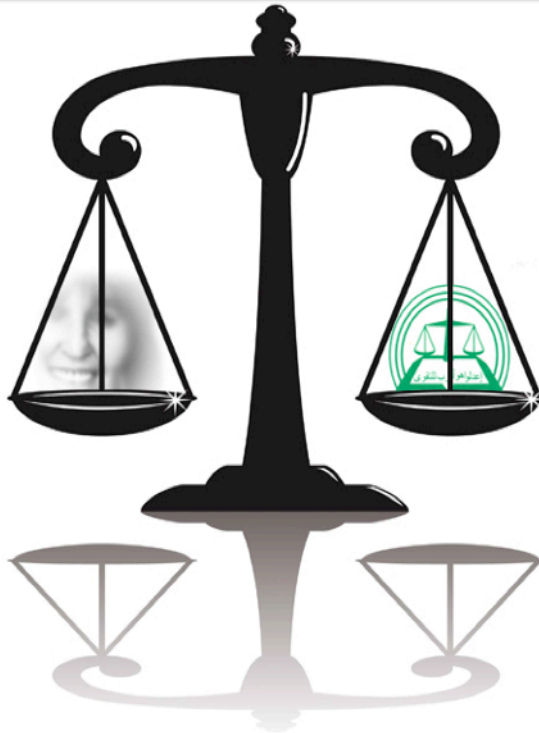


In the Name of Allah, the Most Merciful, the Giver of Mercy



RESPONSE TO BARONESS COX'S ARBITRATION & MEDIATION BILL



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The ISC's response to the Arbitration and Mediation Bill moved by Baroness Cox.

- 1st Reading: 07th June 2011 –
House of Lords
- 2nd Reading: 22nd October 2012 –
House of Lords

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Written By Khola Hasan for the ISC

Arbitration and Mediation Services (Equality) Bill, moved by Baroness Cox.

*This article is based on the Second Reading of
the Bill which took place in the House of Lords
on 19 October 2012.*

While reading the transcript of the discussion in question, one is reminded of Joseph Conrad's '**Heart of Darkness**', with comments that do credit to Kurtz's article '**International Society for the Suppression of Savage Customs**'. It is interesting to see a renaissance in British imperialism which struggled to civilise the dark races in culture, language, dress and religion so nobly. European orientalism has a strong tradition of insulting and dismissing Islam as medieval, discriminatory and irrelevant. This is part of the imperial mindset that justified slavery on the basis that black and brown people were biologically and intellectually inferior to the white races. Pseudo-evolutionary science was used to back such beliefs, just as

pseudo-intellectual and emotional discussion is used to insult Muslims today.

The reader cannot but be moved by the dreadful circumstances in which British Muslim women live today. After all, Kurtz's dying words are, "*The Horror! The Horror!*"

This is the horror of the adherents of an ancient faith who tragically keep alive their religious tradition in the wake of the hurricane that is global consumerism, secularism and loss of morality.

The debate in the House of Lords was characterised by a deep dislike of Islamic law and Muslim customs. It was also characterised by a superb ignorance of the reality of Muslim lives in Britain today. During the discussion, sweeping stereotypical statements were given with manufactured statistics, to give the impression that detailed research had taken place across Britain and that official figures had been compiled. Baroness O'Loan was kind

enough to inform us that “*even before Muslim women enter into marriage, some 60% of them experience some degree of coercion before marriage.*” These figures had been plucked out of thin air and had the same degree of authenticity as sightings of the Loch Ness monster.

The criticisms levelled at the Sharia councils during the debate were the following:

- * Sharia councils keep scant records.
- * many women think that these informal tribunals are real courts and submit to their rulings accordingly.
- * victims of domestic violence are coerced and intimidated into returning to their abusive partners.
- * women are discouraged from having civil marriages.

- * Sharia law envisages the creation of a parallel legal system.
- * Sharia law is inherently discriminatory against women.
- * women automatically lose custody of their children when the latter reach the age of 7, despite the rulings of civil courts on the issue.
- * polygamy is culturally acceptable.
- * women are given second-class status and their evidence is worth half of that given by a man.
- * female siblings inherit less than male siblings.

SHARIA LAW and a parallel legal system.

The Islamophobia expressed in the Bill is worrying. But what is more worrying is the brazenly-expressed hatred of Sharia. We are told in no uncertain terms that,

“Sharia law discriminates against women and children, and puts those who have experienced violence and abuse at further risk. Its rulings are incompatible with UK legislation, including the Sex Discrimination Act 1975, the Children Act 1989, and the Human Rights Act 1989”.

The honourable members of the House of Lords are woefully ignorant of a law that functioned across two-thirds of the globe for over a thousand years, and produced glittering empires such as the Umayyads, the Abbasids, the Fatimids, the Mughals and the Ottomans. European greed for imperialism and even the Crusades were directed solely by a desire to loot as much as they could from these great civilisations.

Sharia law is not a static, monolithic, outdated or oppressive system. It is an innately pluralistic philosophy that, during its fabulous 1200 year history, adapted to continuously meet the needs of its diverse and changing international

community. It is a cumulative tradition that is shaped by the past history of its people, has a determinant moral imperative, its foundations are revelation-based, and it is deeply grounded in the living experience of its adherents. Its rich history has seen the evolution of a complex judiciary, court system, and a fully formed legal theory at a time when European Christians were drowning witches and burning heretics.

Sharia law is much more than law per se. It includes the five daily prayers, fasting during the month of Ramadan, pilgrimage, giving charity generously, funeral regulations, marriage customs, upbringing of children and more. Are British lawmakers willing to dismiss all these facets of Muslim life in one sweeping sentence?

Neither Muslims nor Sharia councils have expressed a desire to introduce Sharia law into Britain or to set up a parallel legal system. Part

of the Islamic sharia is to show respect and obedience to the law of the land.

The work of the Islamic Sharia Council is not to run a parallel legal system, but to facilitate mediation, marital counselling and religious divorces. It has never considered itself to be above civil law. Section 1 of the Family Law Act of 1996 wanted mandatory mediation in marriage breakdown. The report of **The Family Justice Review** in 2011 wished for disputants to move away from the courts. It envisaged some exposure to mediation or other forms of Alternative Dispute Resolution. This has also been a requirement of Islamic law through the centuries, and the work of the Islamic Sharia Council is to offer mediation services in a culturally sensitive environment.

Although we have no statistics on this issue, it is evident from the work of all sharia councils and lawyers that a huge number of Muslims marry only in a religious ceremony, without a civil

marriage. This is their choice rather than something forced upon them by outside bodies. In such marriages, English law is very limited in the relief it can award such couples. Custody orders may be given, but a divorce cannot be granted. The aggrieved party can attempt to prove marriage through witness statements and other forms of evidence that point to a married life, but this is long and costly. Few couples who did not have a civil marriage are willing to undertake such a difficult legal process. They prefer to apply for religious divorces alone. Only a respected body such as the Islamic Sharia Council can award a religious divorce, and this is done according to strict procedural criteria. The majority of the beneficiaries of these religious divorces are women, as they can suffer when deserted by their husbands. At the ISC we often see female clients whose husbands have refused to grant them religious divorces out of sheer malice. In the past, these women would travel to their countries of origin to seek a

religious divorce through Sharia courts. This was financially and emotionally debilitating. Today such women can obtain a religious divorce with great ease through the ISC.

CUSTODY.

Under Islamic Law, custody of children is determined after careful consideration and in the best interests of the child. Under UK law, mediation is not permitted in custody issues, so the ISC insists that divorcing parents seek civil court judgement on this issue.

Given the interest of their lordships on this issue, we are happy to summarise the classical Islamic position on this issue. Sunni law consists of four schools of thought, and in most situations, it is common for custody to be granted to the mother unless she is unfit to take care of the child. In such a case, custody will be awarded to female maternal relatives, such as the grandmother or aunt. The Hanbali and Shafii schools do not distinguish between girls and

boys regarding the duration of female custody. The Hanbalis maintain that the mother should have custody from birth until the child reaches the age of seven, at which point he or she may choose between parents.

The Shafiis allow the mother custody until the child reaches the age of discretion and may choose either parent as custodian. The Malikis rule that female custody of a boy shall last until he reaches puberty, and for a girl until she marries.

Under the Hanafi School, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most Hanafi jurists set this age of independence at seven years, although some set it at nine. Hanafi jurists differ on when a mother's custody of her daughter ends. Most maintain that the mother's custody ends when the girl reaches puberty, set at either nine or eleven years of age. However, others allow the

mother's custody to last until the girl reaches the age of womanhood.

Despite the complexity of the issue, Baroness Cox or Turner is so confident of her knowledge of Islamic Law that she proclaims,

“Children over the age of seven automatically pass into the care of a man following a divorce decision by a Sharia court.”

FEMALE EVIDENCE.

In the amendment to Section 29 of The Equality Act 2010, the proposed Bill adds,

(12) For the purposes of subsection (11), discrimination on grounds of sex includes but is not restricted to—
(a) treating the evidence of a man as worth more than the evidence of a woman, or vice versa.

Islamic Scripture is clear that in the prevailing social conditions of Arabia in the seventh century, women were not known to deal in

financial matters. This made it difficult for them to act as competent witnesses in court cases dealing with business transactions, civil debts and contracts. The Quran therefore requires two female witnesses against one male witness, but it is clear that one woman is the actual witness and her testimony will carry full weight. The second woman is only a guarantor for the accuracy of the testimony of the main witness. The evidence of a woman is therefore equal to that of a man.

Justice is the central factor in the Islamic court and consideration is given to the area of expertise of both men and women. In many cases dealing with family affairs, midwifery and children's issues, the testimony of a woman on her own will be accepted.

For the Lords to state that Muslim women are treated as second class citizens by Islamic law shows how much contempt they have for a law of which they are completely ignorant.

INHERITANCE.

The Bill proposes an amendment to The Arbitration Act 1996:

3 Validity of arbitration

(1) The Arbitration Act 1996 is amended as follows.

(2) After section 6 (definition of arbitration agreement) insert—

“6A Discriminatory terms of arbitration

No part of an arbitration agreement or process shall expressly or implicitly provide—

(a) that the evidence of a man is worth more than the evidence of a woman, or vice versa,

(b) that the division of an estate between male and female children on intestacy must be unequal,

(c) that women should have fewer property rights than men, or vice versa.

Lord Donaldson in Attorney General v Observer Ltd (1990) commented that,

“The starting point of our domestic law is that every citizen has a right to do what he likes unless restrained by the common law or statute.”

The law has no business telling individuals how to dispose of their property. If a person wishes to leave his estate to the RSPCA or to Battersea Dog’s Home, he can do so. If parents wish to divide their estate according to Islamic rules of inheritance, they are at perfect liberty to do so. The Islamic Sharia Council is not an arbitration service, so the amendments for this section do not apply. However, when clients seek advice on how to divide their estate according to Islamic rules, we give them the required advice.

Islamic law contains one of the most comprehensive and detailed schemes of inheritance in the world. It contains a general rule that a male sibling will receive double the

share of his female sibling. This rule is consistent with variations in financial responsibility in Muslim family life. Men are given the divine responsibility of financially taking care of their families, from elderly parents to siblings and to their own families. They are required to pay a dowry to their wives at the time of marriage, and maintenance during marriage and divorce. Women are not required to make any such financial commitments, but if they wish to do so, it is their own choice. It is in the context of such a clearly defined family structure that the inheritance system is based, and to isolate the discussion from its context is to do injustice to it.

Masood Baderin explains that the double-share for the male does not apply in all cases. *“There are some instances where the female gets the same share as the male. For example, a father and mother get equal share (a sixth each) when they survive and inherit from their deceased son*

in the same capacity as parents; the uterine sister gets equal share (in the same capacity) with her uterine brother; and where the sole inheritors are a husband and a full sister of the deceased, the husband gets one-half and the full sister of the deceased equally gets one-half. There are also instances where the female could receive double the share of the male. The female will also receive the entire estate if she inherits alone. This contradicts any emphatic allegation of unqualified discrimination on grounds of sex in the scheme of Islamic inheritance.” (International Human Rights and Islamic Law, 2003.)

POLYGAMY.

In the amendment to Section 29 of The Equality Act 2010, the Bill adds

(3B) Steps under subsection (3A) should include but not necessarily be restricted to—

(a) informing individuals of the need to obtain an officially recognised marriage in order to have legal protection;
(b) informing individuals that a polygamous household may be without legal protection and a polygamous household may be unlawful.”

This is a strange addition as it gives precisely the same advice that the ISC gives on a regular basis. Muslims are fully aware that Nikah-only marriages have no official status and in a divorce the wife will not be able to receive matrimonial relief. They are also aware that polygamy is illegal in Britain.

Although there are no official statistics on this issue whatsoever, there is plenty of anecdotal evidence to suggest that polygamy in religious marriages is on the rise in Britain among the Muslim community. This is a social reality which is due to a number of complex factors. If

Muslim men are choosing to live polygamous lives, sometimes without the knowledge of the wives in question, there is nothing the law can do about it. These marriages are religious marriages with no legal sanction, and the men are fully aware that the law can offer neither a penalty nor any assistance.

The Islamic Sharia Council's role in these marriages begins when one of the wives in question decides she wants a divorce. We facilitate these divorces, but we cannot police the private lives of the people. Nor can we stop religious marriages, whether polygamous or not, from taking place.

The English legal system cannot intrude into the private lives and family institutions of British citizens. We do not wish to turn Britain into Orwell's nightmarish hell where Big Brother watches the bedrooms of his citizens and punishes their misdemeanours. If this is the kind of society we want, then perhaps the Lords

should also discuss the issue of adultery in wider English society.

The most regularly invoked figures suggest that roughly 30-40% of those in a marriage or long-term relationship will be somewhat unfaithful at some point.

The Daily Telegraph reported in 2007 that some 9.3 per cent of married and cohabiting British men, and 5.1 per cent of women, admitted to having had more than one partner in the past year.

We wonder if the Lords would like to share their lofty standards regarding monogamous marriage with the rest of society.

DOMESTIC VIOLENCE.

The proposed Bill contains a further amendment to The Criminal Justice and Public Order Act 1994:

(1) The Criminal Justice and Public Order Act 1994 is amended as follows.

(2) In section 51 (intimidation, etc, of witnesses, jurors and others), after subsection

(10) insert—

“(10A) This section applies where the victim of a domestic abuse offence is assisting in the investigation of that offence or is a witness or potential witness in proceedings for that offence.”

Domestic violence is just as much a crime under Islamic law as it is under English law. Muslims need not be patronised as if they are uncivilised and need the superior intellect of others to inform them that domestic abuse is unacceptable.

Domestic abuse has no connection with religion whatsoever. Sadly, it is a cultural phenomenon that transcends all religions, cultures, social classes and ethnicities.

The charity **Women’s Aid** explains that,

“The vast majority of the victims of domestic violence are women and children, and women are also considerably more likely to experience repeated and severe forms of violence, and sexual abuse. Women may experience domestic violence regardless of ethnicity, religion, class, age, sexuality, disability or lifestyle. Domestic abuse can also occur in a range of relationships including heterosexual, gay, lesbian, bisexual and transgender relationships, and extended families.” Furthermore, findings from the **British Crime Survey** (Walby & Allen, 2004) show that there was little variation in the experience of inter-personal violence by ethnicity.

The statistics on domestic violence are staggering. Women’s Aid explain that the British Crime Survey found that there were an estimated 12.9 million incidents of domestic violence acts (that constituted non-sexual threats or force) against women and 2.5 million

against men in England and Wales in the year preceding interview (Walby & Allen, 2004).

The Islamic Sharia Council is not a policing body nor does it deal with criminal actions. When a woman approaches the Council for a divorce following domestic abuse, she is advised immediately to contact the police if she has not done so already. She is never advised to return to her abusive husband, and her application for divorce is never unsuccessful. In some cases, the husband will wish to speak with his wife to attempt some form of reconciliation. If there are no restraining orders and only if the wife is happy to do so, we will arrange a joint interview. If the wife is not happy to sit in the same room as the husband, we arrange a telephone conference call so that she can join in the session from a safe location. We have never knowingly put the safety of any of our clients at risk.

SHARIA COUNCILS KEEP SCANT RECORDS.

The first words revealed of the Quran to Prophet Muhammad (peace be upon him) were:

“Read in the name of your Lord who created. Created mankind from a clot of blood. Read, as your Lord is very Generous. Who has taught the use of the pen. Taught man that which he does not know.”

The Quran further exhorts believers to keep written records of transactions, such as commercial dealings and wills. Muslims thus have an ancient historical tradition of reading, writing and keeping written records. In fact, we still have extensive extant records kept by Sharia courts in the seventeenth and eighteenth century in Syria, Palestine and Egypt. These records not only provide fascinating insights into the working of the law in the Ottoman empire, but they also prove the importance Muslims have always attached to keeping written records. The Islamic Sharia Council keeps electronic records of cases for at least

five years. These are confidential and so not available for the entertainment of their Lordships. But this does not mean that the records do not exist.

WOMEN ARE COERCED INTO ABIDING BY SHARIA COUNCIL DECISIONS.

Our esteemed Lords must be careful not to discuss Muslim women as if they are stupid and ignorant. They are intelligent beings who are perfectly capable of accessing services they require. Many choose to refer to Sharia councils rather than civil courts for a number of reasons. The main reason is that many have not had a civil marriage so they cannot apply for matrimonial relief. Secondly, they prefer to have their family disputes settled by a religious scholar who is sensitive to their religious and cultural needs. These scholars do not have the backing of the English legal system, but they have the unqualified support and respect of the

Muslim community. This is why the ISC is still in heavy demand today.

In 2011, the ISC dealt with 570 Islamic divorce petitions, 439 of whom were lodged by women. To suggest that Muslim women are incapable of dealing with their domestic problems is patronising, and patronising is indeed the tone of the entire debate in the House of Lords.

The need for Sharia Councils.

The Arbitration Act 1996 allowed for the establishment of arbitration tribunals, including provisions for faith-based tribunals to resolve civil disputes. Like the Jewish Beth Din, the Islamic Sharia Council (the oldest Sharia council in Britain) was established under older precursors to the Arbitration Act to deal with family disputes. To be precise, the ISC was established in 1982 with a very specific purpose in mind. Under Islamic Law, there are three main ways of dissolving a marriage: *Talaq* (unilateral repudiation by the husband, which

can be delegated to the wife in Talaq Tafweed), *Khul'a* (divorce instigated by the wife and involving a religious scholar or court), and *Faskh* (judicial dissolution by a court). In normal practice this means that a man can obtain a divorce without recourse to a third party, but a woman needs an Islamic court to pronounce divorce. In Muslim majority countries this clearly poses few problems as structures are in place to facilitate these procedures. But in a country like Britain, where there were no such facilities for the early immigrant community, thousands of women were forced to endure unhappy marriages because their husband refused to initiate divorce. In many cases, such husbands would take a second wife (under Islamic if not English law) but refuse to repudiate the first wife, forcing her to live a life of misery.

To resolve this difficult situation, several prominent Muslim scholars came together in 1982 and decided that a religious body that

could issue khul'a and provide guidance on religious issues needed to be established urgently. Thus was born the ISC. From the outset, the mandate of the ISC was to provide a forum for mediation and counselling for the unhappy parties and also to pronounce judicial divorce. To this day, the bulk of its work remains in this precise field. The advantage of mediation by Muslim scholars is that it provides a culturally and religiously sensitive environment in which the couple can air their grievances.

It should be noted that Khul'a proceedings proceed in tandem with divorce proceedings in civil courts. Women who petition for Khul'a are required to begin civil proceedings at the same time. However, there are many Muslim couples who continue to marry in religious ceremonies only and do not have civil registrations. Although this is clearly not a satisfactory state of affairs, such women have little recourse to

civil law and can only obtain divorce through Sharia councils.

The ISC has also become a forum for Muslims to approach regarding religious issues that need scholarly answers. For example, prayer during the short winter months, the use of inhalers and insulin while fasting, alcohol in dental treatments, porcine gelatine in flu jabs, female genital mutilation, interest-based mortgages, forced marriage, cousin marriages and so forth.

The Archbishop of Canterbury, Dr Rowan Williams, created a furore some years ago when he seemed to suggest that Muslims could be governed in respect of some disputes by Sharia. It was however, quite clear that the Archbishop was suggesting that individuals could opt to resolve certain disputes under their own choice of jurisdiction. This was not as ground-breaking a suggestion as the media declared, given that many Muslims had been turning to sharia councils for their marital disputes for decades.

The furore surrounding Dr Rowan's lecture on shows how difficult it is to discuss the issue of sharia in a calm atmosphere. Any discussions on widening the scope of sharia in Britain are usually met with great hostility and dismay. The ensuing debate invariably revolves around cutting hands and stoning to death as if these form the parameters of sharia. For a start, the introduction of Islamic criminal law into English law has never been on the agenda for sharia councils. Only an Islamic country can enforce Islamic criminal or governance laws. But more importantly, it is frankly ridiculous to equate Islamic criminal law (which is only one branch of sharia) with cutting hands and capital punishment. Islamic criminal law allows for a host of measures to deal with serious crime, including financial compensation and prison sentences. The severe *hudud* punishments are offered as a last resort, not as a first port of call, and have incredibly stringent evidence requirements. For example, a couple who

commit adultery may only be punished if there are four, adult, sane Muslims who saw them *in flagrante delicto*. In the unusual event that such witnesses are actually available, the punishment will be less for adultery and more for public order offences.

The Marriage (Registration of Buildings) Act 1990 allows for buildings of worship to be registered for the solemnisation of marriages. In theory, Muslims can attend one marriage ceremony at a registered Mosque and thus have their marriages registered under both Islamic and civil law. In practice however, it has been observed that very few of Britain's Mosques have shown an interest at being so registered. This in itself is not necessarily a problem, as the Muslim community has long been accustomed to having two events for their big day: a religious ceremony at a Mosque, and a white civil ceremony. The religious ceremony is seen as the 'real' wedding, with the civil ceremony simply being the state's stamp of approval.

Cohabitation will be allowed if a religious ceremony only has been conducted, but not if a civil ceremony alone has taken place.

Unfortunately, recent research suggests that the number of non-registered marriages (in other words, nikah-only marriages) is showing a dramatic rise. This has wide implications for Sharia councils as well as for the human rights of women. The Islamic marriage is potentially polygamous. Most Muslims who live in Britain are perfectly aware that polygamy is illegal under English law, and so are quite happy to remain monogamous. However, a small minority wish to practise polygamy underground. If these marriages fail, the women and children are often left in very vulnerable positions. Many women who enter into marriages without civil registration do so because they believe they will be treated as 'common law wives' and so will have rights in court if the marriage fails. Sadly, belief in the concept of the 'common law marriage' is one of

English law's most enduring myths. Many men who refuse to register their marriages do so either because they are contemplating polygamy or because they wish to deny their wives a share in their wealth should the marriage fail. In any event, it is generally the women who suffer at point of divorce if the marriage is not registered. A Sharia council can award the wife high levels of financial compensation, but if there is no civil marriage, she cannot pursue these awards in the courts.

The rise in Nikah-only marriages makes an important point about the attitude of many Muslims to the law. While the community as a whole seems happy to leave criminal law and financial disputes to the English legal system, issues of family law are treated differently. Marriage, divorce and the writing of wills are increasingly being seen as the sole preserve of faith-based institutions.