

“Legality of Sharia Courts in India; Boon or Bane?”

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Abstract

At the time of writing of this paper, the legality of contentious Sharia Court has been dragged to the Hon'ble Supreme Court. The contention is that should the Sharia Courts be allowed to function, then it would become a parallel body to Indian Judiciary without having any legal sanction. The assertion therefore is that such a court will only introduce the polarisation effect between the different sections of people on the basis of the religion. This paper therefore tries to analyse the contentious issue of Sharia Courts and their relevance on the backdrop of failing judicial setup due to huge pendency of litigations. The paper finds that the Sharia Court can co-exist and coordinate with regular courts without becoming a parallel body.

Keywords: Dar-ul-qaza, Fatwa, Judiciary, Arbitration, Tafheem-e-Shariat, Qazi.

Introduction

Dispute and disagreement among man is as old as man himself. There could be disputes among nations, between States, between neighbours or within a family. Those issues, settled amicably, are the most fruitful. This amicable solution of settling the disputes among Muslim by help of sharia courts, an alternative dispute resolution, is nearly two thousand years old.¹ Sharia courts acts as a religious code for the Muslims in certain matters such as in marriage, divorce, adoption, inheritance, succession and other similar rights. Thus it acts as a traditional dispute settling body. It is presided over by the Islamic scholars known as Ulema, who are regarded as being expert in Islamic sacred law.

Such Islamic mediation bodies are believed to be known by different names, such as Dar-ul-qaza (House of Justice) or Dar-ul-ifta (House of fatwas). However it is the former and not the later which is the mediatory body, as the latter is one that only gives clarifications on Islamic rules. Primarily there are two Islamic organisations running shariat based courts namely All India Muslim Personal Law Board (AIMPLB) and Bharatiya Muslim Mahila Andolan (BMMA). While AIMPLB is said to be running orthodox version of Islam, BMMA is believed to have some legitimacy as its dictates are not male oriented.

¹ Singh, Dr. Vandhana (2017), ILI Law Review, ‘Alternative Dispute Resolution in Islam: An Analysis’, Vol. 1, New Delhi, pg. 137.

It is believed that this sharia courts which are informal justice delivery system are effective bodies to settle the disputes outside the court expeditiously in amicable and inexpensive manner. Nevertheless certain questions have arisen questioning its validity. At the time of writing this paper, a plea was made in Hon'ble Supreme Court so as to declare the Sharia court as illegal.

Certain questions over the sharia courts that have been put which this article tries to answer are as follows;

- ❖ Is the status of the woman under sharia court lower than that of the man?
- ❖ Are sharia courts running a parallel court to that of established judiciary?
- ❖ Is it giving discriminatory decisions due to sharia court being dominated by man?
- ❖ Is sharia court illegal and unconstitutional?

Grounds of challenge:

Fatwa

The very first issue that is often raised against Sharia Court is system of issuing Fatwa. The basic premise is that the Fatwa is issued by the Sharia Court infringe upon the rights and liberties of many. Therefore understanding the basics of Fatwa becomes inevitable in the present context.

Fatwa has its basis in four primary sources i.e. Quran, Sunnah, Consensus of the scholars and Ijtihad (own logic and reasoning). Fatwa is issued by *Dar-ul-ifta*, which relates basically to the basic tenants of Islam. This Fatwas are issued by *Maulvis*, who are expected to give their fatwa based on religious scripture and such other relevant sources, as opposed to personal belief.

Some Fatwa are highly questionable. For example, Fatwa was issued against Nida Khan for her campaign against triple talaq, so much so as to declare that she be refused a grave and namaz at her 'Janaza' (Funeral Procession). One such fatwa was issued against Shaan, the Bollywood singer, for he had asked that amplifiers should not be allowed in mosque or for that matter in any other religious places, as it creates lots of sound pollution. In another case a Maulvi issued a fatwa against the women watching soccer, saying, watching men play with bare knees violated the tenets of Islam.²

The very pertinent factual aspect that has to be considered at this juncture is that the dispute between the aggrieved parties is adjudicated by Dar-ul-qaza. So this body is the dispute settling mechanism. This is presided over by the Qazi and not the Maulvies. Dar-ul-qaza does not pass Fatwa. They only adjudicate the complicacies of the parties that are aggrieved with.

² Deccan chronicle, 'Indian Muslim cleric says woman watching soccer un-islamic, issues fatwa', available at (<https://www.deccanchronicle.com/nation/current-affairs/300118/muslim-cleric-issues-fatwa-women-watching-soccer-islam-tenets-saudi-da.html>).

Thus the main contention that the Fatwa being issued by Sharia Court is based on the wrong premise. For as noted Dar-ul-qaza, oft referred to as Sharia Court, issues no Fatwa.

Woman are Prejudiced in this Justice system

Another assertion denouncing the sharia court is based on the plea that it is extremely difficult for the Muslim woman to get access to justice in the prevailing justice system among the Muslim community as the shariat court is run by a conservative group of old man with patriarchal mind-set. Another claim is that supposedly voluntary nature of court is a sham, because many a woman are pressurised into accepting such rulings of shariat court which is cheap injustice to such woman.³ Some have even questioned the rationale of men practicing polygamy, by asking as to why woman can't have same rights of having more than one husband.

Almost every custom is prejudiced against the women sect, therefore it would be proper not to deny that no prejudices exist. It would only be welcome step if proper remedies are undertaken in this regard.

Rich vs. Poor

Furthermore, the opinion among few is that, the rich amongst the Muslim community are able to exercise manipulation and thus influence the decision making process of the Shariat Court. Thus while the downtrodden and weaker sections of the society are left remediless, the rich toy with the traditional justice system. It can escape no scrutiny of the minds of the diligent man that every person is prone to having at least a slightest of weakness, be it in nature of sexual prejudice or on basis of financial or social stature of a person standing before him.

The traditional court since based on customs might invite the attention of the rich as to the dividends of traditional dispute mechanism as they can be bought easily unlike the regular courts. The poor meanwhile would prefer much unbiased dispute framework, which cannot be easily envisaged in traditional courts as they are being held by biased Qazis, who are not selected on Constitutional philosophy of judicial independence.

Polarisation on Religious lines

In 1947 the seeds of partition were sown on the grounds of the religious ideologies. It is therefore, also stated that any attempt to give legality to the shariat court will only introduce furthering of the communalism, thus polarising on religious lines. Hence the contention is that there should be implementation of Uniform Civil Code at the earliest rather than giving alternative dispute resolution machine on religious line.

³ Mcsmith, Andy. Independent, *'The big question: How do Britain's sharia court work, and are they a good thing?'*, available at (<https://www.independent.co.uk/news/uk/home-news/the-big-question-how-do-britains-sharia-courts-work-and-are-they-a-good-thing-1724486.html>).

Aids Misuse

One area of concern raised is that a number of Islamic organisations and NGO are receiving aids from the Saudi Arabia and other western Asian Muslim countries, and there is likelihood of such receiving organisations to be influenced by those donators. At a time when jihadist is increasing there is a need to counter such misdemeanours in the country. Thus the assertion is that, to counter such areas, there is an urgent need to tackle with any courts being run parallel to the established judicial system.

However to cast the *aid received*, as one with ulterior motive would be to cast doubt on the ability of the *State* to protect, preserve and uphold the security of the subjects of the country apart from subjecting doubts upon the sanctity of the body receiving the aid. It only goes further step ahead to alienate the sections of people belonging to that particular body. The State should not be casting aspersions upon every aids being received, rather should filter out the ill designed aids and act in zeroing upon it.

Why traditional court is necessary?

Judicial Delay

The main reason to justify the existence of the shariat court is due to undue delays caused in the follow up of matters through proper legal mechanism, as established by the law. No matter how much the government tries to portray the established legal courts as efficient, speedy and impartial, yet in reality it has become largely an inefficient one due to huge numbers of pendency in regular legal setup.

This has become manifest in the delay caused, as can be seen in relation to the judicial determinations pending as of date. Majority of the cases dealt by the shariat court are related to divorce petitions, mainly dealing with woman who are trying to escape from bad marriage or forced marriage. Shariat court provides such woman easy access to justice.

Establishment of sharia courts in Bihar in 1920s is a good example of how this courts work. They have elaborate system of lower and appellate courts. There is detailed set of rules for registration of cases, payment of necessary fees, for conducting necessary in-depth inquiries and for holding of hearings. Their decision is inclusive of statement of facts, evidence and relevant citations of Muslim laws. This judgements are published and does act as court of record. In Bihar, almost 60,000 cases has been amicably resolved in sharia courts, in less than a year!⁴ It is due to the success of the sharia courts that even BMMA has a court of its own.

Arbitration and Mediation as dispute resolution mechanism

Today much of the disputes are solved by way of arbitration. In USA almost 73% of Multinational Companies solved their cases by way of arbitration, thus USA is witnessing

⁴ Shukla, Mehendra. The Indian Express, '*Justice more accessible*', available at (<https://indianexpress.com/article/opinion/columns/sharia-courts-muslim-personal-law-board-aimplb-shariat-act-law-commission-uniform-civil-code-5260892/>).

huge decline in number of cases being tried in Federal court and State courts.⁵ This shows the confidence of the petitioners before the arbitration machineries. Arbitration gives justice with mediated solution in which no loses and there is win-win situation for both the parties.

In the present times arbitration is the new normal. All family disputes are mandatorily referred to mediation in UK.⁶ In India, the mandate for arbitration, mediation and conciliation is expressly referred to in Sec. 89 of Civil Procedure Code. Recently in 2018, the parliament amended the Commercial Courts Act, 2015 and has provided for mandatory mediation in commercial disputes. Arbitration and mediation gains further ground as many of the retired judges of Supreme Court and High Court act as arbitrator.

Judicial determinations

As Fatwa has become integral to present study therefore it is necessary to delve a little over it on its aspect in relation to the judicial pronouncements. In *Vishwa Lochan Madan v. UOI*⁷ the petitioner brought before the court the glaring case of one Imrana, who was declared as 'haram' for her husband by customary court of deoband seminary. In this case, Imrana was raped by her father-in-law. When question arose about her marital status and those of her children born from the wedlock with her husband, the Dar-ul-Uloom issued a fatwa stating that Imrana had become unlawful forever for her husband. Thus a decree for perpetual injunction was passed restraining the husband and wife living together, despite none of the parties approaching the Dar-ul-Uloom.

Another similar instance of fatwa being manifestly misused was brought to attention of court, involving the case of one Asoobi, who was allegedly raped by her father-in-law. Herein the fatwa decreed that no FIR could be lodged against the accused, as there was no witness nor the allegation of the victim had been endorsed by the victim's husband, as per the holy Quran rules. Yet in other similar case, the victim was told to marry the accused father-in-law.⁸

The court In *Vishwa Lochan Madan* case therefore was asked to declare the establishment of Muslim Judicial system and shariat courts as illegal, illegitimate and unconstitutional. Further the petitioner sought to declare the fatwa as being unenforceable, being wholly non-est and void ab-initio.

The court held that a decree can be said to be a decree of legal authority only if such authority is sanctioned by the law and such a decree is binding and is meant to be obeyed unless upset by an authority so provided by the law itself. Moreover, a person deriving benefit from the adjudication should have a right to enforce it and the other person has to comply, else on

⁵ Mustafa, Faizan. Hindustan Times, '*Sharia Courts have a role to play in dispute resolution*', available at (<https://www.hindustantimes.com/opinion/despise-madras-hc-ruling-sharia-courts-have-role-to-play-in-dispute-resolution/story-6S8y0MnoxGiJk3qmAx3S8H.html>).

⁶ Shukla, Mehendra. The Indian Express, '*Justice more accessible*', available at (<https://indianexpress.com/article/opinion/columns/sharia-courts-muslim-personal-law-board-aimplb-shariat-act-law-commission-uniform-civil-code-5260892/>).

⁷ WP (Civil) No 386 of 2005.

⁸ Ibid. At pg. 2.

failure to comply, the consequences therein is to ensue. Thus the court was of the view that sharia court's decision was not an arbitration under the judicial system sanctioned by law.

Thus a Qazi or Mufti has no power to enforce his opinion on anyone by any coercive method because it has got no legal sanctity. A person against whom such a fatwa is passed may ignore it and it is not necessary to challenge it before the court. Therefore court was of the view that it would be wrong to presume that a parallel judiciary is being run by the Dar-ul-Qazas or so forth. However, the fact that despite being not enforceable, it has sanction among the god fearing Muslims, because of the view that if such fatwas are defied than they will be answerable to the almighty.

Therefore the court felt necessary to put a caveat by observing that-

*'Having regard to the fact that a Fatwa has the potential of causing immense devastation, we feel impelled to add a word of caution. We would like to advise the Dar-ul-Qaza or for that matter anybody not to give any response or issue Fatwa concerning an individual, **unless asked for by the person involved or the person having direct interest in the matter**...Fatwas touching upon the rights of an individual at the instance of rank strangers may cause irreparable damage and therefore, would be absolutely uncalled for. It shall be in violation of basic human rights. It cannot be used to punish innocent.'*

Conclusion

It should be our endeavour indeed, to deliberate the disputes with the secular law when it comes common mass. Nevertheless, no matter what, it can't be disputed that, religion forms an integral part of our life. From the cradle to graveyard, we are governed by the religion. To ignore it, would be to ignore the truth of life.

Our country recognizes alternative methods of dispute resolution. It would be impulsive fragment of our imagination to think that only constitutionally embedded judicial system would be enough to determine every issue, at the earliest, with no pain being attributed to the litigants, either physically or mentally or economically. Were such circumstances to be a reality than the mountain of cases before the court would have been addressed in jiffy, the poor and physically challenged litigants would have made themselves accessible to such courts rather than resorting to settle the disputes with other dispute resolution mechanisms!

Everyone should be allowed to settle personal disputes in the tribunals of their choice, even before a religious dispute settling body, if voluntarily brought before such courts. This mediation however as seen in present context holds no legal sanction and therefore if the parties are not agreeable to such directions, then may proceed for settling issue through regular courts.

This dispute mechanisms also brings and sustains love and oneness with balanced settlement among the parties therein, unlike regular courts where the purpose usually is to avenge the other party. Mediation helps to keep the strength in cordiality. Thus unlike the cumbersome

procedure adopted in the judicial setup, the traditional courts is delicate and done with utmost care and caution.

Therefore it can be said that sharia courts are the courts that are useful, accessible, informal and voluntary institutions that can provide to litigants before it inexpensive and speedy justice. Thus although the decree of the Shariat Court is without any legal status and thus can't be enforced, yet where both parties are in agreement with the decree, they may honour it and thus amicably resolve the issues therein. However such a solution must also be in consonance with the established rules as laid within the Country. Thus to conclude, the mechanism of traditional judicial setup can co-exist and coordinate with that of the regular courts without becoming a parallel body.

Suggestions

- i. Holding more issue addressing conferences, workshops and seminars in the country to acquaint with the questions relevant to contemporary times.
- ii. Tafheem-e-Shariat which is to spread awareness about Islamic law be active.
- iii. Where the case is complicated due to legal intricacies being involved than such case must be brought before the regular courts.
- iv. Where one of the litigant is influential and the other is weak, the court must be extra cautious.
- v. The parties must give consent form before they bring the case before the traditional court for redress by mediation.
- vi. Anything that is liable to fall under criminal justice system, must not be adjudged by the shariat court.
- vii. If it has implications on more than the parties to the customary dispute resolution mechanism, than such petitions must come before the regular courts.
- viii. *Dar-ul-Qaza* should have own records, thus ensure like cases receive like determinations.
- ix. The traditional courts should facilitate proper solution by setting up proper facilities and competent persons as adjudicators.