

ADR

Modern Trend and Best Practices

Foreword by

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Foreword

It is with great pleasure that I introduce this insightful compilation, "*ADR: Modern Trend and Best Practices.*" In a world marked by rapid change, the field of Alternative Dispute Resolution (ADR) has not only adapted but also flourished, becoming an integral aspect of how societies, businesses, and individuals approach conflict resolution. This book, expertly curated by the editors, brings together a wealth of knowledge, diverse perspectives, and practical insights from academicians, practitioners, and scholars in the realm of ADR. The collective wisdom contained within these pages offers a comprehensive overview of the contemporary trends and best practices that define the landscape of ADR today. As we navigate an era marked by technological advancements, cultural diversity, and an increasing interconnectedness, the relevance of ADR in providing efficient, fair, and innovative dispute resolution mechanisms cannot be overstated. This compilation explores the cutting-edge applications of ADR across various domains, providing readers with a deep understanding of its transformative potential. Each chapter stands as a testament to the adaptability and resilience of ADR methodologies in addressing the challenges posed by a rapidly changing world. From the exploration of online dispute resolution to the examination of ethical considerations, each chapter in this book contributes to a holistic understanding of ADR. It is my hope that this collection serves as both a valuable resource and an inspiration for scholars, practitioners, students, and anyone interested in the evolving dynamics of dispute resolution.

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Alternative Dispute Resolution (ADR) Mechanism has emerged as a significant in the legal system, playing an active role in resolving disputes outside traditional courtroom settings. This chapter delves into the multifaceted landscape of ADR, encompassing a spectrum of processes that offer viable alternatives to lengthy and resource-intensive court proceedings. It further sheds light on the rationale behind the proliferation of ADR mechanisms, emphasizing their capacity to expedite resolution and alleviate the burden on the judicial system. Focusing on the Indian legal context, this book chapter navigates through the intricacies of laws governing the settlement of disputes through ADR mechanisms. It explores the evolution of ADR in India and the impetus behind its integration into the legal framework.

Keywords: Arbitration, Conciliation, Mediation, Alternative Dispute Resolution (ADR), Legal Services Authorities Act.

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CHAPTER-6

Darul Qaza as an Alternative Dispute Resolution Mechanism: Evaluating its Influence on Access to Justice

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Abstract

Darul Qaza is a concept of Islamic law that aims to provide a fast, cheap, and amicable way of settling civil disputes among Muslims, based on the principles of justice, fairness, and equity derived from the Quran and Hadith. Darul Qaza has a long history that dates back to the time of the Prophet Muhammad (peace be upon him) and the Rashidun Caliphs, who acted as arbitrators and judges in various conflicts among their companions and followers. Darul Qaza has been established in different parts of the world, especially in countries with large Muslim populations, such as India, Pakistan, Bangladesh, Malaysia, and Indonesia. Darul Qaza operates as a parallel or complementary system to the state's judicial system, and usually deals with matters related to family, inheritance, contracts, and other non-criminal issues. Darul Qaza has been praised for its efficiency, accessibility, and flexibility, as well as its ability to uphold Islamic values and harmony within the Muslim community. However, Darul Qaza has also faced some challenges and criticisms, such as its legal status, its compatibility with human rights norms, its gender bias, and its quality of adjudication. This paper aims to explore the concept of Darul Qaza, its historical development, its structure and functions, its advantages and disadvantages, and its future prospects.

Key words: Justice, equity, adjudication, settlement, dispute.

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Introduction

Islam is not only a religion but also a way of life that guides Muslims in every aspect of their personal and social affairs. Islam has a comprehensive legal system that covers both religious and worldly matters, known as *Sharia* or Islamic law. *Sharia* is derived from two primary sources: the *Quran*, which is the word of God revealed to the Prophet Muhammad (peace be upon him), and the *Hadith*, which is the sayings and actions of the Prophet and his companions. *Sharia* also relies on secondary sources, such as consensus (*ijma*), analogy (*qiyas*), juristic preference (*istihsan*), public interest (*maslaha*), and custom (*urf*).

Sharia aims to protect five essential objectives (*maqasid*): faith (*din*), life (*nafs*), intellect (*aql*), lineage (*nasl*), and property (*mal*). *Sharia* regulates various aspects of human life, such as worship (*ibadat*), transactions (*muamalat*), penal law (*hudud*), family law (*ahwal al-shakhsiyya*), inheritance law (*mirath*), and international law (*siyar*). One of the important aspects of *Sharia* is dispute resolution. Islam encourages Muslims to avoid disputes as much as possible and to resolve them peacefully and amicably if they arise.

The *Quran* says:

“And if two parties or groups among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you all against the one that outrages until it complies with Allah's command. Then if it complies, then make reconciliation between them justly” [49:9].

The *Quran* also says:

“The believers are nothing else than brothers. So, make reconciliation between your brothers” [49:10].

The Prophet Muhammad (peace be upon him) said:

"Shall I not inform you of something more excellent in degree than fasting, prayer and almsgiving? The people replied: Yes. He said: It is putting things right between people" [Sunan Abu Dawud].

The Prophet also said:

"The best judge is he who decides justly between people" [Sunan Ibn Majah].

However, not all disputes can be resolved by mutual agreement or mediation. Sometimes, there is a need for a third-party intervention or arbitration to settle the matter according to Islamic law. This is where *Darul Qaza* comes in. *Darul Qaza* is an Arabic term that literally means "House of Justice" or "House of Judgement". It is a distinctive branch of Islamic law that deals with civil disputes among Muslims. *Darul Qaza* is based on the concept of *qada* or judicial decision-making in Islam. *Qada* is one of the functions of the Islamic state or authority that is responsible for implementing *Sharia* and maintaining order in society. *Qada* involves applying Islamic law to specific cases and issuing verdicts or judgments that are binding on the parties involved. The person who performs *qada* is called a *qadi* or judge. A *qadi* must be qualified in Islamic law and jurisprudence, as well as possess moral integrity and impartiality.

Concept of Darul Qaza

Darul Qazas are traditional Muslim courts that operate under Islamic law, or *Sharia*. They are popular among Muslims in India because they are accessible, informal, and voluntary institutions that provide speedy and inexpensive justice, especially to the poor. *Darul Qazas* typically deal with personal law matters such as marriage, divorce, inheritance, and custody disputes. *Darul Qaza* is a well-known concept in Islam. It has a long history that dates back to the time of the Prophet Muhammad (peace be upon him) and his

successors. The Prophet himself acted as an arbitrator and judge in various disputes among his companions and followers. He established a court in his mosque in Medina where he heard cases and delivered judgments according to Islamic law. He also appointed some of his companions as judges in different regions under his authority. For example, he appointed Ali ibn Abi Talib as a judge in Yemen, Muadh ibn Jabal as a judge in Syria, and Amr ibn al-As as a judge in Egypt.

The Prophet also laid down some principles and rules for *qada*, such as:

"The burden of proof is on the claimant, and the oath is on the defendant" [Sunan al-Tirmidhi];

"The judge must not judge between two people when he is angry" [Sahih al-Bukhari]; and

"The judge must listen to both parties equally before passing judgment" [Sunan al-Nasa'i].

After the death of the Prophet, his successors, the Rashidun Caliphs, continued the practice of *qada* and established Darul Qaza in various parts of the Islamic state. They also appointed qualified judges to administer justice according to Islamic law. For example, Umar ibn al-Khattab, the second caliph, appointed Abu Musa al-Ashari as a judge in Basra, Shuraih ibn al-Harith as a judge in Kufa, and Zaid ibn Thabit as a judge in Medina. Umar also established a judicial council (*majlis al-qada*) to supervise and review the judgments of the judges. He also introduced some reforms and innovations in *qada*, such as: dividing the cases into civil and criminal categories, creating separate courts for different types of disputes, appointing female judges for women's issues, and establishing a system of appeals and review.

The institution of *Darul Qaza* continued to develop and expand under the subsequent dynasties and caliphates that ruled the Muslim world. *Darul Qaza* became an integral part of the Islamic legal system that governed various aspects of Muslim life. *Darul*

Qaza also adapted to the changing circumstances and needs of the Muslim society. Different schools of Islamic jurisprudence (*madhahib*) emerged and influenced the practice of *qada*. *Darul Qaza* also interacted with other legal systems and traditions that existed in the regions where Islam spread. *Darul Qaza* also faced some challenges and difficulties, such as political interference and corruption, lack of uniformity and consistency, diversity and complexity of cases, and shortage and quality of judges.

In the modern era, *Darul Qaza* has undergone some changes and reformations due to various factors, such as colonialism and secularism, nationalism and secularism, globalization and modernization, human rights and democracy, and pluralism and diversity. *Darul Qaza* has been established in different parts of the world, especially in countries with large Muslim populations, such as Saudi Arabia, Pakistan, Bangladesh, Malaysia, and Indonesia. *Darul Qaza* operates as a parallel or complementary system to the state's legal system, and usually deals with matters related to family, inheritance, contracts, and other non-criminal issues. *Darul Qaza* is often praised for its efficiency, accessibility, and flexibility, as well as its ability to uphold Islamic values and harmony within the Muslim community. However, *Darul Qaza* has also faced some challenges and criticisms, such as: its legal status, its compatibility with human rights norms, its gender bias, and its quality of

Qaza is not a court in the conventional sense. It is more like a conciliation or mediation center that operates according to Islamic law. It does not have any coercive power or authority over the parties involved. It relies on their consent and cooperation to resolve their disputes. It does not have any jurisdiction over criminal cases or matters that are under the exclusive domain of the state's official system. It only deals with civil disputes such as inheritance and family.

Processes and Procedures

The processes and procedures employed in *Darul Qaza* vary across different Islamic cultures and regions but generally share common elements. Parties involved in a dispute voluntarily submit their case to the *Darul Qaza*, often with the assistance of legal counsel or scholars well-versed in Islamic law. The *Qazi*, or Islamic judge, presides over the proceedings, and witnesses and evidence are presented. The *Qazi's* role is pivotal, as they apply Islamic jurisprudence to the facts of the case and strive to reach a just and equitable resolution. The decision rendered by the *Qazi* is binding upon the parties involved, and non-compliance may result in further social sanctions within the Muslim community.

In the modern era, *Darul Qaza* continues to serve as a vital institution for dispute resolution within Muslim-majority countries and Muslim communities residing in non-Muslim countries. The status of *Darul Qaza*, which refers to Islamic alternative dispute resolution mechanisms, varies from one country to another. It largely depends on each nation's legal, political, and cultural contexts.

Here is an overview of the status of *Darul Qaza* in some countries around the world:

Country	<i>Darul Qaza</i> / Islamic Arbitration	Legal Status
United Kingdom	Exists informally within the British Muslim community.	Decisions not legally binding but can be enforced if both parties agree and take them to a civil court. Legal framework provided by the Arbitration Act of 1996.
Canada	Allows religious arbitration, including Islamic arbitration.	Decisions not legally binding but can be recognized and enforced if both parties agree. Operates within the Canadian legal system.
U.S.	Islamic arbitration panels exist within U.S. legal boundaries.	Decisions not legally binding, subject to review by civil courts. Parties can voluntarily submit disputes to <i>Darul Qaza</i> , with the option to seek recourse in civil courts.
Malaysia	Recognizes <i>Sharia</i> courts for Islamic family and personal law.	Decisions are legally binding for Muslims in specific matters related to family and personal law. Operates within the Malaysian legal system.
Indonesia	Well-established <i>Sharia</i> legal system with <i>Darul Qaza</i> .	Decisions made by these courts are legally binding and cover various civil, family, and criminal matters in accordance with Islamic law.
Iran	Formal legal system includes <i>Sharia</i> courts operating as <i>Darul Qaza</i> .	Decisions made by these courts are legally binding and have authority within their jurisdiction, specifically in matters related to Islamic family and personal law.

UAE (United Arab Emirates)	Islamic courts function as <i>Darul Qaza</i> for matters governed by Islamic law.	Decisions made by these courts are legally binding within the UAE. Operate in areas such as family and personal status issues.
Indonesia	Recognizes <i>Sharia</i> courts for Islamic family and personal law.	<i>Sharia</i> courts function as <i>Darul Qaza</i> , having legal authority in their respective areas of jurisdiction, specifically in matters related to family and personal law.

It is essential to note that the status and authority of *Darul Qaza* or similar Islamic arbitration mechanisms vary widely, even within countries. Their legitimacy and enforceability are often determined by national laws, the degree of separation between religious and civil legal systems, and cultural factors. While they offer a means for Muslims to resolve disputes in accordance with Islamic principles, their role and influence are subject to the legal and political context of each country.

Darul Qaza in Indian Legal System

India is a secular country that guarantees freedom of religion to all its citizens. The Constitution of India recognizes the right of every religious denomination or section thereof to manage its own affairs in matters of religion [Article 26]. The Constitution also empowers the state to make laws for social welfare and reform or for throwing open Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)]. However, the Constitution does not explicitly mention personal laws or their sources. Personal laws are laws that govern matters such as marriage, divorce, inheritance, adoption, etc., based on the customs and traditions of different religious communities. In India, there are different personal laws for different religious communities, such as Hindu law, Muslim law, Christian law, Parsi law, etc.

These personal laws are derived from various sources, such as scriptures, customs, precedents, legislation, etc.

In the Indian context, the roots of a distinctive legal system for Muslims can be traced back to the era when Muslim traders first arrived in India, particularly along the coastal regions of southern states. Local Hindu Kings acknowledged the role of the *Qazi*, who played a pivotal role in adjudicating matters related to the private affairs of Muslims. This institution persisted through the Mughal Empire, with the establishment of official departments like *Darul Uloom* by the State and rulers. *Shariah* laws were formulated and interpreted by knowledgeable Islamic jurists, aligning with the Quran and teachings of the Prophet while addressing contemporary needs and challenges.

With the advent of British rule in India, this system was dismantled around 1862, leading to the disappearance of the position of the *Qazi*. However, responding to persistent demands from the *Ulema* and Muslim political class, the Colonial State passed the Shariat Application Act in 1937. During the anti-colonial struggle, the Indian National Congress promised to reinstate *Shariah* law in independent India. The Indian Constitution acknowledged the cultural and religious freedom of minorities but also mentioned in Article 44 the possibility of formulating a Uniform Civil Code (UCC) if favourable conditions arose in the future.

The *Shah Bano* case reignited discussions on the UCC and gender justice in India. Some feminists and secularists criticized the Rajiv Gandhi government for yielding to the pressures of conservative Hindu and Muslim leaders, leading to the passage of the Muslim Women (Protection of Rights on Divorce) Act in 1986. Feminists argue that the autonomy and gender justice of Muslim women were compromised in the name of protecting Islamic *Sharia* and appeasing conservative views within Muslim Personal Law.

However, alongside the secular legal system that governs the country, *Darul Qaza* serves as a platform for Muslims to resolve civil disputes in accordance with Islamic principles. This coexistence raises questions about the legal status, functioning, and implications of *Darul Qaza* in the Indian context. In India, *Darul Qaza* operates in a parallel, non-official capacity. It does not have legal recognition or enforceable authority comparable to the mainstream judiciary. Its decisions are not legally binding, and parties involved are not obligated to comply with *Darul Qaza* rulings. However, parties voluntarily approach *Darul Qaza* to seek resolution in matters governed by Islamic law, such as family disputes, inheritance, and marriage-related issues. *Darul Qaza* proceedings are informal and often take place within religious or community centers. Parties bring their disputes to the attention of Islamic scholars or *qazis* who preside over the proceedings. These scholars apply Islamic jurisprudence to the facts presented and offer recommendations for resolution, usually based on the *Quran* and *Hadith*.

The current status of *Darul Qaza* in India is that it is not a legally recognized court. In 2014, the Supreme Court of India ruled that *Darul Qazas* have no legal sanction and that clerics have no authority to enforce *fatwas* on anyone using coercive means. However, the court also clarified that the existence of *Darul Qazas* or the issuing of *fatwas* is not illegal. Despite the Supreme Court ruling, *Darul Qazas* continue to operate in India. They are not recognized by the government, but they are respected by many Muslims. *Darul Qazas* can play an important role in resolving disputes within the Muslim community and in promoting social harmony. However, there have been concerns that some *Darul Qazas* have issued *fatwas* that are discriminatory against women and other vulnerable groups. For example, in 2018, a *Darul Qaza* in Kerala issued a *fatwa* that prohibited Muslim women from

driving. Overall, the current status of *Darul Qaza* in India is complex and nuanced. They are not legally recognized courts, but they continue to play an important role in the lives of many Muslims. It is important to strike a balance between respecting the religious freedom of Muslims and ensuring that the rights of all people are protected.

Benefits of Darul Qaza

Darul Qaza can provide an accessible avenue for Muslims to seek resolution of civil disputes without the formality and expense associated with the conventional legal system. It allows parties to resolve disputes in a culturally sensitive and religiously grounded environment, aligning with their faith and values. *Darul Qaza* contributes to community cohesion by encouraging peaceful dispute resolution, thus maintaining social harmony. The informal and expedited nature of *Darul Qaza* proceedings can lead to quicker resolutions compared to lengthy court battles in civil courts. *Darul Qaza* fosters community cohesion by encouraging peaceful dispute resolution and discouraging litigation that can strain social relationships. *Darul Qaza* helps uphold Islamic values and principles in various aspects of civil life, contributing to the maintenance of an Islamic way of life.

However, there are challenges as well like the non-binding nature of *Darul Qaza* decisions raises questions about their legal validity and enforceability, potentially leading to further legal complexities. Critics argue that *Darul Qaza* decisions may not uphold principles of gender equality and women's rights, which are protected by the Indian Constitution. Ensuring that *Darul Qaza* proceedings adhere to universal human rights standards is essential to prevent potential violations.

Conclusion

Darul Qaza's existence within the legal system reflects the nation's commitment to religious diversity and cultural pluralism. While it serves as a valuable avenue for dispute resolution for many Muslims, its coexistence with the secular legal framework raises complex questions regarding legality, fairness, and human rights. Addressing these challenges while preserving religious and cultural sensitivities remains a significant journey toward a harmonious and just society. Clarifying the legal status of *Darul Qaza* and promoting dialogue between its practitioners and the broader legal system could contribute to a more seamless coexistence.

Darul Qaza, as a unique institution within Islamic jurisprudence, holds a significant place in the resolution of civil disputes among Muslims. Its historical roots, guided by principles rooted in Islamic law, and contemporary relevance make it an essential component of many Muslim communities. However, addressing concerns related to human rights and ensuring equitable access to justice remain vital areas for further exploration and development. Ultimately, *Darul Qaza* plays a crucial role in upholding justice, preserving Islamic values, and fostering community cohesion within the Muslim world. Most of the Legal Systems were kind enough not to declare *Darul Qaza* as an illegal entity, we must take this opportunity and prove that such Institutions are useful not only for Muslims but for the entire society. The doors should be opened for counselling of couples, and a true Institution for alternate dispute redressal should be brought into existence. It is a general perception that because of the protracted litigations, the valuable time of the litigating young people is wasted. Couples who feel that they are not compatible with each other may find their new ways, if, the matters can be settled in a short period or by counselling the families could be saved. Therefore, the need for

socially managed Institutions like *Sharayi Adalat* is felt more with the rise in disputes, with a rider that they are established in modern ways.

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