From Khap PanchayatsToHindu Courts: Evaluating The Legal Status Of Parallel Judicial Systems And Extra-Constitutional Authorities[1]

Abstract

That India is a country of great diversity is a fact as old as time. The Indian obsession with religion continues even as there has been no demonstrable evidence on its efficiency as a path to good governance. Like each geographic division of the nation has its own language and culture, so it has its own system of dispute resolution and justice dispensation mechanism. The rise of extra-constitutional bodies such as Shariat Courts, Khap Panchayat and now the Hindu Courts has several important reasons. Despite twenty five years having passed since de-centralised democratic governance was introduced in India, the failure of the judicial system continues to rankle. The structural reforms that promised economic development and social justice at the grass-root level never materialised. Consequently, the parallel judiciary gained in power and prestige due to the intrinsic weakness of the Panchayati Raj institutions. Further, the strong power and influence that these have institutions acquired on people overtime is not based only on the politics of fear, but also on the economics of speedy trials.This paper attempts to chronicle the rise of a parallel judicial system in India, which continuesto flourish despite repeated declarations by various Courts denying their validity in the eyes of the law. The paper also examines their legality and utility vis-à-vis the framework of the Indian Constitution and criminal justice system. The central premise for research work rests on the argument that merely declaring such courts illegal is not a solution (which the Courts have just shied of doing) because they enjoy the support of the masses. The question of how such courts stand with respect to Lok Adalat will also be dealt with.

Introduction

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The truest measure of a country's legal system can be gauged by assessing the courts at the lowest rung of the judicial ladder, the subordinate courts. In the case of India, like much else, judicial systems have their own way of functioning, with not many people being able to make heads or tails of the entire circus.

Outposts of feudalism still thrive in vast swathes of rural India, ranging from khap panchayats in the north to caste-based gatherings of village elders in the south. The number of pending cases across Indian Courts has been increasing. As of July 2009, 53,000 cases are pending with the Supreme Court, 40 lakh with High Courts and 2.7 crore with lower courts. This is an increase of 139% for the Supreme Court, 46% for High Courts and 32% for lower courts from their pendency numbers in January 2000. In 2003, 25% of pending cases with High Courts had remained unresolved for more than 10 years. In 2006, 70% of all prisoners in Indian Jails were undertrials[2].

The Indian Constitution which gives all its citizens a right to a life of dignity and right to get justice seem to be non-existent for generations of these villagers, and the administrative responses both at the policy and at the ground level are possessed by the imagination of the village as a family where no punishments but compromises and adjustments can resolve matters. Such an approach makes the victims all the more vulnerable in the absence of any enforcement agency at the village level. And it is this vulnerability which such 'kangaroo courts' seek to exploit. This vulnerability ensures an audience for the thousands of Muslim cleric and Khap elders who routinely pass orders and judgments barbaric enough to almost be a work of an over-active imagination. However, these systems, despite their erratic way of functioning still continue to prosper.

Objective

The objective behind this research is primarily to understand the reasons behind the rise of extra-constitutional judicial systems, thereby giving the reader an idea about why they have suddenly become so popular. The other aim is to identify the potential issues the rise of such courts can create in the system, thereby subverting the constitutional mandate. And the last is to understand their legal status by critically analyzing past and present Supreme Court judgments on the issue.

Research Methodology

[2] PRS Legislative Research, Pendency of Cases in India Courts

The research methodology for this particular research is primarily doctrinal in nature. The researcher has used both primary and secondary data to shape this piece of work. Since the issue in question is socio-legal in nature, it would not be justified to rely solely upon one kind of data.

Sharia Courts AndKhap Panchayats: Evaluating The Damages Of A System With No Rule Of Law

While Sharia Courts and Khap Panchayats undoubtedly offer a speedier and easier system of justice dispensation, it cannot be disregarded that their very existence is founded upon hollow pillars. There is largely no rule of law followed in handing out decisions or meting out punishments, the latter of which generally includes fines, flogging, ostracising errant members or harsher forms of corporeal punishment. Justice is served according to the communal interest and according to the parochial values that shape the so-called honour of the village community.

Both Sharia Courts and Khap Panchayats are extra-constitutional and do not fall in with the Gram Panchayat structure which is based on democratically conducted elections and finds constitutional support with the *Constitution (73rd Amendment) Act, 1996*. While they may find some defence in terms of being a quicker means of delivering justice or being more socially in tune with the needs of the people, they have no judicial backing for their function.

By existing beyond the means of judicial hierarchy, these bodies have morphed into watchdogs of communal honour and custom, usually to the detriment of non-dominant classes of people who are routinely excluded from their narrative. Women, in particular, find themselves not only victimized by the inequality of the verdict but also as unnecessary collateral to them.

When verdicts are passed on questions of marriage, fraternization or other choices which are fundamentally libertarian in nature, they tilt the full weight of their social significance behind these verdicts nullifying any semblance of choice, independence or autonomy that human beings, and not just men and women, have.

The first significant problem with these bodies is their being the guardians of communal honour. Needless to say, such a weighing scale in itself is faulty, let alone a reliable system of justice delivery by any means. The honour hoax buttresses the pre-existing attitude that a

comes against a bloody backdrop of Khap Panchayat orders which call for the stoning, flogging or beating of couples who didn't subscribe to the Khap mandated norms of marriage. The Sharia Courts have often found themselves at the heart of the dilemma, passing illogical decisions time and again.

This disturbing pattern of incidents points to the immunity that Khap Panchayats and Sharia Courts derive from the sheer political and social clout they shroud themselves in. This doesn't just stem from a communal sense of outdated customs and deteriorating traditions; it develops every single day with the complicity that law enforcement, politicians, local goons and public support share in elevating these courts to the pedestal they do not deserve.Even more disturbing is the reason that such bodies may, at times, refuse to acknowledge the decisions of superior courts, claiming the aegis of religion.

A Tale Of Two Conflicting Stands And 'Unlawful Assembly'

In the headline making case of *Vishwa Lochan Madan v. Union of India*[3], the Supreme Court made the following observation:

> "A fatwa is an opinion only an expertis expected to give. It is not a decree and notbinding on the court or the State or theindividual. It is not sanctioned under ourconstitutional scheme. But this does not mean thatexistence of Dar-ul, or for that matter practice of issuing fatwas are themselves illegal."

That the Apex Court itself shied away from declaring the courts illegal is ample testament to the fact that their utility cannot be wholly denied. For many Muslims, the appeal of sharia courts lies in that, unlike the formal legal system, they are speedy and inexpensive.

To settle a dispute, a Muslim man or woman can approach DarulQaza and submit an application. If all parties to the dispute agree to arbitration, Qazi will summon them and their witnesses, take their written statements, examine the matter in light of the Islamic law and deliver a ruling. The parties are free to abide by the ruling or not. If any of the parties does not agree to the verdict, there is not much that the Qazi can do.

On April 19 2011, the Supreme Court[4]advised strict criminal action against people forming and ruling in khaps, emphasizing that the khap panchayats are illegal and the honour killings

[3] Writ Petition (Civil) No. 386 Of 2005
[4] *Arumugam Servai v. State of Tamil Nadu*, Criminal Appeal No. 958 of 2011

they enforce to be "Barbaric and shameful". It also demanded action against the police authorities and bureaucrats who failed to prevent them. According to Supreme Court, these khap panchayats encouragedhonour killings or other atrocities in an institutionalized way on boys and girls belonging to different castes, who have been married or are going to get married. On grounds that these khaps interfere with the personal life of the people, Justice Katju had, in the judgment, said, "Atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment".

The law of the land as it stands today does not directly hit the actions of such *Khap* panchayats, and the existing penal provisions fail to have a deterrence or sobering influence on their wrath. Any effective attempt to oppose this socio-cultural evil rooted in authoritarianism and superstition necessarily address various dynamics including the nature of the problem, the inadequacy of present law and the wisdom of using penal sanctions for an otherwise lawful group of people aimed at amicably solving concerns for the society.

While Khap Panchayats do seem to be more violent of the two, Sharia Courts have also had their share of cringe-inducing judgments. From misogynistic fatwas dictating how women should be groomed[5], to issuing truly bizzare edicts asking themto refrain from contesting elections[6], the list of sensational Shariat Court verdicts is truly long. This creates an attitude which prevents women in particular from moving forward, in a community which already receives flak for its cruel treatment of its women.

But here, it is indeed interesting to note the restrained language in which the Sharia Court judgment was pronounced, almost as if the Court tried to be careful of not hurting religious sentiments, lest there be a law and order problem. On the other hand, the judgment dealing with Khap Panchayat was a no-holds barred diatribe. It does beg the question: why two conflicting stands for two institutions on the same level? Both institutions are founded upon communal basis, both dependent upon the interpretations of men and women with almost no legal background. The attitude of dichotomy does nothing to strengthen the already weak faith the people of this nation have had in the judiciary.

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[5] Riyaz Hashmi, *Uttar pradesh: DarulUloom Deoband's fresh decrees revive debate over relevance of fatwas (2017),* India Today, https://www.indiatoday.in/magazine/states/story/20171120-darul-uloom-deoband-fatwas-eyebrows-posting-pictures-uttar-pradesh-1083409-2017-11-10 (Last visited Sep 10, 2018).

[6]YoginderSikand, *Unveiling Deoband's Fatwas on Women (2010),* https://www.outlookindia.com/website/story/unveiling-deobands-fatwas-on-women/265579 (Last Visited Sep 14, 2018).

In this author's humble opinion, *Arumugam Servai* was wrongly decided. And this view found acceptance with the Supreme Court in the case of *Shakti Vahini v. Union of India*[7], wherethe Apex Court held that an assembly or Panchayat committed to engage in any constructive work that does not offend the fundamental rights of an individual will not stand on the same footing of KhapPhanchayat. It however, refrained from holding the entire concept of khap illegal, but merely noted that the violence perpetuated by such bodies was outside the constitutional mandate.

The three-judge bench said, "the punitive measures to deal with such an unlawful assembly [under Section 141] will be in force, until a legislation comes into force". However, the section itself is ridden with loopholes. The first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, who should meet for a common object.

Secondly, there must be more than four persons having the common object. Where there is no satisfactory evidence that the fifth person shared the common object, there can be no unlawful assembly with the remaining four persons.

In this context, it should also be understood that not all extra-constitutional bodies are illegal. Many of them are committed to building better villages and improving living conditions for their residents. However, in the light of recent happenings, their work often gets disregarded. Yet, it is imperative to remember that they would only become illegal if they fall under the strict definitions laid down in the aforesaid section detailing the essentials for an 'unlawful assembly'.

The Lok Adalat AngleAnd Future Issues

Matters pending or at pre-trial stage, provided a reference is made to it by a court or by the concerned authority or committee, (when the dispute is at a pre-trial stage and not before a Court of Law) can be referred to Lok Adalat. The Parliament enacted the Legal Services Authorities Act 1987, and one of the aims for the enactment of this Act was to organize Lok Adalat to secure that the operation of legal system promotes justice on the basis of an equal opportunity. The Act gives statutory recognition to the resolution of disputes by compromise and settlement by the Lok Adalats.

[7] WP (Civil) 231 of 2010

The concept has been gathered from system of Panchayats, which has roots in the history, and culture of this Country. It has a native flavor known to the people. The provisions of the Act based on indigenous concept are meant to supplement the Court system. They will go a long way in resolving the disputes at almost no cost to the litigants and with minimum delay. At the same time, the Act is not meant to replace and supplants the Court system. The Act is a legislative attempt to decongest the Courts from heavy burden of cases. There is a need for decentralization of justice.

Something that can be done is to club these flourishing extra-constitutional bodies with Lok Adalat, or at least make them subservient to Lok Adalat, so that the government has a much better stake in keeping law and order and ensuring that irrational decisions are not passed.

It is felt that such honor crimes can be checked by prohibiting such assembly for the purpose of condemning the marriage and taking a course of harassing them. To serve the purpose Government came up with draft legislation named Prohibition of Unlawful Assembly (Interference with Freedom of Matrimonial Alliances) Bill, 2011[8]. The Bill has been the only serious attempt towards a legislative framework to curb the evil of honor crimes. At present, there is no special law and honor killing is treated as murder under **Section 300 of the IPC**. However, this severely restricts the ring of the crime and many co-accused presents in the unlawful assembly of caste assembly are often let off due to the absence of evidence for direct involvement. The existing homicide law is insufficient to directly punish a gathering for such purpose.

Of course, the bill has not yet been passed and continues to languish in obscurity.

Hindu Courts Of The Future And An Argument For The Uniform Civil Code

The Allahabad High Court had, sometime earlier this year, issued a notice[9] to the Yogi Adityanath led Uttar Pradesh government to clarify its stand on the functioning of Hindu courts in the State. This move came as the Akhil Bharatiya Hindu Mahasabha had set up the first Hindu court on the lines of Sharia system on Independence Day. A ceremony was held at

[8] Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill, 2011

[9] Namita Bajpai, *Allahabad HC issues notice to Yogi Adityanath government on Hindu 'courts' (2018)*, The New Indian Express, http://www.newindianexpress.com/nation/2018/aug/22/allahabad-hc-issues-notice-to-yogi-adityanath-government-on-hindu-courts-1861317.html (Last visited Sep 11, 2018).

the Hindu Mahasabha party office in Meerut in which a "judge" was also appointed to settle matrimonial affairs within the Hindu community.

This judicial system of 'revenge', where a community sets up a Court simply because another has already done it, seems to be founded on erroneous beliefs. They go against the very idea of **secular law**, where only one religion can enforce its own courts while others cannot.They have a near impossible challenge to beat in the Central Goverment.

The very idea of religion based courts is an anathema for any democratic government but in a diverse country like India, where each community has the Constitutional freedom to practice their religion as they see fit.

It is here that there arises a need for addressing how a Uniform Civil Code would help curb the issues arising from this problem. A uniform civil code administers the same set of secular civil laws to govern all people irrespective of their religion, caste and tribe. The need for such a code takes in to account the constitutional mandate of securing justice and equality for all citizens. A uniform criminal code is applicable to all citizens irrespective of religion, caste, gender and domicile in our country. But a similar code pertaining to marriage, divorce, succession and other family matters has not been brought in to effect. The personal laws vary widely in their sources, philosophy and application. Therefore, there is an inherent difficulty and resistance in bringing people together and unifying them when different religions and personal laws govern them.

The idea and principle of having a uniform civil code, governing personal laws is to treat every person equally and also so that just, fair and predictable laws protect everyone. Moreover, a uniform civil code would put in place a set of laws that would govern personal matters of all citizens irrespective of religion, which is the cornerstone of secularism. It would enable to put an end to gender discrimination on religious grounds, strengthen the secular fabric and also promote unity.

Therefore, given the current political and social scenario, the more progressive and liberal sections are demanding for a uniform civil code, which would govern individuals across all religions, caste and tribe uniformly, and also protect their fundamental and constitutional rights. Whether it would be the endeavor of the state, the mandate of the court or the will of the people is a pertinent issue which only time will enfold.

Conclusion

The Constitution promises *freedom of peaceful assembly and of expression,* so how exactly would one go about banning such extra-constitutional bodies?

People who readily stand as witness in a Panchayat full of their peers, and speak truth, would feel way more uncomfortable doing it in a court. In many cases, especially land dispute, there are no documentary evidence, all the evidence exists is the elders and their witness to the past. Panchayats handle delicate issues like marriages and divorces/estrangements with swiftness and consensus of both the parties, they are not illegitimate bodies who push their own form of justice on the weak and unsupported. Every person is allowed to present their version, witnesses, and proofs.

Their heads are decided by the people themselves (either through consensus or through their elected representative), and any particular orthodox head is likely to be removed in favour of someone more reconciliatory. The condescending attitude of people who have no inkling about how the rural India functions and their Top-Down approach about solving all problems it encounters is very disheartening.

The author would like to end with the following brief suggestions for the improvement of these institutions, to enable them to function better:

1. Proper sensitization and training for village elders choosing to preside over khap panchayats.
2. Ample incentives to such elders and a proper system of reporting would work at the two root problems: the independent, almost tyrannical way of functioning and the lack of transparency in decision-making.
3. Empowering the local police to handle cases where situations seem to be getting out of hand.
4. Introduce the system of Uniform Civil Code so as to create redundancy of religion-based courts. Until such time, pass regulations and rules to monitor their functioning.

Khap Panchayats, Sharia Courts and Hindu Courts, as discussed above, cannot be said to be illegal**,** *they are age-old* (Much older than Republic of India, that is) *social institutions to which subscription is voluntary*, their **decisions are not binding**, and people routinely do knock on Courts when they fail to deliver a decision, or are not satisfied with it. These bodies sort out a plethora of social and legal issues in villages starting from petty fisticuffs and minor disagreements to grazing land, playground, water and fodder

distribution in villages, land disputes, marital disputes, division of ancestral property, and common-resource management in villages and most noticeably, social customs.Would it really work if all these cases were to go to the overburdened judiciary, and take several years to resolve, by which time the dispute would have become irrelevant anyway? The answer lies in evaluating the follies of our justice system, which has itself driven people to seek alternative forms of justice.