

EFFORTS OF OUR PIOUS PREDECESSORS

HAKEEMUL-UMMAT HAZRAT MOULANA THANWI AND THE ESTABLISHMENT OF SHAR'EE COURTS

For quite some time Hazrat Hakeemul-Ummat Moulana Ashraf Ali Thanwi (RA) perceived the need to have Shar'ee courts established in India, as was the case in the former times before British rule. He explored different avenues and actively pursued this objective throughout his lifetime. For instance, an important figure whom he had spoken to in this regard was the former principal of Darul-Uloom, Deoband, Hazrat Hafiz Ahmed sahib (RA), father of Hazrat Qaari Tayyib sahib.

Hazrat Ahmed sahib in turn, brought this to the urgent attention of Edwin Samuel Montagu, the then British Secretary of State in India. The Deoband principal also urged members of the National Assembly and Council to raise this issue in Parliament. Even the Simon Commission¹ was made aware of the need to set up Shar'ee courts and was petitioned to investigate its feasibility.

In Meerut, upon the instigation of Hazrat Thanwi, an Association for the Appointment of Shar'ee Judges (*Qudhaat*) was formed. This Association exhorted members of the public and other bodies towards the establishment of Shar'ee courts in India, and widely distributed the booklet *Al-Qowlul-Maadhi Fee Nasbul-Qaadhi* (which was probably a fatwa of Hazrat Mufti Thafar sahib Thanwi RA).

Sometime during 1347 (AH), in Delhi, a special conference on the establishment of Shar'ee courts was convened, which was attended by Hazrat Allama Anwar Shah Kashmiri (RA), Mr. Mohamed Ali (Jinnah), Hazrat Khaja Azizul-Hasan (RA, the famous khaleefa of Hazrat Thanwi, as well as members of the Assembly and (political) leaders from Delhi. Prominent 'Ulema from Deoband and Saharanpur has also attended this meeting. The main objective of this conference was to highlight the need for Shar'ee courts and to make the National Assembly aware of the importance and underlying religious significance of such an institution. To this extent the conference was a total success. Having achieved this objective, though, there were no further developments or any indication of success in this regard. Nevertheless, Hazrat Thanwi still remained focussed on this goal and dua was being made daily for its achievement after the *khatme-khajgaan* in Thanabawan.

(*Ashrafus-sawaanih vol.3 p. 240*)

¹ The Simon Commission was a group of academics appointed by the British Govt to monitor and report back on the functioning of Indian Constitution devised by the British Govt. The Commission of 7 members, headed by a lawyer named John Simon, was later on boycotted by the Congress and other Indian parties.

A CASE FOR MUSLIM JUDGES

By Hazrat Moulana Khaleel Ahmed Saharanpuri (RA)

According to the principles of the Islamic Faith, the appointment of Muslim judges and magistrates is a very important aspect and holds the position of faradh (compulsion). There are countless references for this in the works of Jurisprudence. This is of particular importance for Muslims under a non-Muslim state. It is only through the non-existence of Muslim judges that women, who naturally lack ability and physical strength, are suffering tremendous violation of rights in numerous cases. These women, due to their weakness and lack of education, fail to make their voices heard by the government, and are incapable of demanding their rights. And even if they do petition the courts, it is almost impossible to succeed in retrieval of their rights because the government (of the day) had not given due attention to the appointment of Muslim magistrates.

There are hundreds of cases in which there is a great need for verdict of a Muslim judge. The ruling of a non-Muslim judge will not be able to restore to women their rights (in terms of Shariah).

WAQF LEGISLATION DURING THE TIME OF HAKEEMUL-UMMAT

Due to mismanagement of waqf institutions by trustees, some people seized the opportunity to seek (State) legislation on waqf matters. After a short campaign a commission was set up to undertake a feasibility study on waqf legislation, and in 1930 this delegation toured the country to seek the views of various ‘ulema. When they arrived in Thanabawan, Hazrat Thanwi presented them with a detailed memorandum (which appears at the end of this article) in which he established quite conclusively that the State has no right to promulgate legislation on waqf matters. Similar responses were received from Deoband, Saharanpur and other institutes. However, from some quarters the delegation received responses that supported the idea of waqf legislation by a non-Muslim State; hence the Commission subsequently prepared a Draft Bill that was presented to Council for approval.

When the Draft Bill was made available to the public for comments, Hazrat Moulana Abdul-Lateef sahib, head of department at Mazaahir Uloom² in Saharanpur brought it to the attention of Hazrat Thanwi and requested that steps should be taken to stop this Bill from going ahead. He also suggested that senior ‘ulema from Deoband and Saharanpur be invited for a meeting in Thanabawan to discuss the issue in detail. Hazrat Thanwi accepted this proposal, and consequently on 24 Zhul-Qa’dah 1352 the principals of the two institutes along with senior ‘ulema arrived for a consultative meeting. After thorough consultation and deliberation it was agreed that, under the guidance of Hakeemul-Ummat, the flaws in the Draft Bill would firstly be highlighted. Thereafter, such amendments would be proposed that would make the Bill compliant with Shariah. For this purpose the following ‘ulema were appointed: Mufti Muhammad Shafee (the Mufti of Deoband), Moulana Jameel Ahmed Thanwi (a teacher in Mazaahir Uloom), and Khaja Azizul-Hasan (an inspector of schools).

Consequently these three ‘ulema met in Thanabawan and spent several days studying the various aspects of the Bill. Notes were made on every single clause of the Bill after mutual consultation and deliberation as well as the continuous advice of Hazrat Moulana Thanwi under whose counsel and guidance this whole project was being conducted. On the 23 Zhul-Hijja, almost a month after the initial meeting, comments on the Draft Bill were completed. This document was signed by Hazrat Thanwi. It was then suggested that another meeting be held in Deoband to present this document to the other ‘ulema for their approval and comment. Consequently, two days later this meeting convened in Deoband, where senior scholars sat from morning till late at night discussing and debating various aspects of the document. When consensus on the response was eventually reached among all present, 30 ‘ulema were selected to sign it, after which the document was presented to the National Council.

A while later a member of the Council, Hafiz Hedayat Husain, who was also a drafter of the Waqf Bill, wrote to Moulana Thanwi seeking a meeting in Thanabawan to discuss the ‘ulema’s response. He also stated that it would be an honour for him if other members of the ‘ulema of Deoband and Saharanpur can be present at that meeting. On a prearranged date (probably 22 April 1934) an all-Muslim delegation from the British government comprising members of the Assembly and National Council, as well as prominent businessmen met with high ranking ‘ulema in Thanabawan. Among the famous names who attended were Moulana Husain Ahmed Madani, Mufti Muhammad Shafee’, Moulana Zakariya sahib, and the heads of Deoband and Saharanpur. The meeting lasted for five hours, with much discussion centred on the proposed amendments to the Bill. The government delegation accepted some of these amendments, politely refused to accede to others, and promised to consider adoption of some. The meeting then ended.

² This is a famous Darul-Uloom or Islamic institute in Saharanpur, from which came the equally famous Hazrat Shaikh Zakariyaa Kandhalwi (RA).

Due to certain new developments, another meeting of ‘ulema was convened in Deoband, and this time Hazrat Mufti Kifayatullah of Delhi was also invited to participate. In this meeting new amendments were added to the previous response and this second set of proposals were drafted as an addendum to the first document. This new document was also signed by the same group of thirty ‘ulema and submitted to the Council.

The complete response of the ‘ulema was then published in book form for the benefit of the public. Hazrat Thanwi, who headed the whole project, also shared the expenses of the publication. He contributed one third of the costs, while the remaining two thirds were raised by the Deoband and Saharanpur madrasas. Though there were no further developments from the Government’s side, but the efforts of the ‘ulema were instrumental in putting a break on the Bill’s immediate implementation. Duas were made on a daily basis in the Khanqah of Thanabawan for the scrapping of the anti-Shariah Bill and the implementation of the amended, Shariah compliant Bill.

A MEETING BETWEEN HAZRAT MOULANA THANWI AND A STATE DELEGATION

Sometime in 1930, an all-Muslim delegation consisting of barristers and advocates and headed by Hafiz Hedayat Husain, who himself was a senior barrister, made prior arrangements to meet with Hazrat Thanwi for a discussion on waqf legislation. Their main concern was whether a non-Muslim state could intervene in Waqf matters or not. Prior to the meeting, the delegation had sent Hazrat Thanwi a document of 100 hundred questions on various aspects of Waqf. These were the questions they wanted answers to. Due to his extremely busy schedule, Hazrat Thanwi never got down to looking at the questionnaire. However, the delegation arrived and their accommodation and meals were arranged by Hazrat Thanwi himself. He had also arranged to meet them at their lodgings instead of the entire group coming to his khanqah. This, he said, would be convenient to both parties.

Prior to the meeting Hazrat had drawn up a memorandum containing some ground rules for the discussion. Before the meeting could commence he asked Barrister Hedayat Husain to read this memorandum to the rest of the delegation. The points of this memo are listed below in brief:

MEMORANDUM

- 1) Waqf is a monetary ibaadat like zakaat and is strictly an act of worship. (*Raddul-Muhtaar*)
- 2) Though the benefit of waqf sometimes goes to people if they qualify as beneficiaries, it remains an act of worship and does not become a mundane transaction. For example, Zakaat benefits people, but still remains purely an ibaadat.
- 3) When Waqf, like zakaat, is established as an act of worship, any shortcoming in the former (Waqf) will be similar to a shortcoming in the latter (Zakaat). Consequently, any attempt by the State to address the shortcomings of Waqf will be akin to addressing the shortcomings in Zakaat.
- 4) Based on the above, intervention by the State in matters of Zakaat will certainly be considered interference in religion. In like manner interference in Waqf matters will be interference in religion, whether such intervention is upon the request of Muslims or a unilateral act from the side of the State.
- 5) As for the question of how to remedy the shortcomings in Waqf management, this is like asking how to remedy the problems encountered in Salaah, fasting, Hajj, etc. Surely, no one will accept State interference in such acts of worship, or that fines should be imposed upon the guilty parties. These problems will have to be addressed by the Muslims themselves. There are forums among the Muslims through which these issues can be resolved such as: admonishing the trustees or dismissing them. In fact, the Waqf institution itself has solutions to such eventualities. In the event Muslims fail to resolve the problems in Waqf, the sin will fall squarely on the one who has mismanaged the Waqf; but even then, State intervention is not an option.

- 6) The questions on Waqf that have recently being circulated³ are all based on the premise that Waqf is not an act of worship but a mundane transaction. Once it has been established that Waqf is nothing but an ibaadat, these questions become redundant and the need no longer remains to answer them.

NOTES RELATED TO THE PURPOSE OF THE MEETING:

- a) I am most willing to answer your Deeni questions, but decline to offer advice or suggestions on the issue at hand simply because I am not familiar with the subject.
- b) Sometimes the answer to a question needs some research. So I will appreciate it if such questions could be jotted down and handed to me after the meeting so that a reply could be formulated at leisure after thorough research.
- c) If anyone has objection to the rulings of Shariah then we (the 'ulema) are not bound to respond to those objections because we only propagate the Law, we don't make it.⁴ This is similar to an objection against a Law of the country. It will not be the duty of the Judge or Advocate to answer that objection; instead the maker of the Constitution (or the Law-makers) shall have to respond.

SOME INTERESTING POINTS OF THE DISCUSSION

In this meeting, Hazrat Thanwi made it abundantly clear that Muslims cannot condone or tolerate State interference in a matter that is strictly religious. Previously this group had met with other Muslim leaders and were either given vague answers or responses that almost sanctioned State interference in Waqf. Here the matter was made very clear to them. Waqf issues should be left entirely to the 'ulema to resolve.

One of India's top barristers was appointed as spokesman for the group. We relate some of the questions and answers that ensued between him and Hazrat Thanwi:

Barrister: On your observation that Waqf is like Salaah, I respectfully disagree, because Waqf relates to wealth while Salaah is strictly a physical act of worship. And trustees are nowadays abusing Waqf funds. With State intervention at least the beneficiaries will be protected.

Thanwi: Well, if Salaah is not a fitting example, then take Zakaat. Zakaat also relates to wealth, yet is strictly religious. Many Muslims do not pay their Zakaat or are guilty of underpayment and here, too, State interference is not allowed even though such intervention will ensure the needy get what is due to them. But such shortcomings will have to be resolved by Muslims themselves.

Barrister: According to you, are nikah and talaq also religious issues?

Thanwi: Yes they are.

Barrister: So what happens if a man divorces his wife but denies it and forces her to live with him (in that haraam state)? Does this woman not have recourse to the courts to force the man to release her, once she has brought witnesses to the talaq? So see, this is a perfect example of courts intervening in a religious matter to secure the rights of a woman.

Thanwi: Ponder this carefully. Here are two separate issues: one is the talaq itself, the other is the effect of that talaq, i.e. the right a woman enjoys by the husband divorcing her. The court intervention is not in the talaq itself; rather in restoring to the woman a right that comes as an aftermath of the talaq. And this is done to protect her from harm that threatens through her being forced to live with the man. The use of the courts is to safeguard herself from oppression, and this is totally permissible.

³ A reference to the questionnaire referred to earlier.

⁴ This means questioning the wisdom or reason behind a particular ruling.

Barrister: Pardon me, but we can say exactly the same in Waqf matters. When trustees of Waqf commit abuse then the beneficiaries suffer. So the courts will intervene to save the beneficiaries from harm and restore to them their rights.

Thanwi: Again, you need to consider carefully. In the case of talaq the wife suffers harm through the unjust oppression of her ex-husband, by keeping her against her will; whereas in Waqf there is loss of benefits through mismanagement by trustees. There is a difference in causing someone harm and withholding a benefit. Let me give you an example. If someone steals a 100 rupee note from your possession, it will be said you suffered a loss. But if I have a 100-rupee note that I have promised to give you, and then for some reason or other, I don't. Can it be said that you suffered a loss? You never had the note in the first place, so what loss is there? In exactly the same way, the beneficiaries of the Waqf lost a benefit through the abuse of Waqf funds, but they were not harmed. But the woman who is kept in a marriage unjustly, suffers serious harm. This is the difference between the two.

Subsequently there were no more questions. The delegation left well pleased, and even commented that, in comparison to meetings with other leaders, in this session they had learnt a great deal and were treated with much cordiality. Hazrat Thanwi even went as far as the Railway Station to see off the group. Before the delegation could board their train, Hazrat Thanwi remarked: "When you arrived I never welcomed you personally at the Station, for that would have been purely out of awe for your high ranking. Now I am seeing you off purely out of my love for you."

(Ashrafs-Sawaanih vol 3 p. 243)

OTHER OPPOSITION TO THE WAQF BILL

On Sunday 18 April 1934 the annual Jalsa of Madresa Mazaahir Uloom was held. In this gathering Hazrat Moulana As'adullah sahib⁵ delivered a lengthy speech in which he informed the audience of the contents of this Waqf Bill, highlighted its Shar'ee flaws and un-Islamic clauses, and made it abundantly clear that in its present state such a Bill is wholly unacceptable to Muslims. This historic event⁶ received media coverage by a number of newspapers.

In this jalsa a resolution was adopted by all 'ulema present, and this resolution was translated into English and circulated to all officials in government. The gist of the resolution was as follows:

The Madresa Mazaahir Uloom considers the current Waqf Bill that has been proposed by the Legislative Assembly as a danger and threat to the religious freedom of Muslims, for it contains clauses that are in total conflict with Islam. The Muslims gathered in this seminar, who come from all walks of life and are represented by senior religious leaders, regard this Bill as unacceptable. We urge our local councils not to support the Bill; we ask the Muslim public to vehemently oppose the Bill in its current un-islamic format.

The administration of the Mazaahir Uloom madresa also wrote a detailed letter to the Draft Committee responsible for drawing up the Bill in which they explained the imprudence and short-sightedness of the drafters in failing to foresee the far-reaching repercussions such a Bill will have on Muslims. It was also firmly stated that such a move runs contrary to the freedom of religion entrenched in the country's Constitution. It was acknowledged that there were discrepancies in some waqf institutions, but these had to be addressed by Muslims themselves, even if it meant using the courts to bring perpetrators of fraud to justice. But there was no need for State intervention in what is purely a religious matter. In view of the strong objections country wide, the Waqf Bill was

⁵ A khalifah of Hazrat Thanwi and former deputy principal of Mazaahir Uloom.

⁶ Historic in sense that it was the first time an issue of this nature was discussed in a madresa jalsa.

eventually shelved, though later on the India Government established a Waqf Board comprising of Muslim only to handle and administrate certain Waqf institutions.

THE SARDA ACT OF 1929

In 1929, the Central Legislative Assembly of India, a body of representative Indian politicians, passed a law making the minimum age of marriage 14 years for girls and 18 for boys. This Act was popularly known as the Sarda Act, after its founder Harbilas Sarda, who was prompted to initiate this move by Gandhi. Later on an amendment was made to this Act whereby the minimum age was increased to 18 for girls and 21 for boys.

Needless to say, various ‘ulema groups opposes this Act for it clashed with Shariah. In Islam an individual (male or female) is allowed to marry the moment he or she becomes baaligh⁷. In the case of minors, the legal wali (guardian) such as father, grandfather, etc. (in order of priority) has the right to marry off a minor girl or boy. The Bill, which went as far as imposing fines and terms of imprisonment on the legal guardians should they violate the Act, was in diametric conflict with Shariah. Though the Bill was passed in the same year, articles were written and meetings were convened to oppose it. It must be added here, that though the Sarda Act was legislated by the Indian Government, it was seldom enforced, as many writers have acknowledged.

HAKEEMUL-UMMAT’S REFUTAL OF THE BILL

During that period Hazrat Moulana Thanwi (RA) composed a detailed article in refutation of this Bill. The salient points in that article were:

- a) Nikah is an Islamic and religious institution, on par with other acts of worship like salaah, zakaat, etc.
- b) It is not acceptable for the State to interfere with or regulate any religious or Shar’ee act.
- c) Enactment of a Bill to regulate Nikah is akin to regulating acts of worship, such as prescribing to Muslims what time they may offer their salaah, or which animals they may or may not slaughter for qurbani, etc. We Muslims will reject such State intervention.
- d) Stipulating a minimum age of marriage is regulating what Shariah has allowed, and is interference in religion. There are numerous references in Shariah to prove that there is no age limit in nikah.
- e) Muslims should petition the relevant government departments to repeal this Act and revoke the Bill that has been passed. This must be done from the following two angles.
- f) The State Constitution allows for freedom of religion. We need to define what ‘religion’ means in this context. Having done that and having established that nikah is included in the definition of religion as far as Muslims are concerned, we will invoke the clause of freedom of religion to claim our rights.
- g) The second angle is to recommend to the Government that lifting the age limit on marriages will bring about contentment among Muslims and will make the functioning of their lives much easier. This in turn will benefit the State, for it will not have to deal with difficult and intricate problems thus forcing extra legislation and increased expenditure of resources.

The above were the main points around which Hazrat Thanwi’s treatise revolved. He had furnished detailed proofs from Quran, Sunnah, and rulings of former ‘ulema for each point. In the process he also answered the objections of modern Muslims who were in favour of the Bill to stipulate a minimum age for marriage.

⁷ (i.e. upon reaching the age of puberty)

OPPOSITION FROM OTHER 'ULEMA OF INDIA

The passing of the Bill (which was apparently done without the consent and participation of the vast majority of India Muslims) created a huge uproar among Muslims, especially the 'ulema. Mass meetings, rallies, and conferences were held to protest against this Bill. On November 27, 1929, a meeting of 'ulema was convened at Mazaahir Uloom in Saharanpur to condemn and refute this Bill. Later a mass meeting of students was called up wherein the Bill was roundly condemned. A memorandum was handed to the local Government representative informing it of the total opposition of all Muslims to this Bill. The government was made aware that such an Act will adversely affect the lives of hundreds of thousands of Muslims, and is direct interference by State in religious affairs. The government was told in no uncertain certain terms that this unconstitutional act of religious interference will never be condoned or accepted by the Muslim community.

On 29 November mass action in the form of a boycott and downing of tools was initiated in Saharanpur. The entire city came to a total standstill out of protest against the Sarda Act. To this extent that Hazrat Shaikh Zakariya (RA) did not even accept the money orders that came into the madresa (as donations). He returned every single one with the message: *Today is a mass strike to protest the Sarda Act; in solidarity with our Muslim brothers, we cannot accept these money orders.*

The same day a gathering took place at the madresa that lasted from Thuhr till Asr salaah, wherein various senior 'ulema including Hazrat Moulana Abdul-Lateef sahib (head of Mazaahir Uloom) and Hazrat Shaikh Zakariyya (RA) delivered speeches condemning the Bill and highlighting the importance of Shariah and its Laws. Shar'ee proof was presented to confirm the un-Islamic status of the Act.

Meanwhile in Delhi, the capital of India, another potent force among the Muslims, The Jamiatul Ulema of India, had already initiated a number of programs, committees, rallies, etc to protest against this Bill and to put pressure on the Government to repeal it. A lecturer at the Mazaahir Uloom institute, Moulana Noor Muhammed, was appointed by the Jamiat of India to lead protest action in Saharanpur. The said Moulana took out a huge protest from the Jumu'ah Musjid in Saharanpur, and thousands of Muslims voiced their opposition to this Bill.

At the same time a well known barrister, Mr. Tasadduq Husain Khan, who was also a member of the National Assembly⁸, wrote a book titled Child Marriage and Muslims in support of the Bill passed by the non Muslim government. In refutation of this book, the said Moulana Noor Muhammed wrote a 76 page response in which he proved from authentic Islamic sources that marriage of children was permissible in Islam, and that The Quran and Sunnah do not apply an age limit to marriages. This book was well met by 'ulema, the Muslim public and even the Muslim media. The concluding paragraph of this booklet went as follows:

We strongly urge the British Government to exclude Muslims from this Act and thereby calm down the tensions and emotions that are currently very high among the Muslim community. The government should not embroil the Muslims in such controversy that can lead to major tumult within its structures.

⁸ In today's parlance he would be known as an MP or Member of Parliament.

THE 1949 MARRIAGE ACT

In November 1949 the Congress government (which came into power after Britain quit India) brought out a Special Marriage Act in Draft form. This Draft Bill was circulated among all Muslim leaders, 'ulema and institutions for comment. A copy of this Bill also reached the offices of the Jamiatul-Ulema India. After looking at the Bill and observing many clauses that clashed with Shariah, the Jamiat called for a meeting of all 'ulema in Delhi, where its offices were located. Meanwhile, already 'ulema of Deoband and Sharanpur had met to discuss the flaws in the Bill and suggest amendments suitable to Shariah. Here too, world renown figures such as Hazrat Shaikh Zakariyya, Mufti Mahdi Hasan (chief Mufti of Deoband), Mufti Saeed Ahmed (Chief Mufti of Saharanpur) attended.

At this meeting it was decided to send two senior 'ulema to Delhi for the Jamiat conference. These were Mufti Mahdi Hasan and Mufti Saeed Ahmed. They represented the Deoband and Saharanpur 'ulema and put forward amendments to the Marriage Act that would bring it in line with Shariah. These and other amendments were unanimously adopted at the meeting, and soon a document outlining the flaws in the Act as well proposing Shariah compliant clauses were dispatched to the Justice department. The efforts of these 'ulema also stalled the implementation of this Act.

(The 'Ulema of Mazaahir Uloom and their Academic services vol.1 p. 239)