A NOTE ON CASTE PANCHAYATS AND GOVERNMENT COURTS IN INDIA:

Different Kinds of Stages for Different Kinds of Performances

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With the consolidation of British rule in India, the Indians took with great enthusiasm to the court systems instituted by the British, to the point where "traditional" law can be considered to have been displaced (Galanter 1968), and the British-derived legal system can now be seen as indigenous to modern India (Galanter 1972 and 1973). Indian dissatisfaction with courts has also been prevalent, however, even during the period of the displacement of the traditional systems (Kidder 1978). This has lead to periodic reform demands that the Indian legal system should return to its traditional roots, specifically by the creation of panchayats, or councils, to handle disputes within villages (see Galanter 1978). Such nyaya panchayats (from Sanskrit nyaya, "justice, law virtue, equity, righteousness, honesty") were in fact created by the government in the 1950s but they have generally been regarded as failures, marked by declining caseloads and user disaffection (Baxi and Galanter 1979; Meschievitz and Galanter 1982).

It is fair to ask why these attempts to "revive traditional justice" failed. Galanter (1972) has pointed out that, for members of India's elites, the present system is comfortable; they do not really want change. He and his colleagues have also pointed to various structural and logistic shortcomings in the new, government-created panchayats (Baxi and Galanter 1979; Meschievitz and Galanter 1982). Yet I think that there are also other, cultural reasons for the failure. The rhetoric surrounding the creation of these nyaya panchayats sees them as returns to an improved form of traditional justice (Baxi and Galanter 1979: 344-358). In fact, traditional and modern panchayats are similar neither in their mode of operation nor in the tasks generally ascribed to them. The business of both the lawyer and the śastri is (to borrow a famous expression), "how to do things with words", but the "thing" to be accomplished is quite different in traditional panchayats from what it is in modern, court-like nyaya panchayats.

What, then, are these "things", the tasks accomplished in courts and in panchayats? To start with courts: courts "do" many things (Galanter 1981), but perhaps their model task is to determine facts through a process of hearing evidence; when a factual situation is determined and appropriately categorised, legal consequences follow more or less automatically . For example, one was, or was not, negligent in regard to an unfortunate event, or did or did not enter a store at night and without permission. Once the category is known, a consequence can follow: a declaration of liability or of criminal guilt, and pronouncement of a civil or criminal penalty. This seems unremarkable, as in our conceptual scheme legal categories are normatively loaded, and if the category applies, then the results are both known and clear. Thus, the verbal "thing" done by lawyers is to fit actions with legal categories (or, from the other side, to avoid such a fit), as the determination of the category mandates the outcome.

If we look at traditional caste panchayats, a different picture emerges. First, it seems that in most cases the determination of "facts" is not necessary. The participants already know what happened in a given matter (Cohn 1959: 83; Hayden 1983: 295). Instead, argument centers on the normative value to be assigned to the known act (Hayden 1981). Panchayat is a process of extended discussion towards that end (Cohn 1961: 617). The verbal "thing" accomplished by a panchayat speaker is the normative evaluation, or characterisation, of the acts in question. Where a court seeks to determine what happened and then applies a categorical label to the behavior thus found, the panchayat takes known behavior and weighs its propriety. If we accept the dramaturgical metaphor, courts and panchayats are different kinds of performances, and our task is to outline the different components of natya śastra (Sanskrit, "science (śastra) of performing arts") which determine them.

Normative arguments in the Indian tradition

If the tasks of courts and panchayats are different, it is likely that the normative frameworks invoked are also different. It is now generally accepted that the British were wrong in seeing the dharmaśastra as law, in the English sense of rules to be invariably applied by courts. Marc Galanter has described the role of the śastra as providing ideas which, though perhaps applied directly in royal courts, had their more important general effect by "filtering down" to the various sectors of society. He sees the relationship between "high", or royal, courts and other decisionmaking bodies as analogous to those between prestigious universities and small colleges in America: ideas filtered from one to the other, but without mandate (Galanter 1968: 67). Derrett,

reversing Galanter's metaphor, has called the śastra "a social norm-making medium applying a suction to all elements of Indian society ... which had not reached pure Brahmanical customs" (1971: 27). (1) Clearly, the śastra was used, even in the royal courts, as grounds for argument and persuasion rather than as rules mandating results.

The British did not, perhaps could not, see śastra in this way, but rather treated it as law in their own sense, thus creating the Anglo-Hindu law to be applied in the colonial courts. They caused a number of treatises to be translated and published, and used these as the basis for decisions (Derrett 1968: 225-320). They also used native law advisors until 1864, when judicial knowledge of Hindu and Muslim law was assumed. Thereafter, cases were decided on the basis of the translated texts and earlier case decisions, thus ending dharmaśastra as a "living science" (Derrett 1978: 49).

It is unlikely, of course, that the British ever regarded the dharmaśastra as a "living science", as they were trying to find rules applicable in all cases. The distortions caused by their reliance on treatises are well known (see Derrett 1968: 225-273; Rocher 1972). In fact, even when British judges consulted native law officers, they were interested in rules, and distrusted the complex arguments sometimes included in the advice of the pandits (here, an expert in dharmaśastra; also known as śastri) (see Derrett 1969: 135). The British approach was that of the common law: "foreign" law is a matter of fact, to be proved (Cleary 1972: 776-781).

If the śastra was not simply a set of rules, for uniform application in court, how, then, was it used? Unfortunately, as Rocher notes (1978: 1302), very little is known about the way in which judicial decisions were actually made in ancient India. However, we can get some idea of how the system worked from historial documents and ethnographic accounts.

Brahmin advisors did not function as judges, but rather as advisors on dharma (2): the proper conduct of the king in deciding the cases before him (Lingat 1973: 216-222). To this end, Brahmins maintained large libraries (see Steele 1968: 3-22) and cited texts to support their decisions (Derrett 1972: 26-27), but their style of reasoning was not that of the modern lawyer. Texts were cited to support arguments, but they were not of themselves considered to determinative (Derrett 1972).

The Hindu rules of interpretation were complex, and cannot be considered here in any detail (see Lingat 1973: 143-206). The pandits apparently tried to work out a just solution that could

be supported by reference to the literature and to custom (Lingat 1973: 141; Derrett 1978: 50; Derrett 1971: 16), a process which often involved considerable ingenuity in the marshalling and citation of supporting material. An example of the type of reasoning involved can be seen in an early Nineteenth Century opinion by a Madras pandit, probably for a maharaja's court, involving succession to a decedant's estate (Derrett 1967-1968; Derrett 1968a). The pandit cites a number of smrtis (Sanskrit, literally "tradition", here, the literature of the dharmaśastras and dharmaśutras, see Lingat, 1973: 13) and commentators to support both sides, without pronouncing any of them to be superior to the others. He also considers the custom of the caste involved in the particular case, pronouncing it repugnant to the smrtis. This leads him back to the contradictory texts, and a decision that, when there is no clear text deciding the matter (and he has rendered the otherwise clear texts unclear by his earlier discussion), the two parties involved must share the estate - presumably a just solution by local sentiment.

We should note that the pandit does not pronounce the decision, but rather recommends it to "the learned" as the way in which the matter should be handled. Further, the decision does not declare fault, or guilt. Instead, it determines that withholding a share (which one of the parties, being in control of the estate, has done) is a "sin", a condition with important spiritual connotations (Derrett 1967-1968: 538; Derrett 1968a: 276-277). What has been accomplished is not a determination of guilt, or responsibility for a factual matter. Instead, the pandit has arrived at a characterisation of the normative value of a party's action.

If this was the style of reasoning in the royal courts, then we should not expect the guru at the caste level to function as a judge, or even as a lawyer. We know that many castes, at least in South India, have or had gurus, members of higher castes who instruct the members of the client caste on the latter's proper dharma. Often these advisors are members of castes whose herditary function is to serve as gurus for particular other castes. Many of these gurus castes are Brahmin, but others may be low in prestige and ritual purity in the areas they serve. For example, Kameswara Rao (1978) has observed castes of nomads in Telengana, whose traditional occupation is to serve as gurus to the lowest castes in the area, who would not be served by Brahmins.

As Gnanambal has noted (1973: 198), the caste guru is different from the priest, who performs ordinary rituals. The guru is meant to be a spiritual preceptor, an advisor in the ways of dharma. Part of the traditional role of gurus seems to have been to assist caste panchayats in deciding cases of improper beha-

vior by caste members or disputes between them. In the Census of India for 1911, Mead and MacGregor (1912: 199-200) observed that many castes in South India referred their most troublesome cases to the heads of the large maths (place of residence of a guru, roughly similar to a monastery). This phenomenon was also studied by Gnanambal (1973) in the early 1960s. At the village level, Hiebert (1971: 103) notes that many castes in the village he studied in Andhra have gurus who pass judgments in panchayat, and this is also frequently found in the short descriptions of castes in many of the District Gazetteers in Maharashtra (e.g., Government of Maharashtra, 1976). The desirability of having Brahmins present as advisors or even as judges in the royal courts in classical Hindu political theory is well known (see Kane 1946: 269 ff); apparently their presence in case panchayats is also highly regarded.

Gurus were and are custodians or normative learning and they often are involved in handling cases of improper conduct by members of client castes (see Hayden 1981 and 1983; Gnanambal 1973; cf. Kikani 1912: 56-59). However, they do not necessarily support their decisions with reference to śastric literature. For example, the guru of the Nandiwallas, although a highly educated Brahmin, never cited śastric rules in giving his opinion in cases (see Hayden 1981 and 1983). It seems likely that Rocher correctly identified the means of transmission of śastric ideas as maxims (Rochter 1978: 1302), an idea in keeping with Galanter's and Derrett's views, noted earlier, on the connection of śastra to everyday life. It is clear that problems of dharma are not the same as problems of law.

Dharma is to law as panchayats are to courts

> The difference between a dharma-problem and a law-problem is simply this, that in the former case all considerations including the effect of various solutions upon the surrounding social circumstances, are taken into account at the point of decision, while a law-problem is solved by reference to pre-determined rules worked out without reference to particular persons, places or times ... and invariably obtained out of books and other printed paper! (Derrett 1978: 50).

The above quote from Derrett may overstate the rational model of western law, but it does nicely contrast the ideal types of dharma and law. I think it is best to extend the point, however: dharma-problems are infinitely varied, while law-problems are presumed to fit the limited categories provided in the formal law. Western law is based on a system whereby facts are subsumed

under legal categories. Once the former is found the latter follows, but no legal consequences can be imposed in the absence of a specific determination that the appropriate facts occurred. (3) The legal process, which seeks to fit the many varieties of behavior into a limited number of labeled categories, is quite different from the dharmic process, which uses an inventory of rules as a means of evaluating the varieties of conduct, but does not attempt to define uniform standards, or labels, for all situations.

If dharma-problems are thus so different from law-problems, we can expect that procedural systems designed to consider the two kinds of problems will also differ. And they do. Courts proceed in a linear fashion (Hayden 1982), from hearing evidence to pronouncing a verdict to giving a judgment, and the discourse in them is carefully structured towards this end. Thus, turns are ordered, overlapping speech is disallowed, and the entire process is aimed at limiting argument to the consideration of "relevant" information by "qualified" witnesses, the better to arrive at a correct determination of fact and therefore a correct application of law (see Atkinson and Drew 1979; O'Barr 1979 on the ordering of discourse in courts). In contrast to this, traditional panchayats are processes of discussion among many people which aim at a "consensual" evaluation (4) of the behavior in question on the basis of an assumed factual situation (see Hayden 1981 and 1982). The differences between the two ways of proceeding can be seen in the film Courts and Councils (Hess 1981), by comparing the scenes of the nyaya panchayat, which is clearly a court, with the caste panchayat (see Hayden 1982). In the former, the emphasis is on what happened as a question of fact, so that the law can be applied. In the latter, the entire process centers on how to evaluate, in normative terms, the events that all participants know have occurred. The nyaya panchayat proceeding is a kind of controlled exposition of events, while the caste panchayat is a much less structured argument on the meaning of events.

Conclusion

It is tempting to see courts and panchayats as analogous institutions because they deal with similar kinds of situations: improper behavior by someone in the population subject to the institution's jurisdiction. The literature advocating the revival of panchayat justice certainly sees no contradiction between the two kinds of institutions: it sees the nyaya panchayat as a kind of court (Baxi and Galanter 1979). We can conclude, however, that courts and traditional panchayats do such different things in such different ways that they can not be seen as analogous. The

attempt to create the one in the image of the other may succeed in forming a new kind of court, but these will not have the defining characteristics of traditional panchayats. It may be fair to say, then, that the attempt to revive indigenous institutions did not fail; it was never really made. Although the rhetoric surrounding them has called the nyaya panchayats "panchayats", they were clearly meant to be courts. And while they have not been successful as courts, their typically court-like mode of operation has precluded their being effective as panchayats. The two kinds of processes remain distinct: different kinds of stages for different kinds of performances.

Notes

1. The role of the śastra may thus have been similar to other traditions of ancient "law", and possibly to the role of Roman Law in medieval Europe: "not a system of actually enforced rules, but a type assumed by actual systems as their exemplar without corresponding in detail to any of them" (Pollack 1882, quoted in Jackson 1975: 495).

2. Dharma is a very broad concept, and the translation of it as "law" is at least misleading, if not totally incorrect. For present purposes, the most important connotation is "right conduct" (see Lingat 1973: 3-7).

3. It is interesting that plea bargaining in American courts may work in the reverse fashion: the prosecutor and defense attorneys agree on the normative value of the facts before the trial which would act to establish them, and then assign the matter to an agreed legal category (Mather 1979).

4. Consensus in these cases is likely to imply simply the cessation of opposing arguments, rather than agreement by all parties present.

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