

No Country For Parallel Courts?

Critique on the functioning of Sharia Courts as organs of Alternate Dispute Resolution

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ABSTRACT: How far can a minority community go for promoting and preserving their culture without being touched by the ideals of law? This question has given rise to most complex discourses since the beginning of emergence of states as nations. In addition to legal rights, an individual recognizes some moral rights as well, essential for one's identity. Intellectuals today are wary of the state and the constitution not identifying those rights on one hand, on the other, it is also a concern that it might encroach upon the practices already established. This research article is an attempt to analyze one such issue of Sharia Courts. Being popularized as an organ of Alternate Dispute Resolution System, a deeper study reveals certain fundamental issues which might be viewed with criticism by enlightened member of civil society. These issues, however, can be worked upon to render an informal justice scheme complementary to our integrated judicial system. I believe, with coordinated action from state as well as religious actors, these courts can act as effective tools of adjudication.

I. INTRODUCTION

The recent proposal of All India Muslim Personal Law Board to establish a Darul Qaza (Sharia Court) in each district of the country not only created uproar amongst the right wing political ideologists of the country but also stirred minds of most intellectuals about basic as well as complex issues related to it. While common people are still wondering over the working of such courts, policy makers are worried over its ideological and constitutional aspects

Often being interpreted as a parallel to our already firm judicial edifice, Sharia Courts are viewed with cynicism. A little change in perspective and they can be highly valued as a part of alternate dispute redressal mechanism which grants our overburdened judiciary much need relief. A thorough understanding is vital at this stage, both, of the inception of this system as well as its evolvement as a novel concept of imparting justice.

II. SHARIA COURTS: ORIGIN AND SPREAD IN INDIA

Sharia courts as organs of justice delivery system find legitimacy in the principles of Islamic Law. According to Fiqh¹, the designation of power is for the implementation of Sharia. For this purpose, judicial activity becomes necessary. The practical effect of the Sharia norms is impossible without the Sharia judicial bodies executing the principal function of the Islamic state.²

¹The historian Ibn Khaldun describes *fiqh* as "knowledge of the rules of God which concern the actions of persons who own themselves bound to obey the law respecting what is required (*wajib*), forbidden (*haraam*), recommended (*mandūb*), disapproved (*makrūh*) or merely permitted (*mubah*)". Levy, Reuben, *The Social Structure of Islam*, CAMBRIDGE. U. P., 147, 150 (1957).

In India, the practice of administering justice through a similar system has been in place since the Mughal rule. An incorporation of Indian and extra Indian elements, it was a Perso-Arabic system³ in domestic circumstances. Qaziul-Quzzat or chief Qazi was appointed by the ruler. Adjudication of civil and criminal cases, appointment and suspension of deputies in each district, acting as the chief court of appeal were some of his major tasks.⁴ Besides being a religiously authoritative person, his proximity with the rulers was viewed with awe and fright. This ensured easy adherence to his decisions.

In 1880, after passing of the Kazi Act, 1880, Qazis were dispossessed of their judicial duties.⁵ As a result, demand to set up such courts became a matter of private interest. Eventually, Sharia courts sprung up in the state of Bihar followed by West Bengal and Orissa.

At the same time, the situation started changing on the international front as well. Beginning of the 19th century saw profound administrative and political reforms in the Ottoman Empire and Egypt which pushed developed Muslim countries to give way for European type legislation.⁶ The Sharia law adapted itself to these new changes and got confined to consideration of personal status of Muslims.

At present, the All India Muslim Personal Board (AIMPLB) and Imarat-e Shar'iyah Bihar and Orissa have 'Sharia Courts' in some cities and towns. Of these, 22 are established by the AIMPLB from 1973 onwards, 26 are functioning under the Deobandi Imarat-e Shariah in Bihar. AIMPLB has a number of similar Shariah Courts affiliated to it, including one in Tamil Nadu, two in Delhi, three in Madhya Pradesh, four in Andhra Pradesh, five each in Uttar Pradesh and Karnataka, and eleven in Maharashtra. In any case, these so-called 'Courts' deal only with personal law issues like marriage, divorce and inheritance, where both parties are Muslim.⁷

III. DARUL QAZA AND ALTERNATE DISPUTE RESOLUTION

Darul Qaza (Sharia Courts) is an Arabic term, which means the house of Qazi or an Islamic scholar. Lying outside the purview of formal justice system, these courts operate at the local and community level and are represented by religious and community leaders, sometimes civil society organizations as well. These courts form a system of alternate dispute resolution (ADR) that is prevalent the world over.

²Rani, Bitto, *Sharia Courts as Informal Justice Institution System in India*, IJHSSE, Sept. 2014, at 139, (2014).

³Husain, Vahid, *Administration of Justice during the Muslim Rule in India*, UNIVERSITY OF CALCUTTA PRESS, at 73, (1934).

⁴Mohammad PM, Sabah Bin, *Judicature of Islamic Law in Medieval India*. 3rd International Conference on Arabic Studies and Islamic Civilization, ICASIC2016, (2016).

⁵Section 4. Nothing herein contained, and no appointment made hereunder, shall be deemed- (a) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder.

⁶Devji, Faisal, *After the Talaq: Muslim Personal Law in the Age of the Diminished Cleric*, OPEN MAGAZINE, (8 Sept 2017), <http://www.openthemagazine.com/article/essay/after-the-talaq>.

⁷RANI, *supra* note 2, at 135.

From a historical perspective, the method of alternate dispute resolution is considered to have Islamic sanctity because it is said to have emanated from the Quran⁸ and praised by the prophet himself. In reference to the same, the Holy Quran mentions,

*The believers are but a single brotherhood, so make peace and reconciliation (sulh) between two (contending) brothers; and fear Allah, that ye may receive mercy.*⁹

On the lines of Quranic teachings, Islamic religious organizations stress on the need of Sharia Courts for dissolution of disputes among Muslims. It is believed that secular courts are not competent enough on matters pertaining to Islamic laws and ethos.¹⁰ Institution of Darul Qazas on the other hand, is considered a more appropriate approach. Primarily, private familial disputes and those related to property are brought before Sharia Courts. The disputing parties approach the court with the intention of resolution. They are allotted a date for representation. The complainant and the respondent present their respective narrative with no provision of prosecutors. There is no adherence to rules of evidence or those concerning cross examination. As there is no standard of codes needed to be followed, the process of adjudication is simple, speedy, flexible and informal.

Not relying on sound principles of justice, the parties lay confidence on the individual reasoning and interpretation of the Qazi. However, the verdict is not obligatory on the parties and only effective, if they decide to abide by it. In case of rejection, the so-called ‘Shariat Courts’ are powerless, and the Muslim community at large enjoys no authority to coerce the rejecting party or enforce the verdict.¹¹

IV. DARUL QAZA- A PARALLEL JUDICIAL SYSTEM?

The Supreme Court in *Vishwa Lochan Madan v. Union of India*¹² has remarked that Sharia Courts cannot be treated as a parallel form of judicial system. Further, the court mentions,

“As it is well settled the adjudication by a legal authority sanctioned by law is enforceable and binding....These are the fundamentals of any legal judicial system. In our opinion the decisions of Darul Qaza or the Fatwa do not satisfy any of these requirements”.

However, to consider Sharia Courts as mere counseling and mediation centers would be a mistake. What is theoretically preached is different from practical reality. Although the decisions of Darul Qazas are advisory in

⁸ Surah al-Hujurat 49:9, Surah al-Nisa 4:114, Sahih Al Bukhari, vol.3, pp.533, Eng. Tr. By Muhammad Muhsin Khan, Sahih al-Bukhari hadith No 3.857.

⁹ Surah al-Hujurat 49:10

¹⁰ AIMPLB’s Conference, Bhopal, 2005, when the members encouraged Muslims to take their differences to ‘Shariat Courts’ — as against going to the local *ulema* or *alim* as had been the practice. In the same conference, Mufti Ahmed Devalvi of Jamia Uloomul Quran, Jambusar, expressed the opinion that being believers of the faith, Muslims must accept the sharia tenets in resolving their disputes without thinking much about the outcome of the disputes.

¹¹ Zafarul-Islam Khan, Zafarul-Islam, *Petition against “Shariat courts” is misguided*, THE MILLI GAZETTE, (2005).

¹² AIR 2014 SC 2957.

nature and not enforceable, the social coercion in the name of religion to implement these opinions cannot be denied, especially on women.¹³ Most often, these courts function to provide relief to people who are looking for inexpensive means to settle their personal disputes. These people, in majority of cases, belong to the weaker strata of the community. For them, the position of Qazi is not only to be revered but also to be feared. In such a situation, these decisions carry latent psychological sanctions which make them difficult to defy. Even though the apex court has declined to declare these courts illegal, while citing Dar-ul-Uloom Deoband's response, it has expressed apprehensions regarding the effect of such decisions,

*"... as the fatwa gets strength from religion; it causes serious psychological impact on the person intending not to abide by that."*¹⁴

Moreover, time and again, Islamic clerics have laid focus on significance of these courts and judgment given by them which trespass the nature of a non binding opinion. For instance, the president of AIMPLB asserted in 2014 that Islamic courts' decisions were binding on Muslims and it is a 'sin' to challenge them in other courts.¹⁵

For preservation and maintaining Islamic identity in the country, the AIMPLB insists that the state must grant legal validation to Ulema organizations extending to all Muslim Indians in matters related to disputes in which parties are Muslims. The decrees issued by these courts in such disputes, it is suggested, should be recognized by the state as final and binding.¹⁶

The Board's publication of two-part Urdu booklet, 'Nizam-e Qaza Ka Qayyam' ('The Establishment for a System of Islamic Justice') also describes the need to establish a separate system of 'Islamic courts' in the country.¹⁷

Even the Model Nikahnama released by AIMPLB highlights the role of Darul Qaza and other religious bodies for resolution of misunderstandings between couples by authorizing their decisions as binding.¹⁸

¹³Bakshi, Shiv Shakti Nath, *AIMPLB's Sharia courts: Justification on basis of easy access for the poor misses the point that the poor will be its victims*, FIRSTPOST, (22 Jul, 2018), <https://www.firstpost.com/india/aimplbs-sharia-courts-justification-on-basis-of-easy-access-for-the-poor-misses-the-point-that-the-poor-will-be-its-victims-4793771.html>.

¹⁴ Supra note 12.

¹⁵ Sikand, Y, *The Muslim Personal Law Board's Shariah court campaign*, QALANDAR, Sept 2005.

¹⁶ Sikand, Y, *Gender Justice and Muslim Personal Law: Voices of Change, Islam and Inter Faith Relations in South Asia*, INTERFAITH, (23 Mar 2005) <http://www.islaminterfaith.org/march2005/article2.htm>

¹⁷ Sikand Y, *An Outrageous Proposal*, OUTLOOK INDIA. (12 May, 2005), <https://www.outlookindia.com/website/story/an-outrageous-proposal/227488>

¹⁸ Last Section of Model Nikahnama on Iqarnama '*... agar khuda-nakhwasta kisi wajah se hamare dermian koyee nazaa paida ho jaye to darul kaza.....sharyee panchayat, mustanad alimdeen hamare dermian salis hoga aur wo job bhi faisla karega ham dono uske paband rahenge*', Engineer, Asghar Ali A.A, *Model Nikahnama - A Hope or a Disappointment?* SECULAR PERSPECTIVE, (16 May 20015), www.csss-islam.com/wp-content/uploads/2015/06/May-16-31-05.pdf.

V. THE WAY FORWARD

Times are indeed changing. So is the interaction between civil and personal laws. With constitutionality making way in the domain of personal laws, it isn't suitable to stress on a practice that restricts one's freedom to demand justice. Nor is it feasible to overthrow a system which can be accepted by many readily. What is needed is a fine balance between the two. Darul Qaza can definitely function as an effective tool for Alternate Dispute Resolution, providing much needed relief to our overburdened judiciary if it evolves to meet the present demands. It has to act complementary to the judicial system and not parallel. A few suggestions are presented here:

- Committee level, all-embracing, government authorized research into the working and constitution of these courts. This should include statistics on various aspects like volume and nature of cases dealt, percentage of cases where the judgment is followed, issues resolved and unresolved, etc.
- Ensuring gender justice in Sharia courts by introducing necessary provisions legally and infrastructure wise. One such positive step was appointment of women Qazi in these courts but it is also essential to realize to achieve this, it has to be ensured that Islamic juridical framework and jurisprudence does not remain elusive for women.
- The Sharia courts in their present form cannot be compared with arbitration, mediation and conciliation procedures made available under various acts in India and administered within a legal framework sanctioned by the law of the land while upholding fundamental rights of every individual. There is a need to bring them under formal ADR ecosystem of the country to make them more effective.
- Transparency in the appointment of Qazis responsible to these courts. Post appointment training and proper education of Sharia as well as essential civil laws. Also, continuous training programmes to make the institution dynamic and acquainted with necessary changes.
- Discussions with Islamic religious organization regarding the present discourse on Sharia Courts. Maintaining and professing a uniform stand in the interest of Muslim population to avoid confusion.