

RECONCILING NON-STATE JUSTICE SYSTEM AND STATE JUSTICE SYSTEM: AN ENQUIRY

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ABSTRACT

The contours of justice are limitless! It is necessary not to restrict the restorative/distributive justice to a handful of institutions. Given the uniqueness of individual community(ies), the vastness of the territory, the difference in cultural practices and impossibility of identifying a strait jacket formula for addressing all kinds of disputes necessitates the existence of legal pluralism. This legal pluralism can be divided into State Justice Systems (SJSs) and Non-State Justice Systems (NSJs). Acknowledging and recognizing SJSs seems simple and has a universal acceptance whereas, the scenario is completely opposite when it comes NSJs. The first and foremost difficulty is defining what NSJs is. This is because NSJs are predominantly customary in nature and customs of one community/area may not be acceptable to the other community/area or to a civilized State altogether. However, it remains a fact that these NSJs are recognized and remain effective in the communities/area where they are practices. Some of the methods of NSJs are even considered sacred and deviation from the mechanism may lead to massive backlash against an individual. NSJs can be defined as informal (often based on customary practice), social sanction-based justice delivery system whereby the participation of the community through interested intermediaries employing mostly alternative dispute resolution (ADR) methods to render restorative/distributive justice. This paper will analyze whether NSJs is complimentary to the SJSs, should the NSJs be legitimized, can both systems exist parallelly giving an individual an option to opt for one or both systems and lastly can hybrid models emerge involving elements from both systems which is efficacious.

Keywords: *Non-State Justice System; Legitimized; alternative dispute resolution; hybrid*

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I. INTRODUCTION

Why Non-State Justice Systems?

Before inquiring into question the utility and need for recognition of the NSJs, it is necessary to know why NSJs even exist in the 21st century often known as the internet age. The countries around the world are still divided into rural and urban areas, and the resources distribution between these two areas is no way near to be equal, which includes access to State Justice System as well. These NSJs exist in various forms, their form depends upon the prevalent religion, customs and rituals of a region.ⁱ These systems provide access to justice primarily in the rural and tribal areas where the State/formal systems are not accessible. The reason for this inability for access are logistical difficulties; lack of money with the rural population; complications related with the formal legal system. The rural population expects the NSJs to provide cost effective, easily accessible and fast track justice delivery. These have developed over hundreds of years in a given area and often considered better than SJSs by the locals.

*Salient Features of Non-State Justice Systems*ⁱⁱ

- NSJs are community level processes or institutions (in some cases) which help in resolving dispute, particularly for a religious, indigenous and/or ethnic group within a State through the use of Customary Law;
- Upon functioning well NSJs can provide speedy justice which is cost effective;
- NSJs can be seen as guarantors of order and security at the community level, they often have acceptance and trustworthiness more than SJSs;
- NSJs are alternative form of dispute resolution and therefore, involve mechanisms such as mediation and conciliation for resolving the dispute;
- In certain areas they are the only alternative when it comes to delivery of justice.

*Characteristics of NSJs*ⁱⁱⁱ

- Once a dispute comes before a NSJ it no longer remains a private matter it become a community matter;

- There is generally a high degree of Public Participation in the dispute resolution process;
- Since there is no black letter of the law, decisions are taken based on norms, prevalent customs and consultations. The concept of fairness is not unified. In fact, fairness comes from what considered fair in that particular community;
- Procedural rules are flexible so is taking of evidence;
- The leader of the NSJ is selected from the particular community basis the norms of that community.

One of the most important reasons why NSJs exist is that they place strong emphasis on reconciling the restoring peace amongst the disputants. They are different from State systems where the system created winner and losers thereby leaving room for hostility to persist.^{iv}

II. COMPLEMENTARITY OF NON-STATE AND STATE JUSTICE SYSTEMS: LESSONS FROM AFGHANISTAN AND INDIA

We can say that a system is complementary to the other when two systems collaborate with each other in a manner which is mutually beneficial. The NJSs can help the SJSs by reducing the burden of cases on them and the SJSs can keep a check on the arbitrariness or bias of the NJSs.^v In Afghanistan the most important non-state institution are the *Jirga* and *Shura*.^{vi} These are respected by the local leaders and the elders of the community and employ customary law to reach a settlement which is acceptable to both the disputants and the community. They resolve all kinds of disputes ranging from agricultural land boundaries, minor bodily harm and at times violent murders.^{vii} Their focus is on community-led decisions to promote restorative justice instead of retributive justice.^{viii}

They also aim towards reintegrating offenders back into the community once they have been held accountable for their wrongdoings.^{ix} The presence of these institutions reduces the strain of the already capacity deficient SJSs of Afghanistan and are shining examples of effective alternative dispute resolution (ADR) mechanism.^x Not only they are effective example of ADR mechanism they are perceived to be less corrupt, more accessible and more trustworthy than the formal system.^{xi}

In India, there exists a system known as the Panchayat system. It's a council of five individuals who dispense and resolve dispute. These individuals gather in front of the villagers/locals and decide on the complaint received by them. This system is similar to that of Jirgas in Afghanistan.^{xiii} The most striking aspect regarding Panchayat system is that it was recognized by the Constitution of India under Article 40,^{xiii} when the Constitution came into existence in India.

Non-State Justice System far from being flawless

From the discussion thus far one might get a sense that NSJs are not only popular but also have very little problems as compared to the formal system. This notion is far from being the correct one. There are some striking shortcomings in the NSJs. Few drawbacks of NSJs are as follows^{xiv}:

- I. Legitimacy (most of the NSJs are not formally recognized by the formal system as legitimate therefore the decisions are not recognized indicating that the dispute still persists);
- II. No record keeping (unlike the formal system, no records are maintained in this system. So, if an individual gets a dispute resolved today the other person may agitate the issue after few years)^{xv};
- III. Lack of accountability (the individuals making the decision for the disputants are not answerable to any formal authority and whatever they decide the disputants have to put up with it);
- IV. Corruption (there is no mechanism to check if the decision maker is not corrupt)
- V. In cases of criminal acts there is no compliance to international human rights standards either for the victim or the accused;
- VI. Lack of uniformity (since every NSJ changes as per the local custom the practice cannot remain uniform therefore it poses a significant problem in equal and fair dispensation of justice);
- VII. Jurisdictional Limitation (the NSJs are insufficient to resolve inter-community disputes as there won't be consensus of the officer presiding over the dispute and the practices may differ significantly);

VIII. Elite Capture (it is very frequent that the decision makers are generally coming from the same lineage or same cast or some social status, NSJs are generally susceptible to elite capture).

Apart from the above there is another major flaw i.e., woman participation in the NSJs. For instance in Jirgas system of Afghanistan, women are largely excluded from participation in the structure.^{xvi} This absence of women in the structure seriously hampers justice delivery to a woman at the local level. In case of violation of rights of women, things are not very promising because the rural/tribal population do not have sufficient funds to approach the formal justice system nor support from their households.

In India, one of the objectives of recognizing and reorganizing^{xvii} the Panchayat system was to empower the local women. One of the methods for this is reservation for women to be elected in the Panchayat. Their effectiveness however, is questionable as the women who are elected mostly lack knowledge about their rights and responsibilities.^{xviii} In spite of these flaws it has been found that people tend to get their disputes resolved outside the court^{xix} for the simple reason that these NSJs are more accessible and very prompt in the decision-making process. With over 30 plus million cases pending in the Indian Courts and millions of cases pending around the world the presence of NSJs can play a crucial role in reducing the backlog and also tackle the new cases that would come up. Despite the challenges of NSJs the system is functioning and to certain extent it is functioning well therefore, it must not be sidelined just because it is not formally backed by the State.

The challenges must be confronted by the formal system and resolve them for its own convenience.

III. CO-EXISTENCE OF THE NON-STATE JUSTICE SYSTEMS WITH FORMAL SYSTEMS AND ITS LEGITIMIZATION: A STEP IN THE RIGHT DIRECTION (THE INDIAN EXPERIENCE)

The tribes of the north eastern region of India have maintained their indigenous traditions of resolution of conflict. The Constitution of India via the sixth schedule^{xx} as a matter of protectionist policy gave recognition to the indigenous practices by giving separate identity

and jurisdiction to the indigenous people. The Constitution a framework of administration and transferred the jurisdiction of the tribal customary law to Autonomous District Councils (ADC).^{xxi} The members of the ADC would be elected from their respective constituencies. However, these members do not belong to any political party. The jurisdiction of the ADCs is limited to civil cases of small magnitude and all the criminal offences are taken up by the formal courts. The Constitution of India lay special emphasis the concept of local self-regulation.

Article 371A of the Constitution expressly recognizes the rights of tribal communities to self-governance within the framework of the customary system of law.^{xxii} According to the Art. 371A “no Act^{xxiii} of Parliament with respect to inter-alia *Naga Customary Law, and administration of civil and criminal justice which involves decision according to Naga Customary Law*” shall apply to the State of Nagaland unless the State Legislation decides to do via resolution. Art. 371G has similar provisions for the State of Mizoram which is home to the Mizo tribe.

Another example is the Panchayat System of India. This system has existed in India since the Vedic civilization.^{xxiv} It existed even when the British colonized India, it existed when the freedom struggles were going on and ultimately it was recognized in the Indian Constitution because the framers of the Constitution recognized its importance at the grass-root level and how efficient it would be in maintaining the harmony in a huge country like India. It gained more importance when through the 73rd Amendment to the Constitution on India it was formally included in the Constitution aa part IX and eleventh schedule.

The curious case of Gram Nyayalaya Act, 2008

Besides the Panchayat, the Govt. of India gave the power to the respective State govts. to set-up Gram Nyayalayas for every Panchayat. This is nothing but a court that has been conferred very limited powers exercise jurisdiction under both criminal and civil laws.^{xxv} The objective of the Act is to provide access to justice at the grass-root level to the citizens at their “doorsteps” irrespective of social and economic background.^{xxvi} The schedules 1 and 2 contains the scenarios in which this court can exercise criminal and civil jurisdiction respectively.

By virtue this act the govt. provided an option to the people living in the villages so that they are not just obligated to approach the NSJ in their proximity. We are yet to see the effectiveness of having both systems working so closely together (through proper empirical study) but the idea seems very promising.

These are some of the best examples of how both NSJs and SJSs can co-exist peacefully and also complement each other. These instances of legitimization of the NSJs incites confidence in the democratic structure of India. The legitimization also means that in case the framework of NSJs starts to crumble due to reasons like population growth, technological advancement, political reasons, the formal system may intervene and save the system. The formal system can also keep a check on these informal systems and hold the decision makers responsible in the instances of arbitrariness.

If legitimization can work in the such a vast and diverse country like India, then other countries around the world can be confident of legitimizing NSJs within their territory.

IV. HYBRID SYSTEMS HAVING ELEMENTS OF SJSS AND NSJS

Participation of Women in the justice delivery system at the NSJ level and dispute resolution of criminal offense of serious nature like murder, causing significant injury etc. in consonance with the international standards as that in International Covenant on Civil and Political Rights (ICCPR)^{xxvii}, Universal Declaration on Human Rights (UDHR)^{xxviii} and International Covenant on Economic, Social and Cultural Rights (ICESCR)^{xxix} are the glaring problems that needs to be addressed and resolved at the earliest. This can only be done by the State. Hybrid systems that can take the positive from SJSs and NSJs can be very effective in settling the dispute.

System in Afghanistan

The Govt. of Afghanistan has established Community Development Councils (CDCs) under its National Solidarity Programme^{xxx} along-side the existing Jirga system. The Jirgas and CDCs would handle the minor criminal offences^{xxxi} and civil cases, and the people have a

choice get their cases presented before a State court in their nearest proximity. Apart from this, all the serious offences would be handled exclusively by the State Justice System.

The Govt. also established the Afghanistan Independent Human Rights Commission (AIHRC) which in turn established various Human Rights Units (HRUs) to work along-side the NSJs. These HRUs are staffed with female officials to counter balance the dominance of male in the Jirga system. The HRUs also monitor the decisions made by the NSJs so that in accordance with human rights principles.

Empirical studies in Afghanistan shows that these hybrid models have created a synergy between the SJSs and NSJs, and also coherent framework that could provide cost-effective, expeditious and accessible restorative justice to the people of Afghanistan.^{xxxii}

System in India

The Autonomous Councils formed in the northeastern region of India is classic example of a hybrid system. However, they seem to be insufficient in reducing the friction between the two systems in the State of Meghalaya. In a study conducted by Priyanka Upadhyaya and Anjoo Sharan Upadhyaya^{xxxiii} it was found that the NSJ of the region realizes the importance of a formal system in resolving disputes in the region but they are still skeptical about the formal system. The skepticism amongst the tribal people of Meghalaya exists for a variety of reasons. One of them was enactment and imposition of Forest Rights Act, 2012 in the region which deprived the local tribes of their land of normal habitation. Worst part was that the locals weren't even consulted on the issue.

Other concerns are the setting-up of dams, carrying mining activities and conflict between tribal and non-tribal people in the region. These are some serious issues upon which both the NSJs and SJSs need to come together to come up with optimal solution.

Since, the year 2015 the area has a revival of the Council of Nokmas. The Nokmas are the heads of the respective villages who come together resolve an issue when there is an inter-village conflict^{xxxiv} this council can play an instrumental role removing the friction between the formal and informal system. The Council is even seeking their recognition as per the Garo Hills Act, 1958.

System in Sri Lanka

The Govt. of Sri Lanka in the year 1998 enacted the “Mediation Board Act” (Act)^{xxxv} which formalized the already existing system of use of mediation for dispute resolution in the villages.^{xxxvi} Before the Act was passed the mediation was carried out by either a reputed person of the village or a monk. This was replaced with qualified and trained mediators who were accessible to the locals for the resolution of their dispute.

The success of this program is evident from the fact that it is now the 3rd largest mediation system around the world just behind USA and UK. It is essential to highlight that one of the responsibilities of these mediation boards is to establish school mediation units and conducting workshops at the school level so that the whole generation is aware about the process of mediation. The board can mediate on civil matters and petty criminal matters. All the serious criminal matters are adjudicated by the traditional courts.

V. CONCLUSION & SUGGESTIONS

There is no denying the fact that NSJs exist around the world and against famous that State should take over all types of dispute resolution processes and bring under a formal structure run by the State, the NSJs are here to stay. The reason for that is very clear, the people find NSJs cost-effective, trustworthy, expeditious and most importantly they feel understood because there is no language barrier unlike that in the formal system where reasonable proficiency is required in language of the system.

The people who engage with the NSJs don't get a feeling that they are the “outsiders” in the system, which is full of the dominant culture of a country. The NSJs play a pivotal role where the SJs are not able to provide realistic relief. It is evident from the analysis of systems existing in the multiple countries like India, Afghanistan and Sri Lanka that NSJs and SJs not only coexist but also work as complimentary to each other. Recognition and legitimization of the NSJs enables the tribal and rural population to revive their practices, control their speed of integration with State's formal system and exercise control over cultural resources. The negligent attitude of the State towards these indigenous gives the message to the tribal and rural people that they are alien to the mainstream counterparts.

The hybrid models create a meaningful synergy between the SJSs and NSJs by providing a coherent framework aimed at restorative justice which is efficient, easily accessible and cost-effective.

From the analysis of the various systems present in various countries, it is clear that the population always has the option to opt in or opt out of the formal system. The Gram Nyayalayas established in India are a classic example of this. It is a matter of time when the formal system reaches the last mile but it nowhere suggests that people cannot have as to how they want their disputes to be resolved. In fact, the author is of the opinion that it is a matter of right of the tribal and rural people to have options between NSJs and SJSs.

The following points must be considered when a State is establishing a hybrid system of dispute resolution:

- **Formation of Mediation Council:** This has proven to be an extremely efficient and trustworthy mechanism of dispute resolution. The experience from Sri Lanka has proved that most disputes can be resolved over the table instead of multiple tedious years of litigation. This does not undermine the importance of litigation; it merely suggests that the litigation can be avoided in a majority of the cases.
- **Formation of Human Rights Units:** The NSJs are often accused of not conforming to the international standards of human rights while resolving the disputes, especially when a woman is involved. These human rights units can make the decision makers in NSJs aware of these standards and keep a check on whether they are being followed. This will also introduce accountability. The experience from Afghanistan has proved the importance of these units.
- **Creation of effective checks and balances:** The SJS must provide effective checks and balances to keep the arbitrary or unauthorized use of power by the local NSJs. Coming up with a system to appeal against the decisions of the NSJs will keep NSJs under the supervision of SJSs.
- **Space for women-centric systems:** Most NSJs are male-dominated institutions where it is difficult for the males to understand the situation of a woman. In the hybrid system, providing confidential space for women to put forth their grievances must be encouraged. The non-governmental organizations (NGOs) can be instrumental for the same.

The analysis in the paper answers in affirmative that i.) NSJs and SJs are complimentary; ii.) there is need to legitimize the NSJs; iii.) both NSJs and SJs exist parallelly; iv.) an individual does have the option to opt in and out of the parallel systems; v.) hybrid systems involving the qualities of both State and Non-State Justice Systems can emerge. In fact, the hybrid systems are desirable in the ever-advancing human civilization.

ENDNOTES

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ⁱⁱ United States Agency for International Development *Non-State Justice System Programming A Practitioners' Guide*

ⁱⁱⁱ *Id*

^{iv} Ali Wardak, *State and Non-State Justice Systems in Afghanistan: The Need for Synergy*, 32 U. PA. J. INT'L L. 1305 (2011)

^v Ali F, Mathew SK, Gopaldaswamy AK, and Babu MS, (2017) *Systematic review of different models and approaches of non-state justice systems in South Asia and its complementarity with the state justice delivery systems*. London: EPPI-Centre, Social Science Research Unit, UCL Institute of Education, University College London.

^{vi} *Supra* n 4

^{vii} *Id*.

^{viii} Noah Coburn & John Dempsey, U.S. Inst. Of Peace, *Informal Dispute Resolution In Afghanistan* 3-4 (2010), available at http://www.usip.org/files/resources/sr247_0.pdf

^{ix} *Id*.

^x *Id*.

^{xi} Asia Found., *Afghanistan In 2010: A Survey Of The Afghan People* 134 (2010), available at <http://asiafoundation.org/resources/pdfs/Afghanistanin2010survey.pdf>

^{xii} *Supra* n 1

^{xiii} Article 40- Organisation of village panchayats- The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

^{xiv} *Supra* n 2

^{xv} Professor Virginius Xaxa, *Lecture at Daksha Fellowship* dated February 25, 2021

^{xvi} *Supra* n 4

^{xvii} The 73rd Amendment to the Constitution of India reorganized the Panchayat system in India.

^{xviii} Vatuk, S., *The "women's court" in India: an alternative dispute resolution body for women in distress*. *The Journal of Legal Pluralism and Unofficial Law*, 45(1), 76-103, 2013.

^{xix} *Supra* n 5

^{xx} Provisions as to the Administration of Tribal Areas in [the States of Assam, Meghalaya, Tripura and Mizoram]

^{xxi} Priyanka Upadhyaya and Anjoo Sharan Upadhyaya, *Traditional Institutions of Dispute Resolution in India: Experiences from Khasi and Garo Hills in Meghalaya*

^{xxii} Shubhankar Dam, *Legal Systems As Cultural Rights: A Rights' Based Approach To Traditional Legal Systems Under The Indian Constitution* IND. INT'L & COMP. L. REV.

^{xxiii} Act here denotes Legislation by the Central Government of India.

^{xxiv} K.M. Pannikar, *A. Survey of Indian History (1947)*

^{xxv} See section 12 and 13 of the Act.

^{xxvi} See preamble of the Act.

^{xxvii} UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

^{xxviii} UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948), <http://www.un.org/en/universal-declaration-human-rights/>

^{xxix} UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html>

^{xxx} Details available at <https://openknowledge.worldbank.org/bitstream/handle/10986/22653/Infrastructure0developing0economies.pdf?sequence=1&isAllowed=y>

^{xxxi} All those offenses which do not have death penalty as the punishment or imprisonment or both.

^{xxxii} Supra n 4.

^{xxxiii} Supra n 20

^{xxxiv} Biswajit Lahiri and Puspita Das, *Role of Nokma (Village Headman) in Agriculture of West Garo Hills, Meghalaya*. Available at <https://www.researchgate.net/publication/314439770>

^{xxxv} Mediation Board Act No. 72 of 1998

^{xxxvi} Akshina Liyanage and Tharushi Gamage, *What is Mediation 3 – (Mediation Board System in Sri Lanka)* Available at <https://lawfacotaract.com/2020/09/23/mediation-board-system-in-sri-lanka/>



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