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On State And Community/Private Lawmaking: Prospectus For Legal Pluralism In India

Authored By- Fasila A K

Abstract

This paper analyses the possibilities and challenges of legal pluralism and how women's bodies have been used as a site of contest between state and community legal orders. Modern states tend to construct a physically and legally bounded homogenous unit within their territorial boundaries. This comparatively recent tendency set by the emergence of nation-state plays the language of gender equality and protection for its monopoly over the use of force of law against the other religious, cultural and tribal legal orders exercising law for centuries. This paper argues that for three reasons state cannot claim the monopolistic authority of law: the State is as much Patriarchal as any other community; the language of the law is limited to comprehending many lives and experiences outside its textual definitions, and the presence of majoritarian influence in the law-making and adjudication of the modern state.

Introduction

Territoriality, autonomy and monopoly over the use of force are considered the key characteristics of the modern State. On the other hand, communities primarily differentiate themselves from other communities with their distinct way of life but not with their loyalty to the territory they occupy, as in the case of a state.[1] As can be seen in nomadic tribal communities, they identify themselves with a deity they worship and carry with them wherever they travel. The Arab Muslim communities also were recognized for their religious faith and practices. Jews and Christians were allowed to exercise their religious rights under the Millet system in Ottoman Empire without any interference from the ruler.[2] However, the modern states, as observed by Bikhu Parekh, give an "unprecedented moral, political and ontological significance" to the territory. Moreover, these states construct a physically and legally bounded homogenous unit within these territorial boundaries. It is known as *Lex*

[1] Parekh, Bikhu, 'Ethnocentricty of Nationalist discourse, Nations and Nationalism' (1995) 1 *Nations and Nationalism* 25
[2] ibid

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terrae, that is to say, whoever comes within this territory has to be bound by the laws of that particular State despite his/her association with any other states, communities.

The State communicates to its subject citizens in the language of Law, which has its sanctioning mechanism for the implementation of it. Bodin observed that it is a unique feature of the modern State, compared to all other polities that existed before, that legislation is its primary function and a legislature is its supreme institution. The State considers the maintenance of social order based on Law as its primary task, which means the order results from obedience to the laws that the State makes. That is, State operates and regulates its citizens only through laws. Modern states are historically adamant that their subjects should not follow any laws except the one made or endorsed by the State. Any contrary efforts have been watched suspiciously as that challenge the rule of Law and sovereignty of the State.

For the same reason, since the emergence of the modern states, there have been communities -religious, ethnic, tribal- governed by their own set of rules and practices till then, and these legal orders could challenge the State. These multi-ethnic, religious, and cultural communities constituted poly-centres of power, each of which defines and regulates individual subjects' behaviour and social interactions within the boundaries of their culture. Therefore as an obvious consequence, Post state formation, the State's desire to centralize the authority of Law led to conflicts between these communities and the State.

Public-Private Dichotomy

For the harmonious survival of both entities, there was a demarcation of the authority of the state and the community. Hence, according to the public-private divide in the Law and policy-making, the State makes laws and governs the matters between individuals and State affairs in the public sphere. Family and religion were concerns of the private sphere and were left to the respective communities' governance. For example, in India, the colonizers had to permit the practice of Personal Laws within the religious communities to govern the private affairs of the individual subjects of each religion. Tribal communities were allowed to follow their rules and principles within their boundaries. At the same time, the State retained its authority over affairs that affect the maintenance of Law and order in society. It does not mean that thereby ended the negotiation and conflicts between the State and other communities as their authority and laws overlap, encroach and contradict each other frequently. This also does not mean that this division of authority was made equally, as it can

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be clearly seen that the State has determined even the terms of that demarcation of authority. The State, in some way or other, attempted to define relationships terms among the individuals within the private sphere despite the devide. As time passes, this divide fades out, and State extends its arms of Law to the private sphere as though there is a line between two realms that no longer exist beneath the surface. This makes it difficult to understand where the boundary of the public sphere begins and where that of the private sphere ends.

At the end of it, from the general understanding of Law, it can be said it is the State who determines which rules within territorial boundaries qualify to be the Law. The dominant narrative of the state Law generally disregards the alternative legal traditions that existed. Formally the term law is understood as the set of rules enacted by the State-backed by a formal adjudicative system operated with the assistance of judges and lawyers. Most societies across the world have more than one legal orders exist within other than that of the State.[3] These legal orders prescribe their own rules and derive their authority from any particular religion, caste, tradition or tribe. Upendra Baxi called such a legal set-up a Non-state Legal system (NSLS).[4] Most of these informal legal systems also have forums to adjudicate the disputes arising within these communities. The existence of multiple legal orders side by side in a society is known by the term legal pluralism and about which a wide range of theoretical and field studies are available. If we look at the case of India, legal pluralism is explicitly visible here, as nobody denies that India is a multicultural society with a long-standing history. There are Hindu Muslim Christian religious communities governed by their Personal laws (with the approval of the State), and there are also other informal legal systems in the form of *Khap Panjayat*s and different forms of *adult*s in various tribal villages in the country.

Indian Responses To Multiculturalism

Indian Constitution appreciates and recognizes this diversity. The Indian Constitution determines the validity of laws in force before the commencement of the Constitution within the territory of India, including customs and usages as valid as long as those are consistent with the provisions of the Constitution.[5] It was an attempt to accommodate the multiple legal orders of the Indian State to an extent. The Part III of the Constitution guarantees the right to

[3] The term law or legal used here indicates that those rules derive their authority from the State and other cultural and religious authorities too.
[4] Upendra Baxi, *Towards a Sociology of Law* (Satvahan, 1986)
[5] See Article 13 of the Indian Constitution

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freedom of religion[6] and minority sections of Indian society have a right to conserve their language, script and culture[7]. Moreover, no specific laws were made to nullify the existence and effects of these informal legal orders. At the same, there are laws such as the Shariat Application Act of 1937 [8]which authorizes Muslim individuals to reside in India to be governed by the principles of Sharia in their personal affairs that are specifically mentioned in the Act, such as marriage, divorce, succession. There were also incidents in judicial history in which some of these informal adjudicative sites were challenged on the basis that they violated the basic principles of the Indian Constitution. However, the Judiciary did not declare them unconstitutional. Even then, these above measures and actions do not indicate that there were no frictions between the state and community laws. The State's unease to go hand in hand with the other legal orders was expressed, and attempts have been made to overcome these informal systems in multiple ways.

These non-state legal systems have been criticized, and state intervention was demanded mainly on two grounds: firstly, the coexistence of other legal orders with the State is a challenge to the rule of Law. The rule of Law is the backbone of a democratic society which ensures equality and basic principles of human dignity are followed. Many of these communities' practices were considered in violation of the basic principles of human rights and therefore demanded state intervention to abolish those. Secondly, another major criticism against legal pluralism and private-public dichotomy arose from the feminist movements across the border. They demand state intervention in the private sphere as the religious and ethnic cultural rules are arbitrary and discriminatory to women.[9] It is considered a milestone in the history of the feminist movement when the State takes into account the personal experience of women within the family and community structure for lawmaking. In India, the case of Muslim women has been frequently raised as the Muslim Personal Law against gender equality. There were multiple cases fought by the women or NGOs on their behalf because certain rules and practices of Personal Laws as they contravened the provisions of the Indian Constitution. A few sections of these Personal laws were codified and amended due to these legal battles and feminist debates, such as in the case of The Muslim Women (Protection of Rights on Divorce) Act, 1986. The Parliament made this Law to

[6] See Article 25
[7] See Article 29 (1)
[8] *Vishwa LochaMadan v. Union of India* (2014) 7 SCC 70
[9] See Susan M. Okin, Joshua Cohen, (ed) *Is Multiculturalism bad for women?* (Princeton University Press, 1999).

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reverse the effect of the judgment of the famous *Shahbano Begum case*[10] on the question of maintenance of divorced Muslim women. An amendment to the Law of Hindu Succession in 2005 was also the result of criticism by feminist movements.

Although there are flaws in the rules and practices that are followed within the cultural, and religious communities, in the following paragraphs, I would like to argue that an absolute state intervention of the State cannot be an answer to it. There are serious dangers in giving the complete state authority to interfere in the rule-making of a community despite their opposition as much as dangers in following the rules and priciples of cultural and religious community.

1. The State is as much Patriarchal as the community.

Discriminatory practices and laws against vulnerable individuals, especially women, are the major reason for criticism of the Non-state legal systems. Therefore they ask for a state intervention to offer a better position for these vulnerable groups of that particular community, eradicating such patriarchal discriminatory practices. However, it is well explained by Prof. Upendra Baxi that both the State Legal System and Non-State Legal System create subjection: The State with its meta-powers of great general prohibitions and the latter with all its paraphernalia of "polymorphous techniques of subjugation".[11] If Practices such as polygamy and triple talaq of Muslim personal Law are considered, for example, these are criticized as these give a Muslim man arbitrary power over his wife. There is a constant cry for a Muslim personal law codification and to bring in a Uniform Civil Code as these Personal Law rules get interpreted in the hands of *the ulema* of the community to the detriment of Muslim women.

At the same time state also cannot escape its inherently discriminatory public laws. Until it is scraped in 2018 in *Joseph Shine* v *Union Of India* Section 497 in the IPC, which penalized 'adultery', considered the woman involved as a mere chattel in the ownership of her husband as it defines the offence as sexual intercourse between a married or unmarried man and the wife of another person. It does not affect a sexual link between widowed, divorced, or unmarried women. To give another illustration, marital rape is still not a crime under the provision of IPC though it may cover domestic violence. In the same way succession law of

[10] *Mohd. Ahmed Khan* v. *Shah Bano Begum* 1985 SCR (3) 844

[11] Baxi, Upendra, "Discipline, Repression and Legal Pluralism" in *Legal Pluralism: Proceedings of the Canberra Law Workshop* VII 51 (Peter Sack & Elizabeth Minchin eds., 1986)

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the Hindu Personal law is highly discriminatory towards women. Moreover, it remains the same way even after the State codified and amended the Hindu Succession law.

Another major criticism arises against the cultural community adjudicative sites such as Khap panchayat, Sharia Courts. There are cases of a few brutal sanctions imposed by these forums that have been widely criticized, like sanctioned honour killing of couples in inter-caste marriages. They adjudicate disputes on a subjective case-to-case basis as there are no rules and principles to discipline most of these informal sites. In such contexts, the State judiciary is presented as a saviour for women and other vulnerable sections of society. In that case, it is considered inherently objective and well-disciplined and delivers just, fair and reasonable decisions. However, an analysis of even a few most celebrated judgments, which are known for their feminist stands, gives the idea that the state judiciary is also not free from utilizing the same subjugation techniques of patriarchy. For example, in *Shah Bano* and *Daniel Latifi*[12] judgments, the Supreme Court of India determines the right of a divorced Muslim woman to obtain her rightful maintenance from her husband in highlighting her 'qualities' as a 'good wife and a sacrificing mother', which are irrelevant considerations under the personal Law to get her that right. Although they adjudicate in favour of women, in doing so, they legitimize the inherently patriarchal nature by reinforcing the gender norms that underlie women's inequality. Hence the State illustrates assumptions about women's role and identity in a family that are embedded in Law.[13]

Since the Law is perceived as a tool for the legitimacy of the State, a discriminative practice at the hands of the State legitimizes that discrimination, whatever it may be. As it has a greater role in shaping social behaviour at larger levels, it is the greater evil.

2. Language of Law is limited.

The modern State's imagination of its subjects is that of a liberal individualistic figure. The State presumes that its subjects know how to write and read in certain languages. That is why all citizens are presumed to be aware of the Law of the State, and written documents form a significant part of the state adjudication. These presumptions disregard the fact that there are tribal communities which do not speak or write in the same way as modern state citizens do. In the same way, there are experiences of individuals from various cultural communities which the State cannot measure or document with the modern tools that we have.

[12] *Daniel Latifi* v. *Union of India* 2001 (7) SCC 740

[13] Aziza Ahmed, 'Dual Subordination: Muslim Sexuality in Secular and Religious Legal Discourse in India' (2007) 4 *Muslim World Journal of Human Rights* 25.

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3. Majoritarian influence in the lawmaking and adjudication process of a democratic state.

Law making and the adjudicative process with the State are influenced negatively by multiple factors such as political, communal. So, the State may help eliminate one violation at the hand of the cultural or religious community. However, there are multiple experiences of the process of the legislature and the Judiciary of the Indian democracy distorted and diluted by political and communal pressures. Despite the active role that the Indian Judiciary has played in the struggle to end communal violence and related crimes, several court decisions evince the influence of identity politics on judicial thinking. These decisions undermine the Judiciary's independence and commitment to the civil liberties of majority and minority communities. The communal thinking in these decisions has taken several forms. First, courts have fueled communal sentiment by holding certain religious practices of minorities "un-Indian," thus unconstitutional.[14] These courts define the Indian identity in monolithic terms or terms of the culture of the Hindu majority and, therefore, implicitly grant less than full rights and recognition to persons of "un-Indian" (i.e., non-Hindu) communities.[15] In addition, they reinforce stereotypical notions of membership in the majority and minority communities and destroy awareness of the multiple identities Indians have as political, social and religious actors. Second, some courts have adjudicated claims implicating the relationship between secular Law and Religious Law in favour of secular Law, not out of concern for minorities under their religious Law but in the interest of national integration.[16] The decision of *Shahbano* also implied that a uniform code would require that minority groups forego "disparate loyalties" to their religion. In this manner, the language of its decision undermined the Court's concern with the supremacy of secular Law and justice for women. The enactment after the *Shahbano* verdict was to nullify its effect due to the pressure of the Muslim *ulema*s on the government, although the *Daniel Latifi* interpretation gave it a strong double impact later on.

[14] *Sarla Mudgal* v. *Union of India* A.I.R. 1995 S.C. 1531.
[15] See Sara Ahamad, 'Judicial Complicity with Communal Violence in India' (1996-1997).17 *Nw. J. Int'l L. & Bus.* 320
[16] Ibid.

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Conclusion

From the discussions above, it is well settled that an exclusive authority with the State to make laws for communities will not bring good as in the opposite case. Beyond that, a constant contest for authority must also be settled on clear terms because it creates insecurity in the subject's minds. Such contests often raise question of loyalty to the community or State, as we have seen in the past. It would be difficult and time-consuming to reach a mutual understanding between the communities and the State on the authority of Lawmaking as India is a multi cultural society in various levels. Nevertheless it is necessary to be done taking the socio-political experiences of subjects of each community. Not only for cultural and religious communities but also State woman's bodies is the site for fixing its boundaries. Therefore, the state and communities contest for the authority over regulating women as it is extremely visible from the contest on the body of Muslim women. Therefore she has experiences being within the multiple layers of identities produced by gender, religion, member of a minority community within a majoritarian nation. Therefore it is a relevant analysis to check how this simultaneous authority of State and religion impacted her access to justice. Otherwise, the victims may suffer in the middle of the two systems, as happened to Shahbano. She had to renounce claim for maintenance though the Court had allowed it due to questions of her loyalty to the community.

In this regard, the State needs to take the initiative to begin a dialogue with an inclusive policy with the community authorities. In *Vishwa Locha Madan* v. *Union of India,* Muslim adjudicative such as qazi and Sharia courts were challenged. However, Judiciary failed to use the opportunity to have a dialogue to determine the terms of their engagement with these religious authorities. Also, the dispute settlement sites of these private communities can compensate for the limitations of the formal judicial system as they are overburdened with the number of cases before them. A well-regulated informal court system can contribute to dispute settlements, as in the case of Alternative dispute redressal mechanisms in the country.

As nationalist theorists of State envisions a properly constituted state as a homogenous community, by all means, the Indian democratic State has shown that tendency to be a homogenous community through standardization and unification, doing away with its diversities in multiple ways. Therefore there are dangers of nationalist views creeping into the state perspective.

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Hence, in these dialogues, the State should be able to convince the communities that its legislative attempts will not erase their cultural and religious identities and will not restrict their freedom of religion. Despite the disapproval of the particular community, state interference in community rule-making has to be considered as the symptom of changing the nature of a democratic State committed to the unity in diversity of the Indian society into a nation which is exclusive and chauvinistic.