

POWER RELATIONS AND LEGAL PLURALISM: AN EXAMINATION OF 'STRATEGIES OF STRUGGLES' AMONGST THE SANTAL *ADIVASI* OF INDIA AND BANGLADESH¹

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Introduction

In 2002 I began fieldwork which took me into the heart of rural villages² in Rajshahi, north-west Bangladesh and Jharkhand, India. I lived with the Santal – an *adivasi* (indigenous tribal) people who have a long history of exploitation and exclusion – in Thakurban, Dhanban (in Rajshahi), and Madhura (in Jharkhand).³ While the landscapes surrounding the villages in these two regions differed greatly – from lush green paddy fields reaching out to the horizon in Bangladesh, to barren plains punctuated with rocky hills in India – the villages themselves had many similarities. Santal houses were modest, made of earth with thatched roofs made from straw, in need of daily repair and maintenance. Activity in the houses

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² The villages are situated 40-50 km from the nearest town, accessible only by infrequent transport links on roads as far as 10 km away on foot.

³ These are not the real names of the villages.

centred around an inner courtyard surrounded by a veranda where the mother cooked and carried out chores, and where the family ate and slept. There were no sanitary facilities, and the stagnant ponds where villagers bathed were also used for washing dishes, clothes and livestock. The only source of clean water in the village was from one or two tubewells servicing as many as 200 people – at any time of the day the main street revealed two or three women walking barefoot carrying water in terracotta pots to and from home.

In the first village where I stayed, Thakurban, a village in the north-east of Bangladesh, I lived next door to Mary, a Christian Santal woman in her 50s.⁴ She was small and slim, dressed in an old, worn sari – one of only two that she owned, wearing one while she washed the other. Mary's family was landless – she told me her husband's land had been taken away by *dikus*⁵ (non-Santal) during partition.⁶ She was a hard worker, looking after the house and family as well as working as a day-labourer for very basic wages.⁷ When she had a moment free from working she would launch into angry monologue about the poverty and misfortune she and her family had suffered and the difficulty (financially) of sending her grandchildren to school for an education.

Near the end of my stay she invited me for dinner. We sat in the small courtyard of her house surrounded by partly husked rice that she had spent the day beating

⁴ The Christian missionaries were more active in this area than in other areas where I stayed and most of the Santal in the village had converted to Christianity. The missionaries rarely visited the village or made contact with villagers, but had set up a small church in the village and one of the villagers had been trained as a priest.

⁵ The term often describes those who exploit and cheat the Santal.

⁶ During the 1947 partition of India and Pakistan many people fled their land and lost ownership. Acts such as the *East Bengal (Emergency) Requisition of Property Amendment Act 1948* facilitated the acquisition of properties left behind by fleeing Hindus and other religious minorities.

⁷ With the exception of one or two skilled craftsmen in each village, most Santal survive through a combination of cultivation on their own land, day labour work, sharecropping (if they have a plough or bull) and, particularly in India, seasonal migration to other states. While women share much of this work, their responsibilities lie mostly in the maintenance of the household.

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and sifting. I asked her about her husband – who I had rarely seen – and about their life. She told me that he had TB for a long time and because he could not work he became depressed and drank heavily.⁸ She said that he used to beat her and she would run away to her brother's house in the same village for protection. When the beatings continued she turned to the village council. The village people were supportive and the *Manjhi* (headman) warned her husband to stop drinking and hitting his wife or he would be fined 5000tk (approximately 130 days wages). He took this seriously not only because he had no money to pay such a big fine but also because of the social pressure on him to change his behaviour. When I saw him he seemed quiet and frail.

This was not the only time Mary had sought assistance from outside her family to stop an abusive husband. She had previously brought a case against her son-in-law. Her daughter, Sara, married young to a well-off Christian Santal who had a job in the town working in a hospital. Mary told me the husband used to beat Sara (she had been hospitalised several times) and eventually abandoned her for a mistress who also worked in the town. The inhabitants of the son-in-law's village (Rajbhan) asked their *Manjhi* to look after Sara. Sara stayed with the *Manjhi* for two months while they tried to persuade the husband to take his wife back, but this failed. Mary said she was reluctant to bring a case to the state law courts against him for beating his wife because she had no money for fees, travel etc. and no knowledge of the system. The women in Rajbhan encouraged and supported her and an NGO working in Rajbhan offered to help financially and so she began a criminal case against him at the Rajshahi court. She told me that she hoped the threat of prison and losing his job would scare the husband into leaving his mistress and taking Sara and her three children back. Mary seemed to be using the authority of the courts – with the help of an NGO – to put pressure on the son-in-law to come back to and support her daughter and grandchildren. The case took years and eventually the NGO withdrew its financial support so that the case had to be suspended.

Mary's stories were not unique and seemed to raise questions about the place of power in the quest for justice, and the factors that affect how individuals navigate power relations and legal pluralism. I want to explore these question by considering how definitions of legal pluralism can be framed so as to take account

⁸ Alcohol is an integral part of Santal tradition and custom and is brewed especially at times of festivals and rituals but is also available and consumed outside festival time.

of the individual's experience of plural socio-legal fields and the power relations they encompass. I will look at how legal pluralism plays a role in providing space and limitations for individuals wanting to renegotiate power relations within a particular social field. I will then come back to Mary and other examples to illustrate how this functions in practice.

Legal Pluralism and Power Relations

The broad aim of this paper is to use the concepts of legal pluralism and power relations to consider the limits of state law as a tool for assisting marginalised individuals. Underlying this is the basic premiss that legal pluralism incorporates multiple fields of power relations, which are at once social, legal and political. Following from this the paper explores how the individual constitutes him/herself within these (multiple and interacting) fields, but maintains some freedom, with limits, to negotiate. This negotiation is explored through the concept of 'strategies of struggles' – actions and inactions that challenge and test the power relations. The paper examines the constraints and possibilities of these strategies of struggles, and in particular the use of alternative legal orders in the pursuit of justice.

Plural legal orders as socio-legal reality

Legal pluralism is an attribute of a social field and not of law or of a legal system (Griffiths 1986: 38).

As far back as 1913 Ehrlich recognised the existence of an “untold number of associations in society that exercise ‘coercion’ much more forcibly than the state” (Ehrlich 1936: 64). From the 1970s other authors (Pospisil 1972, Hooker 1975, Moore 1978, Griffiths 1986, Chiba 1986) challenged the centralist model of a single legal field of state law. This body of writing helped to situate a narrative of law, or norms, within society, in autonomy (or semi-autonomy) of the state. Sally Falk Moore (1978) introduced the ‘semi-autonomous social field’ as a rule-generating and enforcing arena, separate from, although responsive to, the state. Moore's early work⁹ in this field was concerned with challenging the inadequacy

⁹ Merry describes Moore's concept of the semi-autonomous social field as “the most enduring, generalizable, and widely used” description of legal pluralism (Merry 1988: 878, cited in Woodman 1998: 41).

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of instrumentalist arguments that privileged state law, and saw social change as readily achieved through legislative change. While instrumentalists primarily recognised the state and the individual as key actors in social change dynamics, Griffiths (1986: 29) says, Moore demonstrated that what was previously seen as a vacuum between state law and the individual was in fact full of rules.

Moore states that:

It is well established that between the body politic and the individual, there are interposed various smaller organized social fields to which the individual 'belongs'. These social fields have their own customs and rules and the means of coercing or inducing compliance...they have what Weber called a 'legal order'. (Moore 1978: 56).

Moore creates a picture of the normative social field as a social space where complex relationships exist that facilitate rule making and compliance. In her description of Chagga society she describes the power of the lineage-neighbourhood complex: the relations between individuals who are tied together through property interests, "ties of tradition, neighbourly contiguity, and sometimes affection" (Moore 1978: 74). These communities exercise control over their members in many aspects of their lives (dispute resolution, illness, financial crisis). Within the lineage-neighbourhood nexus rules are created and enforced for example in relation to land allocation and disputes, witchcraft and debt. In her examination of the New York dress industry she discusses the 'fictive friendships', which act as instrumental relationships, at the heart of processes of allocation of power and resources. She finds many different rules that penetrate daily interactions. While some rules emanate from government and marketplace, many are produced within the field of action itself either through quasi-legislative action of organised corporate bodies such as unions or through the interplay of various key players (Moore 1978: 63).

Moore's work demonstrates that the nature of the rules, their generation and enforcement, is closely tied into social relationships.¹⁰ However, the idea of

¹⁰ Interestingly Weber, who she cites throughout her discussion of the semi-autonomous social field, talks of obligations arising through 'rights' constituted by a relationship as 'legal relationships' (Weber 1954: 20), although Moore does not herself use the term 'legal' to describe them.

‘belonging’ raised in the quotation above and through her examples, suggests permanence of association, which may be misleading. In fact in some situations the individual’s relationship with a social field can be negotiable and less permanent. Nevertheless, the attachment between the subject and the social field that this suggests – evoking identity, place, co-existence and possibly co-dependency – is helpful for our analysis of legal pluralism as a factor in determining the scope of strategies of struggles. I will return to this later in the paper.

Moore’s concept of the semi-autonomous social field offers two distinct conceptual tools – one analytical and one descriptive. On the one hand she uses the social field as “an appropriate field of observation” for the study of law and social change in complex society (Moore 1978: 55). The ‘social field’ acts as a unit of analysis, a section of society that we can use to investigate the interaction of state law, social rules and individuals.¹¹ On the other hand she talks about the social field as a normative order, a social space with “rule-making capacities, and the means to induce or coerce compliance” (Moore 1978: 55) – as these two uses have distinct functions in this paper I will refer to the latter as a legal order and the former as the social field.

Although Griffiths (1986) interprets her writing as purposefully avoiding the attribution of a ‘legal’ character to this non-state law,¹² her description of the social field as rule-generating and enforcing is not far removed from even some positivist definitions of law (e.g. Austin’s commands backed by threat of sanctions). It is possible that her avoidance of using the term ‘law’ in relation to rules in the social field was intentional – not to negate the legal character of those rules, but to avoid a discussion that might see definitions of law, and hierarchies of

¹¹ Tamanaha seems to make a similar distinction in his writing, referring to ‘social arena’ where more than one type of law is practiced. He seems to separate out the social arena – as unit of analysis – from different types of laws: “A state of ‘legal pluralism’, then, exists whenever more than one kind of ‘law’ is recognised through the social practices of a group in a given social arena...” (Tamanaha 2000: 315).

¹² Griffiths thought that the absence of the term ‘law’ in her references to these non-state rules meant that she was not interested in the interaction of internal and external law in the social field, but with the “impingement of ‘law’ on a field filled with non-legal social control” (Griffiths 1986: 37).

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laws, privileged over an examination of the power of social rules. Although she did not describe the social field as legal she did refer to it as having a 'legal order' (referencing Weber), and in describing the nature of their rule generating capacities cites Pospisil's 'legal levels' (Moore 1978: 56).

But it is not the legal or non-legal nature of social rules that is important – even this discussion of the 'legal' character of non-state law seems to misappropriate and misunderstand her writing. She was indirectly concerned with a subtle dethroning of law's privileged position in the discourse. Griffiths (1986: 29) sees her approach as noteworthy for its move away from "the problem of the definition of 'law'" (a preoccupation of Ehrlich and Pospisil) and praises the "freedom of her approach from hierarchical, centralist...preconceptions" (Griffiths 1986: 36).

Moore is concerned ultimately with a productive approach to the study of legal pluralism and social change in society - or a section of society – that starts from the broad conceptual approach put forward by Malinowski (Moore 1978: 55). Malinowski set out to analyse "all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they are made valid" (Malinowski 1926: 23 cited in Moore 1978: 55). Moore notes that while Malinowski's broad approach to law - seen as conceptually blurred and indistinguishable from social control (Moore 1978: 220) – may be inappropriate for a study of law in general, "his breadth of approach applied to a *narrow field of observation* [the semi-autonomous social field] seems particularly appropriate to the study of law and social change in complex societies" (emphasis added) (Moore 1978: 55).

This broad enquiry into binding forces manifested through social relationships opens up the study of rules by conceptualising them in their wider context, as part of the fabric of the social field, and allows us to incorporate forces that are at once legal, social and political. By moving across these connected disciplinary boundaries we are better able to understand the totality of forces that affect how individuals interact in their relationships within the social field and how they engage with legal orders – state and non-state. In this paper I am interested in particular in the role of power, or rather power relations, within the social relationships that are at the heart of Moore's concept of the semi-autonomous social field.

Power as a micro process of legal pluralism

While as lawyers we speak of law, norms, binding rules, or narratives (see Melissaris 2004), we are implicitly interested in forces that are associated not only with law, but also with power. Our discussion can be taken further by considering the related concepts of Gramsci's theory of 'civil society' and Foucault's 'disciplinary power'.¹³ At this point we shift our focus to look at the micro-processes through which law is negotiated. We consider power not at the macro level – law as power – but at the micro level, within the social field where multiple legal orders are negotiated, manipulated and altered through power relations.

Gramsci sees law as a concept that includes things that are considered legally neutral and functioning within the domain of civil society. According to Gramsci civil society (including the church, trade unions, political parties, community and charitable organisations etc.: Gramsci 1971a: 238) operates “without ‘sanction’ or compulsory ‘obligations’, but nevertheless exerts a collective pressure and obtains objective results in the form of an evolution of customs, ways of thinking and acting, morality, etc.” (Gramsci 1971a: 242). Gramsci's interest in power relates to the concept of ideological hegemony and the struggle between the ruling classes and the masses. He conceptualises collective pressure put on individuals as an ideological control and manipulation by the state or elite that makes the philosophy, culture and morality of the ruling elite appear the natural order. While his theories are helpful for a broad understanding of power relations, a more specific focus on the 'micro-mechanisms'¹⁴ of power is needed to understand these relations in the context of legal pluralism.

Foucault is celebrated for his “decisive abandonment of the traditional approach to the problem of power” based on the definition of sovereignty and the theory of the state, “in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life” (Agamben 1998: 5). Foucault sets out a definitive statement of his interest in power in *The Subject and Power*. Here he asserts that “there is no such entity as power...[p]ower exists only as exercised by some on others, only when it is put into action...” (Foucault 1994:

¹³ Foucault himself said very little of law and his avoidance of law could be seen as a rejection of the instrumentalist approach.

¹⁴ The term is used by Baxi (1986a: 57) to describe social, non-state power operating in society.

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340). Understanding how power works therefore involves a critical shift from a study of power itself to a study of ‘power relations’ (Foucault 1994: 339).

Power relations are relations of inequality that exist at all levels of society and that direct and govern our actions. I am including within this power as it functions between individuals in their personal social relations and the “institutionalised system of power relations” which functions within groups, which Stone (1966: 592) calls power structures. Foucault says power relations are a form of government, by which he means “the way in which the conduct of individuals or of groups might be directed....to govern, in this sense, is to structure the possible field of action of others” (Foucault 1994: 341). They are perpetuated through cultures and customs and disciplinary technologies,¹⁵ which shape the way we constitute ourselves as individuals with collective identities. They direct the way we perceive, think, act and react.

This process of governing individuals is not simply a matter of control, it is part of the production of individuals: socialisation, identity formation and knowledge. In his work on the ‘self’¹⁶ Foucault argues that the individual constitutes “himself in an active fashion” in the context of a given culture/society through practices of the self which “are...not something that the individual invents by himself” but rather “patterns that he finds in his culture and which are proposed, suggested and imposed on him by his culture, his society and his social group”. The individual becomes the culture, absorbs it, and it forms part of his/her collective identity

¹⁵ These are described in Foucault’s early work *Discipline and Punish* in which he examines the historical process of informalisation of punishment in Western society: the introduction of surveillance, micro-penalties used to regulate behaviour, timing etc., and examinations all used to normalise behaviour.

¹⁶ While in *Discipline and Punish* Foucault focuses on the individual’s ‘normalisation’ within institutions, in his later work he makes a shift towards an active self-constituting subject. According to McNay a more “specific, diffuse idea emerges of individuals actively constructing their day-to-day existences in a relatively autonomous fashion” (McNay 1991: 82). This emphasis on the active, independent subject is particularly visible in *History of Sexuality Vols. 2 & 3*. Here Foucault shifts emphasis away from the idea of individuals as ‘docile bodies’, which he formulates in *Discipline and Punish*, and towards a more active individual, the ‘self’. McNay sees this as an adjustment of, rather than as inconsistent with, his earlier work.

(Foucault 1988: 11). This is similar to Gramsci's concept of 'common sense'¹⁷ or the sociological concept of 'habitus'.¹⁸

While Foucault focuses here on the impact of 'culture' he does not seem to intend to limit this to culture in the broad meaning of an ethnic ideology. He means to evoke spaces of identity formation and knowledge acquisition that go beyond the state legal order, or the ethnic or tribal community. It allows us to include less overtly 'legal' orders, such as the family, as a legal order where individuals are socialised and acquire knowledge and identity, and are made to relate to others in established power relations. This is not a new idea. Santos (1995: 417 and 2002: 374) writes of the 'household place' which governs relations between husband and wife, their children, and among kin. Woodman (1998: 45) seems to accept that, however "inconvenient for those looking to define legal pluralism more precisely", in the absence of an "empirically discoverable dividing line running across the field of social control...we must simply accept that all social control is part of the subject-matter of legal pluralism".

Freedom and the Resisting Subject

Whilst the individual constitutes him/herself under the direction and influence of these power relations within the semi-autonomous social field encompassing these legal orders (LOs), Foucault says there is always some element of freedom – if there is no freedom then we are no longer in the domain of power relations. Foucault (1980: 98) identifies two basic elements indispensable to power relations: the acting subject and a field of possible actions. For Foucault: "power is exercised only over free subjects, and only insofar as they are 'free'. By this we mean individual or collective subjects who are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behavior are available" (Foucault 1994: 342).

¹⁷ Simon says for Gramsci 'common sense' is the ideas people absorb "from a variety of sources and from the past, which tend to make them accept inequality and oppression as natural and unchangeable". This is different from the popular term 'common sense', which Gramsci calls 'good sense' (Simon 1991: 26).

¹⁸ The phrase is associated with Pierre Bourdieu who used it to mean the system of values, lifestyle, expectations found in a given social group and common to all members of the group (Bourdieu 1984, 1994).

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Within the power relationship “a whole field of responses, reactions, results, and possible inventions may open up” (Foucault 1994: 340). In other words, power “operates on the *field of possibilities* in which the behavior of active subjects is able to inscribe itself. It is a set of actions on possible actions; it incites, it induces, it seduces, it makes easier or more difficult; it releases or contrives, makes more probable or less...” (emphasis added, Foucault 1994: 341). This is important because it means that not every relation of inequality is a power relation according to Foucault. We can only talk of power relations as long as there is some chance of the subjugated individual freeing him/herself: “slavery is not a power relationship when a man is in chains, only when he has some possible mobility, even a chance of escape” (Foucault 1994: 342).

For Foucault there is a complicated interplay between power and freedom, “not a face-to-face confrontation of power and freedom as mutually exclusive facts (freedom disappearing everywhere power is exercised)...” (Foucault 1994: 342). The two exist simultaneously, renegotiating boundaries of power in the relationship through a ‘strategy of struggles’:

At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking of an essential antagonism, it would be better to speak of an ‘agonism’ – of a relationship that is at the same time mutual incitement and struggle; less of a face-to-face confrontation that paralyses both sides than a permanent provocation (Foucault 1994: 342).

Although his theory seems to incorporate individual resistance, Foucault himself says very little on this subject.¹⁹ Feminist and social movement theorists have considered resistance at the level of the individual (McNay 1991; White 1986: 56; Scott 1985), but it remains an underutilised concept. The term ‘everyday resistance’ coined by Scott in the 1980s (Scott 1985) has been heavily critiqued, especially by feminist writers eager to focus on the vulnerability of the subordinate and preoccupied with avoiding a reading of everyday resistance that imagines individuals of disadvantaged groups as powerful. Lila Abu-Lughod’s paper entitled ‘The Romance of Resistance’ is a good example of this. She finds that writers of

¹⁹ Foucault sees resistance primarily as a tool for analysing power. He says power relations can be analysed empirically by taking as a starting point the forms of resistance against different forms of power (Foucault 1994: 329).

resistance neglect power and allow conclusions that can be read as perceiving resistance as a weakness of power (Abu-Lughod 1990). But we have to be careful not to oversimplify the power-resistance relationship. Treating them as mutually exclusive (one cancelling out the other) facilitates opposing, equally unhelpful misunderstandings. While, as Abu-Lughod is keen to stress, any theory of resistance that conceives such acts as a pure triumph over power/domination is misleading, the same can be said of an analysis that abandons resistance and conceives power as unchallenged or unchallengeable or the subordinate as incapable or unwilling to resist.

What we have to keep in mind is that at the heart of Foucault's notion of power relations is an intimate co-existence of power and resistance, a strategy of struggles (Foucault 1994: 346). The Foucauldian concept of strategies of struggles helps us to move away from a confrontational understanding of relationship dynamics, one that counter-positions power and resistance, to an understanding of how these opposite forces co-exist. Resistances as strategies of struggles, then, do not constitute an escape from power but function as an integral part of the power relation. In this respect there is always a possibility that resistance may reverse power for a moment but what is important is that each triumph is only a moment in an ongoing power relation – if the relationship is severed completely or the subordinated individual has no chance of resistance we are no longer talking of power relations. The only thing we can be certain of is that resistance is always present where there is power, the two co-exist.

Legal Pluralism: Facilitation and Limitations of Resistance

We have said that the individual is constituted within social fields with overlapping legal orders, within which power relations govern the field of possible actions and instil a 'common sense'. These power relations develop inequalities between individuals which are not one way flows of power – the dominator imposing his/her power on the subordinate – but evolve through a process of interacting through which both the dominator and subordinate each engage in strategies of struggles. But how does this work in practice and what effect does plurality of LOs within the social field have on strategies of struggles? Below I introduce two ways in which legal pluralism can facilitate strategies of struggles: by providing an alternative legal order (ALO) with a remedy against the injustice, and by providing perspective on power relations. I do not mean here to overemphasise these as forms of resistance but to demonstrate their scope, and I discuss later, in the

context of the Santal, some of their limitations.

Legal pluralism as Alternative Legal Orders (ALOs)

In this paper the starting point of analysis is the subaltern²⁰ individual who engages with legal pluralism not only as a member of different groups but as a free subject renegotiating power relations, with limits, within overlapping legal orders. The individual as subject or actor in legal pluralism features in the work of Vanderlinden (1989: 153). He considers the individual as subject to/regulated by multiple laws and thus as the point at which conflict of laws occurs. He defines legal pluralism as “the condition of the person who, in his daily life, is confronted in his behavior with various, possibly conflicting regulatory orders, be they legal or non-legal, emanating from the various social networks of which he is voluntarily or not a member”. Taking a related approach, Chiba, investigating ways of expanding considerations of legal pluralism, raises the need to look at issues of ‘subjectivity’ as one phase of legal pluralism (Chiba 1998). His theory of law in subjectivity has the aim of: “turning the perspective of our topic from the prevailing objective one to the neglected subjective one, focusing on the will and decision of the recipient under legal pluralism...”. He notes (citing Vanderlinden 1989 and Petersen 1996) that a person living in a number of legal ‘structures’ is an active agent of the law who makes a choice between the alternative legal rules available to him/her.²¹ Hellum, discussing gender and legal pluralism in Africa, takes an ‘actor perspective’ which allows legal pluralism to be analysed “in terms of coexisting legal, social and cultural norms, values and institutions which provide individuals and groups, rulers as well as the ruled, with a variety of options, choices and dilemmas as to how to achieve their aims and goals” (Hellum 1995: 18).

²⁰ This term was originally used by scholars studying the important role of ordinary people in uprisings in colonial India who were absent in historical textual accounts. The term is now used to refer to the perspective of disadvantaged, less visible or vocal individuals, those perceived to have little influence or power, as being outside of the hegemonic discourse. See further Guha 1983, 1982.

²¹ He uses the subjective approach to elaborate on the understanding of legal pluralism but neither he nor the other authors he cites investigate how individuals navigate legal pluralism.

An understanding of the individual's experience of legal pluralism is illustrated well in Harris's edited volume which includes case studies demonstrating how groups and individuals living on the borders of legality or society manipulate different LOs to gain certain advantages (Harris 1996).²² Elsewhere Keebet von Benda-Beckmann demonstrates the complex socio-political dimensions to forum shopping in a village in West Sumatra (K. von Benda-Beckmann 1981). Vel considers how development organisations introduce another normative order, which is part of a legal repertoire used by community leaders on an Indonesian island. They adopt a pragmatic strategy of forum shopping, choosing different orders (indigenous adat, church, state and development organisation) depending on the situation (Vel 1992). At the group level Franz von Benda-Beckmann and Taale examine uses of legal pluralism by communities to negotiate rights over land and natural and human resources (F. von Benda-Beckmann and Taale 1992).

These studies illustrate that the existence of overlapping LOs provides scope for individual resistance where they provide an alternative forum which offers to provide relief for the subjugated party. The use of these alternative LOs (ALOs) is based on the presumption that the ALO offers a remedy for the injustice (recognises it) and that its jurisdiction is recognised by both parties affected by its decision. But the use of ALOs is not simply a matter of individual choice and jurisdiction, even if recognised, may not be enforceable in reality. A number of factors affect recourse to ALOs in the context of struggles for justice by the subaltern individual – I discuss these in relation to the Santal below.

Legal pluralism as perspective

Gramsci questions whether we should “take part in a conception of the world mechanically imposed by the external environment, i.e. by one of the many social groups in which everyone is automatically involved from the moment of his entry into the conscious world” (Gramsci 1971b: 323). Foucault goes even further, he tells us that individuals constitute themselves in an environment of freedom and choice: the practices we adopt are “proposed, suggested” as well as “imposed” by culture (Foucault 1988: 11).

²² Cf. Ashley et al. (2003) on legal pluralism as an obstacle to access to justice in the southern African context in rural areas where complex socio-political negotiations take place in an uneven playing field.

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Because of this freedom, individuals are able to constitute themselves from a variety of LOs and relationships, which they inhabit. Although they may conform to the most dominant LO of their immediate social environment, they are choosing these practices above others. Where the LOs are very diverse and the overlap between them great – such as the state LO and Santal LO for the village Santal – the process of constituting oneself gives the individual some perspective on his/her own culture. This is subtle but it contributes towards his/her ability to confront, or challenge the power relations s/he encompasses.

Not everyone has the same perspective on the various LOs they inhabit. The individual's ability to use this plurality of LOs will vary depending on a multiple attributes, one of which is their ability to move between LOs. A Santal woman who has seasonally migrated for work in India, for example, will have been exposed to other societies and other state laws which may make her more able to look critically at her own situation. A rural Santal man who has worked in the town may also be able to view his village life in a more critical way. Individuals who are borderliners - who straddle a number of cultures or LOs - tend to be naturally more able to think critically about the LO they live in.

But this perspective is not simply about comparing your life to other approaches you see outside one LO. It has the ability to change the nature of the relations that an individual engages in. I have identified three different forms of relation, which I call 'modes of domination' (Shariff 2007: 9), which can be distinguished: these are relations of force, dependence and nature. *Relations of force* describe a relation where domination is imposed and maintained through fear or force (e.g. slavery, forced/bonded labour, or any violent imposition of control). This constitutes a Foucauldian power relation as long as there is some chance of the subjugated individual acting freely (Foucault 1994: 342). *Relations of dependence* are relations where inequality is accepted in a certain situation by the subjugated individual because s/he acknowledges his/her dependence on the relationship, and the benefits it provides (typical of a relationship between peasant farmer and landlord). *Relations of nature* are relations where inequality is internalised as necessity and/or as natural (e.g. inequality formed by disciplinary power, gender inequality). A certain ideology is portrayed as natural or as the 'truth' and is sustained as such by transforming itself into 'necessity'.²³

²³ As discussed earlier, power relations work on the individual to make him/her take responsibility for his/her part in the collectivity in order to survive and develop. The notion of domination being portrayed as a necessity is illustrated by

These are not relationships (ongoing connections or a bond between individuals) but rather moments in a relationship that impact on strategies of struggles, which I call ‘relations’.²⁴ These modes of domination are not mutually exclusive and may coexist in the same time and space, constituting different aspects or moments of a relationship between individuals in society. Each relation of domination may be more prevalent in some relationships, but exposure to alternative perspectives can lead to a temporary or permanent re-conceptualisation of the relationship or aspects of it. For example the female seasonal migrant worker who returns home after experiencing domestic living in another state where women have more equality in decision-making may no longer see her subordination to men in decision-making in the family as natural or a relation of nature. Her experience may lead her to continue accepting her subordination, but as a relation of dependence rather than a relation of nature – i.e. as something she accepts only as long as she benefits from the relation in return. This shift may make her more likely to conceive of openly challenging her subordination if the benefits are not forthcoming or of seeking additional benefits from within the relationship.²⁵

Illustrating Santal Experiences of Power and Legal Pluralism

Power relations in Santal life

The Santal experience socialisation through a number of LOs. I have chosen to focus on three of these, which I will call the family legal order (FLO), village legal order (VLO) and state legal order (SLO). Each LO appears to represent a

Foucault: power takes place “at the effective level...of the immediate environment, of the cells and most basic units of society” where “phenomena of repression or exclusion possess[s] their instruments and their logic, in response to a certain number of needs” (Foucault (1980: 100-101).

²⁴ Some relationships may be likely to be characterised by a certain type of relation. For example peasant-landlord relations may for the most part be relations of dependence, but this does not mean the relation will never be experienced as a relation of force.

²⁵ I call this the counter-power of rights (see further Shariff 2007).

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lived space but in fact, as discussed earlier, they are not mutually exclusive but rather co-exist within the social field. Each LO, nevertheless, constitutes a distinguishable relational space where relations of inequality are formed through legal or non-legal rules.

I describe each of these LOs separately because, although interlinked, the power relations that constitute an individual in each LO belong to relations of that LO. The patriarchal structures, rituals and mechanisms in the VLO that subordinate women to men in the village, for example, are not the same as the mechanisms that subordinate a woman as a 'wife' to her husband in the context of the FLO. The two may be linked and may reinforce each other, they may even be informed by the same principle of patriarchy, but they are nevertheless constituted through relationships within quite distinct relational spaces. These relational spaces are normative fields, capable of rule making and enforcing in the context of the relationships they embody.

(a) Family legal order (FLO)

At the level of the family, *garong*,²⁶ rights and duties are distinguished on the basis of gender inequalities that are internalised and played out through divisions of labour and differentiating perceptions of worth. The rules generated in each FLO follow similar patterns and processes that constitute the individual in a gendered role and induce or impose compliance through a gendered hierarchy of control and rituals of everyday life. Forms of marriage, division of labour between men and women, negative perceptions of women, prohibitions on certain types of behaviour, and restrictions on property rights, especially land holdings, play a role in constituting the woman as an object of the household. Her resultant disadvantage is manifested in her dependence on men within the FLO and limitations on challenging violent domination by men.

(b) Village legal order (VLO)

The village is the central unit of Santal customary law. Each village has its own

²⁶ A family unit ranging in size from a conjugal family (a couple and their offspring) to a pyramidal family (parents and their married children) or extended families (Das 1967: 8).

political structure, including in most villages a headman (*Manjhi*), deputy (*Paranik*), messenger (*Godet*), guardian of morals (*Jag Manjhi*), and spiritual guide (*Naiki*). At the level of the VLO a political structure of village officials and elders, oversee and adapt rules of Santal customary law, coercing or inducing compliance through a system of councils (Village Council, Council of the five *Manjhis* and *Lo Bir*), processes relating to witch hunting, and social rituals/ceremonies. This visible control is supplemented with more subtle mechanisms that govern individuals' actions. Individuals are constituted within the village with varying degrees of privilege and power. These are determined by a number of factors including: relations with the headman and other post holders; extent of knowledge and experience of Santal law and rituals, and of state law; gender; wealth and poverty; and size of kinship ties within the village.

(c) State legal order (SLO)

Within the SLO, where the Santal are constituted as a disadvantaged cultural, linguistic and religious minority, inequalities result not only from state policies but also from the power relations between individuals at the local level. Recognition, representation, resource allocation and identity are key factors in exclusion of Santal both locally and nationally. Exclusion from representation in political and economic life results from lack of education, poverty and lack of long-term group strategies combined with pressures to vote for certain non-*adivasi* candidates with existing resources and power. Mal-distribution of wealth combines with cultural hierarchies in an economy still underpinned by pre-state kinship systems to exclude the Santal from access to resources and political power. Negative imaging of the Santal in the majority community and the Santal's own distrust of government agents and police make them less confident. In India distrust in government agents, police and *dikus* – a legacy of past exploitation – and in Bangladesh fear and insecurity – as a result of government apathy in the face of land grabbing and attacks by *dikus* – exacerbate the subordinated position of the Santal in power relations with non-Santal. This in turn limits the scope of their willingness and ability to resist.

Scope and limitations of legal pluralism's role in strategies of struggles

Despite these legal orders constituting individuals in unequal power relations, the co-existence of these LOs in the social field that each Santal individual inhabits

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creates opportunities for strategies of struggles as described above: the use of alternative legal orders in the pursuit of social justice. But the use of ALOs has its own limitations.

(a) The presumption of hierarchy of LOs

Although the significance of non-state law in dispute resolution is well documented by legal anthropologists and legal pluralists there is a persistent assumption amongst lawyers and some legal academics, in human rights law especially, that state law holds a privileged position in social ordering – many are still reluctant to use the term law to refer to non-state law, which they see as lacking the authority and compulsion of state law. Admitting to a hierarchy of legal orders suggests that a ‘higher’ LO has the power, jurisdiction, to manipulate or override LOs functioning at lower levels in the hierarchy. The idea that LOs can infiltrate even against the will of its subject misrepresents the relationship between LOs and individuals. Village Santal, for example, are sometimes able, with limitations, to switch between the LOs of the state, village and family in pursuit of the most ‘just’²⁷ solution.

Although the SLO is supposed to have monopoly over criminal matters, in fact petty crimes such as theft and assault are often dealt with locally, either within the FLO or VLO, which apply their own justice.²⁸ Greater crimes, such as murder, would usually be reported to the police and thus enter the domain of the SLO. But this may not always be the case: a killing of a villager by another may be passed off as an accident to avoid intervention from the SLO.²⁹ A Santal elder – Sapha – whom I met in a village adjacent to Thakurban, told me he had resorted to the village legal order to resolve a criminal case where state law (SL) was unable to provide an appropriate remedy to restore harmony. A group of men had entered Sapha’s village, threatened the villagers and stolen some goods. Some young men in the village came out of their houses and fought with them. Sapha’s nephew was

²⁷ Laura Nader identifies a “general expectation of justice”, which motivates the person who has been wronged in seeking redress (Nader 2002: 668).

²⁸ The Santal often prefer to resolve minor offences within the village (Archer 1984: 457).

²⁹ Naqavi found one case of a Santal murder that was dealt with by a Village Council and not reported (1979: 182).

amongst them and he hit one of the robbers on the head with a stick and the man collapsed and eventually died. Sapha reported the incident to the police (he said it was better that he registered the events as he saw them rather than leave it to the family of the murdered thief). In fact the nephew had fled to India so the police were not able to prosecute him and the case was suspended. Under state law the nephew had escaped any penalty but the reality in the village was very different. Sapha said “we found the case was disturbing everyone’s life”, referring to the need for resolution of the case to restore harmony, “so we decided to settle it amicably by giving the murdered person’s family three *bighas* of land”. Despite the criminal nature of the case it was the VLO and not the SLO that finally settled the dispute on terms that were conducive to re-establishing harmony.

There were other examples where the VLO functioned separately from the SLO – sometimes as above providing a remedy that was not being provided under the SLO, at other times, particularly in witchcraft-related crimes discussed below, preventing a remedy under SLO. In civil matters, recourse to the SLO is any way not obligatory and was avoided where possible due to the length and cost of bringing cases to SL courts. What this demonstrates is that despite an apparent hierarchy of LOs people are able to exercise some choice – within limits – as to which LO they call on to judge a matter.³⁰ But also that a solution presented in an ALO may not penetrate the social reality of another LO where the injustice may persist.

(b) Historical integration

An individual’s willingness to use ALOs has to be understood in the context of the broader relationship between the LOs. LOs evolve in the context of other LOs and may be influenced by them, and their jurisdictions overlap. This overlap affects the way the LOs are viewed and sentiments attached to having recourse to them and if the LOs are too closely allied it can also mean that the alternative LO fails to provide an alternative perspective on the injustice or inequality.

Much has been written about the impact of SL (colonial laws) on indigenous law

³⁰ This is perhaps only possible because of the autonomy of the VLO from the SLO. Cf. Paliwala’s (1982) study of the Village Courts initiated by the state in Papua New Guinea which administer SL – albeit with some bias towards customary law interests.

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(see Woodman 1988; Snyder 1981; Fitzpatrick 1984, 1990) and to a lesser extent indigenous law on state law (Benton 1999). The Santal themselves directly influenced state law in the Santal Parganas (a region of what is now Jharkhand State), India, as a result of the Santal Revolt in 1855. After the revolt the colonial court system was adapted to address the grievances of the Santal more effectively and new rules were created to reduce opportunities for exploitation by *dikus* (which had been the main trigger for the revolt). Santal laws in turn have been particularly affected by Hindu laws and customs in India – Santal often live with or near Hindu communities and participate in some Hindu celebrations, although they are not Hindu themselves. Some Santal forms of marriage such as the *Ghar Jamae* are also common to Hindu family law. In Bangladesh, however, where the state is still young and the Santal's presence more recent, the Santal have had little or no impact on SL. The state, keen in these early stages of formation to emphasise unity and euphemise ethnic difference, does not recognise *adivasis*. The Santal in turn have not assumed practices common to the majority Islamic community – in fact some of their cultural traditions clash with Islamic taboos on eating pork, drinking alcohol and dress codes. While Santal in India seemed unconcerned about the fluid boundaries between their own customs and religious practices and those of the Hindu majority, and some saw SL courts as an extension of their court system in certain circumstances, in Bangladesh Santal distanced themselves from the Muslim majority and there was a shared feeling that Muslims, and the SL, treated the Santal as a subordinate race – they are referred to in the Constitution as *upojati* (subclass) and colloquially as *jungalies* (people who live in the wild). This lack of integration between Santal culture and the host culture may be one factor in the reluctance of villagers in Bangladesh to use the SL system. Other factors such as the longevity of the Santal's settlement in Santal Parganas and their gradual formal integration into the political and legal system may also be relevant. The result is that most cases of recourse to SL in Thakurbar and Dhanbar in Bangladesh were involuntary (cases brought *against* members of the Santal community by non-Santal), whereas in India most cases involved villagers voluntarily using the SL courts in disputes with other Santal as well as with non-Santal.

(c) Conceptual differences

Alongside these developmental interrelationships between the SLO and Santal law there are fundamental differences in the way justice outcomes are conceptualised in the two LOs. While Archer tells us that Santal rules relating to theft replicate

the Indian Penal Code (IPC) (Archer 1984: 456), Bandyopadhyay notes that some areas of Santal law are in conflict with the IPC and “court records reveal that the Santal are facing trial for violating Penal law although they are well within the boundary of their customary law” (Bandyopadhyay 1999: 120).³¹

An example of this difference can be seen by looking at the role of sanction in the VLO and the SLO. In the example I gave earlier of the thief who was killed by a Santal villager, Santal justice was achieved outside the SL courts by a gift of land to the widow of the deceased thief. Justice was served not through punishment but through reconciliation and addressing the need for the widow to survive without her husband. This approach to justice for the widow of a murdered man is not unique to Santal society. Baxi’s discussion of the Indian *Lok Adalat* (people’s dispute resolution process thought to replicate community justice) demonstrates that, there also, a murderer (or a relative of the murderer) would be required to look after the widow and children of his victim. This is contrasted to the SL approach which would see the murdered sent to prison, leaving the victim’s family destitute (Baxi 1986b: 77). The customary law focuses its decisions not on punishing the perpetrator of the offence but on ameliorating the situation of the victim or their family.

But sanction’s role is not only to correct a wrong, as described above. It also plays a role in returning harmony to the wider legal order. Elsewhere in Santal law paying a fine to correct a violation of the law is often associated with feasting the village or providing food or drink for the village council. It is a means for the perpetrator of an infraction of re-entering society, a symbol of asking forgiveness from the people and showing willingness to conform. The primary aim of the sanction in restoring harmony in the village and keeping people together can also be seen by the fact that expulsion from the village is rare and is considered the most drastic punishment. It is only warranted if there is a breach of the rules of tribal endogamy or clan exogamy, which are seen as fundamental to Santal survival and cohesion. But interestingly even if these rules are broken the emphasis is not on punishment. The offenders are given the chance to avoid expulsion by denouncing the forbidden liaison and paying a fine. Accepting the sanction is a means of staying in society.

These conceptual differences between Santal law and state law can mean stigma is

³¹ He made these comments in relation to West Bengal, but his comments are equally relevant to the Santal Parganas.

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attached to using the SLO in some circumstances. Some Santal respondents who I interviewed said going to the SL courts after the *Manjhi* had given his decision would amount to disrespect not only for the *Manjhi* but for all the villagers as re-establishing harmony through dispute resolution involved everyone. Refraining from recourse to another LO was about having respect for your own customs and society, and it was also linked to maintaining the autonomy of your society.³² This evokes the concept of belonging that I raised at the beginning of the paper and which I will return to below.

(d) Access to justice

Aside from the above, there is much written about the practical problems of accessing SL courts in particular. These problems are associated with the power relations within LOs. Inequality in power relations works to complicate, restrict and even deny access to these forums. The system which itself puts the dominator in a position of privilege works against the subordinate in every way to restrict their ability to use the courts against their adversary. I will address a few of the technologies of power relations that work to restrict access.

Having knowledge of the system and contacts within it are important factors in being able to use the courts. In Marc Galanter's paper 'Why The "Haves" Come Out Ahead', he shows that frequent users ('repeat players') have many advantages in the system (Galanter 1974). One aspect of this is their knowledge of the system, including what Anderson calls 'institutional skill': "the ability to understand and use the system" (Anderson 2003: 16). Amongst the Santal community, few villagers can afford to be frequent users of the SL courts. Knowledge of SL amongst the Santal did, however, vary. In Bangladesh where Santal were forced to attend court to protect property rights against non-tribal land grabbers, and these cases were discussed openly within the village, most villagers had a good understanding of the procedures for attending court. In India, however, where most experience of the SL courts resulted from individual disputes over inheritance, stolen cattle and land disputes between neighbours, often other Santal,

³² Nader's study of the Zapotec mountain village community in Mexico in shows that harmony within the Zapotec village society was a means of stopping the state authorities interfering in the community. There was pressure on individuals to obey the village LO in order to ensure a degree of freedom from imposition of state authority (Nader 1990: 20).

cases were not openly discussed and general knowledge of case procedures was limited to those who had actually had cases.

As well as knowledge, having contacts in the court system facilitates successful use of SL courts. Given the underprivileged status of the Santal in both countries, the villagers have few natural allies in the court system and being one-time users means that they will have to rely on middlemen to get contacts with lawyers, or civil society liaising between marginalised groups and the institutions of justice, e.g. legal aid NGOs. Apart from NGOs, availability of Santal lawyers and police officers, clerks etc. may help to improve a village Santal's access to contacts in the system. In Dumka, Santal Parganas a conscious effort was made to replace Bihari court officers and police with *adivasi* officers after the creation of Jharkhand state. However, in other parts of the region where no equivalent action had been taken there were far fewer Santal amongst the court employees. Individuals without established contacts in the system are most likely to use personal links often through non-*adivasis* – i.e. contacts through a local landowner or employer or through relatives.

The Santal's first language is Santali and whilst those who have worked outside the village (mostly men) are able to speak local dialects (India only), Hindi, or Bengali they have had no formal teaching in these languages and levels of competence vary greatly. Women are particularly disadvantaged in this respect.³³ Most women spoke little Hindi or Bengali and what little they did know of these or local dialects was not sufficient to be able to communicate, often complex, problems to officials, lawyers and even judges. In Dumka there were some Santal clerks in the courts, but in Deoghar the court had only recently taken on more Santal staff and one senior clerk admitted to me that not being able to speak Santali made his job more difficult. In Bangladesh there were no Santal workers in the courts. In both countries there is no formal provision for translators.

Language and literacy problems made villagers wary of the court system and prevented them from accessing knowledge about the system. It also had repercussions for the village Santal's perception of the courts. While in Santal dispute resolution forums honesty and open discussion are fundamental to the process of finding a solution, the state law system was seen as lacking transparency and encouraging manipulation of the truth. An elderly man in Paraha

³³ See also Kochar (1964: 21). Most Santal are bilingual with the exception of children and some women who have little contact with outsiders.

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said of lawyers: “[t]hey mix the truth and make stories to tell the court”. This lack of honesty at the base of the SL system together with the obstacles that language and illiteracy created for Santal involvement in the court process led to frustration and distrust for the system: “We have to take a lawyer because we can’t read and write. We don’t know what they’ve written. I tell him the truth but who knows what he writes. He writes lies, if I could read I would be able to check but I can’t”. This led to the conclusion, succinctly stated by a young male respondent in Madhura, that “we can’t read and write so we get cheated”.

Cost is a significant consideration in accessing the SLO and VLO.³⁴ Although the cost involved in accessing the SLO is far greater than that of accessing VLO, any cost can be a prohibitive factor. The costs involved in accessing the SLO are multiple and limitless. Even reporting incidents to the police or other SL officials often involves small payments – including bribes to middlemen to get access to senior officials.³⁵ Taking a case in a SL court entails further costs. A case can take years and sometimes involves as often as fortnightly visits to meet court procedures for collecting forms and information. On top of court fees, lawyers fees and additional ‘tips’ to clerks etc, each visit to the court entails the cost of travel to the town (often a long journey by foot, bus and rickshaw or ‘van’), spending a day out of the village, thus having to pay for meals in the town and missing a day’s paid work. The cost of travel and food would also have to be borne for other villagers needed to give support or act as witnesses for the case. Without assets or wealthy relatives, and with limited help from legal aid,³⁶ a

³⁴ At the level of the VLO parties may have to pay for drink (village brewed beer, wine or spirit) or a feast for the village or council, and may face a possible fine (if they are found partly responsible for the dispute). This cost can be prohibitive: see Bodding 1997 Vol. II: 339 ‘Two Brothers Who Quarrelled’.

³⁵ Timm (1991: 17) writes that middlemen, who assist villagers taking a case to court, and lawyers and their assistants, charge *adivasis* more than Bengalis for their help.

³⁶ Legal aid is available to a limited extent in both countries but is not widely used or known about by the village Santal. In Deoghar and Dumka legal aid is mostly used for criminal defendants who have no representation and in Bangladesh it is administered through an NGO which focuses on domestic violence cases amongst the Bengali Muslim community. As such it is out of the reach of most village Santal. Also legal aid only provides a partial solution to the burden of costs since it would not cover the multiple additional costs of travel, loss of earnings, bribes and

village Santal is unlikely to get loans with flexible repayment options. Timm (1991: 16) writes that the biggest complaint from *adivasis* is that the legal system “serves only the rich of the Bengali community”. Cost may also be a greater barrier for women because they often engage in un-remunerated work or have no control over how their earnings are spent. They are therefore likely to have to depend on support from a male relative to meet any costs. When I asked women in the focus groups what they would do for finances if they needed to go to court, most said they would have to get help.

Strategies of struggles: an illustration

I have discussed above some of the factors that affect the use of legal pluralisms in renegotiating power relations. I want now to explore the reality of this a little further with three examples from Santal society. I will begin by returning to Mary’s experiences, which I introduced at the start of the paper.

(a) Domestic violence: perspective and the ALOs

Domestic violence is a very complex problem and a specialist area of research in its own right. I am not seeking to generalise broadly from Mary’s experience here to make a theoretical link between ability to challenge domestic violence and legal pluralism, but to use it in an analysis of the factors affecting Mary’s recourse to ALOs in this case. I describe a difference in the rules that apply within the FLO and VLO. While in the VLO these rules emanate from Santal customary norms, in the FLO they emanate from the interactions of, and expectations of, key players (husband and wife) in the family unit within the village. The rules that are generated can be seen to differ, and offer scope for strategies of struggles by the subordinated party.

(i) The logic of domestic violence within the FLO – relations of nature

At the start of this paper I recounted the experiences of Mary who used the VLO and SLO to challenge abuse by husbands within the FLO. As I have said, women

meals bought out.

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are constituted within the FLO as subordinate to men. A woman is throughout her life dependent on her father, husband and then sons for general wellbeing, health and safety. The family unit will provide her with certain rights, which the men have a duty to provide, but in return she has a duty to contribute to the family unit by working, maintaining the house, preparing food and bearing and raising children. The male head of the family is responsible for the overall survival of the family unit, for resolving all disputes within the family (Kochar 1966: 15) and ensuring everyone carries out their prescribed role. Chastisement is tacitly accepted as a disciplining technique against women who fail to carry out their role.

Because the inequality between men and women – in terms of division of labour, power and resources – is portrayed as being intrinsic to the family's success as a unit it takes on a logic of its own. The inequality itself is not only accepted as 'natural' – nature's division of the sexes – but as 'necessary' for the survival of the family unit. The man's dominant role is accepted and although women may perceive the unfairness of their subordinate position, they will not conceive of challenging the inequality outside the context of the FLO itself as long as they continue to experience it as a relation of nature.³⁷ The rules here are different to those of the VLO because they emanate from the interactions between husband and wife. As Moore (1978: 63) demonstrated in her chapter on the semi-autonomous social field, discussed earlier, there are pressures on different players to conform to a system of exchange. Some of these rules are produced within the field of action itself, arrived at through the interplay of mutually dependent parties.

(ii) Acceptable and unacceptable acts of domestic violence according to the VLO

The VLO plays two vital roles in facilitating resistance to domestic violence. Because the VLO has a different approach to domestic violence, it provides a different perspective on what is acceptable within the context of relations of nature,³⁸ and because the VLO has its own system of councils it also acts as an

³⁷ I should stress here that the approach I am taking is particularly relevant for societies which are strongly patriarchal and where domestic violence occurs as an integral part of man's privileged position in society. I am not suggesting that my theory of changing modes of domination applies to domestic violence in liberal individualist societies (typified by cycles of violence followed by a 'reparative moment' - offering of flowers or some other gesture and seeking forgiveness).

³⁸ For further description of relations of nature see Shariff 2007.

ALO for the woman wishing to have her grievances answered outside the FLO.³⁹

Although domestic violence is not often talked about in the villages where I stayed there seemed to be distinctions made in the VLO between chastisement that was accepted as part of the man's disciplining authority and domestic violence that was seen as unfounded. While the women seemed to accept⁴⁰ that, rightly or wrongly, men would use physical violence as a disciplining tool, and that the woman would be seen as responsible (the solution was for her to 'behave'), they were clear that it was considered unacceptable in some circumstances.

A new bride had been welcomed to a village adjacent to Thakurban. She was older than most, in her late teens, but seemed shy. A small group of women had gathered and we chatted about married life. I asked the new bride how she was enjoying her new life and if her husband treated her well. She giggled and said 'ok'. I asked did she ever get told off, and gestured a hit. Shyly she said, "only if I don't do my work properly, if I am good then he will not hit me". Her tone suggested that this was accepted practice. I asked would she hit back if he hit her. The women all laughed and one older woman asked rhetorically 'what can *we* do?' raising her hands in a gesture of resignation. The other women hummed in agreement. I had the same response from women in Thakurban. When I carried out the focus group with women villagers a few days later I asked what the *Manjhi* would say about domestic violence, and one woman replied: "if the husband says 'I only hit her when she's bad', the *Manjhi* will say [to the woman] 'you should behave, you should listen to your husband'".

Already implicit in their descriptions was the understanding that domestic violence was a response triggered by certain behaviour by the woman. What became clearer elsewhere was that this acted as a condition for acceptable chastisement. Waiting

³⁹ Within the FLO a woman can have recourse to her wider family for help. If the male head of the family fails to keep the peace the elder members of the family will help to restore harmony (Ali 1998: 136), and the woman's brothers and parents may also get involved to try and resolve the dispute.

⁴⁰ I do not mean here to suggest that all women also saw it as acceptable. Older women who had seen men abuse their powers felt instinctively that men should not hit their wives, but they accepted that some men would do so and that this would be condoned by others in some circumstances where the woman was seen as failing in her duties to the family.

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for my assistant one day I spoke to a young woman, Shanti, who had a position of responsibility in the village: she was the head of the village women's committee set up by a local NGO to help families save money for future emergencies. I asked her about the *Manjhi's* role in resolving domestic violence according to Santal custom. She said he "would help the woman if there was no reason for the beating, for example if the husband got drunk and beat his wife then this is not allowed."

It seemed that when domestic violence occurred outside the context of failure by the woman to do her work the relation between the man and woman was transformed from a relation of nature – where his dominant position was part of a necessary hierarchy in family relations – to a relation of dependence – where she accepted the treatment only because the relationship was part of her survival strategy – or force – the man's dominance being forced upon her.

In Mary's stories about her case against her husband and her son-in-law she was careful to stress that the beating she received and that her daughter received were unjustified and to emphasise the absence of fault or provocation on her and her daughter's part. As such she seemed to have adopted this distinction between domestic violence that was acceptable and domestic violence that was unfounded and therefore unacceptable, and her recourse to the VLO and SLO were triggered by this transition. In the context of her own relations with her husband the VLO not only provided her with perspective in this way but also with an ALO because the *Manjhi* intervened on her request to call for the husband to stop beating her.

We have seen above how Mary was able to take the step of challenging her husband's abusive behaviour through the VLO council. In the case involving her daughter she went one step further and, when the VLO was unable to influence the husband, took a case to the SL courts. She had no doubt been persuaded by the NGO supporting the case that the state law would look critically at the son-in-law's behaviour. But her case against her son-in-law also provided a reminder of the limits of access to justice for the poor (not only in the form of fees but also food and travel cost and missed days of work to attend court, lack of knowledge of the system and the duration of cases). Sadly also the case demonstrated the difficulty of using law to change behaviour because the threat of the court case was not sufficient to make the son-in-law return to the village and leave his mistress. This may in part be due to the fact that the husband living and working in the town – and no doubt having taken his own legal advice – saw the risk of punishment in the court as too remote or too distant a reality.

While Mary seemed to be able to at least conceive of using these ALOs this is not to say that *all* women who suffer domestic violence experience this shift from relations of nature to relations of dependence or force, or if they do, that this leads to them seeking redress through the courts. The transition for Mary of conceiving her daughter's relations with her husband as a relation of dependence or force is affected by her exposure to other legal orders which provide alternative perspectives. Mary's own experiences with her husband no doubt made it more natural for her to perceive her son-in-law's behaviour as wrong. Her brother was a landowner in Thakurban village and he had experienced many cases in the courts against *diku* land grabbers and this had given Mary some exposure to the SL court system. The NGO's assistance and perspective may have influenced her decision to go to a SL court. The NGO in her daughter's village gave her exposure to an alternative perspective – they were promoting women's rights as it was conceptualised at the international legal level, or within the legal order of international law.

(iii) The draw of belonging: seeking harmony

Despite this shift to experiencing the domestic violence she and her daughter suffered in terms of relations of dependence or force, which leads her to use an ALO, Mary is ultimately seeking harmony. As illustrated earlier harmony is an important goal in Santal customary law.⁴¹ When I asked her what outcome she wanted from the case she said she wanted 'peace', meaning peaceful relations between her daughter and son-in-law. She was using the SLO, not for a final decision against the husband, but as a way of putting pressure on him as part of her strategy of struggles. She told me she hoped that the fact of bringing the case before the SL courts would make him change his ways. Pursuing the case to a final outcome that might see the son-in-law convicted of beating his wife would mean him being sent to jail and losing his job – that would leave her daughter with nothing and her grandchildren would suffer. She said her aim was to withdraw the case once the son-in-law agreed to take back his wife and children, and leave his mistress.

⁴¹ The importance of harmony in customary law elsewhere is discussed at length in Nader 1990.

(b) The stolen duck: accepting inequality in the VLO

While I was in Thakurban village, Bangladesh, there was a case over some missing ducks. A man in the village, Paulus, accused another, Bolanath, of killing and eating two of his ducks. Rumours had it that Bolanath had been ordered to kill the ducks by a Muslim landlord of the area, Ahmed, and had acted without telling Paulus or consulting the village. The Village Council was convened to hear the case. There were 16 men at the council meeting. The accused had just two supporters sitting on his side, while Paulus had seven who were all sitting close to the *Manjhi* and thus had a bigger part in the discussion and decision-making. There were four men who were not related to either family. Some women stood further back, watching but made little or no contribution. Ahmed, who was said to have given the order to kill the ducks stood near the *Manjhi* and left half way through when he felt his contribution was over.⁴²

Ahmed said he had instructed Bolanath – who worked for him occasionally – to kill two ducks that had wandered onto his land and were eating his crops.⁴³ He could not say whether Bolanath had acted on this or what he had done with the ducks. No one had seen Bolanath kill the ducks and Bolanath did not admit to eating them. A witness gave evidence that he had seen Bolanath and his brother-in-law in a neighbouring village eating dark meat⁴⁴ on the night the ducks went missing. Bolanath's brother-in-law – the only person at the meeting to speak out in his favour – said they were eating wild rat. There was heated discussion mostly between Paulus' supporters. One of the villagers who was not supporting either party asked questions to both parties and Ahmed to try and ascertain the facts. The *Manjhi* recounted the outcome of a previous similar case. Most of the discussion took place near the *Manjhi*.

⁴² Ahmed refused to take any responsibility, and in fact seemed upset that he would not get compensation for crops the ducks had eaten. Luke, my assistant, told me if he had been a Santal he would have been fined for ordering the ducks to be killed but it was important to keep the peace with Muslim neighbours and anyway the *Manjhi* could not enforce any fine against him.

⁴³ There are Santal laws against grazing (cows, bullocks, buffaloes or goats) on others' land. The owner may be liable for a fine and compensation depending on the quantity of crops eaten and whether it was intentional (Archer 1984: 454). My assistant told me that this applied to ducks also.

⁴⁴ Meat is unaffordable for most families and rarely eaten.

After this the *Manjhi* summarised the facts and announced the conclusion of the discussion. Bolanath was most at fault, not for killing the ducks on Ahmed's order,⁴⁵ but for consuming the ducks and going to another village to do so deceitfully without telling anyone. He would pay a fine to Paulus that would cover the cost of replacing the two ducks and the eggs the ducks were nurturing. Paulus demanded compensation for the two weeks worth of potential additional eggs he had lost because he would be without the ducks for this period. At this point the *Manjhi* reminded Paulus that he was partly responsible because he had allowed his ducks to consume crops on another's land. Because of this he would forfeit the extra compensation for the loss of potential eggs.

Although the decision attributed some blame to Paulus (he forfeited his extra compensation) the process struck me as heavily weighted against Bolanath. The numerical weakness of the people defending him and his own reluctance to defend his actions made the discussions quite one-sided. This seemed not just to be a question of his having poorer support on the day but seemed to mirror his weaker position in village society. He had fewer kinship ties in the village and was less well integrated. His alleged act of following the orders of a Muslim, Ahmed, to the detriment of a fellow villager and then hiding his act and enriching himself in the process, further disassociated him from the villagers. The judgement seemed to me to be punishing him, not just for eating the ducks, but for his general lack of integration.

Bolanath was at a disadvantage in the village. He had married in *Ghar Jamae* form – moving to live with his wife in her village – and so had no blood relations there. Bolanath was of the *Kisku* clan and his was the only family of that clan group in the village leaving him without clan based kinship ties for support. Furthermore the people in Thakurban were descended from four couples, and Bolanath's wife's family was the smallest of the families. By contrast Paulus was part of the largest extended family in the village. Two of Paulus' brothers were village officers and, although poor, his family had much support. Although this did not give Paulus control over the decision it meant that there was more pressure to find a solution that favoured him than Bolanath.

⁴⁵ Luke, who was helping to translate the discussion, said that if Bolanath had simply left the dead ducks, Ahmed would have been responsible and the *Manjhi* would not have been able to enforce a fine.

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Bolanath's weaker kinship ties were exacerbated by the fact that he and his wife were marginalised in the village. They both worked during the day and locked their house whenever they were out. I was surprised when I first saw their house locked up – in many villages houses do not even have doors and trust amongst the villagers is strong. The only reason for locking your door would be to stop theft by outsiders if there was no one to watch your house. The fact that Bolanath killed the ducks on the orders of a Muslim rather than telling Paulus also suggested lack of assimilation into the village. All these factors may have contributed to the lack of support he received in the case.

What is interesting is that Bolanath submitted to the authority of the *Manjhi* and accepted the decision. He could have refused to accept the decision of the Village Council against him and addressed the issue to the SL, initially in the form of the local Union Parishad Chairman. This might have resulted in a more balanced decision that recognised Paulus' infraction and Ahmed's role more substantially and reflected it more fairly in the outcome. Being outside the VLO the SL courts would have been more likely to have weighed the infractions by the parties more neutrally. But having recourse to the SL would have had wider repercussions.

Bolanath seemed an intelligent man, he had some land, and when I asked where he would go if he was forced to leave the village he was one of the few villagers who said he would live on his own land. He saw land as an individual rather than a village asset and said that his own needs took priority over the needs of the village. Nevertheless he admitted that if he had to leave the village he would have a difficult life. He seemed to have a strong compulsion to respect the wisdom of the *Manjhi* and considered it important to conform to what the villagers felt was right. He said that he would never use the SL courts rather than going to the *Manjhi* for help: he would need the *Manjhi's* support to go to the SL courts anyway and villagers did not encourage people to use the SL courts under any circumstances. He seemed to see the village as a primary and sufficient forum for resolving disputes: "why would someone go to court when we [the villagers] are here to resolve the problems".

When I asked him about whether villagers ever go to SL courts after the *Manjhi* has given a decision, he told me that it is not good to challenge the *Manjhi's* decision, it shows disrespect for the villagers, but people will use the SL courts if the *Manjhi's* decision is not acceptable. This suggests that in this case, taking into account the stigma attached to using the SL courts for a village dispute, he saw the decision as acceptable – i.e. falling within what he perceived as the natural order

of things.

(c) *Witchcraft: the myth of hierarchy*

The Santal believe that women and girls can be abducted by witches and taught to invoke spirits and become possessed. It is believed that once she has become a witch, the woman or girl will be capable of inducing sickness and causing death, usually to a man, through communication with the spirits.⁴⁶ Witches are thought to be the cause of all fractured relationships, illness, disease and death in the village (Bodding 1942: 160). The most common way for a witch to cause illness or death is by (metaphorically) cutting out a person's organ (liver, heart or lungs) and cooking and eating it. It is then only a matter of time before the victim falls ill (Archer 1984: 493, Chaudhuri 1987: 105). If an entire organ is consumed then the victim will die and nothing can save him, but if only part is extracted or eaten it may be re-grafted onto the body and the man saved (Archer 1984: 492). This possibility of reversing the witch's deed provides the basis for an elaborate system of witch-hunting.

In the first instance a general call is made by the *Manjhi* for whoever may be responsible for the illness or disease in the village to remedy the situation. If there is no change three *Ojhas* (witchdoctors) are asked to discover through divination the cause of the illness. They may find that the cause is an unhappy house *bonga* (spirit), or a witch, or find some other cause. If all three find a witch is the cause of the illness or disease then the *Manjhi* carries out a divination to discover which household or person in the village is responsible. The person who is suffering from the illness or his relatives can then consult a *Janguru* (witchfinder) and must then verify his findings with a second and possibly third *Janguru* (Archer 1984: 497-501, Bodding 1942: 164-166). If a woman is named a witch the villagers gather to decide her punishment (Bhattacharya c1991: 29).

⁴⁶ The witch can ask a spirit, *bonga*, to arrange the killing in a number of ways: *bonga* directly kills; *bonga* uses an agent such as a tiger or dog or snake to kill or transforms the witch into an animal such as a bear to kill; *bonga* transforms into a stone which is buried and if anyone steps over the stone they are struck with disease or death; or *bonga* creates 'seeds of sickness' which are sprinkled in wells or on the lanes of the village causing people there to become ill (Archer 1984: 494-5).

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While the above description identifies how the practice of witch-hunting ought to take place, even as far back as 1871 a senior Santal elder, Kolean, noted that *Jangurus* were no longer truly spiritual diviners, they were learning the trade and were becoming more deceitful (Bodding 1942: 168). When Bhattacharya carried out research in 46 Santal villages in West Bengal in the 1980s he found that in most of the 50 cases he analysed the *Janguru* depended on hired agents to collect information about existing convicted witches in the village and conflicts between the ill person (and his family members) and other relatives or neighbours. Kolean similarly mentions the use of “secret informers” and where there are none he says the *Jangurus* “feel their way” changing their findings according to how the villagers respond (Bodding 1942: 168 see also Bhattacharya c1991: 29). Bhattacharya says sometimes the *Ojha* and villagers or relatives of the victim connive with the *Janguru* to fix who will be named in his divination (c1991: 18). This suggests there is a possibility of using the process of witch-hunting to target an innocent woman, with potentially devastating consequences.

Bhattacharya’s research showed that in forty-two out of fifty cases he studied the woman found to be a witch was fined. A woman in Thakurban told me if a witch was found out she would be fined and beaten. According to Bhattacharya (c1991: 30) if a witch refuses to pay the fine and sometimes even if she does pay it, her house may be burnt down or she may be beaten or even murdered. In nine cases the accused witch or her family members were threatened with death, three ended in murder (Bhattacharya c1991: 32). Although people in the villages were reluctant to talk about witchcraft, in India cases of attacks on and murders of women on grounds of witchcraft were well known outside the community (Kumar 1997; Bhattacharya c1991; Chaudhuri 1987: 112; Awasthi 2002; newspaper article, *Dainik HJagren*, Dumka, 27 February 2003).⁴⁷ The Chief Judicial Magistrate for Dumka and a member of the senior judiciary in Deoghar said witch-hunting represented the most common basis for criminal cases brought before them involving the Santal.⁴⁸ Naqavi (1979: 178) found that witchcraft was the highest

⁴⁷ Lawyers and judges in Chaibasa and Deoghar told me that they received many cases where women who had rights over land were accused of witchcraft by those trying to take their land.

⁴⁸ In Bangladesh where there is far less recourse to state law, no specific legislation concerning witchcraft, and less strong belief in witchcraft due to conversion to Christianity, there is little known about the extent of the problem. The existence of witchcraft was acknowledged by the women in Dhanban during the focus groups and Suphol, an elderly man who I stayed with in Thakurban, told

motivating factor for murder in Santal villages in his research area in the Santal Parganas. A newspaper article in a local paper in Dumka reported 20 deaths of women accused of witchcraft, which it attributed to illiteracy and land disputes noting that landed widows were particularly targeted (*Dainik Hjagren*, 27 February 2003). Bhattacharya interviewed women accused of practicing witchcraft and they said the accusations of witchcraft against them were motivated by rivalry, jealousy and property disputes. Chaudhuri writes that women who have characteristics of greed and jealousy, and are prone to break codes of Santal behaviour may be seen as potential witches. Being unable to control anger, being argumentative, physical deformity or suffering from fits of hysteria or epilepsy can be taken as signs that a woman may have associations with *bongas* (Chaudhuri 1987: 97-98).

I was not able to find any evidence of witch hunting during my fieldwork and any enquiries I made about it during my stay were responded to with vague answers that they had heard stories in other villages but that was a long time ago. Nevertheless cases involving accusations of witch-hunting are brought to SL courts. The failure to prosecute those involved in witch-hunting in India is an example of the SLO not being able to enforce its jurisdiction. I spoke to one lawyer practicing in Chaibasa who told me most of the Santal cases he represented in the state law courts involved accusations of witch-hunting. Only 5% of these actually made it to court and few ended in convictions because although initially a member of the accused witch's family or a friend would support and assist the prosecution, in most cases they would withdraw their support (he thought, as a result of pressure from the villagers). In order for the police to successfully prosecute someone under these laws against witch-hunting they need to have evidence and witnesses from the village. Without witnesses to testify against the accused, the prosecution case fails. I was shown a number of case files in Dumka court which involved assaults on women and men accused of witchcraft and which had ended with an out of court settlement. The judges I interviewed in Doeghar also told me that villagers did not cooperate with investigations into alleged witch-hunting.

me his father had been a *Janguru* but that there were no *Jangurus* in the area any more.

Conclusion

In this paper I have tried to demonstrate the scope and limits of legal pluralism in creating possibilities for individuals to challenge unequal relations, and in shifting an individual's conception of aspects of power relations from one mode of domination to another. Understanding legal pluralism as the existence of multiple legal orders, sources of rules (whether conceived as legal, social or political in nature) existing and evolving in a social field, is the starting point for this study. I have investigated how these legal orders can also be understood through Foucault's work on power, which allows us to see legal orders as directing and governing, producing individuals through socialisation, identity formation and knowledge. Using Foucault helps us to understand the subjective experience of legal pluralism by de-prioritising an analysis of power as law (or law as power) in favour of an understanding of the role of micro-processes of power, power relations, in social justice outcomes. In his study of power Foucault analyses the *subject* rather than power itself and his work helps us to shift our focus to what Chiba calls legal pluralism in subjectivity, to investigate not only how the individual experiences law but the complex strategies of struggles the individual engages in, and to understand how the individual re-acts and interacts in the processes of power relations.

I have shown that power relations in the Foucauldian sense are relations of inequality that direct and govern our actions but leave the individual free. This freedom creates a permanent provocation at the heart of the power relation, manifested through resistances. The range of these resistances are explored elsewhere (Shariff 2007) but here I focus on the form of resistance that takes advantage of legal pluralism – the use of alternative legal orders. Legal pluralism facilitates resistance in two ways. Firstly it may provide an individual with an alternative perspective on their situation. This perspective does not simply allow the individual to compare their position, but it has the effect of altering the power relation. I have identified three different forms of power relation, which I call 'modes of domination' – relations of force, relations of dependence and relations of nature. Experience of an alternative legal order can lead to a shift in the way an individual experiences a power relation e.g. from relation of nature, where the inequality is internalised as natural or necessity, to relation of dependence, where the inequality is accepted in the context of a relationship from which the individual benefits. Secondly it may provide an actual forum for relief. But this has its limitations. The jurisdiction of the alternative LO, even if formally conceived as prominent, may not be enforceable. State law courts may not be able to enforce its

jurisdiction even in criminal matters. There may be significant conceptual differences between the LOs that make individuals reluctant to approach the alternative LO for a solution. On the other hand historical juxtapositioning of different LOs may mean that they share some of the same norms, making individuals more willing to use them, but with the risk that this sameness in the two LOs makes the alternative LO less critical of the LO where the injustice occurs. Forums of alternative LOs may also be out of reach, especially for the poorest, who lack contacts, knowledge, money, time and other skills needed to navigate the system.

We have seen that for the Santal the existence of legal pluralism does provide some scope for challenging power relations but that the many limitations can frustrate the achievement of ultimate justice for the subjugated. This is not to say that legal pluralism and power relations therefore have no role to play in facilitating social justice, but rather that they pose deeply complex challenges for those seeking social justice and those seeking to assist marginalised individuals. Those challenges lie not in remediable problems of access to courts or education but in complex dynamics of subjugation with roots in identity, rules of belonging, psychology of domination, spiritual beliefs and instincts of survival which are constantly in flux and may differ from one individual to another.

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