autonomy and non-discrimination for all citizens; and the increased participation of minorities along with majorities in mainstream economic, political and social institutions. While the focus is not solely on culture, and multicultural equality cannot be achieved without other forms of equality, such as those relating to socio-economic opportunities, its distinctive feature is about the inclusion into and the making of a shared public space in terms of equality of respect as well as equal dignity.”²⁸

Progressive multiculturalism’s distinctive characteristic is that as well as focusing on the traditional markers of integration (e.g. social and economic mobility or racism), it adjusts itself to increased cultural diversity and the ‘politics of recognition’. More generally, progressive multiculturalism also provides some resources to defend multiculturalism against a number of recurring critiques that it causes harm to women. Progressive multiculturalism, unlike ‘hard’ versions of multiculturalism,

27 For a discussion of some of these issues see W. Kymlicka, ‘Introduction’, W. Kymlicka (ed.), *Rights of Minority Cultures*, (Oxford: Oxford University Press, 1995), at p. 7. See also Maleiha Malik. ‘Faith and the State of Jurisprudence’, in Peter Oliver et al (eds.), *Faith in Law: Essays in Legal Theory*, (Oxford: Hart Publishing, 2000), at pp.129 – 133.

28 Tariq Modood, *Multiculturalism*, (Cambridge: Policy Press, 2007) at pp. 61 – 62.

acknowledges the risks that are inherent in the recognition of cultures in the public sphere. The ‘multiculturalism v feminism’ debate has highlighted the way in which the accommodation of cultural difference – especially differences that arise from traditional cultures and religions – can pose a risk for women. This ‘multicultural vulnerability’ means that some groups of citizens, e.g. women, are asked to bear a disproportionate burden of the costs of multiculturalism.²⁹ Faced with a conflict between calls for the public accommodation of minority cultures and the rights of vulnerable groups within minorities such as women it is possible for progressive multiculturalism (which is justified by liberal concerns with individual autonomy) to give weight to the interests of individual women. Therefore, the ‘progressive’ aspect of this version of multiculturalism has the resources to answer the critique of those who argue against accommodating the needs of religious minorities such as Muslims. This model of ‘progressive multiculturalism’ provides a useful framework to analyse the accommodation of Muslim legal and ethical norms in European liberal democracies that remain committed to women’s rights as a minimum non-negotiable floor of constitutional protection.

II.3. Legal Institutions and Legal Pluralism

The previous discussion has endorsed ‘progressive multiculturalism’ as the preferred model for integrating European Muslims into liberal democracies, which also has the benefits of ensuring greater cohesion and integration. This adjustment of liberal politics to the fact of greater cultural and religious diversity also requires a shift in our understanding of law and legal institutions. Law cannot immune itself from the social and political consequences of the fact of increasing cultural and religious diversity. At a practical level, these shifts in politics and society will become increasingly important questions for law because the legal regulation of equality has now moved beyond the traditional categories of race and sex and now extends to religion and some of its cultural manifestations.³⁰ Approaches to law and society have focused on the way in which law acts as an ‘external’ structure which can influence and change social formation; as well as the process through which law ‘emerges’ out of existing social formations.³¹ On the one hand, restrictions on the cultural and religious practices of Muslims can be understood as an example of ‘external’ regulatory law which is aimed at changing behaviour rather than reflecting or reinforcing it. At the same time, the precise forms and justifications for legal regulation also reflect existing social and political formations. Pluralism, and the increasing calls by minorities such as Muslims for the accommodation of their religious ‘norms’, will also influence legal consciousness: i.e. the way in which forms of law enter into social consciousness, relations and practices. These laws will have an influence on public opinion. In addition, there will also be a wider impact: “In terms of legal consciousness, apart from their direct objectives, laws may change the way people think about wider issues, and create in them new expectations beyond the law itself.”³² Increasingly, in the context of the legal regulation of Muslims and Muslim communities, the wider debate about ‘Islamic law’ and ‘sharia’ is also overlapping with other dominant public narratives on migration and terrorism. Early empirical research in Britain confirms that this overlapping set of discourses is making its way through to the formation of social attitudes which link

29 For a detailed discussion of ‘multiculturalism vulnerability’ see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*, (Cambridge University Press: Cambridge, 2001).

30 See for example The Employment Equality Directive 2000/78/EC implemented in Britain via the Employment Equality (Religion or Belief) Regulations SI 1660 2003 (introduced/presented 26 June 2003; in force 2 December 2003)

31 For a general discussion of the relationship between law and social spheres see Dennis J. Galligan, *Law in Modern Society*, (Oxford: Oxford University Press, 2007) especially chapters 2 and 6.

32 Ibid. at p. 338.

a complex set of factors – Islam, terrorism, immigration and Muslims - and lead to the rapid racialisation of Muslims as a social groups.³³

Increasing diversity will make it more difficult for ‘regulatory’ law to enforce or ensure compliance from citizens if the legal rule is failing to reflect the social norms by which they organise their daily lives. This new type of politics around issues of ‘diversity’ and the ‘accommodation of difference’ has two aspects that are relevant for law.

First, social groups, such as Muslims, will look to the ability of law’s regulatory functions to safeguard their private identity and choices. However, the use of legal challenges as a way of advancing the interests of increasingly diverse social groups puts a strain on these principles. More specifically, the calls for the accommodation private identity in politics and law is often perceived as a threat to legal ‘centralism’.

Second, individuals and groups may regard the law as an instrument of legal change. Disadvantaged and marginal groups who have been alienated or excluded from law may use law to advance their goals. For example, the volume of individual litigation on the headscarf issue across Europe demonstrates that Muslim women are increasingly using law in this way: i.e. making legal claims for the public accommodation of their private identity. This raises a specific problem for liberal democracies. A core feature of modern western legal orders is their appeal to generality and equality before the law as a requirement of the rule of law. The fear of fragmentation is especially acute in the case of Muslims whose demands for accommodation are often understood as call to be allowed to follow a parallel (informal) legal order³⁴: i.e. where State law intersects and co-exists with normative rules that are based on cultural or traditional norms.³⁵ Yet, at the same time as being problematic, the political mobilisations of these popular movements through law, and demands for public legal accommodation of their most pressing needs, is also “so closely associated with the self-image of modern societies, so fundamental to its legal structure, that neglect or reversion, while possible, would be difficult.”³⁶

The use of law as part of a strategy for the ‘accommodation of difference’ (e.g. by Muslims) is significant for majorities as well as minorities. The law and legal institutions have always been viewed as instruments for change by social and political groups. However, they are also increasingly important because of the increasing relevance of private identity in the public sphere, and the consequent ‘politics of recognition’. On this analysis, law and legal institutions are not merely a focus for this new form of politics because of the impact they have on individuals and groups. Rather, law and legal institutions are increasingly taking on a constitutive function which goes beyond the regulating of individual disputes. This means that the common meanings and beliefs embedded in the law and its institutions can be understood as the basis for a common understanding which creates and sustains a sense of community.³⁷ The law and legal institutions also play a role in constructing

33 ‘Most of them have got a knife or blade. They’re brought up different to us. These Muslims, you can’t keep having them, who’s to know these asylum seekers aren’t terrorists?’ Comments of Male, C2DE (i.e low income group), 25 to 50 years, in Norwich, UK. Cited in Miranda Lewis, *Asylum: Understanding Public Attitudes*, (IPPR: London, 2005) at p. 39.

34 A. Griffiths, ‘Legal Pluralism’ in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* (Hart Publishing: Oxford, 2000). For a general discussion of the relationship between law and social spheres see Dennis J. Galligan, *Law in Modern Society*, (Oxford: Oxford University Press, 2007) especially chapters 9 and 10. For a discussion of the way in which the religious cultural norms of Muslim societies can be understood as informal legal norms see L. Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989).

35 See the critique of state centrality and an analysis of legal pluralism in John Griffiths, ‘What is Legal Pluralism’ (1986) *24 Journal of Legal Pluralism* 39.

36 Dennis J. Galligan, *Law in Modern Society*, (Oxford: Oxford University Press, 2007) at p. 275.

37 In the common law tradition Ronald Dworkin has explored the relationship between law and community, see R. Dworkin, *Law’s Empire* (London: Fontana Press, 1986). More specifically Roger Cottrell has developed this vision of law’s function as the creation of a ‘community’ in Roger Cottrell, *Law’s Community*, (Oxford: Clarendon Press, 1995).

behaviour, giving it sense and meaning, and influencing the self-interpretation of the participants.³⁸ Moreover, proper understanding and compliance with law requires that the law ‘speaks’ in a language which is accessible to the person whom it seeks to bind.³⁹ This complex social role assigns to law and its institutions an important public role: as a bank of collective wisdom; a means of creating a cohesive community; and as a public ritual.⁴⁰

Once law is configured in this more complex way it becomes clear that it will be a primary focus for the ‘politics of recognition’ At an obvious level, the inclusion of important sources of personal identity in the law will become an important objective for popular movements. Moreover, where the law either fails to recognise, or misrecognises and distorts, important features of an individual’s personal identity – e.g. as Muslims - this will cause harm to their sense of personal autonomy and self-respect.⁴¹ This is not to say that there should be a perfect correlation between law and personal identity. Rather, a vision for law that sees it as a source of creating and sustaining common meaning in a community makes it important to ensure that individuals personal perceptions are given some weight, and that they do not see important features of their personal identity as distorted or misrecognised in law. This approach is more likely to ensure that they can identify with the mainstream legal system. There is, therefore, the significant bonus of a greater coalescence between the experience of individuals in their daily and practical lives and normative legal institutions. This also means that the law is likely to ‘speak’ to individuals in their own language, thereby ensuring meaningful identification and a higher degree of co-operation by citizens.⁴²

For all these reasons, it is important that law and legal institutions do not distort or misrecognise the value of religious norms and practices for those Muslims for whom they have significance. This is not to say that the wishes of these Muslims, or their characterisation of their own practice, has precedence or is authoritative. Rather, it means that their perspective is one additional aspect that legal analysis needs to keep in mind in order to ensure that, as well performing its regulatory functions, the law is able to generate a deeper form of identification by the Muslims to whom it is addressed. Limited measures of the accommodation of Muslim legal and ethical norms may, in this context, ensure ease of compliance with the objectives of state law and policy, as well as facilitating greater social cohesion.

Part III. Muslim Legal and Ethical Norms in European Liberal Democracies

III.1. Accommodating Muslim Diversity

The migration of Muslims into European liberal democracies has been a varied process. Migration into Britain was predominantly after WW2 from the former colonies of India, Pakistan and Bangladesh. French de-colonisation in North Africa led to migration of Algerian and Moroccan migrants into France during the same period. There are significant Turkish Muslim communities in Germany, as

38 Gerald Postema, *Bentham and the Common Law Tradition*, (Oxford: Clarendon Press, 1996) at 73.

39 See R. A. Duff, ‘Law, Language and Community: Some Preconditions of Criminal Liability’ (1998) 18 *O. J. L. S.* 189.

40 For a detailed discussion of these points see Maleiha Malik. ‘Faith and the State of Jurisprudence’, in Peter Oliver et al (eds.), *Faith in Law: Essays in Legal Theory*, (Oxford: Hart Publishing, 2000) at 137.

41 *Ibid.* at 137.

42 See R. A. Duff, ‘Law, Language and Community: Some Preconditions of Criminal Liability’ (1998) 18 *O. J. L. S.* 189, at p. 206. In the context of criminal liability Duff writes: “[...] the identification and examination of the preconditions of criminal liability is an important task; that one of those preconditions concerns the accessibility of the language of the law to those whom it claims to bind, as a language which they could speak in the first person; and that it is a serious question whether, and how widely, that precondition is satisfied. There may still be a bridge that connects the language of the law to our extra-legal normative language: but for some citizens that bridge is so long, or so steep, that the law cannot reasonably demands that they cross it.”

well as Muslim communities throughout European Union member states.⁴³ There are also national Muslim minorities in Bosnia, Kosovo, Macedonia and in the former Soviet Union republics. One result of the variety of geographical and cultural background of European Muslim migrants is that there is a significant variety in the religious practices of European Muslim individuals and communities. This diversity is significant for a number of reasons. It makes it important to resist an analysis based on crude 'orientalism' that essentialises Islam on the basis of long standing prejudice rather than basing analysis on a detailed understanding of the actual practices of European Muslims. The risk of essentialising diverse Muslim religious and cultural practices into one homogenous block is also exacerbated by the delegation of power to 'representatives' of Muslim communities who may not themselves fully reflect diversity within European Muslim communities. This means that a reductionist approach that essentialises all Muslim religious practice into one authorised form of 'Islam' is likely to distort the daily practice of individual Muslims. This is particularly important because there is a risk that the claims for accommodation that are made by 'Muslim community representatives' on behalf of Muslims reflect one particular –rather than the one and only – viewpoint about Muslim norms. It is essential to protect the right of Muslim communities to maintain their own community organisations and representatives as part of a commitment to the collective aspect of religious freedom. Nevertheless, in these contexts, it is also important to maintain diversity, as well as examining the impact of the accommodation of religious and cultural norms on Muslim women.

III.2. Safeguarding Muslim Women

Traditional cultural and religious groups raise a distinct set of problems for a number of reasons. As Anne Phillips has noted, there is a tendency to exaggerate the degree of conflict between the norms of gender equality and the practices of cultural and religious minorities such as Muslims.⁴⁴ Nevertheless, it remains true that traditional norms and attitudes towards women and young girls, or gays and lesbians, which are especially prevalent in religious groups, can sometimes conflict with the liberal principle of equality. The fact that all these grounds – race, religion, gender and sexual orientation – are all protected within liberal democracies raises the spectre of a 'conflict of rights', e.g. where a religious group argues that its distinct practice requires discrimination against women.⁴⁵ It is worth observing that the potential for a 'conflict of rights' will raise special difficulties in any analysis of religious discrimination: e.g. in delineating the scope, nature and extent of the public accommodation of religious difference, and Muslim legal and ethical norms, that is possible within liberal democracies.

It has been argued, most forcefully by Susan Moller Okin, that an inherent part of 'traditional' cultures, and especially religions, is that they are misogynist and sexist.⁴⁶ Okin argued that liberal theories and policies that encourage the state to 'accommodate' the practices of minority cultures invariably introduced a risk of harm to women and young girls. In the UK context, situations where there have been perceived conflicts between race, religion and culture and the rights of women include those involving violence, force and coercion or the invasion of bodily integrity. These areas include

43 For a discussion of the patterns of migration and settlement in Britain see Jorgen S. Nielsen, *Towards a European Islam*, (Palgrave Macmillan: London, 1999). For a detailed survey of the relevant statistics and the patterns of migration into GB, France and Germany see Robert J. Pauly, Jr., *Islam in Europe: Integration or Marginalization?* (Ashgate: London, 2004).

44 Anne Phillips, *Multiculturalism without Culture*, (Princeton, NJ: Princeton University Press, 2007) at page 22-25.

45 See Susan Moller Okin: "'Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit' *Ethics* 112 (January 2002): 205-230 and Susan Moller Okin: 'Feminism and Multiculturalism', *Ethics* 108 (July 1998), 661 – 684.

46 *Ibid* at p. 661.

'honour' killings, forced marriages and female genital cutting.⁴⁷ It needs to be made clear that these harmful cultural practices are linked with a wide range of ethnic minority groups rather than solely the Muslim community.

It is worth observing that although oppressive practices are often - and predominantly - associated with 'minorities', it is also intelligible to speak about the way in which a majority culture can oppress women because of its violent or discriminatory social practices. Moreover, the perception that minority cultures are more or irredeemably misogynist or patriarchal may itself be based on stereotyped (or racist) views about minorities which should be challenged through law and social policy. This is particularly important because the idea that 'multiculturalism is bad for women' has often been deployed in ways and contexts that replicate racist stereotypes and that encourage policies that are an attack on vulnerable minorities.⁴⁸ It is also worth noting that whilst the main focus of the discussion is on the harm that patriarchy causes to women, these forms of gender relations may also cause harm to men forced into social roles that are damaging. Nevertheless, this discussion concentrates on Muslim women because they are predominantly at risk.

The issue of how mainstream legal and political institutions should respond to claims for the accommodation of Muslim religious and legal norms will be easier to resolve where women do not consent to practices (e.g. forced marriage) that cause them harm. It is crystal clear that there can be no accommodation in these areas. Difficult questions may arise in situations involving the upbringing of children where that child or its parents are from a 'traditional' culture or religion. The possibility that traditional practices may cause harm to young girls makes this a particularly important issue for law and policy relating to children.⁴⁹ Young girls can be harmed by traditional practices within their cultures for two reasons: because of their sex and because of their age.⁵⁰ Of course, parents are rightly concerned about the environment in which their children are raised but can they impose practices on their young female members that may cause these children harm? John Eekelaar has recently discussed this issue and concluded: '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.'⁵¹

Conflicts which involve women who do not consent or children will be easier to resolve than those situations where women choose to remain members of cultures or religious groups that may cause them harm or which may include discriminatory practices. Therefore, in cases which involve violence or coercion against women, the government and public agencies need to take a zero tolerance approach. It is sometimes argued that 'traditional culture' is the problem in these cases. One leading practitioner in this area, Hannana Siddiqui, has summarised the dangers over-emphasising the role of 'traditional culture' in the following terms:

While the recognition of culturally specific forms of harm is welcomed, it has also created a climate where virtually all killings of South Asian and Middle Eastern women by family or community members are redefined as so called 'honour killings' rather than domestic murders. By

47 See Moira Dustin, *Gender Equality, Cultural Diversity: European Comparisons and Lessons*, (London: The Nuffield Foundation, 2007).

48 See Anne Phillips, *Multiculturalism Without Culture*, (Princeton, NJ: Princeton University Press 2007).

49 It should be emphasised that female genital cutting is illegal under the Female Genital Mutilation Act 2003; any difficult questions relate only to the most appropriate measures for addressing it.

50 Susan Moller Okin, makes the point that leaving young girls to be raised in a culture which does not respect their autonomy can cause them harm, even – and especially – where these young girls internalise the values of the culture, see Susan Moller Okin, 'Feminism and Multiculturalism', *Ethics* 108 (1998): 661-684.

51 John Eekelaar, J. (2004) 'Children between cultures', (2004) *International Journal of Law, Policy and the Family*, 18(2) at p 191.

extension, all domestic violence (incorporating forced marriage) within minority communities is likewise increasingly being defined as HBV ['honour'-based violence]. The result of this tendency is that a parallel universe where domestic violence against minority women is considered 'different' to that experienced by white women, requiring 'different' analysis and solutions is created. Cultural values within minority communities are regarded as the underlying cause of violence against ethnic minority women rather than patriarchy. This means that proposed solutions are based on changing minority cultural and social attitudes rather than empowering women by changing gender power relations.⁵²

Placing violence against ethnic minority women in its proper context may, therefore, require a dual approach: i.e. first, the presence of religion or culture requires a distinct solution through specially tailored social policy provision; second, it is also critical to place this violence within the broader context of 'violence against women' that encompasses the range of violence experienced by both majority and minority women. Social policy, therefore, may need to use this twin track approach that allows specific services for minority women, whilst at the same time also making sure that mainstream service provision for all women accommodates the needs of minorities.⁵³

In some situations an apparent conflict between religion or culture and the rights of women will fall short of violence or coercion. Many women choose to remain members of a cultural or religious group and they voluntarily adopt practices that are perceived to conflict with equality and non-discrimination norms. For example: women may choose forms of dress that many people consider to be patriarchal; they may enter into intimate relationships – such as arranged marriages – which are considered to embody unequal relationships between men and women; or they may choose to regulate their personal affairs in forums – such as Muslim arbitration or *Beth Din* forums – where the rules of inheritance or divorce are discriminatory.

The problem in these situations is not that it is difficult to categorise the practice as being unequal or discriminatory, but rather that these practices fall outside the jurisdiction of constitutional, human rights or criminal law, as well as the scope of discrimination law. Nevertheless, it is possible to identify a number of principles that can be applied in these situations. Most significantly, it is important to balance the continued advocacy of the principles that underlie constitutional and human rights principles, as well the commitment to equality and non-discrimination, with a recognition of respect for women's autonomy. This balancing requires a more complex response to conflicts between religion or culture and sex equality: i.e. a response that recognises that women can make a legitimate choice to remain members of a group that may sometimes contain discriminatory practices. A recent illustration of approach can be found in the analysis of Baroness Hale in the House of Lords decision in *Shabina Begum v Denbigh School* (a case involving the right of a young adolescent Muslim school girl to wear a strict form of Islamic veiling in breach of her school's uniform policy). Baroness Hale made the following statement confirming that gender equality should prioritise an individual woman's autonomy: 'If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticize or prevent her.'⁵⁴

Another way of framing this analysis is to say that women have the right (e.g. as part of their right to freedom of association, their associational right to freedom of religion or belief, or their right to membership of a cultural group via Article 27 of the International Covenant on Civil and Political Rights) to remain in a group that may contain practices that discriminate against them on the ground of

52 Zohra Moosa (ed.), *Seeing Double: Race and Gender in Ethnic Minority Women's Lives*. (London: Fawcett Society, 2008) 2008, p. 45-46.

53 Erica Burman, Sophie Smailes and Khatija Chantler, 'Culture as a Barrier to Service Provision and Delivery: Domestic Violence Services for Minoritized Women', (2004) 24(3) *Critical Social Policy* 332-357.

54 *Shabina Begum v Denbigh* [2006] UKHL 15, per Baroness Hale at para 96, p. 39.

their sex.⁵⁵ This, in turn, requires law and policy to continue to support women who choose to remain members of a cultural or religious group, despite the fact of sex discrimination within that group. For example, in areas such as the choice of intimate relationships or dress or religious forums for dispute resolution it may be inappropriate to introduce legal regulation. There may also be a number of non-legal responses that can be used to protect women and promote sex equality in these contexts, such as offering financial and practical support to minority women's groups. Regarding complex areas such as the choice of *Beth Din* or Muslim family arbitration, it may be necessary for the state and public agencies to provide resources which encourage self-regulation and training that emphasises values such as gender equality.

As the previous discussion has suggested, policies of multiculturalism and the 'accommodation of difference' can perform an important function in the integration of Muslim minorities, whilst at the same time fulfilling the goals of freedom, equality and social cohesion. However, the prospect of the public accommodation of religious norms – such as Muslim legal and ethical norms – raises the prospect of a conflict with principles such as secularism or gender equality. 'Progressive multiculturalism', which was endorsed in Part II of this paper as the preferred strategy of European liberal democracies, can be presented as a model for the 'accommodation of religious difference' that can overcome some of these more troubling concerns. Progressive multiculturalism's focus on the limited accommodation of the most pressing needs of Muslims can be understood as compatible with soft forms of secularism. Moreover, the priority that this model gives to individual autonomy allows it to resolve conflicts between cultural and religious equality on the one hand, and gender equality on the other.

III. 4. Social Policy – Preserving an adequate range of options

There are differences in the nature of Muslim demands for the accommodation of their distinct legal and ethical norms across different European nation states. Unlike Britain, Muslim communities in European countries have not undertaken social activism in favour of local community based Sharia Councils. Rather, in countries such as France and Belgium there have been meetings between different scholars which have led to the establishment of the European Council for Research and Fatwas in the late 1990s. This initiative is a project for the adaptation of Islamic law (*fiqh*) into a series of legal opinions which are more reflective of the needs of European Muslims. There has also been significant discussion about whether the opinions of the scholars and experts of these bodies (fatwas) could evolve into a distinct type of Islamic law which is called minority fiqh (*fiqh al aqalliyat*) which is specifically designed to allow Muslims to live as a minority.

Moreover, diversity within Muslim communities means that it will be impossible to identify one definitive strategy as *the one and only* demand for accommodation of legal and ethical norms. Whilst in some situations Muslims will want the accommodation of Muslim legal and ethical norms as distinct and separate normative 'legal' systems as part of a process of legal pluralism, there may be other situations where Muslims want to 'mainstream' their religious legal and ethical norms into existing legal, political and social structures. In family law, for example, there are a number of possible responses available to Muslim who seek to conduct their private and intimate relationships in ways that are compatible with their understanding of Islam. One possible response is to call for 'religious arbitration and tribunals' where Muslim decision makers apply 'Islamic' norms. Alternatively, Muslims may want to ask for recognition of their religious marriages and divorces within mainstream and existing legal systems. Other Muslims may feel that the existing mainstream procedures in relation to marriage and divorce – which, for example, require consent and fair

55 International law also recognises the right of a woman to both sex equality (Article 26 of the International Covenant on Civil and Political Rights – ICCPR) and to membership of a cultural group (Article 27 ICCPR), see *Sandra Lovelace v Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

distribution of rights and responsibilities – already reflect the Muslim legal and ethical norms by which they want to organise their private and intimate lives. It is important for policy makers to maintain a range of options to allow the maximum choice for Muslims and state institutions rather than assuming that one option – e.g. Muslim religious arbitration – is the only or best option. Tariq Ramadan, for example, has recently argued that the focus on minority fiqh – and the accommodation of distinct and separate Islamic legal rules – was one part of a phase of development of European Muslim communities who need to now adopt strategies that emphasise ‘universal’ rather than ‘separate’ values.⁵⁶

Part IV. Accommodating Muslim norms– the British Experience

IV. 1. Muslim ‘Sharia’ Arbitration Tribunals

The debate about accommodating Muslim family law has taken on greater urgency since the speech of the Archbishop of Canterbury (Archbishop Rowan Williams) which suggested that there may be some useful role for ‘multicultural jurisdictions’ which devolve some decision-making in areas such as family matters back to religious communities. Archbishop Rowan Williams’ speech was met with a vigorous denunciation throughout the British media. The public hysteria that followed this incident confirmed the difficulty of having a reasonable public discussion about accommodating Muslim religious norms in an atmosphere in which Islam and Muslims are routinely demonised in public debates.⁵⁷ The over-reaction to proposals to accommodate Muslim legal norms in Britain also echoed the Canadian experience.⁵⁸ Yet Archbishop Williams’ central claim that Muslim legal and ethical norms – the sharia – were already guiding the conduct of British Muslims is self-evident. As scholars of legal pluralism have noted, there is no strict separation between state (mainstream) law, and the various informal norms that are followed by minorities such as Muslims. Presenting these two systems of norms as a strict dichotomy fails to take into account the intermediary spaces where individuals often apply a hybrid mixture of norms to guide their conduct or to settle disputes. In Britain, once these alternative spaces are analysed, it becomes clear that many Muslims are using alternative forums (which are usually associated with local mosque formation) for advice, consultation and dispute resolution. These Muslim community organisations - often labelled ‘Sharia Councils’ – are alternative forums for dispute resolution which apply Muslim legal and ethical principles, as well as cultural norms of local communities. Sharia Councils usually focus on family law issues, e.g. marriage and divorce, although they also provide advice in areas such as contract and inheritance. They also provide advice and assistance on Muslim family law to members of the Muslim community, solicitors and in some situations the judiciary. The three main functions of the Sharia Council are: first, reconciliation and mediation; second, issuing Muslim divorce certificates; and third, producing expert opinion reports on Muslim family law and practice.⁵⁹ As Samia Bano has noted, Sharia Councils are closely linked to diasporic transnational networks that cut across the national and international space. Many of the members who give ‘opinions’ in the Sharia Councils often have links with countries of origin of Muslims such as Pakistan and Bangladesh. They represent diverse and varied ‘schools of thought’ within Islam. They can also be understood as part of the process through which Muslims use a hybrid range of sources (their religious and cultural norms as well as state law) to guide decision-making and

56 See Tariq Ramdan, *Western Muslims and the Future of Islam*, (Oxford: Oxford University Press, 2004) at page 6.

57 See Jonathan Petre and Andrew Porter, ‘Archbishop Williams Sparks Sharia Law Row’, (8 February 2008) *The Daily Telegraph*.

58 Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective*, (Ottawa, 2007, on file with the author).

59 Samia Bano, ‘Muslim Family Justice and Human Rights: The Experience of British Muslim Women (2007) 2(2) *Journal of Comparative Law* 38, at 45.

conduct. Moreover, the common assumption that Sharia Councils are ‘forced’ upon Muslim women who are reluctant users of these systems fails to reflect a more complex picture: Muslim women are often willing and active users of these forums, and they are seeking the reform rather than abolition of this form of Muslim family justice.⁶⁰

Two examples can usefully make these abstract points more concrete: a discussion of Islamic mortgages reveals the considerable benefits of multicultural accommodation of Islamic legal norms; whilst the case of separate family law tribunals illustrates the risks of the multicultural vulnerability of Muslim women.

IV.2. Islamic Mortgages – Multicultural Accommodation

The first example illustrates the way in which multicultural accommodation can work successfully. In the UK, the Finance Act 2003 abolished an excessive and double stamp duty on mortgages that comply with the Islamic law (Sharia) 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 law was a significant barrier to the development of more widespread home finance for Muslims. The abolition of this penalty by the Treasury has 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 could have 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. These types of modest concessions can yield considerable and magnified political benefits for minorities. 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.

IV.3. Muslim Family Law – Multicultural Vulnerability

The reason that the public accommodation of Islamic mortgages is unproblematic is because it does not raise the specter of ‘multicultural vulnerability’⁶¹. This term refers to the risk faced by certain individuals within a minority group whose rights as citizens are compromised by the grant of public recognition to traditional rules and practices. The prospect of ‘multicultural vulnerability’ becomes most obvious in the area of family law. At first sight the grant of separate jurisdiction to traditional groups in areas of family law seems unproblematic. The response of some liberal democracies has been to make exactly this concession to its racial, cultural and religious minorities. A noteworthy example was Canada where Ontario’s Arbitration Act 1991 allows the use of alternative dispute resolution procedures to resolve personal disputes in areas as diverse as wills, inheritance, marriage, remarriage, and spousal support. The legislation allowed individuals to resolve civil disputes within their own faith community, providing all affected parties give their consent to the process and the outcomes respect Canadian law and human rights codes. Muslim groups in Ontario had indicated a wish to set up a system of Muslim personal law tribunals (comprised of retired judges, religious scholars, private arbitrators and lawyers) that would govern some aspects of family law. More recently, this strategy of accommodation was criticised with the result that there were restrictions to

60 Samia Bano, *ibid.* See also Sonia N. Shah-Kazemi, ‘Untying the Knot: Muslim Women, Divorce and the Shariah’, *Report of the Nuffield Foundation*, (Nuffield Foundation: London, 2001).

61 See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*, (Cambridge: Cambridge University Press, 2001)

the use of religious arbitration.⁶² There is some limited evidence that some British Muslims would welcome this option. The Guardian/ICM poll (November 2004) based on a survey of 500 British Muslims found that a clear majority want Islamic law introduced into this country in civil cases relating to their own community. Some 61% wanted Islamic courts - operating on sharia principles - "so long as the penalties did not contravene British law".

From the perspective on multicultural accommodation there are clear advantages to such a move. Family law governs some of the most private and intimate aspects of who we are and it relates to our personal identity in the most profound way. It therefore seems appropriate to allow citizens in a liberal democracy to reach an agreement about the rules that will govern these aspects of their life. If all persons, and women, freely choose to be governed by a traditional justice system – the argument goes – then there seem to be no conclusive reasons why the state should not respect these choices. This is at first sight an attractive argument. However, this analysis moves too swiftly from free choice to a separate system of family law. Most significantly, such a quick analysis pays insufficient attention to the myriad of ways in which granting control over family law to a traditional culture or religion has the potential for causing harm to vulnerable group members such as women.

We should ask ourselves why traditional groups always give priority to gaining control over family law issues. The answer should not surprise us. Women and family law become a focus – sometimes an obsession - for traditional groups concerned with the preservation and transmission of their culture or religion because they recreate collective identity by reproducing and socialising future members of the group. Therefore, controlling with whom and on what terms they should undertake their childbearing and childrearing functions becomes an issue not only for individual women, their partners and families but for the wider community. From this perspective, it becomes a critical matter that women should enter into their most intimate relationships and functions in a way that preserves the membership boundaries and 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. Women are also often given the status of passing on the particular collective history of the tradition and its social, cultural and religious norms to the next generation. Women become a public symbol of the group as a whole. This explains why traditional communities focus on family law when they demand accommodation. These groups insist that they, rather than the State, should have exclusive jurisdiction in these key areas.

One of the most powerful arguments for multiculturalism is that there are power hierarchies between minority groups, majorities and the State that should be re-negotiated. However, this recognition of external hierarchies should not blind us to the fact that there are also power hierarchies within groups. These 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; restriction on the right to education, employment or participation in the public sphere; giving up the right to control over their own reproduction and bodies. It is often argued that many women choose to remain members of a group despite the fact that traditional rules and practices undermine their interests. "They have a right to exit but they freely choose to remain" is often the response to any challenge. But this 'right to exit' argument is not a realistic solution to the problem of oppression within groups. 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 (which has conceded jurisdiction in this area to the group) 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,

⁶² See Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective*, (Ottawa, 2007, on file with the author).

her family and community. The complexity of the choices that women face in these circumstances makes it more likely that they will continue to consent to practices despite the fact that they experience harm. This internalization of harmful practices is exactly what exacerbates women's vulnerability in these contexts. In the case of Muslim women the 'right to exit' argument is rendered yet more problematic by the fact that this 'exit' is also from a faith community. The stark fact is that emotional attachment, economic circumstances and religious commitment makes the 'exit' not only an unrealistic but also a tragic choice for many Muslim women.

The discussion of multicultural vulnerability confirms that traditional cultures and religions cannot claim to be immune from interventions and criticism where they harm their members. One of the great errors of some forms of multiculturalism is the assumption of essentialism of groups: the claim that it is possible to identify one fixed definition of a tradition or culture or religion. Any complex group contains not just one but a plurality of ideas and arguments. Some of these voices are backed by existing power structures whilst others are relatively silent and do not have access to public space. It should not surprise us to learn that very often those who purport to speak on behalf of traditional cultures are not always attentive to the specific needs and interests of women. There will be significant diversity in the response of Muslim women. Of course they should be assisted if they choose to exit from the group altogether. These are not the hard cases. It is much more difficult to know how to respond to those women (probably the majority) who choose to remain 'insiders' within cultures and religions which do not always give them power, safeguard their interests or allow them full participation as equals. This is perhaps one of the most perplexing aspects of the behaviour of Muslim women that causes confusion. There is rarely one right answer to such complicated personal choices. Some women may choose to remain silent despite the injustice in their communities. Others may seek to challenge the dominance of certain 'interpretations' of their traditions that are a source of their oppression.

This is not just a quarrel for 'insiders' within Muslim communities. The state, and 'outsiders', can and should play a critical role. Vulnerable individuals such as women can and should expect support from the state and 'outsiders'. The starting point for analysis must be that the state should safeguard the individual rights (e.g. free speech and association) of those women who choose to remain 'insiders', but who want to challenge injustice and oppression within their communities. Outsiders can also make a valuable contribution if they are able to overcome their scepticism and work constructively with Muslims. It is possible for existing political movements to form alliances with religious groups such as Muslims whilst at the same time maintaining a critical stance on issues such as gender and sexuality. Some commentators are sceptical and pose the dilemma faced by secular democrats in its most vivid form: "Atheists, feminists and anti-racists are paralysed by Islam. Whichever way they turn, they find themselves at risk of alliances with undesirables of every nasty hue." [...] "Muslims must also accept the right of others to criticize their religion without smearing any critic as racist."

Outsiders must strike a balance between showing solidarity for religious groups such as Muslims whilst at the same time maintaining an authentic critical perspective about religion. However, there is no reason why contemporary critics should be 'paralysed by Islam'. 'Outsiders' often provide the most prescient and invaluable critique of Muslim communities. In the context of the present discussion on family law, some critics – e.g. feminists - may respond to Muslim women who choose to affirm their faith by insisting that they need to be re-educated out of their present choice. They will want to insist that 'exit' is the only legitimate response of Muslim women who face injustice within their communities. A less extreme response would accept that partial recognition of a religious group does not require the wholesale uncritical acceptance of all its practices. In fact, one of the most significant contributions that outsiders can make is to 'hold the line' by providing a detailed and constructive critique of Muslim communities. Insiders such as Muslim women can turn to this critique as a precious source of information and ideas. It is a strongly held belief amongst Muslim women that Islam contains within it the resources to allow them to challenge injustice and oppression within their

own communities. However, this belief should not prevent them from appropriating legitimate arguments from outside their own tradition; using the experience of Western feminism and other political movements as a precious source of ideas and experience; and making demands for dignity and justice by citing successful examples of women from other traditions. Western feminism has made an outstanding contribution towards securing dignity for women. It also has an understandable and healthy skepticism about religion. It is therefore lamentable when this constructive analysis collapses into a less coherent position: the view that Muslim women must shed all their religious affiliations before they can be considered legitimate partners in political movements. This is a significant barrier to Muslim women establishing political alliances – feminist alliances - that would assist them in the Herculean task of challenging the power of men within their own communities.

The accommodation of Muslim family law in Britain along the lines developed in Ontario is certainly a debate worth having. Such a move has the potential for a greater coalescence between the most intimate experiences of British Muslims in their daily private lives and their experience of normative political and legal institutions. Where there is evidence of coercion or a risk of harm the state must be willing to protect individual Muslims despite the religious or cultural claims of their community. There need to be procedures which ensure that women are fully informed about the nature and consequences of their choices. Any discussion about special family law tribunals must take seriously the risks that such a strategy poses for vulnerable individuals such as women. Bypassing mainstream family law procedures and safeguards in a liberal democracy in favour of traditional forms of justice in special tribunals is a serious decision which deserves sober reflection. The next section sets out some of the ways in which British legal and social policy has sought to accommodate Muslim family law, as well as Muslim ‘sharia councils’.

IV. 4. Sharia Councils, Muslim Family Arbitration and the British Family Justice System

Although existing research cannot confirm the number or nature of all the systems of applying Muslim legal norms – e.g. Sharia Councils and Muslim Family Arbitration – it is clear that there is significant use of these informal forms of dispute resolution within Muslim communities, particularly in the context of family law. Although some bodies such as the Muslim Arbitration Tribunal are increasingly centralising their procedures and services⁶³, the councils are not unified under one system and there is no ‘common procedure’ that governs their approach to dispute resolution. The decisions of these tribunals are subject to national law and they cannot be automatically enforced through the domestic state legal system. All members of the Muslim community retain the right to refer to an English court at any point in the proceedings, and any agreement that falls within the definition of an arbitration agreement can also be reviewed if there is evidence of pressure, duress or coercion.

Sharia law is not a part of English or Scottish law in a formal way, but provided that these rules and tribunals do not contravene any legal provisions they are free to operate. These councils deal with contractual matters and personal law such as inheritance, as well as family law matters such as divorce. The parties have to consent to the decisions of these councils who only have powers to make recommendations to the parties. These councils are wholly dependent on the consent of the parties to enable the resolution of the dispute because these bodies do not have any enforcement powers.

In the specific context of Muslim family law, there is no recognition of Muslim marriages and divorces in English law. For Muslim marriages to be recognised as legally valid they have to conform with the terms of the Marriages Act 1949, which would require that the places where the marriage is carried out (e.g. a mosque) is registered. Most of the cases that are dealt with by Sharia Councils and the Muslim Arbitration Tribunals concern the dissolution of marriage (a *khula*) where a woman seeks

63 See www.matribunal.com/ (accessed on 2 February 2009)

a religious declaration that her marriage has been dissolved and that she is divorced.⁶⁴ In these cases, if the woman or the parties jointly want any agreements relating to the division of matrimonial property or children to be recognised by English authorities they have to submit a consent order to an English court. These consent orders are scrutinised to ensure that they comply with English family law principles, to safeguard the rights of the parties and especially women and children.

Alternatively, the parties using Sharia Council or Muslim dispute resolution can sign an agreement under the Arbitration Act 1996 which allows them to authorise a third party to resolve their dispute. This applies to civil law disputes. It is worth pointing out that the Arbitration Act 1996 specifies that decisions of arbitrators that are illegal or contrary to public policy are not enforceable. It is also worth noting that there has been use of this civil arbitration mechanism by British Jews whose ‘rabbinical court’ – the Beith Din – deals with the granting of divorce and the dissolution of the religious limb of Jewish marriages. In this context, the problem of a refusal of a recalcitrant spouse to grant a religious divorce has been addressed through specific statutory provisions, so that the Matrimonial Causes Act – as amended by the Divorce (Religious Marriages) Act 2002 – enables a court to require the dissolution of a religious marriage before granting a divorce. This provision can be used in the context of Jewish divorces. Muslims can also apply for recognition – and therefore protection – under this legislative provision, although they have not yet registered to use this facility.

It is often argued that women who choose Muslim arbitration forums are subject to pressure and that these forums should be prohibited. However, two leading researchers on Muslim family arbitration have concluded that these forums fulfill an important need for Muslim women.⁶⁵ Muslim women want to continue to have access to these forums, although they want to see important ‘internal’ reforms. It may also be necessary to require a more explicit articulation of the need for consent and the limits of arbitration in those cases where women choose to use these forums. If it is correct that there is real demand for these forums from women themselves, this suggests that a strategy of abolition is unlikely to be successful, and it speaks instead to the need for reform and training to transform these forums into a more ‘user friendly’ environment for women.

There may be several options for reform in this context. One option would be to prohibit these forms of alternative dispute resolution (sharia tribunals) altogether. This would tackle the problem of any coercion. However, if it is true – as suggested by the research – that women are using these tribunals because of a pressing need – and out of choice – then a blanket prohibition is likely to result in the informal use of these tribunals, thereby increasing Muslim women’s vulnerability. The present approach of allowing these tribunals to operate as another form of arbitration is also not ideal because it does not take into account the specific risk to women of being ‘conciliated’ back into violent or coercive relationships. One solution would be to accept that human rights law provides the minimum floor which binds all the parties in this context and which justifies state intervention to secure the rights of women. This may require training of staff, inspection and procedures to ensure that women are fully informed about the nature and consequences of their choices. Marion Boyd’s proposals in Ontario recommended the use of alternative dispute resolution in these contexts, but they also set out other recommendations and safeguards. Boyd’s report, released in December 2004, came after meeting with more than two hundred people and receiving almost forty submissions. Boyd made forty-six recommendations, including: regulations to ensure proper record-keeping, mandating written decisions, and training of arbitrators; imposing a duty on arbitrators to ensure that parties understand their rights and are participating voluntarily; providing for greater oversight and accountability, including empowering courts to set aside arbitral awards for various reasons including unconscionability, inadequate financial disclosure or if a party did not understand the nature or

64 Samia Bano, ‘Muslim Family Justice and Human Rights: The Experience of British Muslim Women’ (2007) 2(2) *Journal of Comparative Law* 38, at 45. See also Sonia N. Shah-Kazemi, ‘Untying the Knot: Muslim Women, Divorce and the Shariah’, *Report of the Nuffield Foundation*, (Nuffield Foundation: London, 2001).

65 Ibid.

consequences of the arbitration agreement; public education and community development; expanded appeal possibilities; and further policy analysis to determine whether additional safeguards are required.

At present, there is no evidence that the UK Government is willing to allocate the resources that would be necessary to provide these safeguards. Any discussion about special family law tribunals must take seriously the risks that such a strategy poses for vulnerable individuals such as women. Bypassing mainstream family law procedures and safeguards in favour of traditional forms of justice in special tribunals is a serious decision which deserves sober reflection. An additional advantage of an approach that permits some recourse to these tribunals, but which regulates them to meet safeguards, is that the social group is encouraged to reform its practices from within. This may provide a more effective way of transforming social group norms that may harm women, as well as empowering women within these communities to demand and initiate change without abandoning their group membership.⁶⁶

IV.5. Sharia Law in Mainstream British Courts

Mainstream cases – particularly family law cases – also raise questions about Sharia law and Muslim legal and religious norms. The ‘Sexual and Cultural’ Research Project at the London School of Economics sets out the considerable number of British cases where there is a potential conflict between gender equality and claims based on religion or belief, race or culture.⁶⁷ A number of the cases where there have been claims for accommodation by Muslims relate to forced marriage or violence against women which arise not only in criminal law proceedings, but also in wardship proceedings in the family courts and petitions for the annulment of marriages. Other cases relate to divorce or the dissolution of marriages. Problems about the status and suitability of Muslim religious norms have also arisen in cases where the parties (often members of religious minorities) have chosen to submit to foreign jurisdictions in preference to English law in the regulation of divorce.

Many of the cases involving Sharia law in family law – e.g. the cases summarised by ‘*Women and Cultural Diversity: A Digest of Cases*’⁶⁸ - arise at first instance. Two recent cases in the highest appeal courts – one in the Court of Appeal and the other in the House of Lords - illustrate the contemporary approach towards Sharia law and the accommodation of Muslim legal norms.

The first case - *KC and NNC v City of Westminster Social and Community Services Department*⁶⁹ - concerned the legal validity of an Islamic marriage ceremony which took place on the phone between a British man based in Britain who was mentally disabled (through substantial intellectual impairment and autism) and a Bangladeshi woman who was based in Bangladesh. On behalf of the bridegroom it was argued that Islamic ideas of ‘welfare’ supported the practice of marrying those who were mentally ill so that their partners could provide them with ‘care’. Owing to the bridegroom’s incapacity, the marriage was held to be invalid despite the fact that it may be valid in Bangladesh and by some interpretations of Sharia law. The Court of Appeal relied on the principles of public policy to assert its inherent jurisdiction and to declare that the marriage was void. Significantly, the Court of Appeal limited its decision to this particular set of facts which focused on the mental incapacity of the bridegroom to give consent, rather than declaring that all “telephone” marriages were illegal. Moreover, the basis of the decision was public policy rather than a blanket refusal to apply sharia law. There was not, therefore, the type of reference to sharia law as incompatible with democracy or rule of law that

66 See Ayelet Shachar, *Multicultural Jurisdictions*, (Cambridge: Cambridge University Press, 2001).

67 See ‘*Women and Cultural Diversity: A Digest of Cases*’ at <http://webdb.lse.uk/gender> (accessed on 20 May 2005).

68 See at <http://webdb.lse.uk/gender> (accessed on 20 May 2005).

69 [2008] EWCA Civ 198

was a feature of the European Court of Human Rights decision in the *Refah Partisi* decision⁷⁰. This suggests that there is some scope for applying the principle of ‘severance’ in relation to the use of Sharia law or Muslim legal norms in English law, e.g. the courts will be able to consider the norm that is being applied, to evaluate it against public policy principles and reach an overall conclusion about its applicability in a British context. This would allow courts to make decisions about which parts of the Sharia law can apply because they are compatible with English law and public policy, whilst refusing to apply those parts of the religious norms that contravene law or public policy.

The second case where Sharia law has been considered is the House of Lords decision in *Em (Lebanon) (Fc) (Appellant) (Fc) V Secretary of State For The Home Department Appellate Committee*⁷¹. In this case, the appellant was a woman who came to Britain from Lebanon. Her son had reached the age of seven when, under the system that regulates the custody of a child of that age under Sharia law in Lebanon, his physical custody would pass by force of law to his father or another male member of his family. Any attempt by her to retain custody of him there would be bound to fail because the law dictates that a mother has no right to the custody of her child after that age. She may or may not be allowed what has been described as visitation. That would give her access to her son during supervised visits to a place where she could see him. But under no circumstances would his custody remain with her. Therefore, the close relationship that exists between mother and child up to the age of custodial transfer could not survive under that system of law where, as in this situation, the parents of the child are longer living together when the child reaches that age. The House of Lords concluded that in this situation there was a real risk that the very essence of the family life that mother and child have shared together up to that date will be destroyed or nullified. The House of Lords observed that this system of child custody under these Sharia law rules was not compatible with the European Convention of Human Rights standards which require the mutual enjoyment by parent and child of each other's company is a fundamental element of family life. A second feature of these custodial rules was that they discriminated between mothers and fathers, which would contravene the principle of non-discrimination on the ground of gender.

In *EM*, the House of Lords decided to allow the woman leave to remain and relied on Article 8 of the European Convention on Human Rights which guarantees right to privacy and family life. Significantly, both Lord Bingham and Lord Carswell made it clear that they were not passing judgment more widely on the status of sharia law. The House of Lords observed that in deciding this appeal on the basis of the right to privacy and family life (article 8 of the European Convention on Human Rights) they were applying British domestic law as well as the common values of the states who are members of the Council of Europe. Lord Bingham and Lord Carswell also made it clear that they were not passing judgment on the law or institutions of any other state. Nor were they setting out to make comparisons, favourable or unfavourable, with Sharia law, which prevails in many countries, reflecting the religious and cultural tradition of those countries. This approach reinforces the view that British courts are not willing to undertake wholesale and blanket condemnations of Sharia law, or Muslim legal norms, but that they are willing to consider the impact of these rules on a case by case basis, as well as scrutinising the public policy implications of permitting the application of these norms. This pragmatic and incremental approach – which focuses on the impact of Muslim legal rules on individuals, enshrined constitutional and human rights values, as well as public policy – is in sharp contrast to the wholesale condemnation of the sharia by the European Court of Human Rights in *Refah Partisi* decision⁷².

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

71 [2008] UKHL 64

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

Conclusion

The two examples – Islamic mortgages and Muslim family law – that have been discussed confirm the complexity of translating multiculturalism into practice. The Treasury's accommodation of the needs of British Muslims for mortgages is a salutary reminder that an imaginative and sensitive response to a real practical problem can sometimes yield more promising results than abstract definitions of multiculturalism and citizenship. The introduction of a separate system of family law for Muslims highlights a different point. It forces us to acknowledge that the injustice of forced assimilation of a minority by a powerful majority is not the only challenge that faces multiculturalism. We must also be vigilant about the risk of harm to vulnerable individuals from oppression within minority groups.

The institutional context of increasing cultural diversity in the European public sphere is critically important in all these cases. The debate about accommodating Muslim legal norms, and the resulting negotiation between the majorities and minorities, needs to be carried out within mainstream EU and national political and legal institutions. Civic society and the media are also important actors within this process. This procedure is likely to ensure the broadest range of participation in public debate and political negotiations. In this way the painful compromises that are an inherent part of multicultural politics are more likely to command the consent of all those involved. Points of difference and friction between majorities and minorities can often act as a catalyst towards a stable form of integration that avoids the worst injustices of forced assimilation. In some cases we must be satisfied with an outcome that is a patient and resigned *modus vivendi*. More optimistically, this technique also has some potential to redeem the worst excesses of multicultural politics: to generate a deeper and more meaningful identification with national institutions for the majority and minority, in a joint enterprise, that creates and sustains a coherent political community rather than a plethora of self-interested splinter groups. A sense of belonging for all citizens, including European Muslims, can be effectively hammered out through debate and compromise carried out in our public sphere.

Within this context and spirit, and within the limits of the requirements to safeguard vulnerable groups such as women, there should be greater accommodation of the most pressing needs of European Muslim minorities to live their daily lives according to religious norms – including the norms of the Sharia. Such an approach is justified as a matter of principle and pragmatism in European liberal democracies. As a matter of principle, such an approach ensures that these minorities are treated according to the principles of freedom and equality. As a matter of pragmatism, such an approach can make a substantial contribution towards the integration of European Muslims, as well as promoting the goals of social cohesion.

Author contacts:

Maleiha Malik

Reader in Law

School of Law

King's College

University of London

E-mail: Maleiha.malik@kcl.ac.uk