

Sharia Courts as Informal Justice Institution in India

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Abstract: *Though the liberal state tried to fulfil man's thirst for rights and liberties by granting equal civic and political rights to all, the mid-twentieth century threw a challenge to the liberal paradigm. Under tenets of liberalism, it was assumed that cultural diversity could best be accommodated by allowing 'minority groups' who are largely disadvantaged, to associate in pursuit of their distinctive ends within limits imposed by a common framework of laws. This policy has been challenged in recent decades by an influential school of political theorists who claim that the 'difference-blind' conception of liberal equality fails to deliver either liberty or equal treatment. In its place, they propose that the state should recognize cultural identities by exempting groups from certain laws, publicly accepting the value of various cultures and recognizing their cultural peculiarities, thereby providing them special privileges. By offering an incisive criticism scholars ascribe that the state tends to misdiagnose the problems of minorities. Highly critical of 'culture-blind' approach promoting 'cultural-differences', scholars prescribe primacy to equal rights, a standard of fairness that can be shared and accepted by all. The liberal paradigm falls short of representing the cultural differences evident among people; being inhospitable to the idea of differences it negates the whole point of the liberal principle of equality before law. 'Celebrating difference' is neither unethical nor politically controversial; such celebrations had been endorsed by UNESCO in its 'Report on Cultural Rights and Cultural Variation'.*

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1. INTRODUCTION

The discourse on sharia courts, fraught as it is with a plethora of complexities is one of the most challenging, yet compelling domain of disquisition and articulation within contemporary socio-legal debate and research agenda. Critiques have engaged in recent years to interpret sharia courts as something parallel to formal courts engaged in posing challenges to the formal judicial edifice. A study of the existence of sharia courts or for that matter sharia justice is particularly fruitful and warranted for a deeper understanding of the interplay of power, social control and freedom. This endeavour assumes added importance because the problem of understanding sharia justice compel us to move beyond seeing power as radiating outwards from something called the state towards a more complex and nuanced understanding of the ways in which law and government work through individual and community freedom, rather than against them.

Issues of rights and justice are crucial in the sphere of dominant discourse. It is often debated whether the government fully protects and promotes the rights and liberties of its citizens. How far the state is successful in reconciling rights with its broader aim of achieving justice in society? The question becomes all the more crucial when questions of minorities arise. Has the government taken positive steps for the protection and promotion of rights of the minority communities within its jurisdiction? How far the state has been successful in its mission? Do the minority communities have the freedom to preserve their religious and cultural diversity while remaining within the main stream, or is the state passive on such issues. All these and many more questions have become issues of intense debate and concern for both the state, and individual and communities alike. It is a recognizable fact today, that an individual citizen besides having legal rights also has some moral rights. Individual and groups alike are concerned with the question

whether the state (or its constitution) properly recognize and safeguard the moral rights of individual citizen or whether the individual citizen has the right to override the dictate of the state if their moral rights are not respected.

The contemporary period has witnessed hues and cries against the existence and operation of sharia courts. Much of the critical scholarship has embarked upon its relationship to existing legal processes and the ways it challenges these processes. What is vital is the necessity not only of understanding retrospectively the working of sharia courts but also to grasp what is specific and novel about its justice initiatives.

The sharia courts are not 'courts' in the strict sense of the term because the Indian legal system negate the idea of a parallel judiciary. However, the fact remains that neither the Muslim Personal Law Board or the seminary at Deoband have ever laid such a claim. Privatization of adjudication is a global reality today, the notion that all laws must necessarily emanate from the state have been questioned by proponents of legal pluralism. History is replete with instances when laws developed from social customs and societal practices in the absence of any form of government. It is vehemently argued that culture as an important element of justice has long been ignored by the state. An individual can regard himself as an autonomous being only when he has the freedom to his cultural practices, but in situations where members of minority groups face disadvantage, it is legitimate for the state to rectify it by 'special group-based measures' or minority rights. Justice requires special attention to the specific needs of those who are concerned. By providing special rights to its minority groups the state neutralize inequality and hence discrimination. 'Group-differentiated rights' are thus a matter of justice between members of different groups which serve to preserve cultural identity and negate inequality and discrimination thereby decreasing diversity and social isolation. The fundamental liberal position on group rights advocates that individuals should be free to associate in any way they like and follow their own way of life as long as they do not break laws designed to protect the rights and interests of others outside their particular group. Liberal-democratic tradition put the onus upon the state to protect the cultural-distinctiveness of its citizens by providing them the right to protect their own cultural norms, traditions and practices. The Liberals hold that each person have the same freedom to pursue his chosen ends, that each is therefore obligated to refrain from interfering with others in their freedom and that the function of the state is solely to protect each individual's freedom.

The functioning of sharia courts rather than revealing a conventional turn to mechanisms of alternative dispute resolution as problem solving move emerging from an over-loaded docket springs from much deep-seated fundamental socio-religious and communitarian concerns. The emphasis is upon the ideological effect of fostering and monitoring an apparent social bond between disputing parties with engagements to displace fundamental inequalities in power relations and wider processes of exploitation and domination. Infact the system unfolds itself through both social and spiritual lenses. The sharia courts as socio-religious institutions provide a voluntary, empowering way of resolving familial disputes of members of Muslim community in an informal way.

This paper is based on empirical data collected from qualitative research conducted between 2009-2013. In this paper, I draw upon empirical research to trace the terrain of sharia courts, to map its growth and existence capturing the full range of informal justice initiatives as the delivery of dispute resolution services, social transformation and personal growth.

Through my empirical investigation I focus to better understand how sharia courts as informal justice dispensing institution aid in mitigating private-familial disputes of Indian Muslims. I try to comprehend the various nuances of its functioning as informal institution in the realm of private disputes adjudication and the degree to which such courts are catering to needs of justice disbursement.

2. SHARIA COURT AND INFORMALISM

Sharia courts popularly known as 'darul-qaza' stand for the 'house of the qazi' or an Islamic scholar who has the authority to suggest solutions to problems of Muslims approaching them. Though the term sharia is subject to both curiosity and misunderstanding and often interpreted to denote punitive legal system exhibiting little concern for national or constitutional laws and customs, and something stagnant and impervious to change but often we tend to ignore the

internal dynamism of the term sharia. The word 'Al-Shari'ah', literally means, 'the pathway, path to be followed or clear way to be followed, and has come to mean the path upon which the believer has to tread'. In original usage sharia meant 'the road to the watering place or path leading to the water'. Sharia denotes a water source, a flowing stream where living beings (both humans and animals) gets water to drink; it is the provider to life. A flowing stream cannot be static and hence sharia is not static. Sharia has an in-built mobility within itself. Dynamism and not stagnancy represents Sharia. Hence, Abdullah Ahmed An-Na'im opines that sharia is open to substantial reform by contemporary Muslim jurists. Sharia is the way of life for Muslims; and Muslims all over the world are judged by its standards irrespective of their location and culture.

Since the dawn of civilization Muslims have looked upon sharia principles to bring order and structure to their lives. Extending to all aspects of life, both public and private, the sharia rules infuse within the Islamic society a deep sense of moral responsibility and justice. Sharia is unique in itself. It is not only a source of law but also constitutes within itself processes for resolution of conflicts. Moving beyond the typical legal-illegal dichotomy, the sharia principles lay down full range of human behaviour classified as 'farz' or obligatory, 'mustahab' or commendable, 'mubah' or permissible, 'makruh' or reprehensible, and 'haram' or forbidden.

The sharia courts are characterised as informal institutions as they lie outside the threshold of the state sponsored formal justice system, operate at the local and community level and are manned by non-state actors as traditional and religious leaders and by civil society organizations.

The proceedings of sharia courts are marked by a degree of flexibility. Strict rules of evidence are not followed. The proceedings are informal and non-legalistic and marked by simplicity and absence of delay. The plaintiff himself makes representation of his case in front of the qazi or the judge. Absence of prosecutors and cross examination of witnesses renders proceedings swift and easy. No legal experts are required to present and defend cases; the parties directly approach the traditional community leaders and mediators to find amicable solutions. Devoid of cumbersome legal procedures and legal jargons cases are disposed within a relatively short time in opposition to the weeks, months or years that are spent in facing hassles and complexities of the legal system. The process of dispute resolution rooted in the process of dialogue provides the parties with the added freedom and flexibility. Those manning the institution neither adhere nor display affinity for procedural and technical complexities. Absence of legal representation makes the ambience more informal and user-friendly. Circumstantial and forensic evidences are not required and they do not follow any standardized codes. The absence of these formalities makes proceedings streamlined and time saving. All these lend sharia courts an element of informality. Decision making is quick and generally corruption of the general court system is conspicuous by its absence. This is an advantage over the regular court system where corruption, bribery and nepotism runs high and the general public cannot afford to employ expensive legal brains.

The institution is easily accessible. Avoiding legal maxims, the verdict of the qazi as judge is based more on common sense knowledge and actual social reality than on abstract legal principles. Justice through sharia court generally incurs lesser expenses than formal litigation. The popularity of the institution as mode of settling disputes is due to the fact that justice dispensation is much more speedy and cheaper than conventional judicial procedure and provides a forum more convenient to Muslim parties who can choose the time and place for mediation and reconciliation. The sharia courts conveniently reduce the transaction costs in terms of delays caused by legal and technical complexities and procedural rigidities as well as monetary costs in terms of rising price of protracted litigation. The aim is to bring about reconciliation among the disputing parties bypassing the winner-loser rhyme thereby nipping the bud of disenchantment in its infancy. The institution derives its strength from the fact that instead of going to a formal court which usually ends a relationship, an informal restorative justice based sharia courts are adapted to give more inclusive decisions better suited for members of the Muslim community.

The sharia courts are anchored in local religious and socio-cultural beliefs and norms. They sit within the relevant social context. The element of personal approach to private spousal disputes is an added advantage that helps the informal sharia courts to score high over the formal justice system. Private spousal dispute are attempted reconciliation in a convivial atmosphere without formal-legal technicalities and complexities. The confidentiality of the process is keeping in line with Islamic precepts.

The Islamic legal tradition, however, has never questioned the propriety of settling conflict through alternative dispute resolution (ADR) mechanisms. Islamic jurisprudence insists upon settlement of familial disputes through sharia principles. Throughout its history, the Islamic legal system has emphasized the importance of 'sulh' or reconciliation. Focused on ascertaining the truth and dispensing justice with minimal procedural distractions, the Islamic tradition has always favoured 'sulh' over formal litigation.

3. SHARIA COURTS AND INDIAN CONSTITUTION

The existence of sharia courts does not stand in contradiction to the spirit of the Indian Constitution. The Indian Constitution has specially upheld the functioning of sharia courts based on personal laws of the Muslim community. It is worth recalling here that Article 372(1) of the Indian Constitution says, "... all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority." The word 'all the laws in force' in the above mentioned article includes all statutory, customary as well as personal laws. Henceforth, by virtue of this article the Muslim Personal Law stands recognized and Muslims in the country have all the right to live their own way of life. On 26th January 1950, as the Indian Constitution was adopted the Indian Republic confirmed continued application of Muslim Personal to Muslim Community.

The same argument is also applicable for 'Entry No.5 of List III (Concurrent list) of the Seventh schedule read with Article 246 (2) of the Indian constitution which give power to both State Legislatures and the Union Parliament to legislate on 'all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law in matters of marriage, divorce, will, succession, inheritance, etc. Both the Supreme Court and High Courts follow the Muslim Personal Laws in matters where both parties are Muslims. Thus citizens are free to access sharia courts having all the liberty to follow sharia laws in responding to needs of their community members. This maxim has been well established by the decision of both earlier Privy Council as well by the Supreme Court.

Justice Vivian Bose once speaking for the three judge bench of the Supreme Court indicated 'personal laws of the Muslims were immune from the provisions of the Constitution including the provisions in Part III thereof relating to the Fundamental Rights'. In a decision on the case 'Krishna Singh vs. Mathura Ahir', a two judge bench of the Supreme Court decided on dated 21-12-79 that 'Part III of the Indian Constitution does not touch upon the personal laws of the parties.' It further stated that judges of the High Court, 'in applying the personal laws of the parties could not introduce his own concepts of the modern times'. The Supreme Court thus 'banished and prohibited' any reformulation or reconstruction 'of the old sources' thus assuring that personal laws would remain untouched by the Indian Constitution. It is often debated, if personal laws are open to scrutiny under Article 13 of the Indian Constitution, Article 25 of the same would be rendered redundant. In the famous case of 'Bombay High Court vs. Nasaru Appa Mali' it was concluded that personal laws 'were based on considerations peculiar to each of the communities' and hence enjoyed immunity from other provisions of the Constitution. Both Justice Chagla and Justice Gajendragadkar pointed out in separate judgements that personal laws do not come within the scope of Article 13(1). A further point was pointed out by the Supreme Court in 'Bajya vs. Gopikabai' that personal laws do not lose their status as personal laws even if they are codified. (Justice Hegde while recognizing the importance of personal laws which is due to past history, differences in culture, traditions and customs; was referring to the Hindu Code of 1955-56 which he says are personal laws). Before the promulgation of the Indian Constitution, the High Courts in India had mostly decided cases on lines of personal laws. When the Constitution was framed, this point was amply borne in mind by the framers of the Constitution who inserted Article 225 which stated that laws which the High Courts administered in deciding disputes of the parties before the commencement of the Constitution would continue as before. Thus, Article 225 justifies the continuation of their personal laws for the Muslim community. Arguing on the justifiability of the personal laws of Muslims or sharia laws as it is often called, it is held since 'the source is traditional scriptures and texts, the same would not be open to a constitutional challenge.'

4. HISTORY OF SHARIA COURTS

Rooted in and operating within the frame work of local relations of power, sharia courts are appropriated by social actors to preserve their heritage in consonance with early traditions of informal dispute adjudication.

Before the British consolidated their ground over the Indian soil, Mohammedan Penal law prevailed in the country as Hanafi Law was widely practiced and professed in regulating both the personal and private lives as well as in adjudicating disputes. The role of qazi as the chief judge is a practice evident since the Mughal rule. The institution of sharia courts under the royal Mughal patronage was decisive in its articulation which continued unabated until the British intrusion.

The history of justice administration during the Mughal rule in India reveals a fine combination of the judicial traditions of foreign nations as Egypt, Iraq, Turkey and Spain. The justice administration evident during the Mughal rule was an amalgam of Indian and extra-Indian elements; it was Perso-Arabic system in Indian circumstances. (Vahid Hussain, 1934)

Well-articulated sharia courts or qazi courts had been vital to the justice system during the Mughal rule in India. The Mughal ruler appointed a 'qaziul-quzzat' or the chief qazi who sent deputies on his part into each district; these deputies in turn were appointed and removed by the chief qazi. Among all qazis, the 'qazi-ul-quzzat' being the chief qazi at the realm was associated with the imperial Court; his judicial powers were supported by the Mughal emperor himself. The chief judge or the 'qaziul-quzzat' was both the supreme judge of the empire as also 'the qazi of the Imperial Camp' and often found to be in the company of the sovereign. Having the power to decide both civil and criminal cases, his office was highly esteemed and powerful. His closeness with the royal authority gave his office an awe and authority that made natives fear and besides religious sanctity this was one of the reasons for complete obedience to his verdicts.

The chief qazi appointed the local qazi in every city and every large village throughout the empire. The office of the chief qazi was the chief court of appeal. Though not debarred from deciding original suits, the chief qazi's main function was to listen and decide upon appeals from lower courts. As per the Muhammadan Law the chief qazi possessed the power of reviewing his judgement. He took upon himself the responsibility of 'ruyat' or reviewing his verdict if the previous decree has been repugnant to the 'Quran', the 'Sunnah' (Traditions of the Prophet) and basic tenets of Islam and listened to the case again. Similarly, he also embarked upon correcting accidental errors and clerical mistakes.

The judicial tradition in the country displayed elements of reliance more on the ethical than upon the legal means to achieve harmony. Standing upon the foundation of the ethical norms, men were trained to attain the highest sense of ethical obligations for which neither any fixed rule was required nor laid down because this practice was a part of the spirit of benevolent-despotism vogue since the historical period. Imbued with the aim of maintaining comprehensive unity and omitting differences, the practice of referring disputes for 'tahkem' or arbitration was common.

Sitting in his own court, the qazi conducted and settled disputes in accordance with the precepts of the Mohammedan Law taking cognizance of such cases concerning marriage, marriage-contract and settlements, the division of inheritance, testaments, the appointment of 'Muhammadanmutewallis' or trustees of religious endowments and attested all papers and deeds with his seal. In the discharge of his functions, the qazi was often assisted by the 'mufti'. The mufti was an expert in 'fiqh' or Islamic jurisprudence and competent to give fatwa or legal opinion. Though the 'muhtesib' or market-inspector was not ordinarily vested with judicial powers, he sometimes formed a part of the board for justice administration. A sort of full bench existed and after hearing the case and the parties in question the qazi as judge pronounced the verdict while the mufti recorded the 'fatwa' or the law applicable to the case in question. The mufti well-grounded in Islamic 'fiqh' was appointed by the sovereign to aid and advice the qazi with the expositions of legal principles. He was the legal officer of the empire. In case of ambiguity the mufti was asked to expound the law and ascertain the procedure to be followed. Every qazi court had a mufti attached to it and when the Mughal Emperor held his Royal Court it was incumbent upon both the qazi and mufti to attend it. Under the Muhammadan rule, the task of the mufti was neither to present the case for the party viz-a-viz the emperor nor support the case

for the sovereign but to expound the law correctly in its true spirit and express the legal opinion freely.

Conducting all proceedings of his court with the other learned men attached to it; the office of the qazistood as the final expression of judgment supplemented by considerable privileges and patronage from the sovereign; it was independent of the supreme authority except in certain remarkable cases. Drawing its very existence from the royal prerogative, the qazi with his office was a perfect link between natives and the imperial authority. The office of the qazi as chief judge of the court of cannon law as well as common law was deemed to be 'Arkan-i-Daulat' or 'the pillars of the state'. Under the Mughal dispensation the chief qazi was a man of celebrity and importance and his power and influence upon the administration of justice was enormous.

The chief justice or the qazi-ul-quzzat in charge of maintaining the judicial system throughout the empire was also responsible for the appointment and management of qazis' all over the kingdom. As judge of the canon law he shouldered the responsibility of dispensing justice through sharia courts giving good counsel and warning to those guilty of violating the social and religious norms. Though this court was the chief court of appeal but that did not bar the Muslim judge from deciding original suits.

Working on principles and laws of sharia, the qazi through his courts enforced the principles of classical 'fiqh' as recognized by the Islamic 'madhabs' or schools of thought. Bound by the sharia the qazi as judge followed the prescribed procedure and prepared 'mahazir' and 'sijilat', that is records and decrees respectively in proper form. Discharging his adjudicative function impersonally without accepting any 'nuzzars' or gifts and favours from either party in dispute, the qazi was indefatigable in the exercise of his adjudicative authority and by being regular in his devotions assiduously refrained from all things forbidden by divine laws. The qazi court functioned on the maxim of treating all men justly on an equal footing so that the weak may not be disappointed from justice and the rich and powerful may not hope to extract undue privilege.

Combining within his personality the elements of both the temporal and spiritual, the qazi was both a layman and religious persona thoroughly conversant with the 'Quran' and other Islamic texts, relevant principles and rules. His judgement was decisive for the parties involved. In deciding cases he followed and never acted contrary to the law laid by the religious texts or a universally accepted tradition; and in abiding by both 'ijma' or consensus and through 'ijtihad' or independent reasoning he upheld the sanctity and infallibility of the positive rulings and methodological principles universally agreed upon by the Islamic scholars. He held his sway not only in the capital but exercised his unchallenged authority through a network of qazis' spread over the countryside, as every town and village both large and small had its local qazi appointed by the chief qazi. Though his office and responsibility was of public nature, time had helped it to attain the status of a hereditary one.

Sharia Courts and Indian Muslims

The Muslim Personal Law Shariat Application Act of 1937 regulates the life of millions of Muslims in India. It provides for the application of Islamic code to the Muslim community. The Act stipulates, "Notwithstanding any customs or usage to the contrary, in all regarding adoption, wills, women's legacies, rights of inheritance, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, (including talaq, ila, zihar, lian, khula and mubaraat) maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties to a case are Muslims shall be the Muslim Personal Law (Shariat)." (Tahir Mahmood, 1983) The Shariat Application Act 1937 came at a time when the British-Indian Government was trying to subvert Islamic law and its application to the Indian Muslims in the name of bringing about social reforms. In response to the British-Indian Government's move, a call was given by the Indian Muslim leadership to Muslims across the country. At the forefront was the 'Jamiatal-Ulema Hind' who spearheaded the movement to express their resentment against the government's actions. The government's initiatives drew ire of the leading ulemas' or religious scholars of the country who deemed it as their religious obligation to create awareness among the Muslim community of the evil-designs of the

government to uproot Islamic law. Hence an intense campaign was carried out throughout the country to persuade the Muslims to follow 'Islamic Sharia'. Along with the campaign against government's action, parallel efforts were made by 'ulemas' to end the many 'un-Islamic' practices among various sections of the Muslim community in the country.

To ensure continued applicability of the Sharia Application Act (1937) the All India Muslim personal Law Board (AIMPLB) was formed at a meeting at Hyderabad on 7th April 1973. By adopting suitable strategies, the AIMPLB strove for annulment and exemption of members of the Muslim community from any parallel legislation or rulings of courts of law which in their opinion would result in interference with Muslim Personal laws. The board took upon itself the responsibility of creating general awareness among members of the Muslim community of the tenets of Islamic law or sharia principles and how a Muslim should govern his life by relying on them. It would also construct a comprehensive framework for the promotion of Islamic laws among the community members. Along with ensuring protection and continued applicability of Muslim Personal law, the aim of the AIMPLB was to foster a sense of harmony, goodwill and a spirit of brotherhood among the various sections of Muslims across the country. One of the major aims of the board was to establish 'dar-ul-qazas' or sharia courts across the length and breadth of the country to adjudicate on disputes of personal status among the Muslims. Time and again, the AIMPLB has adopted resolutions at its various meetings on the issue of 'darul-qazas'. Important among many resolutions are the ones adopted at Kolkata on 6th-7th April 1985, at Jaipur on 9th-10th October 1993, Mumbai on 28th-30th October 1999, at Hyderabad on 21st-23rd June 2002.

The logic behind the establishment of sharia courts is that secular courts are not competent enough to interpret and apply sharia principles which are based on 'Quran' and 'traditions of the Prophet' (Peace Be Upon Him). This can be done effectively by sharia' courts alone manned by muftis and ulemas learned in Islamic law. The board has been enthusiastic about establishing sharia courts since its inception. The very same year of its birth, it had established two 'darulqazas' in the state of Maharashtra (1973) and at present there are about 16 such institutions working effectively in the state alone. Bihar was the first state in India to establish darul-qaza followed by Orissa. Under the patronage of 'Imarat-e-sharia' 26 'darul-qazas' are fulfilling their duty of settlement of disputes in Bihar, Orissa and Jharkhand. Thousands of disputes between Muslims are tried by qazis working under the Imarat organization. The Imarat still exists and its qazis, acting as private judges decide cases involving questions of family law and succession and has disposed about 45,000 cases through 'darul-qaza'. The system has been working since 1919 in Bihar, Orissa and Jharkhand and adjoining regions of West Bengal, where verdicts pronounced by sharia courts are considered by district courts as arbitration awards. The institution of darul-qaza exists in other states as Uttar Pradesh, Madhya Pradesh, Andhra Pradesh, Tamil Nadu, Uttaranchal, Delhi, Karnataka, Gujarat, and North-Eastern states mainly in Assam. Sincere efforts are also being made to establish sharia courts in the states of Rajasthan, Himachal Pradesh and other major cities and towns of India. In 2013, Mumbai got its first darul-qaza which was inaugurated by Syed Mohammed Wali Rahmani, the general secretary of All India Muslim Personal Law Board. The most recent addition has been an all-women sharia court at Pune. At present more than 100 sharia courts or 'darul-qazas' are effectively rendering their services towards their community members.

Since the Indian judiciary is already overburdened, issues which can be readily solved with the help of community members and within the boundary of Islam can be referred to it. It would not be wise to drag every dispute to courts. Islam contends that differences which can be resolved with the help of elders of either the family or community should be resolved without much noise and within private domains. It is best to resolve differences among one's family or community members quietly and privately. The darul-qazas' have always strove to render 'Islamic justice' to its community members. Since secular courts are not competent enough to deliver justice according to Islamic sharia it is recommended that Muslims avail the service of sharia courts as far as possible. The secular judges often fall short in their ability to interpret and apply sharia principles in its true spirit which is only possible through Islamic scholars well learned in Islamic traditions. Therefore, taking recourse to sharia courts is completely within the bounds of Islam and its tradition.

5. SHARIA COURTS IN ACTION

Since the Mughal period the functions of the qazi have not changed much in as much as he still remains responsible for performing the 'qadha' or 'qaza' that is, settling disputes according to sharia principles and balancing rights and duties that Muslims owe to 'Allah'. Well versed in 'Islamic fiqh', the qazi as judge discern and extract the legal rules from the sacred Islamic sources and suggests remedy to those approaching him with their grievances. As judge the qazi chiefly follows the Quranic injunctions and precepts together with previous interpretation of the Holy Law by eminent jurists.

The qazi as mediator brings together the contesting parties. He has no ritual sanction nor any temporal powers but only a serious determination to mediate between man and man, and man and God. The ability of sharia courts to adjudicate upon disputes within a normative framework together with its flexibility to assimilate customary values along with Islamic principles has allowed for their wide acceptance in the Muslim society. Addressing private family disputes and social breaches without concerning with serious criminal cases, sharia courts strike balance among different familial actors. These courts adjudicate upon disputes within a normative framework together with its flexibility to assimilate customary values along with Islamic principles. The system addresses the issue of power-relationship between the victim and offender within the broader context of communitarian values.

The qazi attached to the institution performs a number of functions. He is not only a judge competent to pass judgement but also an experienced community member who helps the parties in distress vent their emotions, fix priorities, cognize disputants on specific questions of Islamic laws and principles and explain codes of good behaviour and 'mustahaab' or virtuous actions.

The institution is competent to deal with any question of Islamic personal law regarding marriage concluded in accordance with Islamic law including questions about its validity or dissolution or with questions that depend on such marriages and relates to family relationship and maintenance; any question relating to divorces of Muslim spouses; the payment of 'mehr' (dower), issues of 'talaq' (unilateral divorce) and 'khul' (divorce at the insistence of wife); any question on Islamic personal law regarding gifts, will, or succession relating to Muslims; any question of personal law regarding an infant and of guardianship; and where all parties to the dispute are Muslims who have requested such court to hear their case and resolve it in accordance with Muslim Personal Law. (Tahir Mahmood, 1983) Within sharia courts all issues of marriage, divorce, maintenance, succession and inheritance fall within the domain of the qazi who hold meetings, listen to grievances, mediate between contending parties while providing them the opportunity for negotiation and reconciliation and finally pronounce judgement. The sharia courts rigidly believe in the command of the 'Holy Text' which forbids 'la dararwa-la dirar', that is 'injury and no counter-injury. As judge the qazi plays a far more proactive role during the resolution process. Rather than act as a mere neutral mediator, he delves into the actual substance of the conflict, openly evaluate arguments of both the parties and actively take part in reaching a consensus solution.

Primarily it is private familial disputes that are brought before sharia courts. Empirical observations have shown that spousal disputes and divorce cases form the bulk of cases that approach the institution for reconciliation. The qazi often use the juristic principle of 'ikhtilaf' or mutual co-existence of differences in interpretation to give benefit to the victim and fill the space between the legal rhetoric and social reality with rulings in favour of women who are victims in 99% of cases. Since the practical effect of divorce is very important in the area of family and childcare cases where sharia principles have an important role to play, settling claims for 'Haqq-e-Hazanat' or the right of the mother to rear her children is an area of crucial importance. In cases of mediation relating to child custody the qazi's actions underline the freedom to negotiate in reaching an amicable solution. The qazi delivers his verdict keeping the best interest of the child or children in question. Acting in conformity with the sharia principles that custody should be delivered not only in accordance with the age of the child or children but according to the capacity of parents to bear the responsibility, he exercises his discretion in fixing where the child or children's security best lie. It is here that the Islamic judge looks towards the traditional Islamic institution of ijma or scholarly consensus as the way forward in resolving issues. Besides 'ijma',

the judge also exhibits his reliance towards 'ijtihad' as tool of legal reasoning on issues where the 'Quran' and 'Sunnah' remain silent. (Wael B. Hallaq, 1997)

Any believing Muslims can approach the institution with his 'dawa' or claim. The plaintiff or the litigant has to provide detailed information in his appeal about the kind of dispute to which he or she seeks remedy. This prayer of the plaintiff is processed by the office attached to the sharia court and within a few days, probably after a week a notice is sent to both the parties to appear before the qazi along with their witnesses at the fixed hour. There are volunteers to perform these jobs. The notice that is sent to the litigant has only time and date mentioned in it. The one sent to the accused bear details of the allegation brought against him/her by the litigant. When both the parties appear before the qazi at stipulated date and time, the case proceeds normally but the absence of any one becomes a barrier to quick resolution. Non-appearance of any one of the party renders the case remaining unresolved because the notice from sharia courts, unlike the notice of a legal court, is devoid of the legal power to coerce the accused and ensure his presence. When the parties in dispute appear before the qazi, he lends a patient hearing to both the 'muddai' and 'muddai-alaih' that is the plaintiff and the defendant respectively, even though sometimes the issue at the first instance may appear to be trivial.

Though it seems that the qazi is only listening to events, actually he is corroborating facts presented by both the parties and their witnesses. The qazi listens to facts narrated and make enquiries asking them to produce documents, if needed, to verify the authenticity of facts narrated. He then analyses and appreciates those facts in the light of the law of Islam. The qazi is neither equipped to investigate the case himself nor does he possess the staff to do so. His dependence upon such facts as the parties are willing and able to establish is entire. This is for the sole reason that an official like a public prosecutor who could investigate criminal offence and bring the offender to trial do not exist in Islamic law. Trials are conducted solely by the qazi, there is no pre-trial discovery process and no cross examination of witnesses. Drawing his power from religious principles, he refrains from using any kind of physical coercion. His office neither applies any physical force nor demands circumstantial evidences. The verdicts are obeyed due to the religious sanctity and social respectability attached to the qazi's office.

The ambience of sharia courts is informal with friends and relatives of both the plaintiff and defendant sitting in front of the qazi. They remain free to participate in the deliberation and express their opinion. The witnesses present provide the 'murafaat' or evidence in person before the qazi. Following the general rules of evidence, he accepts the 'bayyina' or statement of all Muslims without any qualm including women. However, the qazi refrains from accepting the testimony of minors and insane because sanity of mind and maturity of years are important preconditions in the sense that their evidences are invalid for such persons do not possess the power to assume any obligations upon themselves. To avoid all confusions and be objective, the qazi neither accepts the testimony of a person who has overheard from behind the curtain or from outside the house without seeing the actual speaker because voices are often mistaken.

The rules of evidence maintain a distinctive custom of prioritizing oral testimony. 'Iqrar' or confession of the accused and oral testimonies of witnesses are main evidences admissible. The qazi asks for written evidences if only he deems it fit. The strict rules of evidence of formal courts are not followed but the qazi as judge takes steps to sieve the truth from falsehood and identify, in real sense, the wrong doer. The qazi also relies upon his experience and makes use of 'mahir-i-fan' or physiognomy; he utilizes psychological reactions and scrutiny of facial reflections as blushing, squinting of eyes, changes in voice and turning pale to identify the wrong-doer or the guilty.

The informal ambience of sharia courts render discussion over the issues easy and less complex as all present deliberate until a solution is found and consensus reached. Apart from prioritizing Islamic values, the qazi also makes liberal use of common sense knowledge to arrive at rational and acceptable solution. Following norms of natural justice, the qazi never tries the case ex-parte or in the absence of the defendant or opposite party. The sharia court ensures obedience through social pressure as they are devoid of any effective power to hand down retributive punishments.

However, the verdict of the qazi is never obligatory and depends upon the mutual consent of the parties to abide by the verdict. However, empirical observations have shown that those Muslims

who resolve seek resolution to their disputes under the care and guidance of sharia courts respect and admit to its decisions. The qazi's decision is considered authoritative not because it accords with specific legal rules and principles rather it is the imperium tied to his institutional position within a sharia rule of law system that lends verdicts their authority. Sharia as a rule of law system implies the existence of institutions to which community members grant authority either through social commitments or through the very act of seeking adjudication of disputes. The parties seek moral assistance from sharia courts which disregards the winner-loser dictum of the formal court because they believe that such mental state is disadvantageous in situations where there are reasons to maintain good relationship after the verdict is passed as in cases of family disputes.

Perhaps the greater benefit, however, is the arrangement that grants the qazi significant power and discretion to promote reconciliation. He offers informal advisory opinions to educate and persuade the parties hoping that they would realize the benefits of negotiation and compromise. Self-criticism, forgiveness, acknowledgement and responsibility are vital to the process of reconciliation.

Restoration or repairing the harm inflicted upon the victim forms the dominant theme of sharia justice. The sharia courts function on the belief that the victim not only deserves assurance, reparation, vindication and empowerment but what is essential is that the individual must be helped to find meaning. The victim needs answer as to why certain incident occurred and what is being done to extend help. The public dimension of the harm or injury makes the community accountable to the victim (since victim is a member of the community) and is therefore obliged to meet the victims' needs. The relationship-based restorative efforts of sharia courts make it particularly attractive to parties seeking to resolve domestic disputes.

While re-building the ruptured relationship through the process that allows open participation of all parties the aim is to improve relations within the community and to increase public satisfaction. Reconciliation through negotiation and compromise reinforces communal bonds. In aiming at achieving restoration and healing sharia courts as community justice dispensing forum strengthen the normative standards thereby reducing recidivism.

Premised on two primary innovations of offence control and problem solving efforts the resolution process seeks to bring together the victim, the offender and the community. The element of acknowledgement and responsibility engrained in sharia justice holds the offender accountable to both the victim and the larger community. Since crime devalues the community, the community as important stake-holder has an important role to play in repairing the injury caused by the offence.

6. CONCLUSION

The sharia courts improve access to justice delivery by lessening costs associated with bureaucratic delay and with the need for professional assistance, and lessening the discouragement of potential parties who are confronted in regular courts by judges and lawyers of higher social status than themselves. Since litigation is considered to be a negative social phenomenon leading to disruption of harmonious social relationship, sharia courts through mediation uphold shared societal interests and reaffirms social bonds. Fostering community peace and larger social harmony through mediation is the tangible expression of sharia courts. The institution can be best described as 'internal community regulatory mechanism.'

Sharia courts today are important alternative dispute resolution (ADR) mechanism; its role is complementary to the formal judiciary. Under the present dispensation sharia courts or darul-qaza is an integral dispute redressal forum for the Indian Muslims as they are able to resolve disputes expeditiously and amicably. By settling private disputes of such a big community as that of the Muslims, the darul-qaza is complementing the formal Indian judiciary. Apart from its complementary role, the system is inspired by the ideal of service to mankind. In a developing country as India, the darul-qaza through its informal approach create a more flexible and precise instrument for dispute adjudication and reduce the uncertainty and insecurity that emerge from the rigidity of the formal legal system. The institution is fully adapted to the profile and requirement of its community members.

The system confronts delinquency and offence through proactive practices with the aim of creating and upholding vital and just community. Positive human relations contribute towards a positive community environment crucial for ensuring justice. Justice dispensed by sharia courts is based on the firm conviction that to prevent crimes and curb its future occurrence it is necessary that parties, particularly the offender, be imparted social, educational or religious attention because 'needs ought to be met'. The needs of disputants must be met to experience even approximate justice. The pious nature of the qazi office invokes and upholds the belief in human nature that a frown, reprimand, disapproval and light forms of rebuke are sufficient for men to mend their ways.

REFERENCES

- BasuDurga Das, 'Introduction to the Constitution of India', 21st ed. Haryana: Lexis Nexis, 2013, ch. 3, pp. 25-26.
- Chatterjee Partha, 'A Possible India: Essays in Political Criticism', Delhi: Oxford University Press, 1998, ch. 14, pp.234-262.
- Engineer Asghar Ali, 'Islam Challenges in the 21st Century', New Delhi: Gyan Publishing House, 2004, ch. 21, pp. 257-264.
- FyzeeAsaf A. A, 'Outlines of Muhammadan Law', 5th ed. New Delhi: Oxford University Press, 2012, ch. 4, pp. 117-143.
- Grady Standish Grove, 'The Hedaya' or Guide; A Commentary on the Mussulman Laws', 2nd ed. London, WM H. Allen & Co., 1870, ch. 3, pp. 343-373.
- HallaqWael B, 'A History of Islamic Legal Theories - An Introduction to Sunni Usul al-Fiqh', UK: Cambridge University Press, 1997, ch. 1, pp. 1-15.
- HanifN, 'Islamic Concept of Crime and Justice', 1sted. New Delhi: Swarup & Sons, 1999, ch.1, pp. 1-21.
- Husain Vahid, 'Administration of Justice during the Muslim Rule in India, Calcutta: University of Calcutta Press, 1934, ch. 6, pp. 73-121.
- Kymlicka Will, 'Contemporary Political Philosophy', 2nd ed. New York: Oxford University Press, 2002, ch. 8, pp. 327-352.
- Mahmood Tahir, 'Muslim Personal Law; Role of the State in the Indian Subcontinent', Nagpur, All India Reporter Ltd, 1983, ch. 2, pp. 15-27.
- Mahmood Tahir, 'Laws of India on Religion and Religious Affairs', New Delhi: Universal Law Publishing Company, 2008, ch. 5, pp. 94-109.
- Parekh Bhikhu, 'Rethinking Multiculturalism: Cultural Diversity and Political Theory', Hampshire: Macmillan, 2000, ch.1, pp. 16-17.
- PatraAtul Chandra, 'The Administration of Justice under the East India Company in Bengal, Bihar and Orissa', Bombay: Asia Publishing House, 1962, ch.1, pp. 12-30.
- Phillips Anne, 'The Politics of Presence', New York: Oxford University Press, 2003, ch.1, pp. 1-12.
- Pathak Bindeshwar and Srivastav B. N, 'Constitutional Safeguards for Weaker Sections and the Minorities in India', New Delhi: Concept Publishing Company, 1999, ch. 1, pp. 17-30.
- QutbSayyid, 'Social Justice in Islam', Kualalumpur: Islamic Book Trust, 2000, ch. 3, pp. 51-93.
- WojkowskaEwa, 'Doing Justice: How Informal Justice Systems can contribute', Beijing: ADB, China National School of Administration. UNDP Oslo Governance Centre, the Democratic Governance Fellow Programmes, 2006, ch 2, p. 11-12.

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