SHARIA COURTS: LOOKING INTO THE LEGALITY OF DAR-UL-QAZA AND THEIR RELATIONSHIP WITH FATWAS

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INTRODUCTION

The controversy regarding the so called Sharia Courts or Dar-ul-Qaza began when the AIMPLB (All India Muslim Personal Law Board) announced the decision to open 10 more of such courts with 5 already being approved and the other 5 being looked into[1]. They also recommended one such court being opened in every district for the convenience of the Muslim populous in resolution of family disputes in accordance with the sharia law.

The controversy seemed to have been stirred by mostly conservative sections of the Indian society and mass misinformation being propagated by the Political Parties in India. With claims like Sharia Courts being a "Parallel Justice System"[2] and BJP spokesperson Shazia Ilmi writing a blog on Times of India titled "No country for sharia courts: Constitutional values and not AIMPLB should govern laws for Muslim women"[3] and that Sharia Courts have got no constitutional backing which is true to as legally speaking there is no legal sanction behind any judgment given by the said courts unless both parties consented to the dispute resolution. In fact Sharia Courts are an Alternative Dispute Resolution mechanism like mediation which

[1] Manzoor Shah, U. (2018). Opposition mounts over more Sharia courts in India - ucanews.com. [online] ucanews.com. Available at: https://www.ucanews.com/news/opposition-mounts-over-more-sharia-courts-in-india/83136 [Accessed 30 Aug. 2018].

[2] Faisal Fareed, Sharia courts divide opinion even among Muslims – but they are not a parallel justice system Scroll.in (2018), https://scroll.in/article/886047/sharia-courts-divide-opinion-even-among-muslims-but-they-are-not-a-parallel-justice-system (last visited Aug 30, 2018). (Link to news organisations and BJP leaders calling Sharia Courts "A Parallel Justice System" is in the article but you can also visit the video at: https://www.youtube.com/watch?v=JI7Ak_ExqhU)

[3] Shazia Ilmi, No country for sharia courts: Constitutional values and not AIMPLB should govern laws for Muslim women Times of India Blog (2018), https://blogs.timesofindia.indiatimes.com/toi-edit-page/no-country-for-sharia-courts-constitutional-values-and-not-aimplb-should-govern-laws-for-muslim-women/ (last visited Aug 30, 2018).

gives faster and most cost effective alternative to the Family Courts. This is not only allowed by the judiciary but is actively encouraged[4] so that family disputes can be solved without large legal fees and privacy.

The other controversy is that these so called sharia courts give their judgments in accordance with the Sharia Law and the Politicians claim that India is governed by its constitution and not the Sharia[5], which is obviously not true as Muslim personal law has been governed by the Sharia even before the Constitution by the "The Muslim Personal Law (Shariat) Application Act, 1937"[6] and it was adopted as it is by the parliament. So in principle the customs that one must keep in mind while giving any judgement on the Muslim Personal Law would not be much different for a court than what any Sharia Court keeps in mind.

One another problem with Sharia Courts is their association with fatwas. This was accentuated in the Vishwa Lochan Madan v. Union of India[7] case in which the issuance of fatwas was challenged as a one Delhi based lawyer was appalled at the absurdity of fatwas when he heard that when asked "hypothetically" about a real case, that if a woman were raped by her father-in-law what would the status of her marriage be? The muslim cleric answered that the marriage would not be valid anymore as quran orders one to marry not the woman whom your father married as this is quite easily seen that the reliance on this particular edict is unfounded as this edict talks about marriage and not any other sexual activity. But due to the answer given by the ill-informed cleric a PIL was filed and validity of there "absurd" fatwas was challenged in this case. This case has been widely misread and misunderstood as after it's judgement in 2014 the headline read "Historical judgment in India: Fatwas, Shariat courts illegal, says Supreme Court", "Supreme Court slams Shariat Courts, says fatwas are 'illegal'", "'Shariat courts not legal'"[8] but the judgement clearly states that while Fatwas or Dar-ul-Qaza or Sharia Courts

[4] J. Venkatesa, Give mediation a chance, family courts told The Hindu (2018),https://www.thehindu.com/news/national/give-mediation-a-chance-family-courts-told/article4472541.ece (last visited Aug 30, 2018).
[5] Supra *note* 2.
[6] The Muslim Personal Law (Shariat) Application Act, Act 26 of 1937.
[7] Vishwa Lochan Madan v. Union of India, (2014) 7 SCC 707
[8] Saif Mahmood, Misunderstanding a good judgment The Hindu (2018), https://www.thehindu.com/todays-paper/tp-opinion/misunderstanding-a-good-judgment/article6226896.ece (last visited Aug 30, 2018).

doesn't have "sanction under our Constitutional scheme."[9] but also saying that "this does not mean that existence of Dar-ul-Qaza or for that matter, practice of issuing fatwas are themselves illegal. It is (an) informal justice delivery system with an objective of bringing about amicable settlement between the parties. It is within the discretion of the persons concerned either to accept, ignore or reject it."[10]

So, in this paper we will try to separate the reality from the perspective that surrounds these Sharia Courts as well as their not so close connection with Fatwas. We will try to answer looking at the existence of similar mediation bodies to answer the question of legality of the Sharia Courts or Dar-ul-Qaza.

ARBITRATION ON FAMILY MATTERS IN INDIA

In India, the family unit continues to be the dominant entity in the social structure. With your family deciding your spouses as most of Indian marriages aren't just a union of two individuals but two families. It has been often seen that law that governs family affairs is fairly murky as the religious values often aren't in consonance with the law of the land and the Courts have to decide questions of law which are rooted more on values than the strict interpretation of law itself. In this chapter we examine the authorities and their view on whether or not should arbitration be a valid choice to get your family disputes resolved.

LAW COMMISSION REPORT

The Law Commission of India has been vehement in trying to bridge the differences between the diverse personal laws in India in at least in the matter of resolving family disputes outside courts. In its 129th Report[11], it has recommended that after the issues have been framed alternative dispute resolution methods ought to be made obligatory on the Courts. A settlement reached by conducting any of the alternative dispute resolution mechanisms namely,

[9] *Supra* note 7.
[10] *Ibid*.
[11] 129th Report of the Law Commission of India (1988).

arbitration, conciliation, mediation, judicial settlement or through a Lok Adalat (a settlement court) is much more preferable to conventional courts.[12]

Also in the 238th Law Commission of India report the first clause of which states that
"*The proliferation and pendency of litigation in Civil Courts for a variety of reasons has made it impracticable to dispose of cases within a reasonable time. The overburdened judicial system is not in a position to cope up with the heavy demands on it mostly for reasons beyond its control. Speedy justice has become a casualty, though the disposal rate per-Judge is quite high in our country. The need to put in place Alternative Dispute Resolution (in short, "ADR") mechanisms has been immensely felt so that the courts can offload some cases from their dockets. The ADR systems have been very successful in some countries, especially USA wherein the bulk of litigation is settled through one of the ADR processes before the case goes for trial."*[13]

And the third clause stating:
"In our country, arbitration and mediation have been in vogue since long. Arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure. The first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act, 1940 which in turn was replaced by the Arbitration and Conciliation Act of 1996. The mediation of informal nature was being adopted at the village level to resolve petty disputes from times immemorial. Thanks to the innovative measures taken by the judiciary in some States, resolution of court litigation through Lok Adalats became quite popular during 1970s and '80s. With the advent of Legal Services Authorities Act 1987, Lok Adalats and Legal Aid Schemes have received statutory recognition and become an integral and important part of the justice delivery system."[14]

The report goes on to explain the legal background of solving disputes through ADR methods and recommends that in order to deliver speedy justice and dispute resolution we must adopt

[12] *Ibid*.
[13] 238th Report of the Law Commission of India (2011), http://lawcommissionofindia.nic.in/reports/report238.pdf.
[14] *Ibid*.

ADR whenever we can. It also thoroughly examines Sec. 89 of the Code of Civil Procedure, 1908 which will be subsequently discussed in this paper.

CODE OF CIVIL PROCEDURE

The substantive provisions of the CPC namely Section 89 has been procedurally complemented by Order X, Rules 1A, 1B and 1C.[15] Rule 1A gives an option to the parties for settlement of the dispute outside court. If a party uses this option, a date is fixed for appearance before the authority or forum which has been selected by the parties for settlement of the given dispute.[16] Rule 1-B states that, the parties have to appear before such forum or authority[17] and Rule 1-C gives power to the Presiding Officer of the authority or forum to refer the case back to the court and fix a date if he/she is convinced that it is in the best interests of justice to do so.[18]

The Indian Legislature also enacted Order XXXIIA[19] in the Code of Civil Procedure by The Code Of Civil Procedure (Amendment) Act, 1976[20], Rule 3 of which states the duty of the Court to try settlement procedures wherever the situation seems appropriate in all matrimonial proceedings.[21] It is needless to say that it is the Code of Civil Procedure which applies to any suit which concerns family.[22] The Supreme Court, in the case of Salem Bar Association v. Union of India[23] has provided the Model Rules of ADR and the Model Rules of Mediation with a direction to all High Courts of the country to adopt the said rules with necessary modifications. Thus, it may be concluded that not only are Alternative Dispute Resolution Methods an acceptable alternative to the conventional family courts but that there has been a conscious effort by the Indian Legislature, The Law Commission as well as the judiciary to settle disputes out of court using ADR.

[15] The Code of Civil Procedure, 1908.
[16] Order X Rule 1A of The Code of Civil Procedure, 1908.
[17] Order X Rule 1B of The Code of Civil Procedure, 1908.
[18] Order X Rule 1C of The Code of Civil Procedure, 1908.
[19] Inserted by Sec. 80 of The Code Of Civil Procedure (Amendment) Act, 1976.
[20] Act 104 of 1976.
[21] Order XXXIIA Rule 3 of The Code of Civil Procedure, 1908.
[22] Order XXXIIA Rule 1 of The Code of Civil Procedure, 1908.
[23] Salem Bar Association v. Union of India, 2003 (1) SCC 49

FATWAS AND SHARIA COURTS

The definition of a Fatwa is the "Technical term for the legal judgment or learned interpretation that a qualified jurist can give on issues pertaining to the shariʿa."[24] Since in India no person, no matter how learned, can issue a legal judgement as that power rests solely with the Indian Judiciary. So in India it just means a learned interpretation that a qualified jurist gives when someone goes to him with a question. It has no legal sanctity at all. No one implementing the judgment. It is up to the person asking such opinions whether or not to follow such interpretations. The issue who counts as a "qualified jurist" depends on who is asking and that is also a problem as explained by Saif Mahmood, a writer for The Hindu

"In practice, however, Muslims seek such opinions from maulvis presiding over small mosques in every nook and corner of the country, who are often far too ignorant to even lead prayers, much less render scholarly opinions on sensitive inter-personal issues."[25]

Even renowned muslim scholar Hamza Yusuf says, "Some fatwas are dangerous... and some are ridiculous"[26] In respect of the problems with Fatwas he also said that, the biggest obstacle, is ignorance "and compounded ignorance – often not being aware of how ignorant we are".[27] So, the issue of Fatwa is quite understandable, as any Maulvi who presides over a Mosque has some authority that gives him a soft power over people. So any ill-informed Maulvi could potentially pass a Fatwa which could hurt someone, as anything said in a Fatwa by a Maulvi, even an ill-informed one would have some legitimacy derived from the position that they hold. The problem is while Maulvis might be ill-informed, normal populous is more so and they would believe what anyone with authority says.

So, we have established Fatwas can be dangerous when they are given irresponsibly by an ill-informed cleric but "A Qazi or Mufti has no authority or powers to impose his opinion and

[24] Wael B. Hallaq "Fatwa", Encyclopedia of the Modern Middle East and North Africa, http://www.encyclopedia.com/doc/1G2-3424600948.html (last visited Sept. 2nd 2018).
[25] *Supra* note 8.
[26] Shireena Al Nowais, Some fatwas are dangerous... and some are ridiculous, says renowned Muslim scholar Hamza Yusuf The National (2018), https://www.thenational.ae/uae/some-fatwas-are-dangerous-and-some-are-ridiculous-says-renowned-muslim-scholar-hamza-yusuf-1.744932 (last visited Sep 6, 2018).
[27] *Ibid*.

enforce his Fatwa on any one by any coercive method."[28] and "The person or the body concerned may ignore it and it will not be necessary for anybody to challenge it before any court of law. It can simply be ignored."[29]

All this was discussed in the Supreme Court Judgement of Vishwa Lochan Madan v. Union of India. This case was filed by a Delhi based lawyer Mr. Vishwa Lochan Madan who filed a PIL after being outraged by a fatwa that was issued by a Maulvi when asked by journalist about a case that happened in a case in Charthawal village in the Muzaffarnagar District, Uttar Pradesh in this village Imrana who was 28 year old and a mother of five was raped by her Father-in-Law and when the journalist asked about the validity of her marriage now that she was raped the Maulvis said that the marriage stood void due to the interpretation of the quranic verse "And do not marry those [women] whom your fathers married, except what has already occurred. Indeed, it was an immorality and hateful [to Allah] and was evil as a way."[30]

So, taking this Fatwa the basis of the petition Mr. Vishwa Lochan Madan argued that using Fatwas and Dar-ul-Qazas they are running a justice system which is outside the established structure of the courts in India.[31] Completely disregarding the fact that rape is a criminal offence and Dar-ul-Qazas basically deal with civil and mostly family matters and also the fact that she got her father-in-law convicted through approaching criminal courts.

After all this you may still ask, what is the connection between Fatwas and Dar-ul-Qazas? This is apparent as both the petitioner and the court seems to be confused between the two and even use the two interchangeably. Due to this even the court while giving the judgement has clubbed both of these things, an institution and religious/legal practice together. But, the final verdict on these courts stood at "It is not sanctioned under our constitutional scheme. But this does not mean that existence of Darul-Qaza or for that matter practice of issuing Fatwas are themselves

[28] *Supra* note 7.
[29] *Ibid*.
[30] The Holy Quran, Surah An-Nisaa 4:22.
[31] Centre studying fallout of `fatwa' against girl, The Hindu (2018), https://www.thehindu.com/todays-paper/tp-national/centre-studying-fallout-of-fatwa-against-girl/article18431134.ece (last visited Sep 7, 2018).

illegal. It is informal justice delivery system with an objective of bringing about amicable settlement between the parties."[32]

So, we can conclude that the reason that these two separate issues are treated as related is because they were dealt with in the same case and even the Supreme Court did not treat them separately. Consequentially, the news outlets reported their news also clubbing these two and almost treated them ones. The only ones that treated them as different concepts completely were the ones that wanted to report the narrative spread by various news outlets. Like the article in the Hindu "Misunderstanding a good judgment"[33] which dealt with the fake narrative that was ran by the news outlets.

DAR-UL-QAZAS AND WOMEN

The petition filed by Mr. Vishwa Lochan Madan didn't only claim that these Sharia Courts were a "parallel justice system" but also that they were discriminatory against women.[34] So we must examine how much truth there is to that statement.

The first study we must look to in this issue is that by two sociologists based in IIT Kanpur Anindita Chakrabarty and Suchandra Ghosh that found out that "At the Kanpur darul qaza where we collected more than a hundred cases, close to 95% of the cases were brought by women."[35] So an overwhelming no. of people that come to the courts are women. Mostly because these courts are cheaper, more time efficient and most importantly predictable. So, women can approach them knowing the court's limitations and advantages. Women know that any decree for regarding property isn't enforceable so they would approach the Dar-ul-Qaza for the divorce and get the property dispute resolved in the Civil Courts as concluded in the dissertation by Katherine Lemons of the University of California, Berkeley.[36]

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[32] *Supra* note 7.
[33] *Supra* note 8.
[34] *Supra* note 7.
[35] Anindita Chakrabarty and Suchandra Ghosh, Judicial Reform vs Adjudication of Personal Law, Vol. 52, Issue No. 49, (09 Dec 2017), pp. 12-14, https://www.epw.in/system/files/pdf/2017_52/49/CM_LII_49_091217_Anindita_Chakrabarti.pdf.
[36] Katherine Lemons, At the Margins of Law: Adjudicating Muslim Families in Contemporary Delhi, UC Berkeley Electronic Theses and Dissertations, Published 1st Jan 2010, https://escholarship.org/uc/item/6f66n4dn.

Women go to these courts for getting divorce and claiming maintenance from their husbands or ex-husbands. Mostly these courts charge a fee of Rs. 2000 which is also waived if the woman is not financially capable of paying the fee.[37] Normal civil courts and the lawyers make no such concessions to women who come to them and fee that runs into lakhs of rupees which realistically is outside the capabilities of these women.

But, these courts aren't free from discrimination at all and face many different problems not least of which begin with the fact that it is only men who adjudicate issues and women aren't allowed no matter how qualified. The women who live away from their matrimonial home have little or no means and support from the community as the community they live in is most likely the one in which their husband grew up.

These problems are discussed at length by author Sylvia Vatuk in her paper "The "women's court" in India: an alternative dispute resolution body for women in distress"[38] and her book "Marriage and Its Discontents Women Islam and The Law In India"[39] but the problems that are inherent in the system are outside the purview of this paper. This institution like any institution has its problems and one can argue that these problems are more problematic than the solutions it offers. But that mustn't mean that we dismiss it as an institute, in terms of accessibility and cost effectiveness these courts are must better than traditional family courts for a part of society which has been marginalised for the longest time who are the Muslim Women.

As a preliminary inquiry by Flavia Agnes, a Journalist interviewing a Mufti at the Dar-ul-Qaza at Nagpada, Mumbai and found out that out over 850 verdicts given by them only 2 were challenged in the traditional courts and both times by the husband.[40] This means one of two things, that these courts give fair judgements that are acceptable by both the parties almost all of the times or that nearly all the people who approach these courts lack the agency to go to

[37] Flavia Agnes, Darul Qaza row: A storm in a teacup Deccan Chronicle (2018), https://www.deccanchronicle.com/opinion/op-ed/010818/darul-qaza-row-a-storm-in-a-teacup.html (last visited Sep 7, 2018).
[38] Sylvia Vatuk, The "women's court" in India: an alternative dispute resolution body for women in distress, The Journal of Legal Pluralism and Unofficial Law, Issue 45:1, pp.76-103 (2013).
[39] Sylvia Vatuk, Marriage and Its Discontents Women Islam and The Law In India (2017).
[40] Supra *note* 37.

traditional courts and challenge their verdicts. But this makes it even more important that these institutions instead being pushing outside even the non-traditional forms of dispute resolution must be brought closer to the oversight of the judiciary, made more fairer in terms of the procedural aspect and train more qualified people to adjudicate cases. All this is only possible when we accept the Dar-ul-Qazas as a legitimate ADR body, still not having any legal sanction but a sort of recognition that makes it more accountable not only to the parties that approach them but also to the collective conscience of the societies so that they give up on dated concepts and adjudicate issues keeping the current times in mind.

CONCLUSION

This paper strived to answer the question of the legality of the Dar-ul-Qazas or the so called "Sharia Courts". I think we have succeeded in establishing that while they do not have any legal sanction in the constitutional scheme they still aren't illegal but are acceptable dispute resolution centres most approached by one of the most marginalised part of the Indian society which is the muslim women. The hypothesis of this research stands as we have established that they are "That Sharia Courts are a legal and legitimate alternative to family courts for family disputes for muslims."

We established this by looking at attitude of the Law Commission and the Indian Legislature towards out of court settlement in matrimonial disputes. Then we looked at their relationship with Fatwas and the judicial pronouncement in Vishwa Lochan Madan v. Union of India.

And finally we looked at the relationship between women and the courts and found out that these courts are much more accessible and cost effective than traditional courts and their importance to these marginalised women. Looking at all these factors we argued that instead of shunning away them as a parallel justice system which is against the principles established in our constitution we must be more inclusive with them and make them fairer and more transparent as whether we like it or not they do give verdict on an impressive no. of cases and almost all the time the parties seem content enough with the verdict to not approach traditional courts or lack the agency to do so.

So, we must ourselves why are these courts painted as an evil institute which strives to blanket all Muslims under its influence and subvert the rule of law in our country? While there can be a no. of different explanations as why that is, the primary reason has to the rising conservatism in our country with the Hindu majoritarian government of BJP always trying to push a negative narrative against Islam and its institutions. In the age of information, there is so much available that people can always find something which satisfies their preconceived notions without looking at all the evidence available.

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