

DRAFT – NOT TO BE CITED OR CIRCULATED

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**Patterns of social power and the persistence of 'archaic' forms of dispute resolution
in contemporary South Asia**

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In 1974 Mark Galanter laid out the common paradigm for understanding legal systems as a set of eight propositions, before pointing out how unrealistic they were. The first of these was that governments were the primary if not exclusive, focus of legal controls, and the second that legal rules and institutions in society form a coherent whole, animated by common purposes and procedures. He then commented that these propositions it would be widely admitted that these propositions did not fit very well with the observed realities of the American legal system. Deviations were however, explained *ad hoc* rather than viewed systematically. (Macaulay et al 1995: 25-27)

A few years later, Simon Roberts wrote a survey of anthropological work on disputes and their resolution in the non-Western societies studied by anthropologists and proposed that all sorts of mechanisms that ensured the modicum of social harmony needed for the maintenance of societal processes be viewed as aspects of the legal system of particular societies even if these mechanisms included violent self-help by the aggrieved party. (Roberts 1979) This approach would however make it difficult to

discern where legal process ended and conquest or indeed genocide, began. A successful genocide brings about order of a sort after all as well.

South Asian society in the past few centuries shows us a situation where complex social and economic systems functioned with contending and contradictory legal processes. Colonial rule papered over these cracks and imposed a surface uniformity – though private adjudication and illegal violence remained vital to colonial government and economy, as evidenced by the continuing use of torture in tax collection and the exercise of personal coercion by plantation owners in many parts of British India. Older magnate groups also used direct coercion in their own way: so for instance, the landlord of an Ajmer *thikana* routinely inflicted chastisement on peasants who infringed his edicts, heedless of the Civil Code, CPC, CrPC or District Judge in Ajmer. (Gold and Gujar 2002)

Indian legal thinkers before the colonial era did not expect or require uniformity. So for instance, several classical law-givers stated that the king had to enforce even the impious laws of corporate groups upon dissenting members. (Majumdar 1969)

These practices did not solely originate in the segmentation characteristic of subcontinental society. I would argue that they also emerged as a function of the inability of governors to penetrate and control local society. Alternatively, local society itself responded too and infiltrated the institutions of the state. The management of dispute and deployment of surreptitious violence were part of the arsenal of governance; killing wild predators, assassination of internal rivals and apprehension of thieves all fell under *kantaka sodhana* – the removal of thorns.

Islamic conquests from the twelfth century onward did not affect these processes. They added new layers of separate laws and judicial bodies without removing earlier ones. The new judges were confined to the towns where most of the Islamized population resided and the kings (as Ibn Batuta testifies) handed out life and death as they saw fit. Localities largely managed their own affairs though periodically subject to cataclysms from the kings and the heavens (*asmani wa sultani*). Even quite poor complainants could go forum shopping, like the mother of a cowherd boy who went from the local administrator to the Qazi of Ahmednagar and up to the Pesva in Pune.

It was in this setting that local disputes and feuds were fought out and litigated in the Maratha country under the rule of the Adilshahi and Nizamshahi sultanates and subsequently under the Marathas. It is likely that the situation Elphinstone described at the end of the eighteenth century had long been current. In “common criminal trials no law seems ever to be referred to, except in cases connected with religion when Shastrees might be consulted. The only rule seems to have been the custom of the country and the magistrate’s notion of expediency.” This is borne out by archival documents (Jaitone case Guha 1995: 104-5). Another case illustrates both the autonomy of village society and the indifference of kingly power to how exactly its authority was enforced.

In the mid-seventeenth century when the two headmen of Karanjiya accompanied by a Gondnak, a Mahar (Dalit village servant) attendant went to the fort of Rohida to pay the village's taxes. In the fort, he got into a fight and beat up a state official. (It is possible that the headmen played a more active role in the affray than is reported here.) Then they all fled; the Mahar Gondnak prudently absconded. Soldiers came from the fort and arrested the two headmen and their kin, threatening to behead them all if the (or a) culprit

was not produced. The soldiers also demanded food and were lavishly entertained with goats' flesh and marijuana candy. Before passing out, they summoned the village Mahars and told them that if any of the prisoners or their belongings was to go missing, all the Mahars would be beheaded. The villagers then held a hasty council. None of the village Mahars would agree to confess to the offence saying "Admit guilt to the Diwan and have our heads and our sons' heads struck off? This cannot be done by us." Finally, the Gondnak Mahar who had been employed at the fort was found and entreated. "He responded: 'so I am to lose my head on your account – well, it is acceptable. But swear an oath on your ancestors as to what *watan* (hereditary patrimony) you will give my son Arajna□k and I will redeem you.' At that time we pledged our word to Gondnak "We will give [details of tax-free and village lands and fees omitted] ... Any of our lineage, father, brother, cousin or son who unjustly deviates from this promise is violating the oath sworn to Maha□kāla." Gondnak was executed. The two headmen then went to the same fort and had the agreement duly registered with the officer Dhond Deuji and the officers there. It is interesting that the officials explicitly pardoned the two headmen, and before registering the deed asked the currently serving village Mahar if the arrangement was acceptable to him. (Rajwade 2002, vol. 2:247-9)

Village estates – even the lowest - were thus often dearly bought and dearly retained. Violations led to feuds that spanned the generations and resulted in multiple murders. Many examples are found in the Marathi archives. For example, a dispute between cousins descended from the village lord Daya Patil resulted first in the murder of the cosharer Pakoji Patil. His widow strove to hold her share of the estate with the support of the villager accountant and the headmen of the merchants and weavers etc. But

the killer Samanji came back and murdered five of her supporters whereupon she fled the village with her infant son. The village passed from Adilshahi control to that Shivaji, then to the Mughals and back to the Marathas (roughly 1650s to 1729 but the feud remained unsettled despite various efforts at resolving it. State officials under several administrations seem to have seen the matter as one of resettling the village and ensuring that the feud did not lead one side or the other to side with an enemy power. (Rajwade 2002 vol. 2:261-272) Such durable conflicts could not be resolved by ever-changing government officials. Settlements were therefore often supported by the assembled worthies – either of the village or even of the county (*pargana*). Like the *jirga* the judgment would have been made in the presence and with the agreement of all those who counted in the relevant community such all local officials, heads and professions and castes, including craftsmen and Dalit village servants. This was also done in the case of all transfers of land and hereditary estate (*watan*). The analogy with contemporary cases is striking:

Sometimes series of *jirgas* take place when the peace is broken again and again. In July 1999, a *jirga* was held in the Circuit House at Sukkur to settle an 11-year-old dispute between the Maher and Jatohi tribes. This was the fourth consecutive *jirga* as the earlier ones in 1993, 1996 and 1998 had not provided lasting peace. By 1999, more than 100 people were said to have been killed between the two tribes. ... Tribal *jirgas* have no institutionalized enforcement mechanism ... (Amnesty 2002: 17-18)

So sometimes fines announced for future violations of the agreement as a deterrent.

The *jirga* system was evidently linked to the political structure of rural society. The tribal chiefs in their “official capacities, they speak the language of good governance, of the separation of powers which entails the respect for the independence of the judiciary and of human rights but in their constituencies they preside over tribal courts.” (p.19) In the 17th or 18th century such duplicity was unnecessary. Everyone recognized and operated with the political realities that made state-craft in great measure the management of local disputes and feuds to political and economic advantage.

The tribal chiefs in contemporary Sind were themselves using these for fiscal and political advantage. Local observers told Amnesty that

the system itself has lost its legitimacy as *sardars* have become corrupt, use *jirgas* to strengthen their political and social status and their hold over their tribe and have begun to accept a fee, a ‘donation’ for holding a *jirga* or retain part of the compensation paid to the victim. Some have also pointed out that, given the *sardars’* political roles in the official political system and its emphasis on political alliances, *sardars* are no longer neutral and in fact the more powerful tribes are favoured during *jirgas* with the weaker ones being intimidated. (p.32)

Here we see the inevitable entwining of local socio-political institutions with formal, state-level ones as well as traditional nostalgia for the authentically good days.

The parallel in North India is the *khap* gathering headed by caste leaders. Better communications and a more active Press have begun bringing more cases to light, especially those that culminate in murder. The councils have lately also begun to protest film and TV depictions of them and their activities. A careful study of one case published by Prem Chowdhry enables us to trace the social roots of these bodies in the ‘tribal’

councils of the dominant Jat community of western UP and Haryana. It also shows how issues of rivalry and dominance are played out in these bodies and their deliberations.

“It represents a direct attempt at retention of power by the caste leadership, which is fast being eroded and challenged by aspirants from different socio-economic strata as well as by the younger generation.” These leaders cannot as Chowdhry points out, interfere with landed property or business disputes; these would be pursued actively and in any case tend to divide the community.

Therefore periodically sparking ‘culture wars’ around marriage and honor help the traditional leaders demonstrate their power when they can no longer adjudicate matters of property or landownership. But this Hookah Party can, like the Tea Party nonetheless defy the state and influence electoral processes in a highly competitive setting. So Chowdhry points out, “Ironically ... the danger to Indian democracy stems from the grassroot level.” (Chowdhry 2004)

Conclusion

This paper began with Galanter’s perspicacious recognition of the limited extent to which actually extant legal systems conform to their Platonic ideal. I have adduced cases that stretch the ideas of both law and system to the breaking point. Let me now ask a different question – do these tell us anything about the conditions that place legal systems at various points on the continuum between (say) Sweden and Sind? An easy answer would be to say the political system, but that is also a societal product like the legal system. We may note, however that organized para-judicial institutions in India and Pakistan have been much stronger in the rural than urban areas. So urbanization is part of the answer.

The state's ability to directly tax the countryside has also been in steady retreat in both countries since the beginning of the twentieth century when the bulk of direct taxation fell on agriculture. Agricultural taxes are practically non-existent now and the bulk of tax income comes from indirect taxes and income-tax on business and the professions. Foreign sources of income have been budgetarily significant too. Weiner and Banuazizi noted some decades ago that states that tax their citizens are more likely to effectively penetrate local power structures. (Weiner and Banuazizi 1986: 12) But even this explanation has a degree of circularity: low taxation capacity is both cause and effect. So the varying configuration of legal function remains a moot question in the original signification of the word. Let me therefore present this problem to the Witanagemoot – the gathering of the wise here assembled.

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