THE IDEOLOGY OF POPULAR JUSTICE IN SRI LANKA: A SOCIO-LEGAL ENQUIRY. By NEELAN TIRUCHELVAM. [New Delhi: Vikas Publishing House. 1984. vi + 215 pp.]

THIS book is a valuable addition to the body of literature which offers case detail, social and legal context and (occasionally) grand theory, on the general subject of the sociology of dispute-resolution through court and court-like processes. It is almost impossible to draw a boundary around the published thought which might fall within or be relevant to this field. From a western lawyer's perspective one prominent current aspect of the field is the burgeoning literature on "alternative dispute-resolution": the search for methods of settling disputes without having to go through the formal judicial process. So great is American interest in this aspect of the field, that critics have dubbed the literature "the dispute industry".[1]

[1] See: Cain and Kulscar "Thinking disputes: an essay on the origins of the dispute industry" *Law and Society Review,* (1981) 375.

The modern origins of this literature can be found in the classic legal anthropologies which followed the second world war. These were essentially studies of courts and legal processes in tribal societies: North American Indians, Africians, Pacific Islanders, etc. Originally a sub-species of anthropology, "legal anthropology" has moved from its earlier attempts at documenting and explaining the judicial and "social control" aspects of tribal communities. Today, the techniques of micro social examination are deployed in modern societies, with the focus generally on the less formal and rigid processes of dispute-resolution e.g; socialist courts and disputing forums; dispute-settlement in revolutionary situations; and studies of the applicability of any or all of these processes to western settings.

This is necessarily an interdisciplinary field, involving "law", linguistics, history, anthropology, sociology, etc. As such, studies draw not only on observed social detail, but on a vast array of thought about order and conflict in society. It is the presentation of the observed detail about disputes (e.g.; how people dress, stand or sit when they argue, what "norms" they use, the language of debate, etc.), the integration of this detail into wider socio-economic and historical context, and the *explanation* of both detail and context *(i.e.* theory) which together mark the development of this field.[2]

Tiruchelvam's work offers something of all these aspects: social detail, well-researched historical and political contexts, and a wide comparative sweep. The focus of the study is on Sri Lanka, in particular on the statutory conciliation scheme introduced by the socialist coalition government which came to power in the late nineteen-fifties. This focus is set in the context of analogous experiences of 'popular justice' in socialist and developing countries. The author outlines the expressed ideals of 'popular justice' in these other contexts, and then compares ideals and reality in relation to the statutory conciliation scheme in Sri Lanka. To accomplish this comparison, he examines the history of "lower courts" in Sri Lanka, the ideals expressed in relation to the statutory conciliation scheme and the structure and processes of the scheme. Finally, he asks whether the ideals have been matched by reality.

Like 'ideology', 'popular justice' is not defined, but its essential ingredients are clear from the first chapter — the author is interested in those types of 'participatory' legal process which do not have the characteristics of being formal, rule-bound, professionalised and authoritarian, in the way that the western legal process of adjudication is often pictured today.[3] The nature of the inter-relationship between *ideas* about law and power (hence, presumably, 'ideology'), and the related *structures* (such as courts, tribunals, etc.), is bound to be complex, of course. As the author notes, even if different societies appear committed to "popular justice", there are important variations in what this means and how the ideals are to be achieved:[4]

> The different configuration of structural and functional features represented by each of these institutions points to differences in the legal ideology of these societies; which are in turn related to and shaped by their traditional and contemporary authority structures, and legal and social organisations.

2 Cf. Snyder "Anthropology, dispute processes and law" 1981 (8) *British Journal of Law and Society.* 141.

3 P. I of the work under review - all references to this work will be by

4 Pp. 1-2.

From the outset, thus, we see the author trying to tie together factual detail and explanatory theory: different structures and functions of courts tell us about different ideologies; in turn, ideologies are related to and shaped by old and new "authority structures", etc. My difficulties with *explanatory theory* are revealed at this early stage of the work and they are never satisfactorily resolved: the nature of the inter-action between "ideology" and "comparative court processes" is never itself tackled. Indeed, I felt in general that the work fell short of exploring and developing theory about this fascinating material. (Like the author, I suspect), I struggled to come to terms with what was posited as a relationship between 'ideology' and the actual operation of popular justice, whether in Sri Lanka or elsewhere. Was this simple 'is' *(i£.* social reality) and 'ought' *(i.e.* ideology), or was there something more the author was driving at? But one must be fair: the development of grand social theory was not the goal of the author. More modestly, he has endeavoured "to place an important phase in the socio-legal history of Sri Lanka against the backdrop of several socialist and developing countries."[5] This is undoubtedly achieved.

The book begins with the backdrop: Chapter 1 is a comparative overview of "popular tribunals" in a number of countries, divided into three categories. The first comprises the Soviet Union (and those stimulated by the Soviet experience, such as Poland and Cuba; also discussed here is the abortive attempt at creating neighbourhood tribunals in Chile). In the second, are countries where "indigenous inspiration" has produced judicial alternatives to the colonially-imposed British court structures (Tanzania, India and Burma). The third category is reserved for China, where popular justice is of 'a different order': interpretations vary between seeing this as continuing traditional conciliation and viewing popular justice as part of Mao's interpretations of Marxist-Leninist thought.

In conducting this comparative survey, the author has necessarily used a broad brush to illustrate the ideologies and structures of the different popular tribunals. He recognises that he faces a basic difficulty: viz., how to distinguish state rhetoric (one might add, propaganda) about popular justice, from what may well be the contrary reality that local courts are vehicles for the penetration of centralised rule. His warning is important: how does one know how far are Soviet "anti-parasite tribunals" examples of popular participation in justice, or the local expression of centrally-organised tyranny?[6] The author's goal here is to illustrate how the rhetoric is reflected in statutory structures of popular tribunals. But I felt that we are being offered two views of the same: offical rhetoric and the rhetoric of statute; neither tell us what takes place in a Soviet Comrades' Court. The same might be said of both the Cuban and Chilean sketches: how in reality do Cuban tribunals express "the power of the working people in the socialist state... educate the masses and protect the public order"?[7]

In short, I wondered whether simple recognition by the author of the problem of distinguishing (legal and official) rhetoric and the operational reality, was enough. There is an inherent tension in the notion of institu-

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6 Pp. 6-7.
7 Pp. 9-10.

tionalising popular justice to fulfil certain perceived socialist goals. I felt this needed to be explored more fully. However, as summaries of the public rhetoric (the 'ideology'?) which lay behind these popular tribunals, the sketches in all three categories are crisp and interesting. The common thread is the expressed desire for more "public participation" in the justice process, though there are other different social 'goods' and 'evils' which the tribunals are supposed to support/eliminate. Most significantly for the author, is the difference between those societies which see popular justice within some form of traditional framework, and those which see it as expressing (at times directly contradictory) socialist ideals. It is to probe this difference to which the author turns by examining the Sri Lankan example.

The village court of pre-colonial Ceylon, the Gamsabhava, represented the traditional' ideal for supporters of popular justice in the nineteen-fifties. The author traces the institution's precolonial history and its absorption into colonial 'indirect rule' (apparently fired by the ideas of Henry Maine — that reference itself raising fascinating questions about the effect of his legal-evolutionary ideas on the colonial judical systems).[8] The author looks at the authority suggesting that the Gamsabhava was more than a "purely judicial body" and that it combined "legislative and executive powers with the judicial".[9] I found the historical references interesting and the accumulation of evidence that the Gamsabhava was involved in land and other communal "government" valuable. But I was amazed that the question should have been in any way in issue. It shows how enormously influential (indeed, how damaging to our understanding of the nature of law), has been the notion of the separation of powers. To speak of a "purely judicial" body in the framework of pre-colonial social order, is surely nonsense: equally, one cannot look at the dispute-resolution function of Tanzania's T.A.N.U. party committees, or of the party officers in China, as "judicial", unless one ignores the fundamental association between power and courts. The author graphically shows that the political hierarchy was also the "judicial" in Kandayan society: the King was "the ultimate judicial authority".[10] He then explores the limits of the judicial authority at the different levels — what were the personal, subject matter and geographic limits to jurisdiction; could adjudicatory decisions be "imposed", or were the proceedings dependent upon reconciliation of the litigants? The answers again are interesting; but again, I felt explanation was lacking: the association between power and courts is crucial to the understanding of law, and particularly to the phenomenon of popular justice.

From the traditional institutions, Tiruchelvam moves to examine voluntary conciliation at grass roots, prior to the state institutionalisation of the Conciliation Boards. Interestingly, the spur to the voluntary conciliation schemes was apparently a perception of an excessively high rural crime rate. "Popular auxiliary law enforcement agencies"[11] were set up in the last decades of colonial rule; police and administrators cooperated closely and until overcome by hard work and shortage of resources, the system seems to have worked extremely well. With the stress on crime, and then on general rural development, I was immediately struck by the similarity with the

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10 P. 50.
11 P.64.

tribunals we had encountered a few chapters back: Soviet "anti-parasite tribunals", the Cuban tribunals "educating the masses and protecting the public order", etc. Again, we face the ambivalence of involving the local population, often through something which looks "judicial", in order to achieve a particular goal, set from the centre of power.

By the time of independence and the establishment of the Statutory Conciliation Boards, the author argues, there were three competing conceptions of what these new "local courts" might achieve. He describes these as: "revivalism" (of traditional disputing methods), "reformism" (essentially, liberal notions of "access to justice") and "socialist legalism" (to reverse the "legal domination" which came from relying on specialist lawyers, to involve "lower" social classes in judicial administration, etc). The legal profession was antagonistic to the scheme, especially those aspects which reflected the latter ideology. Opposition M.P.'s charged that the Boards were instruments of the ruling party — given the history of association between power and courts, it would have been surprising were this not in part true. In any event, once in power, the previous Opposition implemented the scheme with redoubled vigour and the Boards became extremely highly politicised. From all parties, M.P.'s integrated the Boards into their local support organisation.[12]

When Sri Lanka's efficient electoral broom swept the Bandaranayake socialist coalition back to parliamentary power in the nineteen-seventies, the government revived the socialist conception of the Boards, stressing de-professionalisation. The author argues that anti-legalism was aimed initially at the higher courts' review of unconstitutional legislation and executive arbitrariness. However, this soon spread to all the courts, and the humble Conciliation Boards were rejuvenated in an attempt to remove many other matters from the formal courts of law. Lawyers fought back, primarily via the Civil Rights Movement, which opposed a host of legislation as being contrary to fundamental liberties. The government in turn struck at the monopoly of the lawyers, though it did not attempt to eliminate professional autonomy as such.[13] Vulnerable to charges of being unresponsive to the demands of the rural poor, the Advocates Association (the barristers organisation) split, with a rival left wing organisation being formed. The other main professional body, the Law Society of Proctors (Sri Lanka's profession was split, along the lines of barristers and solicitors in England) remained intact, however, apparently because its members had far less interest or involvement in the issues.

Given this governmental mood of de-professionalisation, the Statutory Conciliation Boards came again into great importance. The author examines the structure of the scheme, and presents the results of field research to show how it works. Particularly significant for this reviewer, was the reluctance of M.P.'s to appoint "persons of low status" to the Boards, as they would face difficulties in carrying out their responsibilities, particularly in the multi-caste districts.[14] Indeed, members of higher castes warned that there would be communal violence if such appointments went ahead. Time and again, the evidence confirmed that "popular participation" involved giving judicial power to persons of "standing" — power and courts remained entwined, albeit in different knots. Again, this is not explored at a theoretical level.

[12] P. 105.
[13] Pp. 122-3.
[14] P. 136.

How did these Boards actually work? Case detail is presented in chapter VI: "The Process of Statutory Conciliation". The author shows that since the statute envisaged that any decisions would require the consent of both parties, considerable time was devoted to ensuring the acceptance of what was really an adjudicatory determination. I found this procedure fascinating, in part because it mirrored my own studies of primary courts in Zimbabwe. When the Board chairman complained because he had to waste a great deal of time persuading a litigant to accept a solution, he was repeating the difficulties of "weak" (in the sense of not being able to impose a decision) court officers in all ages and climates.[15] Here, the court procedure can be seen as directly related to the "power" of the court: hamstrung by the need to secure consent, the court cannot deploy the over-riding adjudicatory power which comes from the backing of the forces of coercion represented by sheriffs, police and prisons.

Finally the author concludes, rather pessimistically for those who had high hopes that the Boards would transform society, that the Boards have essentially become another vehicle for the maintenance and consolidation of existing social arrangements. The author writes that "(a)lthough popular tribunals assume their greatest importance in 'post-traditional' societies, they also face therein their most difficult challenges, and thereby often tend to retard rather than accelerate the pace of socialist transformation."[16]

If the western-styled post-colonial courts were regarded as having failed Sri Lanka's democratic ideals, it now seems we must say that the Conciliation Boards also failed their socialist ideals. In concluding this review, we might reflect briefly on those failures.

The problem of the legitimacy of colonial courts after independence is common everywhere. It is perhaps a little ironic that the western legal tradition, often hailed as the single most enduring contribution the west has made to 'civilisation', should be regarded by so many politicians (and today, authors in the 'dispute industry') as having failed in at least one basic respect—providing accessible justice to all. The complaints are that resort to courts has become costly, drawn-out, formalistic, dependent upon lawyers and, most importantly perhaps, often substantially unsatisfactory in overall outcome for winner *and* loser. The charges are serious; indeed, they strike at the root of democracy, not just at the technicalities of court procedure. The court system we are taught at law school, grew in the tradition which both extended state power and curbed despotism — hence the 'rule of law' whereby the public power could only do that which the law allows, whereas a private person could do anything not specifically disallowed by law. During the growth of this tradition, public participation in government increased dramatically, particularly through the indirect medium of elections and through increased access to information. With regard to the judicial process, a fair trial before an impartial judge, assisted by a jury, became the benchmark of freedom. How then, have we reached a position where many condemn the formalism of western law as 'undemocratic'?

Tiruchelvam's socio-legal inquiry does not ask these questions, but they are built in to his analysis. For example, they are particularly evident in the

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16 P. 188.

conflict between the ideals of the Sri Lankan legal profession and the socialist government. Different conceptions of the social order were, as always, being played out in a 'legal' theatre. Tiruchelvam's work demands that we explore the implications of this — what does it mean to law and lawyers schooled in western constitutionalism and legality? Do the alternatives really differ in offering anything new? I suspect that Tiruchelvam's answer to this last question would be in the negative: rhetoric aside, each party appeared to be using the legal system to consolidate its grip on the rural peasantry, through the rural elites. How different, I wondered, is this from the role of popular justice in the other countries surveyed?

In addition to providing a framework for private persons to settle private disputes, courts (and law) have always had the duality of being both the means for rulers to *control* subjects and the means (generally more tenuous) by which the subjects controlled the rulers. Thus, the "King's Bench" and the other common law courts were crucial to the consolidation of the King's power in Britain — just as they were crucial to the limitation of that power. The importance of the jury trial related to the fact that the legal process was starkly a means for prosecuting centralised power: public participation was (and is) crucial to ensuring that the power stayed within acceptable limits.

Of course, it took centuries before the centralised state took in its present coherence, reflected in (essentially) one court structure. The previously decentralised nature of power meant that there were 'judicial' bodies at almost every level of society; often these competed for power, as in the 'jurisdictional' disputes between common law and equity, or the clashes between civil and ecclesiastical courts. Almost by definition, the different 'judicial' forums were accessible to those living under the umbrella of the political unit from which the courts took their authority. Just as people knew where they stood in relation to that power, so they understood how the judicial process worked. But what has happened since the consolidation of the state's power and the concomitant centralisation of the courts? Rules have become complex and depersonalised: industrialised western civilisation, built upon the rise of the modern state which governs through law, ironically has alienated its people from the legal process. An early popular illustration of this can be seen in novels. Note, for example, the awesome mystique and power of law and lawyers in *Great Expectations.* Today, lawyers such as those who have contributed to the 'dispute industry', or, more recently, those who form part of Critical Legal Studies,[17] reflect *(inter alia)* a profound concern that the western citizen has lost control over (and certainly understanding of) a crucial part of social life, *viz* the management of both 'private' and 'public' disputes.

How, in a modern legal system, can one balance the undoubted need for formal, often complex rules, with the cry for more 'participation', more 'popular justice'? What ideologies ought to be systematised through the legal system? What modern power hierarchies does (or should) the legal system support? These questions strike at the heart of the modern state. As Tiruchelvam's work, and the literature to which it is related, indicates, these issues face developed, socialist, and developing countries. Focussing on the

[17] For an extensive bibliography of CLS writings, see (1984) 94 Yale Law Journal 464. An important CLS work is David Kairys (ed.) *The Politics of Law* (New York, Pantheon, 1982). A recent work which stands some way between the 'dispute industry' and Critical Legal Studies, is R. Abel (ed) *The Politics of Informal Justice (2* volumes) (Academic Press, New York, 1982).

lower levels of the legal system, his study remakes the obvious, but profound point that the sociology of court and court-like systems has a fundamentally political dimension. The Sri Lankan example, concisely captured in this book and well set against comparative experience, demonstrates the detailed attention which should be paid to lower courts; fora which lawyers and academics tend to ignore.

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