

Afrooz Maghzi Najafabadi

Justice at the crossroads of plural
normativity:
Religious and customary-based
non-state justice in light of the
European Convention on Human
Rights



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1. Introduction

1.1 Statement of problem

The starting point for this doctoral research came from the insights gathered during exploratory fieldwork with Afghan communities in three cities of Germany. Having commenced the research with the primary aim of testing the developed categorizations of types and functions of non-state justice forums in an ethnic Muslim community, I conducted ethnographic and empirical research. In 2020, I concentrated on the newly established Afghan community in one of the eastern German cities, particularly on the community dispute settlement forum supported by the city's municipality. Through engaging with different stakeholders of dispute resolution forums, I observed the particularities of disputes in Afghan communities and the unique and nuanced community forums established to address them. Covid-19 related public health restrictions precluded the possibility of continuing fieldwork. Although it was necessary to adopt a primarily desk-based approach, the initial empirical insights gathered played a formative role in guiding the trajectory of my research. These observations, illustrated through the vignettes below, pointed to the knowledge gaps which this project seeks to fill.

I met Ahmed, an Afghan engineer in his 30s and the father of four children, who belongs to the Pashto community. Accompanying four other respected Afghan persons, he was elected by a newly established Afghan community in Germany to run a committee for the integration of Afghans in the city's municipality. Along with other work, they played the role of mediators in the community. The council, however, survived for just three years before it was dissolved. Ahmed attributes this to a combination of factors, including what he considers as the lack of solidarity and trust in Afghan communities, his personal challenges of adopting to a new country and the lack of structural support from the state.

He recounted many instances of involvement in matrimonial and family disputes. He referred to one particular instance where a woman, Farah, had complained about her husband's violent behavior towards her and children. Farah's husband argued that his family's respect for him and for their culture had declined since they came to Germany. While Farah did not desire to leave her husband, she

wanted him to recognize that a new country entailed a different set of values and attitudes compared to the traditional beliefs of their home country. In an effort to address the dispute discreetly, Ahmed and other elders did not inform Farah's husband that they had been approached by Farah but rather that they had only overheard the couple's quarrel. This was intended to safeguard Farah from repercussions for having brought up the private matter of the family outside. Ahmed and other elders explained to the husband that his behavior is not even acceptable based on their cultural and religious values, and the legal consequences of his behaviors in Germany. Farah was also reminded of her duty as a wife to respect her husband. As a result, their dispute subsided, at least for the time being.

Mina's family approached the forum in the aftermath of an incident which they feared could have detrimental consequences for the family reputation. Mina, an intellectually disabled girl in her 30s, was living with her caretaker, her sister. One day a 17-year-old Afghan boy met the family and after encountering Mina alone, raped her and left her wounded and injured. The family were disturbed by the incident not only because of what Mina experienced, but because she later expressed desire to continue meeting the boy and having an intimate relationship with him. While the council helped the sister to find some necessary medical help for Mina, they contacted the relative of the boy seeking a solution. Finally, they agreed that the boy should leave the city as a result of his wrongdoing and never contact Mina or be seen in the city again. As Ahmed explained, "we saved the boy's life from being destroyed for some stupid adolescent act and also managed to calm down the situation to not impact the future of Mina's sisters".

The vignettes above exemplify the complex phenomenon of non-state justice (NSJ) mechanisms in the context of minority groups. NSJ refers to a wide range of community-based forums for disputes resolution outside the classic state structures that are mainly characterized based on their association to cultural and religious values and principles (Kokal, 2020). Various in form, structure and application, they exist almost in all societies but the state's response to them vary according to the country's particular political, social and historical circumstances(ibid). This plurality of normative orders and justice providers in "the same social field" is discussed in theories of legal pluralism (Merry, 1988, p. 870). Influenced and largely developed by legal anthropologists, legal pluralism emphasizes the plurality of normative orders and justice providers as an empirical and normative matter (Corradi, 2017). Recently, this area has received increased attention, in particular, in the context of international development programs as an important avenue for accessing justice. There is also increased advocacy for the state involvement in NSJ processes to promote their compliance with human right standards (ibid). The im-

portance of NSJ is also discussed with regards to the religious and cultural rights of minority groups as well as their effectiveness in resolving particular sorts of disputes.

The application of NSJ in modern societies, however, has been met with serious concern regarding their negative impact on social cohesion, violations of human rights and inconsistency with norms of legality (Tamanaha, 2015). It has been the subject of a particularly heated debate in Europe and North America in the last two decades given their increased application in minority groups. The main area of concern relates to the association of NSJ in minority groups to different and even conflicting value systems with the western liberal law and the potential risk of their applications for vulnerable members of minority groups (Gaudreault-DesBiens, 2005). Such concerns have led to parliamentary debates, initiating legislative proposals as well as legal reforms in countries such as Canada, the UK and the US (Ashe & Helie, 2013).

However, the experience of Farah and Mina is in line with Megret's arguments that condemnation of NSJ solely because of disapproval of a particular aspect of its practice or normativity fails to grasp the complexity of dispute resolution among minority groups (Mégret, 2012). The martial and inter-generational disputes exemplified by those of Farah and her children are less likely to be settled without an understanding of the underlying cultural and religious elements and the best ways for resolving them. On the other hand, one cannot ignore the societal conceptions of gender, sexuality and mental disability which culminated in undermining the severity of the sexual violence experienced by Mina. The concern over the future life of the "boy" and the "family honor" of Mina's sisters dominated the processing of the case, eclipsing Mina's victimization. As such, in examining legal policies, it is vital not only to pay adequate attention to the protection of human rights of vulnerable members of minority groups, but also to both the symbolic meaning embodied in NSJ and its multifaceted practicalities in minority groups.

The present study therefore takes the task of looking at the application and functions of NSJ in religious and immigrant groups in Europe from a human rights perspective to discover how the state should properly respond to them. In doing so, the research adopts a state-centered approach in evaluating the work of these mechanisms and the obligation of the state towards them. The results will contribute to the rich and extensive research field of "human rights and legal pluralism" (Corradi, 2017, p. 5). According to Corradi, a variety of analysis is conceivable at different levels of interplay between "the legal and social dimensions of legal pluralism with the legal and social life of human rights" (ibid). Looking at the state's approach to legal pluralism in light of the European convention of human rights,

this project falls under what is called by Corradi the sub-field of “Normative legal pluralism and human rights law” (ibid). This sub-field deals with two sets of different questions. First, “how should states respond to legal pluralism according to human rights law?” and second, “how should states respond to legal pluralism in order to protect human rights?” (ibid).

In addressing these questions, however, a necessary step is understanding the reality of NSJ in minority groups. In the absence of such knowledge, legal debates and initiatives may risk generalization and fall prey to ideological and theoretical rhetoric. In recent years, a number of ethnographic and empirical studies have been conducted in Europe to investigate the reality of NSJ forums in minority communities. However, a systematic comparative analysis between them is lacking, which is essential to the overall and context-based understanding of these phenomena.

Therefore, the main groundwork of this thesis is dedicated to the construction of conceptual socio-legal classifications of the types and functions of NSJ mechanisms in minority groups that allow for a more systematic analysis of states’ obligations in response to them. It is not intended to culminate the knowledge of dispute resolution in minority communities, but to provide a framework of these mechanisms and their roles on which theoretical and empirical research can be developed.

1.2 Research Question

This study aims at answering the following question: how the empirical and ethnographic accounts can inform a European state compliance to human rights standards in response to the phenomenon of NSJ in minority groups.

To answer this question, the thesis follows a twofold inquiry. First it investigated how customary and religious based NSJ is perceived under international and regional human rights law with the focus on ECtHR case law. However, the main task ahead, in addition to analyzing the legal approach, is to understand the reality of NSJ mechanisms in minority groups. This involves a socio-legal study to desegregate the various types of NSJ and their particular functions in minority groups. It therefore led to three sub-questions considering:

1. To what extent the work of NSJ is recognized or limited under ECHR?
2. What types of NSJ exist in minority groups?
3. What are the structural and individual functions of such mechanisms in minority groups?

The overarching aim is to identify the criteria that a state faithful to human rights should take into account in defining its relationship with NSJ in minority groups.

1.3 Outline of chapters

In chapter 2, the study is contextualized by outlining the key concepts and discussions in the field of legal pluralism and human rights. It elaborates on the concept of non-state justice as a social fact and legal concern, the controversy over its application to minority groups, and the human rights implications of its application, in particular, under the ECHR. Finally, I discuss why developing any legal policy about NSJ requires understanding its reality and a systematic analysis of its types, socio-structural basis and why community members approach it.

Chapter 3 undertakes a legal analysis on the admissible scope of NSJ according to the ECHR and the case law of the ECtHR. It helps to understand the extent to which the work of NSJ in minority groups falls into the already recognized scope of private justice. The chapter first looks at different legal traditions in the EU regarding NSJ and the role of EU law and jurisprudence in harmonizing their various approaches. It continues with discussing the recognized manifestations of NSJ, and their restrictions in particular, with regard to the rights of citizens to access to justice and the right to fair trial under European regional law and jurisprudence. These chapters provided the answer to sub-question number 1.

Chapter 4–6 includes a socio-legal study on the application and function of NSJ in minority groups. The result is producing three sets of categorizations on the various types of NSJI in minority groups (chapter 4), the socio-structural grounds for their existence (chapter 5), and the individual reasons for their approach by minority community members (chapter 6). These chapters provide the answer to sub-questions 2 and 3.

Finally, in chapter 7, the developed categorization on types and functions of NSJ will be used as analytical tools to answer the main research question. That is to say, how the state should respond to non-state justice in minority groups given its commitment to human rights standards on the one hand and the functions of these mechanisms in minority groups on the other hand.

1.4 Methodology

1.4.1 Interdisciplinary research

To address the research questions, it is vital that the methodology can withstand evaluation. As Henn et al explains, methodology is the overall approach or the strategy that will be adopted throughout the research project (Henn, Weinstein, & Foard, 2009). Many research projects in particular in the area of law incorporate a hybrid of various methodologies which make them difficult to be categorized under any precise heading (Salter & Mason, 2007). This thesis is grounded in interdisciplinary research, applying a part-doctrinal, part-socio-legal methodology.

This research begins with a doctrinal legal methodology to answer the first sub-question of the research; namely, whether the work of NSJ mechanisms is recognized or limited under the European Convention on Human Rights. Doctrinal research is referred to “a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine” which is based on analysis of legal provisions and court decisions” (Salter & Mason, 2007, p. 49). The third chapter of the research is focused on the analysis and interpretation of the European Convention on Human Rights, as well as the relevant case law that supports the implementation of non-state justice. So, it will investigate their logical relevance through an examination of the European Court of Human Rights case law as well as the existing literature. Using this methodology, the researcher will be able to critically evaluate the legal framework that is set by the European Court of Human Rights for non-state justice, and the state’s human rights obligations in response to the relevant mechanisms. Given some practical aspects of non-state justice have not yet been raised in the ECtHR, some legal responses from the UK and Germany are explored to illustrate how some practicalities are addressed by national States.¹ The UK is included because while it is no longer in the EU, it is still a member of the council of Europe and therefore is bound to the ECHR.

Additionally, the thesis adopts a socio-legal approach to address the second and third sub-questions of the research regarding the various types of non-state justice mechanisms that operate in minority groups as well as their functions. Accordingly, the research approach moves away from focusing only on legal documents in order to construct a more contextual analysis. The methodology in this part reflects a

1 References to ‘England’ in the following paragraphs will refer to the law applicable to England and Wales.

predominantly social-theoretical study which aims to understand the work of non-state justice in minority groups as a social phenomenon. Socio-legal study or as Calavita puts it, “real law” has no agreed definition given in part its origin in different traditions in the US, the UK and Europe and its diverse approaches. In general, it might be defined as “a way of seeing, of recognizing the mutually constitutive relationship between law and society and includes both theoretical and empirical work (Creutzfeldt, Mason, & McConnachie, 2019, p. 4).

In doing so, the development of typologies/analytical classifications is used as an analytical tool to distinguish various types and functions of non-state justice mechanisms in minority communities. Borrowing the Neslund’s arguments in categorization of alternative dispute resolution measures, this is based on the presumption that while there are potentially numerous NSJ mechanisms in minority groups, each body consists of a selection of unique organizational and socio-structural characteristics (1990). Moreover, it is assumed in this research that an analysis of a state’s response to these mechanisms is impossible without the identification and classification of these characteristics (ibid). What follows is a critical review of three kinds of literature; a) Socio-legal and anthropological conceptual debates on dispute processing which help to identify categorical attributes/characteristics on which the final classifications will be constructed. b) Theoretical and empirical literature on the application of non-state justice in England and Germany. And c) literature on informal justice systems particularly regarding its compliance with human rights principles and its relation to the state. Through this mapping, first the main attributes/characteristic factors are developed which enable analytical classification of the application of these mechanisms and their functions. The output of this part is a suggested organization of the body of knowledge of non-state justice in minority communities through analyzing the various types of non-state justice in minority groups (chapter 3), socio-structural reasons for of their emergence (chapter 4), and determinants of parties’ choices (chapter 5). The material for categorizations provided in this part is primarily based on the empirical and ethnographical literature that are indicated in the bibliography. Given the limited research investigating the phenomenon of NSJ in minority communities, this will require updating to reflect developments in empirical/ethnographic research. While recognizing the significant contribution that this research provides, it is necessary, however, to highlight that its outputs are limited and are best understood as a first step towards analyzing the complex phenomenon of NSJ in minority communities.

1.4.2 Choice of country

This research is focused on Europe and its scope is limited to religious and immigrant background minority groups in England and Germany. This selection is based on the number and the nature of empirical and ethnographic research that has been conducted in these two countries following the concerns over the development of extrajudicial justice systems in religious and migrant minority communities.

England has been particular in the number of conducted bodies of research on NSJ as there are a considerable number of institutionalized religious and cultural based justice forums in this country. The focus of many of these research projects has been on family matters, in particular, regarding religious termination of marriage and the way women are treated by these mechanisms. England, therefore, has been selected because of its extensive and prominent ethnographic and empirical research on the topic among European countries, in particular, on the institutionalized forums of non-state justice systems such as the Jewish London Beth Din (Douglas et al., 2011), the Catholic National Tribunal for Wales in Cardiff (ibid), the Sharia council and Muslim arbitration tribunal (Bano, 2012; Billaud, 2016; Bowen, 2016; Douglas, Doe, Gilliat-Ray, Sandberg, & Khan, 2011; M. M. Keshavjee, 2013; Manea, 2016; Parveen, 2017; Pilgram, 2017; Shah-Kazemi, 2001; M. Siddiqui, Hutchinson, A-M., Momtaz, S., & Hedley, S. M., 2018) (Walker, 2016; Yilmaz, 2003; Zee, 2015), the Conciliation and Arbitration Boards of Shia Ismaili (Jamal, 2013; M. Keshavjee, 2007), and the Kurdish peace committee (Tas, 2016).

Germany was selected because of the number of ethnographic and empirical studies that are focused not only on religious groups (Jaraba, 2019, 2020), but also on more closed minority ethnic groups and which go beyond family disputes to cover a variety of other conflicts with criminal and private law elements. The ethnographic data available in these bodies of research enable a broader and more comprehensive understanding of the reality of non-state justice systems in minority groups. Research on the non-state justice phenomena in Germany started with the monograph *"Richter ohne Gesetz"* by Joachim Wagner in 2011 which reported on a range of conflict regulations that are carried out beyond the remit of state control and/or non-compliance with legislative requirements in some Muslim ethnic groups in Berlin. The study by Mathias Rohe and Mahmoud Jaraba took a deeper and more comprehensive qualitative survey into the concerns raised by Wagner's research focusing on predominantly Arab-Kurdish families and clans in two states of Berlin and Baden-Württemberg (Rohe, 2018; Rohe & Jaraba, 2015).

A significant step forward in the investigation of extrajudicial dispute resolution mechanisms among a number of minority groups in Germany has made by the research project Conflict Regulation in Germany's Plural Society, which was conducted within the Law and Anthropology Department of the Max Planck Institute of Social Anthropology. The main communities studied here were Yazidis, Mḥallamī, Kurdish, Syrian and Chechnya ethnic minority groups (Elliesie, Foblets, Sadyrbek, & Jaraba, 2019). The primary aim of this thesis was to develop a broader overview of NSJ operations using the collected ethnographic data from this project as well. However, it couldn't be accessed as the research conclusions had not yet been published at the time of finalizing this research.

These bodies of research on England and Germany, collectively, analyze the work of NSJ mechanisms and their interaction with the state legal system from the perspective of the forum's personnel, experts and users. While each individual body of research differs in terms of its target groups and methodology, their findings are, nonetheless, conclusive, allowing for a systematic comparative analysis of their types and functions in minority groups.

Justice at the Crossroads of Plural Normativity: Religious and Customary-Based Non-State Justice in Light of the European Convention on Human Rights explores the intersection of legal pluralism, minority rights, and state obligations under international human rights law. Drawing on interdisciplinary methods, the book offers a rare socio-legal analysis of non-state justice (NSJ) mechanisms – such as religious and customary forums – within immigrant and minority communities in Europe, particularly in Germany and the UK.

Combining doctrinal legal analysis with empirical research, Afrooz Maghzi examines how these community-based forums operate in practice, their normative foundations, and the lived experiences of those who use them. The book investigates how NSJ mechanisms address family, criminal, and civil disputes while mediating between cul-

tural values and state legal standards. It critically assesses their human rights implications, highlighting both the potential for empowering marginalized communities and the risks posed to procedural fairness, gender equality, and access to justice.

Through a typology of NSJ mechanisms and a mapping of their legal, social, and structural dimensions, this study provides a comprehensive framework for evaluating state responses to legal pluralism. It argues for a nuanced, context-sensitive approach that recognizes cultural diversity while upholding fundamental rights. Grounded in socio-legal scholarship and international human rights law, this work is a timely and important contribution to current debates on multiculturalism, legal pluralism, and justice reform in contemporary Europe.