PEOPLE'S LAW, DEVELOPMENT, JUSTICE

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I INTRODUCTION: LAW AND "DEVELOPMENT"

1. Conceptions of "Development"

The law is resorted to almost talismanically for initiating and implementing social change decisions by the elite of the "developing" (or more accurately impoverishing) societies. In this sense, the law (as a body of rules and precepts, as a group of social institutions making, applying and enforcing rules and precepts, and as a carrier of ideologies, values) is an important resource for, and adjunct to, development or directed social transformation. Notoriously, most change-oriented laws designed to further social and economic transformation turn out to have rather limited efficacy, at least in the not too short run. They do not bring about optimum behavioural compliance, much less changes in attitudes and values. This, in turn, affects the symbolism of the law and its processes generally; and threatens to erode, in the long run, the legitimacy not merely of the law but of its makers and upholders as well. A related aspect, well worth recalling, is that the attempt to use the law to initiate and accomplish planned change is, in basic respect, a "bootstrap operation" for the "developing" societies. Glib talks of law's potential for development simply overlook that substantial economic and social costs have to be borne in order to make the law an effective instrument of social change. Resources have to be constantly and consciously allocated to the making of law (which is not just a matter of copycat drafting but of relating change aspirations to obdurate social realities by a painstaking grasp), its dissemination, creation of supportive structures (mobilization through public opinion), favoured interpretation systems (courts, tribunals), adequate implementation/enforcement systems, continuing social audit of the law's operations and ongoing repair and reform jobs. All this requires a rather substantial investment of manpower and money. Typically, however, the net outlays of national budgets for administration of justice, legal enforcement, supportive structures is low and even miniscule. Very often, political elites want just this: a veneer of change over the substance of status quo. Most changes sought to be ushered in by the law are such that they only nominally, if at all, affect the dominant patterns of distribution, and management of distribution, of power in society. But even for elites, who somehow manage to transcend their class base, and for whom recourse to law for social change may not be chicanery and ritualism, the problem of the use of law for developmental purposes may well be an aspect of underdevelopment itself. In other words, even where the fundamental drive of developmental effort may be to reduce poverty, such effort itself continues to be affected by the very context of poverty and scarcity at every level (Baxi, 1976a: 38 – 94). We thus have to ask in contexts like India not merely whether the law can affect changes in the lives of the poor but also how far poverty itself affects initiation and accomplishment of ameliorative legal changes.

In order to understand the relevance of law to development, we need at the outset a clear understanding of both the notions. What is "development"? The many conceptions of "development" floating around in the massive literature are, I suspect, by themselves a means of exploitation. But this is a subject by itself. Let me point out one or two ambiguities and then move on. It is said that "development" may be looked upon as the process of planned or directed social change. But the real questions are: Development for whom? development of what? development through what? development from whom? These are very crude ques-

tions: so crude that very few social scientists pause to ask these. For me in my relative lack of scientism these are the questions which matter. Undoubtedly, in most countries the Gross National Product has increased. But Gross National Poverty (the other GNP) has also simultaneously increased. That is why I am more comfortable with the expression "impoverishing" societies than "developing" societies. From the notorious, and somewhat nefarious, scholarly concern with "development" in the fifties and sixties we have arrived, in the seventies, with a more engaging and promising concern with "another development". One might say, with some risk of overgeneralization, that the literature of the sixties revealed, in essence, a hegemonial, unilinear, eurocentric model of "development"; it was, notably, the work of Western scholars. Concurrent with the model of development were certain preferred strategies for it, which were either emulated by or imposed upon the elites of the developing societies (Inaytullah, 1975). The quest for "Another Development" in the seventies has arisen out of the realization that development is a multilinear, history and culture specific process and is conditioned by the nature of international political and economic orders.

It is now accepted that development is all about distribution. The technocratic approach to development emphasises "technological modernization, managerial efficiency and growth in GNP". Underlying this approach is the assumption that "the system could be made to work if equitable distribution is built into an essentially growth model" (Haque et al., 1977: 12). This has been the prevalent approach so far in India. The results are not all that impressive. This approach in any case relies on the "classical" conditions of capitalistic accumulation such as frugality, innovativeness, access to home market, and the political and military power to create international markets conducive to industrial growth at home" (Haque et. al., 1977: 13). The realities do not support these assumptions.

The other way of looking at development seeks to redefine the processes and objectives of development "into the direction of rapid social change and redistribution of political power". On this approach, development is not just to be measured in terms of technoeconomic variables but rather as development of "the collective personality of the society". The processes of development are, on this view, designed to foster a "collective" sprit ("a sense of belonging to a society, pride in national achievement, fulfillment in helping one's distressed neighbours"), creation of "aspiration frontiers" (dissemination of appropriate values), generation of self-reliance and "participatory democracy". The latter is one way of eliminating "consciousness gap" between leaders and masses (Haque et. al. 1977: 12, 15 – 19). Ultimately, these processes should lead to de-alienation.

From this standpoint, the "development" resulting from growthmodel (stressing centralized planning, expansion of modernized industrial sector and assistance from developed countries) is really "anti-development". The second model of development judges developmental process by what it does to man; de-alienation, self- reliance and participation are the three crucial components here. Clearly, this is, for India, (as indeed for most "developing" societies) only a statement of preferred future; but it may provide critical bases for devaluation and even delegitimation of the existing liberal-capitalistic growth model.

2. Law, Legitimation and Development

Where and how do we place law on the debate concerning development? The current development literature is devoid of any critical thought on law's relation to social organization

and change. Nor are the mainstream social scientists much bothered to understand the nature and function of modern law. This was not of course the manner in which the founders of modern social theory regarded law. Durkheim, Marx and Weber gave sustained attention to law as a social form and process in arriving at the understanding of social development. The recent serious attempts made by lawmen (ILC, 1974; Trubek, 1972; Unger, 1976; Trubek & Galanter, 1974; Trubek, 1977; Balbus, 1977; Hurst, 1950, 1964) to provide some theoretical basis for relation of law to development have still to be related to the current debate on alternative conceptions of development.

The simplest way in which law is often approached in the context of development is through an emphasis on its instrumental and technocratic dimension. Law is regarded as a technique for ordering of social relations. It is also seen as a conversion technique, i.e. public and positive law norms convert social, political and economic choices into a system of binding rules and precepts. Law is also regarded, in this view, as facilitating organization of choice and enterprise. In this sense, law is no more than a manual of instructions for people who want certain things done. The instrumentalist notion of law also included a concern with forms of conflict resolution provided under the auspices of the legal system. In this conception, law is merely seen performing certain jobs felt necessary from time to time to keep society as a "going concern". Karl Lewellyn called these the "bare bones" law jobs, whose task is to make group living possible (1940, 1368 – 70). On such a conception, law may not appear to be of any fundamental significance in understanding of social change, and even planning of it. The entire social technology that is law is here reduced merely to a kind of toolkit.

A wider conception of law, both as an aspect of social consciousness and of social organisation, gets us closer to understanding its linkages with social change. Law is not just social technology; it is an aspect of culture (or ideology, if you please). Law as a system, reflects, reinforces and often mutates and innovates values and ideals: whether these be of the dominant groups in society or ascribed to people at large. Law is also to be viewed as a social system – a system of social relations, roles/statuses and institutions. Interaction, through a network of institutions of law having their own "subcultures", between and among the makers, interpreters, onforcers, compliers, breakers, and beneficiaries of law constitutes law as a social system. Law, thus conceived, performs important legitimation functions in a society. A prime function of law is to establish, maintain and justify distinctions between permissible and proscribed uses of force in social relations. Legal systems, more or less, appropriate unto themselves the domain of legitimate force in society. This appropriation function is among the key functions of law in society. But because law appropriates force, it also accustoms us to its exercise according to legally ordained procedures. We think of and feel the legal application of force in purely normative rather than existential terms. Above all, and here lies the danger, the institutionalization and routinization of use of force continually reinforces the authority of law, indeed to a point where the mere existence of a rule prescribing behaviour becomes self-justifying. The intervention of law inhibits the fundamental question: what are the good reasons for the state's continuing appropriation of force? Thus, it contributes to the legitimation of law and the power of its makers.

Normative and social systems of law tend to "institutionalize class conflict" (Dahrendorf, 1957) by providing certain adjustments of conflicting interests and a vast repertoire of conflict-resolution techniques and institutions. Law functions in this manner to sustain existing patterns of distribution and management of distribution of power in society. This too is among the principal legitimation functions of law.

Finally (without being exhaustive) there is the notion of the "rule of law", a heavily overworked notion which performs certain legitimation functions for those who hold power in

any society. In one sense, it simply means conformity with the lawyers' law, that is due observance of the procedures prescribed. This is not the most significant aspect of the notion as such conformity is consistent with the grossest inequity. The other and the more important aspect of the notion "imports both a minimal justness of rules and a dynamic responsiveness of substantive law to the needs of social and economic development" (Stone, 1966: 621). In this sense, the rule of law signifies a complex of standards of redistribution and justice; and in this sense it is a highly variable achievement. Such, however, is the symbolic appeal of the notion "rule of law" that it prevents fundamental questions concerning justice from arising at all: For whom, and for what purposes, and to what extent does the "rule of law" (conceived primarily as an attainment of a modicum of justice through legal processes) exist? Can it be claimed with integrity that it exists for most, let alone, all people in society? Indeed, by solely addressing its constraints to the exercise of public power, the rule of law notion diverts attention from the very real violations of minimal justice in social relations by those who wield extensive "private" power. (The problem in India is precisely of this nature: the state is not the most significant holder of power). Moreover, is the "critical premise" of the doctrine of rule of law that rules can make power impersonal and impartial "not" fictitious? (Unger, 1976: 180). Indeed, as Unger points out, "the very assumptions of the rule of law ideal appear to be falsified by the reality of life in liberal society. But, curiously, the reasons for the failure of this attempt to ensure the impersonality of power are the same that inspired the effort in the first place: the existence of a relatively open, partial rank order, and the accompanying disintegration of a self-legitimating consensus. The factors that make the search necessary also make its success impossible. The state, a supposedly neutral overseer of social conflict, is forever caught up in the antagonism of private interests and made the tool of one faction or another. Thus, in seeking to discipline and justify the exercise of power, men are condemned to pursue an objective they are forbidden to reach. And the repeated disappointment accentuates still further the gap between the vision of the ideal and the experience of reality" (Unger, 1976: 181). And yet this experience of "gap", which is a structural property of legal system, does not serve to delegitimate power. Balbus has recently argued that "the legitimation of the legal order is not primarily a function of its ability to live up to its claims" but "rather of the fact that its claims . . . are valued in the first place". Thus, for example, the notion of the formal equality of men before the law has been so firmly entrenched as to make unproblematic the substantive equal treatment of unequals. The law of theft and the punishment for theft is the same, for example, for the rich and the poor; and in fact the punishment actually awarded may be much less stringent for the former rather than the latter. The equality before the law argument does not countenance the claim that the rich, who should have no reason to commit the crime, should be more severely punished as compared with the poor. To allow such questions would be to initiate delegitimation of the legal order, a "fundamental break with the values and (formal) mode of rationality of the legal form itself". Balbus urges that an adequate theory of "legitimation and/or delegitimation would have to explain why the logic. of the legal order . . . is ordinarily accepted as unproblematical, and is not called into question in the name of a radically different logic" (Balbus, 1977: 581–582).

In outlining the wider notion of law, we have already seen how law is itself a form of social consciousness, in which are embedded certain ideals of justice, equality, authority. A mere technocratic/instrumental view of law would not have taken us this far. We may briefly turn to the understanding of law as social structure to complete the picture. Max Weber, in his rich and seminal analysis of the organization of authority in society, was the first to insist on the relative autonomy of the legal order. He was concerned to show that while the development of law was intimately related to certain socio-economic formations, law as such cannot

be reduced to be a mere reflection of relations between classes. Thus, he recognizes that "the alliance of monarchical and bourgeois interests was one of the major factors which led toward formal legal rationalization", and gave rise to a calculable and predictable system of rules based on the principles of formal legal equality. The specific forms of rationalization in law cannot be explained wholly by taking capitalism as a "decisive factor" in the process (Weber, 1954) Weber clearly saw that law was autonomous at four distinct levels, now sharply formulated by Roberto Unger (1976: 52–54). Law is substantively, institutionally, methodologically and occupationally autonomous. Law is substantively autonomous when its norms "cannot be persuasively analyzed merely as statement of any identifiable" set of economic, political or religious beliefs. Law is institutionally autonomous "to the extent that its rules are applied by specialized institutions whose main task is adjudication". Methodological autonomy of law can be seen by special types of reasoning and justification adopted by legal institutions as compared with other social institutions. Finally, a legal order is occupationally autonomous when a specialized group of people (legal notables to use Weber's expression) – legal profession – "defined by its prerogatives, and training manipulates the rules, staffs the legal institutions, and engages in the practice of legal arguments" (Unger, 1976: 53).

Weber pointed out that a legal order, thus seen, differed from politics and administration by its objectives of generality and uniformity of application: there is a belief that the law "consists essentially in a consistent system of abstract rules" uniformly applied in "particular cases". Obedience is accorded to rules and to legal authority and not to persons occupying office as they too do so, and act, on the basis of obedience to rules in the first place (Weber, 1964: 330). The abstract character of law was favoured by all those interest-groups "to whom the stability and predictibility of legal procedure was of very great importance". It was equally important to those "who on ideological grounds attempt to break down authoritarian controls" (Weber, 1954: 229). Clearly, an autonomous legal order in this sense was a crucial component in the development of liberal capitalist societies in the West (Trubek, 1972). Indeed, it has been argued that while the legal order may be autonomous in the sense that it is "autonomous from the preferences of actors outside this order", it would be wrong to say therefore that it is "autonomous from the capitalist system" (Balbus, 1977: 272). In this brilliant analysis Balbus goes further to show that there is an essential identity between the "legal form and the very 'cell' of capitalist society, the commodity form").

A tolerably clear corelation between legalism and state authority structure thus emerges from the work of, and since, Weber. Weber stressed that "legalism, while seeming to constraint the state really strengthened class domination" (Trubek, 1972: 53). The system of formal justice, Weber maintained, "legalizes" unequal distributions of economic and political power by "guaranteeing maximum freedom for the interested parties to represent their formal legal interests" (Weber, 1968: 812) Whether or not growth model of development is viable, or constitutes "anti-development", legalism is a very crucial aspect of that model and no understanding of it can be complete without some grasp of the nature and relationship of law to social formations.

The same is indeed true when we move away from the technocratic growth model of development to the broadly humanistic model articulated earlier in this part. How would legal systems be related to the essential tasks of fostering "collective spirit", creating new "aspiration frontiers", and a movement towards new forms of social order enhancing participation, self-reliance and de-alienation? Would not all this require major transformations in law as social consciousness and social organization? Given the existing forms of law and social orderings, and the nature of their relations, would it be at all possible to meaningfully decen-

tralize power, escalate participation and restore human autonomy and dignity for the masses? These indeed are no strange questions for the Indian mind. Gandhi raised them eloquently on the eve of constitution making (Baxi, 1967). Jayprakash Narayan raised them again, not just at the level of ideology but of political action, in the mid-seventies. The contemporary increasingly feeble "dialogue" between the neo-Nehruites and neo-Gandhians is an aspect of the same quest.

II PEOPLE'S LAW, DEVELOPMENT, JUSTICE

1. People's Law: Problems of conceptualization:

One way in which we can begin towards a new consciousness of law (especially in a country like India) is to relate "people's law" to "state" law. One factor contributing to the vicissitudes of the law as an instrument of directed social change is simply that most ex-colonial societies of the Third World were (and remain) multilegal, possessing more than one legal system and legal "culture". The imported western legal systems interacted in different ways with indigenous systems of administration of justice. Initially, the imported/inherited western based legal systems were alien both historically and existentially to the people at large. This alienness may still persist after most of these countries have become independent and yet have continued to operate with the received systems of law and justice whether as a matter of deliberate choice (in terms of the maxim "what is good for the elite is good for the masses") or as historical hangover. There are close parallels here between the European "reception" of the Roman law (Stone, 1966) and the ongoing crisis of legality in the newly independent societies which have twice received the European law.

Of course, it is now being discovered all over again (there is no commandment in social sciences forbidding the reinvention of the wheel!) that all societies including those which are highly developed are multilegal, an insight unforgettably proffered sometime ago by Otto von Gierke, Eugen Ehrlich, Max Weber and others. The sociological literature of the sixties and seventies celebrates the return to this theme. It not merely stresses the inadequacies and inhumanities of the state law's "assembly line" justice but also highlights the comparatively superior qualities of non-state, informal, people's law. All this indeed has come to a point that one hears of the "peaceful uses of anthropology" (Lowy, 1973: 205) and creation of African type moots in the suburbs of San Francisco (Danzing and Lowy; 1975: 685)! Interesting too is the semantic distinction (manipulation?). The Asian/African societies have "tradition" and "custom". The same phenomenon is described for the developed societies differently as: "private government", private sectors of law and justice, "informal law", "living law", "people's law".

To return to the main point: the theme of plurality and multiplicity of legal systems is now well worn, although it is differentially assimilated by sociologists and jurists. But the central perplexities remain. Can we describe group ordering of social relations, and group handing of social conflicts, outside the dominating frameworks of state authority and power as law? Too much intellectual energy has been dissipated over this question; but not over the counterquestion: why not? One suspects all this is highly ideological. The liberal democrats who have all along urged political pluralism as their fighting faith have forgotten their own message when they come to the law. The state (behaviourally, the bureaucracy and army) is only one of the many social groupings, howsoever imperious and dominating it may be. If the

state, for its operations, needs a technique of social ordering, social control and institutionalization of conflict – namely, the law – so do the other non-state groups. I do not deny (who can?) the increasing power of state over all other groupings. But the latter exist; nay, sometimes they are even resilient. To refuse to conceptualize their regulatory systems as law (in any significant usage of that term) is to commit a kind of genocide by definition. If not that, at least, it is a goodbye to pluralism.

That hurdle over, arise the more vexing ones of further conceptualization. Thought has moved here in dichotomous pairs: we hear of "state law" and "people's law", "official law" and "living law", "formal law" and "informal law", "private" and "public" legal systems, "national" and "local" law ways, and finally "high culture" and "low culture" law. Bases for classification here vary: in terms of origin (state/people), qualities (formal/informal), scope (national/local), social acceptance (living/enforced) and cultural foundations (high culture/low culture). One clear basis of differentiation is the presence of state power and authority (which is not omnipresent, witness for example the vicissitudes of the "state action" doctrine in the American Constitutional law). This gives us two main types of legal systems in any society: those organized under the auspices of the state and those organized under the auspices of social groups other than the state. The state legal system (hereafter SLS) – itself a large bundle of hundreds of state legal systems – simplified and abstracted, provides a kind of reference group for the conceptualization of non-state legal systems (NSLS). The NSLS in any society would have higher demographic presence than SLS. Anyway, pending this kind of census enterprise, it is possible at least to say that NSLS display substantial variations in origins, development, structure, process, efficiency and viability and values (Pospisil, 1979: 97–126). Inter se relations, and comparisons between (and among) NSLS still represent an uncharted arena of investigation, both theoretically and empirically. When such investigations develop, a search for conceptual tools and organizing principles other than those furnished by the presence or absence of state power and authority may well become imperative.

2. Perspectives für The Study of Interaction between SLS & NSLS

The study of interaction between NSLS and SLS is of prime importance at least, for sociologists of law in the "developing" countries. But it is equally important to prevent such study from becoming dogenerate factology. Perhaps, an identification of perspectives may be useful. May we not study this interaction from social system, social actor, and social development perspectives? Each needs some explaining.

On the social system perspective, the configuration call "law" will now look different. Our universe becomes overpopulated, even congested. We would need to bring some order: identify the main "types" of NSLS; their relation to social structures (roles, statuses, role-sets, status-sets, "culture"). Having done that, we would need to re-explore the SLS in the same manner. Then only we may begin the task of correlating preferred SLS types with NSLS types. And this will need typification of interaction patterns. Jargonistic, all this; but necessary. SLS/NSLS may be symbiotically co-existent; this is conceivable, though not likely. Or they may be related in terms of collaboration, reciprocity or the relation may be of antagonism. A relation of complementarity would exist when NSLS performing the very same law-jobs (which Karl Lewellyn so seminally identified) which the SLS strive to perform. (See Baxi, 1976b: 93–95). On the other hand, the NSLS may be in active antagonism with the SLS. The antagonism or conflict may be at the level of values as well as of interests. Conflict may be so acute as to generate hegemonial drives - NSLS may seek to eclipse or oust SLS or vice

versa. There may be loot and plunder – also disaster, as when state laws coopts the features, even institutions of non-state law through statutory adoption in an effort at hegemony (the state attempts to statutorize community dispute institutions through Nyaya Panchayats in India afford one striking example of this: See Baxi, 1976a: 411-30, Baxi & Galanter, 1979: 341). Alternatively, there may be a "mix" of complementarity and conflict in the relations between NSLS and SLS. This mix may well be a kind of division of social labor between state and people. In a given law-region, the NSLS may do all social control jobs save those of dealing with major crimes (e.g., murder), though theoretically there is no inherent reason for this division. What is all this, one may ask, but a saga of social change?

The social actor perspective wants, rightly, us to look at human beings not just as systems. Curiously, or perhaps not so, man disappears almost altogether in social system/structure analysis; the actor, it is said, becomes the receptacle. He is at the "receiving end of the system", never at the giving end (Dawe, 1970: 207). Even if that be not so, it is true that social systems interact only in the dark night of social scientist's soul; in real world, only people, human beings, interact. Berger and Luckmann have reminded us (1966: 72): "The institutions, with its assemblage of 'preprogrammed' action, is like the unwritten libretto of drama. The realization of the drama depends upon the reiterated performance of its prescribed role by living actors." Take the man into account and the picture begins to look different. Now we find human beings in time and place using the norms, processes, institutions of SLS and NSLS for their choicemaking and social action. The actor's values and interests (not these of the institution's or system's) guide our understanding here. Just one example should do here. Recourse to the court-system of SLS by Indians, villagers particularly, does not necessarily imply any acceptance of the values of SLS or signify any bankruptcy of the resources and values of NSLS (say, Panchayats). Court recourse may merely be a strategy for conflict-handling (an input for more favourable outcome in extra-judicial handling of conflict). It may also be motivated by the desire to correct status-asymmetries in village society (Epstein, 1962: 123–24): or to wage status competition, not quite permissible within the NSLS networks (Rudolph and Rudolph; 1967: 36–66). The results of such recourse may not signify any fundamental departure from the hierarchical, sacral value system of the Hindu society or any confirmity with the "modernistic", secular-rational goals of the constitutionally desired social order. This must remain an open question. What is not open to question, however, is the observation: that from the actor's perspective, adjudication may be "just one of the many contingencies in what is essentially a process of negotiation in a changing social environment" (Kidder, 1973: 137).

We identify the third perspective as developmental. We may proceed here both from the standpoint of the top-down technocractic model of development and from that of the humanistic development model. From the former standpoint, we identify the development inspiration in terms of the constitutionally stated values and aspirations, relation of these with the political elites policies and programmes and the translation of these bureaucratic formulations and implementation. Identification of the normative conceptions of elite espoused notions of development and of development achievement (which may involve, in the stream of time, dialectically, reformulation not merely of the strategies but goals as well) will then provide the foci of the study of development. If the blood group of aspiration and achievement compare well, we have development. If not, we have problems: what went wrong? unintended effects? lack of legitimacy? lack of political will? lack of social learning? (Development is indeed, identifiable, with a process of social learning in the direction of espoused values). If we want to look at development from this standpoint, the study of NSLS in interaction with SLS, or indeed by themselves, would be of considerable help. The NSLS

may reflect the tenacity of social formations and values, these in turn displaying the "folk" notions of development, as distinct (and even opposed to) the elite notions. Where these notions coincide, we may discover different institutional pathways for the attainment of the same set of goals and values. Either way, we would be reaching a reappraisal of both types of legal systems (SLS and NSLS) in their development profiles.
On the other hand, we may wish to study the NSLS in terms of the values of the humanistic or "Another Development" approaches. To what extent the NSLS reflect or preserve a movement towards forms of social order erhancing participation, self-reliance and community? To what extent the NSLS foster dealienation? What are the fundamental presuppositions involved in the structure and functioning of the NSLS concerning the nature of man, state and conflict? Do these presuppositions diverge substantially or radically from the values of the SLS? In other words, what is the delegitimation potential of NSLS for the SLS? What, on the other hand, is the scope and impact of the spread of the culture of SLS in the NSLS and vice versa?

3. Village Law and Justice in India

Let me plunge now into specifics of the Indian situation. Insofar as the study of village law and justice is concerned, we have in India instead of cross-fertilization across disciplines the situation of cross-sterilization. Juristic preoccupation with the SLS has generally led to the belief that NSLS are wayside relics, of marginal importance and destined to disappear in the great March to Progress. Indeed, the general tendency has been to subsume studies of NSLS (dispute institutions) under the rubric "cultural" or "legal" anthropology, an exotic field for a few specialists which a busy judge, lawyer, or legislator finds of little immediate relevance. On the other hand, even legal anthropology has yet to win recognition in India as an integrated discipline. Social anthropologists have studied "village" life; but in the proliferating studies the facus is on kinship, caste, and now-a-days "class". It is incomprehensible but true that very little attention is paid to social conflicts and their management outside (or indeed even within) the main frames of caste and class. Law as a category of structural analysis is virtually absent. The state of art qualifies what follows by way of an overview of literature. There seem to be three main types of NSLS in rural India. Very generally, these are caste-based NSLS; community-based NSLS; innovative, reformist NSLS. The distinction between caste and community NSLS is (as we will shortly see) relative. It is based on the view that "most individuals in rural India have two sets of predominate social relations, one that ties them to a village community which may be viewed as a vertical set of ties and one that connects them horizontally to their biradari and jati (subcaste)". Each set of social relations has "norms that can be considered legal and 'individuals and groups possessing the socially recognized' authority to apply physical force to enforce them within the local communities" (Cohn, 1965:82). The community NSLS extend beyond the caste to the village unit itself, though patterns of caste dominance – or of power distribution – here intrude, sometimes to a point that a village panchayat becomes the very extension of dominant group government. The innovative/reformist NSLS are dispute institutions like the "People's Court" (Lok Adalat) at Rangpur which are sponsored by acculturating agents or agencies, with the ideologies which centre upon the principle of generation of Lokshakti or people's power for social transformation, and which deny, or circumscribe, the state power (Baxi: 1976b).
The dominant form of the organisation in each case is a set of dispute institutions (cf. Abel, 1973: 217) called panchayats. Panchayats normally are a group of five people who hear and

decide disputes mostly when they are summoned to do so but frequently on their own. However, in each type of NSLS, the subject matters vary. Very generally, caste (jati) panchayats deal with conflicts of interests and values within jati-groups, including factional alliances within those groups. Village or territorial panchayats deal with conflicts of interest cutting across caste factors, though those very factors may play often a crucial role in the "resolution" of a particular conflict.

Jati panchayats vary enormously in structure and scope. Bernard Cohn has insightfully grouped the structure and scope of jati panchayats in terms of territorial units as well as patterns of caste dispersal and domination. His classification yields three types of jati NSLS:

(a) villages with a small population of a single caste;

(b) multi-caste villages with single head (authority figure);

and

(c) multi-caste village with a dominant caste (Cohn, 1965: 83–98; see also Srinivas, 1962: 118–9).

It is clear that jati NSLS may have wide territorial reach in terms of aggregation of jati circles, so that it is not unusual to find as many as fifty villages falling within the scope of jati NSLS. The limits of the territorial reach are conditioned only by "the means and the speed of transportation" and "by the kinship radius of the convenors" (Mandelbaum, 1966; 281). There is equally clearly a federal component in jati NSLS and different levels of hierarchy e.g., Cohn, 1959). The nature of the conflict or its importance to jati solidarity patterns may, however, involve the use of the highest collectivity of jati NSLS (panchayats comprised by as many as 20–25 villages). Jati panchayats also show interesting variations in organization of power and authority. While these remain to be systematically studied, a mix of any of the following variables offers some clue to authority and sources of legitimation. The close correlation between age and wisdom provides one mix – the panchayats are often led, even composed, by such men. Esteem, reputation, integrity, and charisma provide another mix. Economic base, as related to social status (Weber's analysis of status-groups as distinct from class is still, despite its seminality, largely ignored in Indian studies) also invests power and authority in certain men. So does the status of being a faction leader. Although not so prevalent now, we cannot altogether ignore the hereditary or royal allocations of role and authority (Cf Cohn, 1965: 85–90).

Jati NSLS primarily involve disputes and conflicts which are related to the maintenance of jati ranking (in terms of ritual axis and of pollution and purity) and solidarity. Ritual lapses, marital relations, commission of polluting acts, sexual deviance, inter se land disputes, credit transactions, patron-client (jajmani) relations – all these fall typically within the range of jati NSLS. As in SLS, the jati NSLS involve application of pre-existing norms (See Srinivas 1962: 118–19. Contra: Cohn, who says "there is, apparently, little question of what 'the law' is in panchayat proceedings" 1965: 91) as well as instant norm creation and norm innovation. (The distinction between norm-creation and norm-interpretation is, in most decisional processes, never so sharp as some wish it to be.) The breach of pre-existing "customary" law is always a major gradient in the convening of jati panchayats: indeed, jati NSLS sometime make law prior to occasions of adjudication. For example, it has been frequently noted that untouchable jati groups, in their desperate bid for social uplift, have adopted regulations "for whole sections of a caste forbidding practices believed to be responsible for their low status . . . Chamars are prohibited from removing dead cattle" (Cohn, 1965: 108 and the literature there cited).

There is general agreement that the processes of dispute handling, howsoever complex, in jati and village panchayats share common features of informality, flexibility, democraticity, and

decision-making (at least always in style if not in substance) by consensus. The state law strives to attain justice inter partes through "impartial" judges and elaborate procedures for ascertaining "truth". Indigenous dispute institutions promote justice with notorious informality through village notables who know disputants personally. The adversary systems (broadly speaking) of state law seek to individualize justice: village law and justice seek collectivized justice. Village law and justice seek social, group harmony through consensus, where both sides engage in give and take: whereas state law, followed to its end, rests on "winner-take-it-all" principle. The flexibility of jati and village panchayats consists in a wider sense of relevance, not the straitjacket notion of relevance. The village elders, it is often observed, assembled to hear one dispute will "discuss another which lies behind it" (Cohn, 1959: Rudolph and Rudolph: 1966). This is partly a function of democraticity – that is freewheeling public participation in the hearing process – of the proceedings – indeed an element fast disappearing in state law systems. Indeed, the democraticity has not been confined to random public "say" but it has a distinctly egalitarian character. Mandelbaum observes, at least in relation to jati panchayats: "The egalitarian aspect of the traditional panchayat seems to pose a paradox. The need for unanimous consent and the right of every man to be heard appear dissonant to the leitmotif of hierarchy . . . The answer seems to be that most define a jati council as a council of peers . . . even a poor man will speak if he feels moved to do so (1966: 291)." While the substance of this account is correct, it remains ideal typical. The prevalence of the so-called tradition of consensus in India needs very critical examination. On most vital issues, the appearance of consensus may well be a mask for domination. They style of consensual decision-making, cleverly manipulated, may legitimate a decision which, in substance, only serves dominant interests. One may assume that in most situations consensus would be "prefabricated", "contrived" or "manipulated". Yet, all in all, in most of the foregoing respects, the ideology of the professional justice, its structure and process are thus at fundamental variance with those of the lay justice.

The jati and village panchayats have a repertoire of sanctionswhich include fine, public censure, civil boycott, ostracism, and varied public opinion pressures by village notables and sometime by predominant groups in the area. The jati panchayats, additionally, have the very potent sanction of "outcasting" and "excommunication". Andre Beteille in his study of cheri panchayat (village panchayat) in Tanjore district village describes the range of sanctions thus: "Fines are levied for a wide variety of offences. For petty thefts, cash fines of small amounts are levied. Higher fines are levied for adultery and other sexual offences. Rape is regarded as a very serious offence and a special punishment is imposed in addition to fines. The culprit has his face smeared with soot, a bucket containing mud is placed on his head, and he is made to go around the cheri (area) in this guise, while a drum is beaten along the route. This is considered the most degrading form of punishment (Beteille, 1969: 63–64)." Primitive? Strange? May be. But social stigmatising is the essence of all sanctions: here it takes a culturally specific form, which is also highly functional. (Similar adaptations of social censure as sanction are to be found in the Russian law – e.g., the famous "windows of satire".) Apart from stigma, public expression of penitence, self-correction assurances also serve as sanctions.

One striking example of a new kind of sanction is provided by the Lok Adalat at Rangpur. When disputants are sent an "invitation" to join the meeting of the Adalat, the last paragraph of the notice reads: "You surely know (appreciate) that expensive and frequent visits to law courts are not in the interests of us poor farmers". One may conceptualize this kind of admonition as a sanctioning device itself. Indeed, in the inter-subjectivities of the villagers, such a statement might imply that if a party does not even appear before the Lok Adalat, the

Adalat itself may encourage court action or, at any rate, it may not discourage such action. Conceptually, then, the threat of recourse to the instrumentality of the state legal system is itself stressed and apperceived as a sanction, whose very probability generates compliance. This is a rather unique phenomenon wherein the non-state legal system appropriates the intimidating paraphernalia of the state legal system to sustain and enhance its continual efficacy, viability, legitimacy and even hegemony. Of course, parallel processes may be perceived in conflict resolution through out-of-court settlement, private arbitration and other forms of mediation. But the striking peculiarity of the Lok Adalat summoning procedure is that it directly employs the threat of formal litigation as a self-conscious sanctioning process to an extent that the range of choices for alternate means of resolution is endeavoured to be effectively eliminated or at least minimized. This indeed is the very definition of "force". To the extent the threat to recourse to litigation actually operates to reduce parties' choice of action, we have surely an operation of sanction (Baxi, 1976b: 83–86).

The effectivity of sanctions is an empirical question, which has not been closely examined in relation to NSLS. Recalcitrance is both conceivable and likely: its incidence is however unknown. Isolated examples also suggest that the dominant group members or resourceful persons can by acts of defiance occasion changes or bypassing or even momentary collapse of sanctioning processes. But overall, the strength of collective conscience or sentiment in the village (and caste) contexts cannot be gainsaid.

4. Conflicts of values and interests

The NSLS (especially the jati and village systems) no doubt reflect distinctive patterns of social organization and consciousness. The constitutionally desired (proclaimed) social order seeks to foster (in part) through the operation of the legal system the value of equality: whereas the Hindu caste system is based on the principles of hierarchy, religiously and "culturally" sanctified and legitimated. The Hindu society, in Andre Beteille's evocative words, is a harmonic system where inequality exists and is perceived to be legitimate whereas the constitution ushers in a disharmonic system: inequalities exist but they are no longer legitimate (1974: 196) Bernard Cohn has maintained this sort of contrast insistently: "The adversary system has developed to equalize persons in court. To an Indian peasant, this is an impossible situation to understand. The chamar knows that he is not equal to Thakur . . . the Thakur cannot be convinced in any way that the chamar is equal, but the court acts as if the parties to the dispute were equal" (Cohn, 1959).

It would be too much to say that equality is a new concept for Indian culture, as the foregoing sets of contrast do ultimately suggest. What is distinctive about the constitutional vision of equality is in fact a total assault on the pervasive principle of social stratification based on status (and, therefore, mobility) ascribed at birth in a particular jati. The constitution abolishes untouchability, makes discrimination based on untouchability an offence: it forbids sex, caste, religion based discrimination and assures equality of opportunity in public employment. All this is done by way of assurance in the nature of justiciable fundamental rights. Opposed to all this, of course, are the myths and philosophies of an old social order which (not unnaturally) continue to persist. As has been often observed, neither the untouchable in the village nor his high-caste Hindu master can really understand how they can be equal with each other. Discrimination, ex-communication and outcasting continue. Women continue to be treated as being of inferior status to men, markedly in the rural areas, although there are laws guaranteeing more or less equal succession rights for Hindu women, or

prohibiting bigamy, or proscribing dowry. Wage-discrimination based on sex is notorious. The values of a resilient "culture" are in constant struggle for hegemony over those of the constitution.

But conflicts of value go even deeper than those contrasts between state and non-state law indicate. Professor R. S. Freed has presented one aspect of such conflicts in his study of village life in North India through the case of Maya. Maya, a married but illicitly pregnant girl, was killed by her father because he believed that his Dharma qua father obligated him to do so for the spiritual well-being of her soul. The sooner her sinful phase in the cycle of births and deaths was terminated, the better would her prospects be in the endless cycle of birth and rebirth. He reasoned also that Maya, if allowed to live, will be ex-communicated from the village sbciety and end up as a cheap urban prostitute, a life full of unmitigated misery. Everybody in both her in-laws' and his village agreed – so much so that two of the kinsmen of Maya's father who were police constables did not do anything to activate legal process. The police visited the village twice but did nothing. Village law was here in sharp antithesis to state law: and the latter, more or less yields to the former (1972: 423–435). Dharma thus conceived, is the legitimating principle of this NSLS which diverges sharply from the democratic belief system sustaining the SLS.

Not all experiments in local law and justice raise perplexing philosophical conflicts as the case of Maya. Some illustrate merely unredressed forms of lynch-justice as the well documented case of the cowherd illustrates. The cowherd committed two "sins": one of covertly cohabiting with a Brahmin's young third wife and his compounding this offence by leaving Brahmin's house by the front door (instead of the back door, as befitted his status). He was first castrated and then killed for this "sinful" behaviour; no official action followed (Gough, 1955; 40; Cohn, 1965: 90). Examples of lynch-justice abound. These indicate the countervailing power of caste and local notables over the state legal system.

On the other hand, well-organized local legal systems may often almost altogether "oust" the state legal system and provide an almost idyllic alternative as is shown by Lok Adalat (People's Court) in Rangpur, North Gujarat – a tribal belt of about 10,000 villages mostly irradiated by the Sarvodaya (Lit. uplift of all) ideology of bhoodan and gramdan (Voluntary gifts of lands and villages for redistribution of common use). Almost all disputes in the region are referred to the Lok Adalat. In the last 25 years, it has settled more than 25,000 disputes. The very fact that the case is brought before it is often enough a valid ground for adjourning proceedings in official courts. Adjudication is done with substantial public participation: each session is attended by 300–400 villagers. The Court's decisions are rarely disobeyed. This is because of their intrinsic fairness and community involvement. In some ways, this Court achieves a quality of justice still sought for by the state legal system: for example, it more effectively protects women's equal rights of inheritance, matrimonial property, etc. The Court's criminal justice system already provides for effective compensation for the victims of crime which is still on the legislative anvil. Its rehabilitative techniques are much more advanced in some respects: a murderer is "punished" to look after the widow and minor children of the victim for a term of years under close supervision of the local community whereas his imprisonment in the official legal system would have rendered both families destitute. The Lok Adalat experiment also illustrates other dimensions of relationship between the state and non-state legal systems. Often, dispute institutions generale and sustain broad based leadership patterns which promote developmental activities – both economic and social. It was through his role as a mediator in village disputes that the leader of the Lok Adalat, Shri H. Parikh (an eminent Sarvodaya worker) attained legitimacy, and a degree of charisma. In turn, he used Lok Adalat to translate his vision of socio-economic reform by making it a

vehicle of reform-oriented adult education. He made the adjudicatory occasions into educational ones, both through actual decisions and plain preaching on many themes – family planning, ill-effects of overconsumption of alcoholic drinks, honesty in credit transactions, civil liberties, irrationality of belief in witchcraft, equality of women, agricultural innovation, etc. Today, the area of about 1000 villages has witnessed remarkable socio-economic changes partly forstored and sustained by this kind of didactic adjudication. In this sense, perhaps more has been achieved by mobilization of lay justice for development than by insistence on adoption of professional justice, as is illustrated by the state's abortive attempts at formalizing village justice through the statutory nyaya panchayats (See Baxi, 1976a). The Lok Adalat is not an isolated phenomenon, although it may be in several respects, unique. On a lesser scale, quite a few such experiments exist. Moreover, not too dissimilar functions (of promoting welfare, development, status mobility) have been and are being performed by jati panchayats (caste dispute institutions) as noted by several sociologists and anthropologists. When they perform such functions, as they increasingly do, both in adjudicatory and other contexts, the jati panchayats supplement the role of state in bringing about social change, although they do so on the basis of caste loyalty and patronage.

It would be misleading to assume the conflicts between state and local legal orders are merely conflict of values; there are also conflicts of interests. Adoption of constitutional values naturally calls for sacrifice of personal or group interests, which are clearly not acceptable to those in positions of higher class, status or power. Some would even say that what are spoken of as values are nothing more than rationalizations of interests of vested interest groups. Cohn's approach – or generally the cultural approach – is ultimately an aspect of social system perspective towards the NSLS. The actor approach, stressing interests rather than values, is steadfastly pursued in the Indian context by Robert Kidder. Of course, his universe of study is not comparable to Cohn's (Cohn studied villagers in North India; Kidder's focus is on "outlying districts" of Banglore in South India). But the overall contrast holds. Kidder is certainly correct to the question Cohn's assertion that Indians recourse to the court system of SLS demonstrates "manipulation", use of courts not "to settle disputes but to further them" (Cohn, 1959: 155). Such a view, according to Kidder (and I agree) misjudges "the importance of constructive force in social interaction". It also ignores "the opportunity structure which is created by systems of formal adjudication" (Kidder, 1973). This opportunity structure arises from "the failure of adjudicative ideal". The administration of justice in India is shot through with delays (Kidder notices average delay in civil suits in Banglore Courts in 1967–67 to be slightly over 17 years). Paradoxically, this delay, and frustrations attendant upon it, are utilized by the adversaries to wage a war of attrition in which the idea is not so much to win the case but to maximize the opportunities for a substantially favourable compromise outcome, outside the SLS, and perhaps mostly through NSLS. Manipulation of delay is being regarded by those affected as being the "intentional product of a shrowd adversary". To the extent this aspect becomes the folklore of state law systems, the NSLS may well persist as alternate opportunity structures. But the capital point here is that the cultural approach helps us overlook mobilization of state law in the pursuit of material interests and of dominance. (For the recurrence of this theme in a related context of legal anthropology, see Sally Falk Moore, 1966: 615–24.)

Be that as it may, we must also note that the limits of state power, authority and law are not set just by values and interests but also (and perhaps no less decisively) by the level or organization of efforts. Most "developing" countries are poor (appallingly so, as in the case of India, where a large number of people do not have means of bare subsistence) we immediately perceive that the level of poverty affects adversely the reach of state law and the

quality of its justice. Investment in administration of law and justice is not (and probably cannot be) a high priority item in national budgets of poor societies at the very time when they have to resort to the machinery of law to initiate the foster social change. This is one among the many paradoxes of social change in developing societies. All this means, of course, that there are not enough courts, constables and lawyers – carriers of official law – in poor societies. Thus, for example, in India (according to one estimate) there are only 183 lawyers per one million of the population as against 507 lawyers in the United Kingdom, 1595 in the U.S.A. 947 in New Zealand, 638 in Australia and 769 in Canada. Indeed, some areas in India have no lawyers at all; and inter se distribution of lawyers within India reveals even striking disparities (Galanter, 1968–69: 201). As regards police, in 1971, according to the official estimates, there was one policeman for every 800 persons in India; but the distribution is uneven between the rural and urban centres. The average jurisdiction of a police station is about 200 square miles covering 100 villages and a population of approximately 75,000 persons. It was estimated in 1950s that police stations were, on the average, about 8 miles from any village (Bayley, 1969: 79–80). The state legal system, pervasive in urban areas, is only slenderly present in rural areas. The low visibility of state legal system, and its slender presence, renders official law (its values and processes) inaccessible and even irrelevant for people. Other factors (such as the language of the law, which is alien to about 95 % of the people) compound the distance between the state's law and people.

5. Evaluation of NSLS

Ideological compulsions – leaping before looking – have often led to evaluations which characterize most NSLS as problematic in terms of their justicity (that is, values of due process, reasoned elaboration and substantive justice values). Lack of hard data in relation to the NSLS may be irrelevant to cafeteria or armchair evaluations but it is an obstacle to informed and thoughtful judgment. The latter kind of judgment was arrived at by Professor D. F. Honderson after a close study of the institution of Choetei and general conciliation processes in Japan: "... the excessive use of conciliation stunts the growth and refinements of the body of rules necessary to sustain complex community life; it dulls the citizens' sense of right, essential to the vindication of law. It may also allow old rules and social prejudices which new legislation has sought to abolish, to influence the outcome of disputes; or it may allow a new regime to ignore the law in favour of its policy ... In other words, conciliation is neither conservative nor progressive in principle; it is simply unprincipled. It may favour the powerful over the weak, in the name of bargaining; it ordinarily forces the plaintiffs to discount their claims; it may operate to compromise large scale group interests which might be better handled by forthright reform legislation. In short, conciliation is only an adjunct to, not a substitute for, legal order; and if relied upon excessively, it is not merely nonlegal – it has antilegal results ... It takes a legal framework to protect the voluntary character of conciliation and if it is not voluntary, conciliation will likely become in practice simply a standardless use of force" (Henderson, 1965: 241).

The foregoing sort of appraisal is common enough in discussions of most NSLS. The basic ideal-typical contrasts between most NSLS and the SLS are that the non-state law and dispute institutions may allow room for "prejudiced" rather than "principled" decisions; the NSLS may be swayed by power differential between parties; that in some ways NSLS are "antilegal". At this level, the case for cribling and even annihilating (if that were ever possible) most "dysfunctional" NSLS becomes impressive, if not compelling.

But such a comparison needs to be made at the same level. What usually happens is that the normative models of SLS are compared with the operative models of NSLS; this "dacoit track" no doubt yields preferred conclusions. But suppose we check this conclusion with accentuation of different aspects (behavior rather than value, reality rather than myth) of SLS. At the behavioral level, the picture begins to look more or less the same. Are the judicial (and legislative) decisions preeminently grounded in "principles" rather than "prejudice"? (Withess the inconclusive controversy over "reasoned elaboration" and "neutral principles" in relation to American judicial process). Are the SLS "law-ways" substantially free from "old prejudices" cancelling the objectives of social change through law? Do no power differentials between parties affect legal initiations and outcomes? Does not the volume of out-of-court settlements in civil cases, and of plea-bargaining in criminal matters, contrast sharply with the adjudicative adversary ideal? Does not the actually operative Crime Contral Model (as against the normative Due Process Model) involve fairly high incidence of "standardless use of force"? These are, no doubt, big questions; but the outlines of answers, in the available sociological literature, having already begun to point out the great gap between rhetoric and reality, between the proclaimed objectives and dysfunctional results. The lesson to draw from these ongoing explorations is not that there are no significant differences between NSLS and SLS but that these differences are of degree rather than of kind.

In conclusion, one must reiterate that the interaction between SLS and NSLS, and the context for it, is thus complex and many sided. Insofar as the NSLS derive their legitimation from belief systems sharply incongruent from those investing SLS with legitimacy, the multiplicity of NSLS may well pose limits to the legitimation of state power and authority. The resilient people's law may divert and even frustrate the goals of planned development articulated and pursued through the law. On the other hand, nation-building elites and "promoters" of "development" in the Third World need a sophisticated awareness of the undoubted potential of NSLS in achieving social transformation.

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