4. Discipline, Repression and Legal Pluralism

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I

As an ardent exponent of the people's law, which I have conceptualised as non-state legal systems (NSLS),[1] I welcome the exposè on "a dialogue of shadows" between legal centralism and legal pluralism.[2] But I believe that, although liberal doctrine and dogma of interest-group pluralism has run aground,[3] there is no need to import this crisis into the domain of legal pluralism. While thinking on legal pluralism has been influenced, here and there, by liberal doctrine, literature on legal pluralism has, by and large, arisen from sociologists of law (including legal anthropologists) and comparative lawyers. No leading liberal political theorist has bothered much about legal pluralism, let alone with the relative autonomy of the law in an analysis of the state. Theorists of legal pluralism, therefore, need not develop pneumonia just because their liberal colleagues are beginning to cough.

Legal pluralism does indeed make certain assumptions concerning the nature of the state and civil society, but these assumptions are rarely tied to a specific version of interest-group pluralism, as was exceptionally and spectacularly the case with the 'theory' of interests developed by Roscoe Pound. As I understand it, the broad notion of 'legal pluralism' stands for the following core propositions:

1. there exists a distinction between the state and civil society;

2. however dominant and imperious, the state (that is, the bureaucracy, the police, paramilitary forces and the armed forces) is one among many social 'groupings' or 'orderings';

3. just as the state needs an apparatus of social control (institutions, ideologies, techniques - the law) for the institutionalisation of conflicts and their resolution, so do social orderings or groups other than the state;

4. the appropriation of the notion of law exclusively for the state is unjustified and untenable;

5. the assumption that the state legal systems (SLS) always exercise a hierarchical control over other forms of social ordering is misguided and misleading;

6. the relationship between the SLS and NSLS shows significant variations across time and space; ideal-typically, these relations may be (a) hegemonial; (b) antagonistic; (c) complementary and (d) symbiotic;

7. studies in legal pluralism explore the historic 'mix' of these varying relationships between the SLS and the NSLS;

8. legal pluralism studies reveal that both SLS and NSLS are massive abstractions; that, in reality, we have a multitude of SLS and NSLS, interacting with several manifestations of their own as well as of the opposite types;

9. just the SLS possess a relative autonomy in relation to the state - and each part of an SLS is relatively autonomous in relation to all others (e.g. adjudication and legislation) - there exists relative autonomy of each NSLS in relation to the SLS as well as in relation to all other NSLS in a certain polity.

These propositions do not provide us with building blocks for a general theory of legal pluralism. But they do indicate some central problems about the nature of law in the SLS and the NSLS, and, most importantly, about the nature of power. Indeed, the lack of adequate theorising concerning power mars many analyses of legal pluralism, and in particular the evaluation of the NSLS they propose.

II

Broadly, approaches to the study and evaluation of people's law (NSLS) can be labelled as 'scientific' and 'millenarian'. These approaches are ultimately informed by some general notions of power, although they often remain implicit. Indeed, they carry within themselves, articulated or not, far-reaching, specific assumptions about the development of power-structures, ideologies and forms of political organisation. The labels I designate do no more than to capture broadly the 'mood' of analysis. I present these approaches boldly and baldly (I hope not badly), without the sophistication of theoretical analysis which often accompanies their formulation and without much stress on their variation.

The 'scientific' approaches relate the present and the future of the people's law to

societal development. In order to appreciate the flavour of this approach, we have just to survey the theoretical landscape - Maine's seminal generalisations concerning a movement from status to contract (and a decline in certain forms of the law); the Savigny-Thibault debate on codification; Marx's and Engels' theorising (howsoever fragmentary) on law and modes of production (and ideologies); Weber's types-of-authority analyses; the spate of 'modernisation' and 'development' theories; and the more contemporary analysis of the place of law in modern society by Unger.

In all these we discern the progressive disappearance of people's law or the NSLS. 'Rationalisation of the Law', 'capitalism', 'socialism', 'modernisation' all entail not so much the withering away of the state and its law but rather the withering away of people's law. And this is, it is maintained, not merely inevitable but also desirable in itself. The NSLS are open to harsh assessment as instrumentalities of injustice, inequality, aggression and exploitation. They appear as historical 'residues', 'remnants', or 'anachronisms' which must be annihilated if they demonstrate undue resilience.

The 'millenarian' approaches, on the other hand, celebrate people's law as a constant reminder of social limits on the sovereign power of the state; and as a promise of the human potential to transcend the state and its repressive/ideological apparatuses. Studied variously as 'custom', 'living law' (the Ehrlichian "inner order of association"), '*Volksgeist*', 'indigenous law', 'informal law', 'private ordering of legal relations', 'revolutionary legality', the millenarian approaches ultimately stress the hope for a Utopia in which the state and its laws will disappear, whether through the Gandhian conception of *sarvodaya* (the emergence of the people's power of non-coercive self-regulation) or through a communistic society as envisioned by Marx.

Those adopting 'millenarian' approaches are, of course, not blind to the fact that people's law, too, can be repressive, exploitative and aggressive. But they believe that people's law has been deformed in this manner primarily by the exercise of the sovereign power of the state. State power, whether through 'centralisation' (repression/displacement/canalisation) or through 'totalisation' (cooptation),[4] transforms people's law in accordance with its own distinctive ends. The process of what Max Weber called, in a different context, the 'expropriation of the law', the confiscation of people's jural tradition, is, on this approach, basically responsible for the deformation of the people's law. In other words, it is the global domination of state power which arrests, deflects, distorts and denatures people's capabilities and potential for self-regulation.

Both 'scientific' and 'millenarian' approaches thus acknowledge the phenomenon of a deformation of people's law. The 'scientific' approach considers it inevitable and

desirable; the 'millenarian' approach considers it an unmitigated evil, and continues to assert against the state and its law the innate goodness of collective self-regulation.

III

The possibility that legal pluralism in any society may be as repressive as, if, indeed, not more repressive than, legal centralism needs to be seriously pursued in legal pluralism studies. Logically, people's law as an expression of the non-sovereign power of social groupings may be: (*a*) from the outset self-consciously repressive; or (*b*) deformed from its original liberating character into an instrument of repression.

History records a number of situations where people's law was consciously used and developed as an instrument of repression. Scriptural Hindu law institutionalised an inferior status for women, to the point of legitimating *sati*, child marriages, and even female infanticide. Classical Hindu law preserved and perpetuated the system of untouchability, in all its tyrannical rigour. Muslim personal law, even till today, preserves unilateral *talaq* (divorce), polygamy, differential inheritance rights, and no maintenance rights beyond customary *mahr*. In many Hindu communities, 'custom' requires the dedication of young women to a goddess (*devdasis* : a form of religious prostitution), and in certain parts of India it is the 'custom' that the first night of a young woman married to a landless labourer belongs to his master. In certain groups, there exists a 'custom' of castrating young persons, making them *hijras* (eunuchs). 'Customary' rights to free services of labourers and artisans by dominant castes are also widespread.

There is no point adding to this list; every society has its own list of repressive features in its NSLS. But, since the above examples refer in a most cursory manner to very complex social traditions and social orders which need to be carefully decoded and deciphered, it would certainly be worthwhile for comparative lawyers and legal pluralists to essay cross-cultural studies of the repressive profile of people's law. Yet, even without such an effort, it is significant that the bulk of the foregoing illustrations relate to women. This suggests a deep-seated conflict between legal pluralism and feminism. Pluralist social reality is, it appears, overwhelmingly oppressive of women. Moreover, the theoretical analysis of pluralism is also, not unaccountably, usually cast within the dominant ideology of patriarchy. It is therefore likely that the state and its law currently offer, at a pinch, a more promising arena of struggle for the emancipation of women than is offered in the domain of the people's law. On the other hand, this may give rise to attempts to augment 'legal centralism' and state power in such a way as to generate, in the course of time, more impervious forms of patriarchy[5].

The second logical possibility, where a genuinely emancipatory movement of people's power and law is deformed into a system of repression, is also frequently encountered in history. A striking example of this is provided by the situation of the Dawoodi Bohra community in India. Originally a Shia sub-sect (Ismailis), constituted around the 8th century A.D., it waged an impressive underground movement against the Abbasid empire - a movement which protested against the 'ossified' Islamic ideology of the Sunni rulers. It has now become a tyrannical theocracy wielding enormous coercive power against those members of the community who continue to protest in the true spirit of the movement. The head of the community, Syedna, virtually constitutes 'a state within a state', levying taxes from conception (all pregnancies have to be registered and a tax paid on behalf of foetuses) to grave. Violation of the fiats of the Syedna entails not merely swift and fierce 'official' sanctions, including excommunication, but also the mobilisation of loyalists for infliction of censure, shame, humiliation and lynch-justice[6] .

Similarly, the role of people's power and people's law in insurgency is highly ambiguous. On the one hand, they represent emancipatory resistance; on the other, a reign of terror. A basic norm of the NSLS in insurgency situations is: 'punish the enemies of the people' - and this includes especially co-insurgents suspected of betrayal; 'death to the traitor' is a fundamental doctrine of any insurgency movement. Furthermore, the historic conditions of insurgency rarely allow discrimination between different forms of dissidence (from non-conformity to downright treachery). Yet, punishment in these cases is not merely a form of repression, it is, at the same time, an expression of 'solidarity'. If the need for solidarity and the fear of betrayal constitute a "well defined element of rebel consciousness",[7] the insurgency NSLS legitimates a perplexing mix of repression and terror at the very heart of the quest for social emancipation.

The recent events in Punjab illustrate the different facets of the repressive potential of NSLS. Bhindranwale skilfully used the existing NSLS of the Sikh religious community to occupy the Golden Temple, first as a sanctuary immunising him and his followers from the processes of state criminal law on charges of murder of the leader of Nirankaris (a Sikh sect which proclaims that the succession of the Guru has not ceased after the tenth Guru), and then as a base which could be developed into a state within a state. His will became the supreme law not just for his followers but also for the operatives of the Temple and the Akali party. The Sikh NSLS, with its powerful sanction of *hukumnama* (an edict passed by five religious heads of the Temple and leading to self-correction or excommunication) proved voiceless and powerless before him. He organised and operated a para-military force and directed the execution of people on the 'hit list' - mostly Sikhs, but also Hindus, who dared oppose his views, and even police officials. For those of his followers who seemed to him to deviate from the path there awaited gruesome torture and

execution even in the Temple premises. The ideology of insurgency was tinged with the politics of terror.

Significantly, Bhindranwale espoused not merely an autonomous Sikh state but also demands for a revival of Sikh personal law (discriminatory against women) and an amendment of Article 25 of the Indian Constitution which included Sikhs within the definition of Hindus for the purposes of throwing open places of religious worship of a public character to all classes and sections of Hindus (essentially an anti-disability, anti-untouchability measure). If these demands were more than mere tactical devices for the consolidation of power and law in the Bhindranwale NSLS, if they were part of a permanent political ideology, then it can be said that terror was used as a means to institutionalise the repression of certain minorities. The phenomenon is altogether too recent and too complex to be analysed within the scope of this paper. But it highlights the fact that subversive recodifications of power, through the marshalling of one group's power and law, may not merely be repressive but also regressive, both in intention and in impact. The Bhindranwale NSLS is 'regressive' because it revives the idea of 'sanctuary' which in its religious aspects has been abandoned by humankind (although it has been secularised and preserved through institutions such as diplomatic immunity); and because it seeks to revive through the politics of terror both male-domination and caste-domination.

These illustrative domains contain, of course, a wide variety of NSLS. They also contain possibilities of wide-ranging interaction with state power and law, an aspect we have not here analysed. Perhaps in any typology of the NSLS one would have to distinguish sharply the insurgent/revolutionary forms from all others, because they want to achieve the overthrow of a ruling elite, if not a fundamental transformation of the whole political power structure. Such NSLS thus provide examples of non-sovereign power struggling to become sovereign power. Nevertheless, it seems likely that all NSLS are repressive of women and various minorities. It is also clear that such minorities can develop their own NSLS which repress intra-group dissidence and punish it with a heavy hand and yet, curiously, may enjoy relative autonomy from state power and law on grounds of the freedom of conscience and religion (that is, legal pluralism).

To what extent the repressive (and terrorist) repertoire of NSLS can be explained as 'deformation' induced by dominant classes and to what extent this 'deformation' may be perceived as coded within their very structure are questions which require searching analysis in the study of legal pluralism.

Here I can only stress that people's power and people's law are potentially as

repressive as state power and state law. If this elementary fact needs to be highlighted, it is only because the term 'people' as an abstraction - as opposed to the term 'state', another abstraction of the same magnitude - often misleads one into thinking that if 'state' power and law are at bottom repressive, and immersed in the alchemy of violence and terror, then somehow 'people's' law and power, standing in opposition to them, must be innately good. Both theoretical and historical analyses tend to show, however, that the state structure is, all said and done, "non-monolithic and contradictory",[8] and that the same applies to the structure of 'people's' power and law which represents the non-monolithic and contradictory movement of 'masses' on their way to becoming 'classes'.

IV

A similar caveat is necessary in relation to theories of power. Legal pluralism is simply incomprehensible unless we posit a plurality of power-structures. But positing this in no real way enhances analysis. Nor is the distinction between 'sovereign' and 'non-sovereign' power sufficiently articulate. Legal pluralism certainly goes beyond the posing of the problem in terms of state and state law. It must maintain, *à la* Foucault, first, that "for all the omnipotence of its apparatuses" the state is "far from being able to occupy the whole field of actual power relations"; and, second, the "state can only operate on the basis of other, already existing power relations". The state is "superstructural in relation to a whole series of power networks that invest the body, sexuality, the family, kinship, knowledge, technology" etc.[9] It would then be the task of theorists of legal pluralism to identify the nature and the forms of power relations which "pre-exist" and "co-exist" with the meta- or sovereign power of the state, which constantly interacts with the "micro-mechanisms" of social (non-sovereign) power operating at all levels of society.

Foucault has characterised these pre-existing power relations as non-sovereign because they do not involve sovereign-subject relationships. Since they lie outside the form of sovereignty, they therefore constitute a different form of power, namely disciplinary power.[10] Foucault does not identify discipline with a particular institution or apparatus but sees it as a distinct type of power:

> comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a 'physics' or an 'anatomy' of power, a technology. And it may be taken over either by 'specialized' institutions..., or by institutions that use it as an essential instrument for a particular end..., or by pre-existing authorities that find in it a means of reinforcing or for reorganizing their internal mechanisms of power..., or by apparatuses that have made discipline their principle of internal functioning..., or finally by state apparatuses whose major, if not exclusive, function is to assure that discipline reigns over society as a whole...[11]

In a later work, Foucault observes that discipline ensures an infinitesimal distribution of power relations, and that it is "in every aspect the antithesis of that mechanism of power which the theory of sovereignty described or sought to transcribe". A "right to sovereignty" and a "mechanism of discipline" define the "arena in which power is to be exercised"; but "these two limits are so heterogeneous that they cannot possibly be reduced to each other".[12]

Discipline as a 'technology', seeks to achieve a "tactics of power" which exercises

> power at the lowest possible cost (economically, by the low expenditure it involves; politically, by its discretion, its low exteriorization, its relative invisibility, the little resistance it arouses)...[It also wants to bring] the effects of this social power to their maximum intensity and to extend them as far as possible, without either failure or interval...[and to increase] both the docility and the utility of all the elements of the system.[13]

Students of NSLS would be instantly at home with this description of the "tactics" of disciplinary power. Foucault might well have been summing up the key characteristics of the sanctioning process in most non-insurgent NSLS. For example, Guha has shown, in fascinating detail, the forms of subjection and trajectories of disciplinary power in Indian society. He has shown how verbal and non-verbal forms of subjection and domination are continually maintained and reproduced and how deeply they are imbued both with patriarchy and with a hierarchical division of men in Hindu society.[14] He has, indeed, provided a history of what Foucault would call "micro-mechanisms of power", through which dominance is operated constantly and unfailingly.[15] Guha demonstrates:

1. how verbal deference functioned to sustain patriarchy (e.g. the total ban on women from calling their husbands and a few relatives by name);

2. how virtues of non-verbal deference (rising, prostrating) were continually imposed;

3. how temporal distances reinforced patriarchy (e.g. women to eat always after men) or rules of precedence which sustained caste/class hierarchy (e.g. on ritual occasions);

4. how dress provided an index of dominance (e.g. wearing of the turban or pagree the sole privilege of certain communities; members of other communities daring to wear a turban were disciplined).

According to Foucault, disciplinary power constitutes 'counter-law'. While the state law "masks" its dominant power by the "establishment of an explicit, coded and formally egalitarian juridical framework", disciplinary power, "the dark side of these

processes", produces essentially "non-egalitarian and asymmetrical" systems of "micro-power". Indeed, he claims that disciplinary power has the "precise role of introducing insuperable asymmetries and excluding reciprocities". These "minute disciplines" represent the "political counterpart of the juridical norms according to which power ...[is] redistributed".[16]

Yet, Foucault insists that this characterisation of discipline is inadequate, for:

> We must cease once and for all to describe the effects of power in negative terms; it 'excludes' it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.[17]

In other words, we must "try to grasp subjection in its material instance as a constitution of subjects".[18] Seen in this light, both law and counter-law, that is, both SLS and NSLS, create subjection: the SLS with its meta-powers of great general prohibitions and the NSLS with all its paraphernalia of "polymorphous techniques of subjugation". The domain of law should be viewed, says Foucault, "not in terms of a legitimacy to be established, but in terms of the method of subjugation that it instigates..."[19]

Studies in legal pluralism, according to this view, thus have to explore not merely the nature of power of the SLS and the NSLS, but, and crucially, the forms of subjugation, in their complementarity and contradiction. Their analytical scope must also extend to an understanding of how the micro-mechanisms of power "have been and continue to be invested, colonized, utilized, involuted, transformed, displaced, extended...by ever more general mechanisms and by forms of global domination".[20]

V

If we accept this account of social power all talk of 'deformation' in people's law is misconceived and misplaced. Small-scale legal systems which constitute 'counter-law' have to be recognised as producing coercive social reality, just like the legal systems of the state. It must also be acknowledged that struggle against discipline is no less necessary and important than revolution against state power. Perhaps it is even more urgent, for if the state consists of the "codification of a whole number of power relations", subversive and even revolutionary recodifications of power, Foucault warns us, may leave the power relations which form the basis for the functioning of the state essentially untouched.[21]

Theorists can only explain the nature of legal pluralism; it is the task of rebel consciousness to seek to change it. But at least legal pluralism can be explained in such a manner as would facilitate the gradual development of insurrectionary jurisprudence, of alternative forms of legality, based on an imaginative, strategic and tactical inversion of the structures and ideologies of both sovereign and non-sovereign types of power and law.

Notes

1. See U. Baxi, *The Crisis of the Indian Legal System* (New Delhi, 1982).

2. See M. Galanter, 'Justice in Many Rooms', in M. Cappelletti (ed.), *Access to Justice and the Welfare State*, Sijthoff, 1981, p.147.

3. T. Lowi, *The End of Liberalism : The Second Republic of the United States* (2 ed., New York, 1979).

4. See G. Therborn, *What Does the Ruling Class Do When it Rules?* London, 1978, pp.219-40.

5. See U. Baxi, 'Patriarchy, State and the Law', paper presented to the Second National Conference on Women's Studies, University of Kerala, December 1983.

6. I. Fera, 'A Law unto Himself', *The Illustrated Weekly of India*, 19 November 1983.

7. R. Guha, *Elementary Aspects of Peasant Insurgency in India*, Oxford, 1983, pp.197-9.

8. See B. Santos, 'Popular Justice, Dual Power and Socialist Strategy', in B. Fine *et al.* (eds), *Capitalism and the Rule of Law : From Deviancy Theory to Marxism*, London, 1979, p.163. See also N. Poulantzas, *Political Power and Social Classes* (London, 1975).

9. M. Foucault, 'Truth and Power', in C. Gordon (ed.), *Power/Knowledge:Selected Interviews and Other Writings 1972-1977*, Brighton, 1980, p.122.

10. *Ibid.*

11. *Idem*, *Discipline and Punish : The Birth of the Prison*, translated by A. Sheridan, London, 1977, pp.215-6.

12. *Idem*, 'Two Lectures', in *Power/Knowledge*, see *supra n.* 9, at 104-8.

13. *Idem*, *Discipline and Punish*, see *supra n.* 11, at 218.

14. R. Guha, *op. cit. supra n.* 7, at 29-76.

15. See, for example, M. Foucault, 'Two Lectures', see *supra n.* 12, at 101.

16. *Idem*, *Discipline and Punish*, see *supra n.* 11, at 222-3.

17. *Ibid.*, p.194.

18. *Idem*, 'Two lectures', see *supra n.* 12, at 97.

19. *Ibid.*, p.96.

20. *Ibid.*, p.99.

21. *Idem*, 'Truth and Power', see *supra n.* 9, at 122-3.