

The Crown, the Colonists, and the Course of Zapotec Village Law

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Early in the twentieth century, much of ethnographic analysis in anthropology was dominated by structural-functionalism. Such studies were often ahistorical, generally focused on artificially bounded communities, and tended to use the equilibrium or harmony model to describe social relations. In the ethnography of law, the longitudinal method was rarely used. In fact, Llewellyn and Hoebel (1941), who might or might not be considered structural-functionalist, took cases spanning a seventy-year period and compressed them into an ethnographic present time dimension. In our critiques of these earlier works, the nonuse of history and the equilibrium or harmony models have become theoretical obstacles to be overcome.

More recently, anthropologists have recognized the importance of history for ethnographic understanding and have expanded the scope of their studies to encompass external social and cultural forces that, in addition to internal forces, have shaped local communities. In doing such work I became interested in the order of legal change (Nader 1978), while others, such as my colleague Elizabeth Colson (1974), explored questions dealing with the politics of legal change. Anthropologists are now developing ethnohistorical models that combine historical, sociological, and cultural analyses within the framework of a power structure. Such approaches enable us to understand the dynamics of legal change caused by shifting political alliances between nomadic and settled peo-

ples, between religious, customary, colonial, and nation-state law, between all these laws and the international and multinational structures (Attia 1988; Hammoudi 1985; Moore 1986), or as in this chapter, between the Crown, the Colonists, and the indigenous villagers. The harmony model takes on a new dimension within this broader context.

An examination of village social organization and the workings of village law courts among the mountain Zapotec of Mexico reveals the link between social organization and harmony as a political strategy, on the one hand, and between the data and structural-functionalist analysis on the other. The relative influence of internal and external forces operates through community social organization and active disputing processes that are governed by the ideology of harmony. The central focus of this chapter rests on attempting to explain the production of harmony as ideology and the way in which this ideology influences the development of anthropological theory.

My students and others have observed that in many societies it appeared as if the harmony model was being replaced by the adversary model as the new nation-states developed (Nader and Todd 1978). On the other hand, in 1969, Aubert reported that Norway had moved toward the harmony model and away from the adversarial one, while ten years later the harmony model had also taken off in the United States (Nader 1978; Abel 1982). An analysis of the uses of harmony or adversariness as political tactics in the community and in individual action reveals that legal changes are not sheer happenstance, but represent part of a common order of happening (see Nader 1986).

In the ethnohistorical example that follows, the focus is on harmony as ideology. I am concerned with the way political alliances of the colonial period have influenced the course of village law. My analysis of this process is based on fieldwork in a mountain Zapotec village in southern Mexico and on historical records. The colonial policy established by the Spanish Crown in the sixteenth century still informs Indian village courts. The relationship that the Crown created between itself and its colonists, both Spanish and Indian, led to the semiautonomous village communities that Wolf (1959) found described in colonial records as *la república de indios*. Crown policy left room for a range of political maneuvers.

Crown Policy and *la República de Indios*

The Spanish Crown's policy of creating Indian communities emerged from maneuvers over issues of relative power between the Crown, the

colonists, and the Indians. According to Wolf (ibid., p. 190), Crown policy was formed:

to guard against the rise of combinations of power that could rival the authority of the crown, the king divorced the right to receive Indian tribute from the control of Indian labor. If Indian labor made the wheels turn in this New Spain, then whoever was lord and master of the Indians would also be lord and master of the land. With unlimited access to Indian energy, the colonists would soon have no need of Spain or king; hence the crown had to limit this access, supervise it, curtail it. . . . The Indians were thus declared to be direct vassals of the crown, like the colonists themselves. . . . No private person could lay hands on Indians without prior license from the crown.

After the first half of the sixteenth century, the Indians were royal wards responsible to royal officials and supervised by the Crown. By the seventeenth century there was an economic depression, a decline in mining and food production resulting from depopulation (Borah 1951). As Wolf (1959:202) observed, the century was characterized as a "retreat from utopia," whereby Middle America retreated into its countryside as in previous times of social and economic difficulties. Wolf describes two patterns that emerged in the course of this retreat: the hacienda (a landed estate privately owned by the colonist) and the tightly knit community of the Indian peasantry, la república de indios. One was to become the instrument of the conquerors, the other the instrument of the conquered. The unit of Indian life was to be the concentrated small community rather than the individual or the city. The Crown underwrote the legal identity of each Indian community as a check on colonists and as a way to maintain their exclusive control over the Indians. Each Indian community was to be:

a self-contained economic unit, holding a guaranteed 6.5 square miles of agricultural land, land which its members could sell only after special review by the viceroy. . . . Communal officials were to administer the law through the instrumentality of their traditional custom, wherever that custom did not conflict with the demands of church and state. The officers of the crown retained the privilege of judging major crimes and legal cases involving more than one community; but the Indian authorities received sufficient power to guarantee peace and order in the new communes. The autonomy which the crown denied to the Indian sector of society as a whole, it willingly granted to the local social unit. (Ibid., p. 214)

This system allowed the indigenes a good deal of room to maneuver to their advantage. Nevertheless, the ensuing diversity among communities was developed within a common frame, resulting in communities that had much in common, although what they had in common they used differently. The core of this community was its political and religious cargo systems, which rotated among adult males the responsibilities for religious organization and operation of the *municipalidad* or town hall, where the town courts are located. By means of this Mesoamerican political and religious system, power and responsibility are allocated and reallocated at intervals to the men in the community. It is through them that ritual and economic life is organized. The Indian community (if we can use the term) has been further described as one where the group is more important than the individual, where people are suspicious of conflict, where conflicts are adjusted, where economic differences are redistributed, and where status is linked to the number and quality of office-holding experiences. The community defends its land against outsiders by prohibiting the sale of land to nonmembers and by marrying within the community.

The differences between communities are usually characterized as open or closed villages, traditional or progressive villages, homogeneous or heterogeneous villages, peaceful or divided villages, or belligerent or passive villages. These categories reflect the transformative elements in such communities: the innovators, the power-seekers, the proselytizing missionary, the political activist, the developer. As Wolf (1959) and others have observed, these communities have never evolved in a single direction; they oscillate, fluctuate, and change in fits and starts, never independent of the larger society to which they send their excess population and to which they are bound by a series of interlocking interests (Hirabayashi 1986).

A Mountain Zapotec Village: Talea de Castro

Early reports by Spanish friars describe the southern part of Mexico, now politically united as the state of Oaxaca, as a land of diverse peoples, languages, and cultures. The Zapotec have lived in the area for more than 2,000 years before the Spanish Conquest. The conquest and then colonization brought dramatic changes: the *encomienda* system, the heavy use of taxation, the use of workers in the mines and fields, which changed the traditional division of labor between men and women, the

concentration of Indians in larger compact settlements. Later changes favored the Indian economy and the developing mestizo and creole classes. New crops were brought in from Europe and other parts of the New World (wheat, sugar, and fruits of various kinds), new tools (the wooden plow and the horizontal loom), and arms (the steel machete and axes). All these innovations spawned new developments.

The Zapotec I write about are mountain people (Nader 1964b). They live in an area known as the Rincón, located approximately 200 kilometers northeast of Oaxaca City. The Rincón is a home of rivers and mountains, and as the label suggests, settlements are located between the peaks, cornered by mountains on three sides. The Indians are primarily farmers. Their land provides a livelihood through the staples of corn, beans, and sugarcane. Coffee, the principal cash crop, was introduced around the turn of the century. Other vegetables and fruit are planted, and a wide variety of wild plants are gathered for food, decorative, and medicinal purposes. The specialties of each village provide a variety found in local markets, producing a lively trade within the area and between the Rincón and other areas.

The oldest route from the Rincón to Oaxaca City runs straight south to Solaga, Tlacolula, or Mitla, and then to Oaxaca City. Until October 1959, this was the route by which coffee, loaded on donkeys, was shipped out of the region. Now, however, the impassable mountains that had previously "cornered" the Rinconeros have been opened to connect the Rincón with the valley of Oaxaca. Until 1959 there was no vehicular road into the Rincón. Traders had to walk into the region from the Sierra Juárez by way of Calpulalpan and Maravillas, a path that was cut off for weeks during the rainy season. By virtue of its geography, the Rincón has been a refuge area.

For the most part, the people of the Rincón live in clustered mountain villages. One village I studied was Talea de Castro, said to have been founded in 1525 when Fray Bartolomé de Olmedo came from Mexico City to baptize and preach Christianity among the Zapotec of the Rincón. Local historical documents record that the respected elder statesmen from various pueblos of the Rincón had gone to Mexico City in the previous year to request that the new king, Cortés, send ambassadors of the new religion. Even in the early sixteenth century the area, although difficult to reach, was neither isolated nor out of touch with the happenings in central Mexico.

In the sixteenth century, Talea was probably smaller than the surrounding towns of Yatoni and Juquila; the history in the town archives

showed only a handful of houses on the accompanying maps. Unfortunately, information is scant on Talea and the region in general from the time of founding until the last century, but every Indian village in the area was affected by the arrival of the Spaniards and the ensuing growth of Mexico as a country separate from Spain—in religion, in economic and political institutions and technologies, and in patterns of exploitation. Contact by choice and by conquest may have come swiftly and directly, or slowly and gradually. Yet even in the more remote and inaccessible corners of the Rincón, contact was in good part linked to economic exploitation and the introduction of cash crops.

During the colonial period, the district of Villa Alta was famous for its riches, particularly in the areas of cotton production and gold and silver mining. Spanish administrators clamored to be sent to this area (Hammett 1971:16–17,36). Political control of the area was obtained primarily through Spanish colonial organization. Each village was to be a self-contained autonomous unit (Gerhard 1972:14). The mines and cotton production that declined after Mexican independence from Spain in the second decade of the nineteenth century were revived in the middle of the same century when Don Miguel Castro, lawyer and politician, came to the vicinity of Talea to rebuild the gold and silver mining industry (Pérez-García 1956, 2:129). Talea became a town of importance in provisioning the miners. There was enough variety of work so that some 200 people could engage in nonagricultural pursuits as miners, blacksmiths, carpenters, carbon makers, brickmakers, butchers, bakers, candlemakers, weavers, tortilla producers, and more.

Around 1905 the mines at the hacienda in Santa Gertrudis closed permanently, and many of the miners from a variety of villages came to settle in Talea, where they began farming for a living. Following this migration of miners from Santa Gertrudis to Talea, the market was gradually moved there as well. After the closing of the mines, Talea was to become the most important commercial center in the Rincón region. Older informants remember Talea at the turn of the century as having a population of about 1,000. By the 1960s the population had more than doubled. Since its founding, Talea has probably changed its size and composition more than any other Rincón village. It was fortunate and probably not an accident of history that Talea became a center of commerce, for with this sudden influx of people from the mines, the gradual accretion of lands from neighboring villages was not rapid enough to provide all these new citizens with land. Many turned to commerce as an adjunct to farming, and to cash cropping as an adjunct to subsistence

farming. Talea was the first Rincón town to grow coffee, and in all probability this was related to the advantages that coffee production has for a town suffering from land shortage. Coffee provided Taleans with cash and changed the relationship that Talea had with the surrounding towns. Apart from the prestige from cash wealth, Talea became more dependent on the surrounding towns for subsistence crops.

A more recent event in the transformation of Talea occurred in 1946, when approximately thirty Talean men left to work for one or two years in the United States as part of migratory labor teams imported from Mexico. Many changes came with the return of these guest workers, who brought back "progressive" ideas and savings, which they invested in coffee plants. Many more Taleans were to follow their lead and leave Talea to seek work in the urban areas of Mexico and in the rural areas of the United States (Hirabayashi 1981).

A final important occurrence was the introduction of the Papaloapan Development Plan, through which the Mexican government hoped to integrate the Sierra Juárez and the regions beyond the sierra with the rest of Mexico. Again there was an economic boom, which was temporarily set back by the drop in coffee prices at the end of the 1950s and early into 1960. But the Papaloapan Commission was responsible for the completion of a road, which provided an opening for manufactured goods of the state and of the nation to compete with regionally produced goods (Berg 1976:109-110).

Each economic fluctuation has left its mark on Talea de Castro. Sometimes this results in the town's collaboration with outside forces, and sometimes there is resistance. Powered by common interests and antagonism to forces outside their small *república*, the Taleans are forever aware of the fragility of their situation—one that accompanies power differentials. Without the Crown, the Indians face the colonists who are now Mexicans, but the Crown left them with an organization that could be used to their advantage.

Social Control through Interlocking Aspects of Social Organization

* If it is true that the imperialists study their colonial charges, it is equally true that the charges study their masters—with great care and cunning. Who shall say which understands the other more? (Borah 1983:226)

The Rincón Zapotec villages have been organized as politically independent, self-reliant, endogamous places that remain free to determine

their lives only to the extent to which they can manage themselves successfully. Villages with feuds that divide them, or problems that escalate to the district seat in Villa Alta, to the state government, or beyond, are more vulnerable to national state interference. For the Taleans, their ability to manage the wider world impinging on them depends on how well they can manage their internal world.

Earlier in the chapter I mentioned some of the cultural patterns that have been described as characteristic of Middle American Indian communities: the way such communities distribute power and wealth through the political-religious system, the rotation of responsibility among adult men rather than a concentration among a few over time, the observation that wealth is not allowed to accumulate among individuals but distributed through the institution of ritual feasting, the strong tendency to practice endogamy, and the maintenance of land sale within the village. All these patterns are also true of Talea and certainly operate to control the behavior of members because conformity is expected in these arenas. Instead of focusing on how the political-religious organizations work as social control, I would like to condense my understanding of Talean Zapotec social control by examining some of the major principles that serve to govern life in the village. These principles of social organization are deeply embedded in social activity, as described above, but are neither coterminous with any one sphere of social activity nor stable through time. They are based on the dimensions of hierarchy, symmetry, and cross-linkage, which operate to stratify, level, and integrate the whole village. All three dimensions are found at all levels and in every domain of village social organization, although over time they carry different weight.

In Talea as in most indigenous Middle American communities, all groups, whether governmental, religious, or kin, are hierarchically organized on the basis of sex, age, wealth, and/or experience. As a man moves up the social ladder, he assumes a great amount of responsibility, authority, and respect. Although how far a man climbs and the number of positions in which he serves before retirement vary with the size of the town and qualifications of the candidate, the system is always hierarchical. In work relationships, depending on the task at hand and the availability of land, one is either a boss or a worker, although who is the boss or the worker has varied through time with changing circumstances. Family relations are also hierarchically ranked by generation and age, and each role is defined as subordinate to the one above. The leveling dimension, the value placed in egalitarian relations, may be seen as contradictory or complementary.

The concept of leveling, of balanced proportions, operates in many of the same social settings in which hierarchy is found. Leveling mechanisms mediate the harsher aspects of hierarchy in superordinate/subordinate relationships and challenge the high value accorded such relationships. In the family, for example, older brothers have authority over younger brothers, and to some extent brothers have authority over sisters. Yet ideally all children are supposed to inherit equally. In the celebration of fiestas, those who can afford the financial burden are expected to bear the costs. Although this is a leveling device, wealthy donors gain prestige and respect. Moreover, participation in town meetings by all adult men allows citizens to question the actions of those at the top of the ladder. Symmetry is also very much a part of the aesthetic sense of these mountain Zapotec people. It is unappealing to be too rich or too poor, too fat or too thin, too pretty or too ugly. Asymmetry is often the underlying cause of envy, witchcraft accusations, or disputes in courts.

The dimension of cross-linkage is found at the level of village organization and structure, unlike the dimensions of hierarchy and leveling, which permeate the daily round of activities. Cross-linkage as a principle of organization brings people together as groups or individuals, while at the same time dividing them by linking some of them with different groups. The degree to which intergroup relations cross-link affects the development of opposition groups or factions in the town. People who belong to the same musical organization do not belong to the same savings and loan association. People who reside in the same sections share membership in a particular savings and loan association with people from other parts of town. When we examine Talean organization in its entirety, the membership crosscuts, and the result is what Kroeber (1917:86-87) in another context called a "marvelous complexity guaranteed to guard against segmentation, rift, or fission." In Talea the savings and loans associations, the musicians groups, and the division between employers and workers would all be dividing agencies if their boundaries coincided. But they do not. As between individuals, cross-linkage strengthens relations between social groups at the expense of individual ties. One might therefore expect to find a higher proportion of disputes between individuals than between groups.

Even before the rapid changes that followed the opening of communication routes during the 1960s and 1970s, one could see how the weight of these principles of social organization was beginning to shift. In the family, relations between husbands and wives have become increasingly hierarchical, a change generally attributed to Westernization. Male

dominance is noticeable in Talea among those who have had a great deal of contact with the external Western world; it contrasts with neighboring villages, where authority is shared more equally between husbands and wives. On the other hand, relations between parents and children are becoming increasingly egalitarian—also something that is attributed to contact. In the realm of symmetry there were also signs of transformation as early as the second or third decade of the twentieth century. Traditional leveling devices, such as loading the heaviest religious obligations on the richest men, have shifted from individuals to the group through creation of savings and loan associations called *barrios*. In the domain of ritual kinship, which also operated as a leveling device, the rich still have more godchildren to care for than the poorer families do. But this too is beginning to change, as the institution of godparenting alters its pattern of linkage by showing preference to family members or members of the same social grouping. It can be said that in Talea, leveling devices have given way to stratifying devices and that the social order has been maintained by ensuring that citizens share multiple memberships in a variety of organizations. As Taleans have felt the outside as threatening, their cross-linkages have increased through the proliferation of committees and commissions to deal with whatever they perceive as a threat—usually something that weakens village unity or independence.

As I have said, the exact manner in which hierarchy, symmetry, and cross-linkage operate as ordering and controlling processes to maintain the autonomy of the village is affected by internal and external changes. For a number of reasons, stresses, strains, and fission activity end up in court when hierarchy, symmetry, and cross-linkage are not sufficient to control behavior: (1) where behavior slips between social fields, (2) where standards are not homogeneous or universally shared, or (3) because the court is an important institution for reaffirming and renegotiating the ideology of order.

The Village Court: Disputing, Ideology, and Autonomy

The struggle to restrict the impingement of superordinate power is carried out . . . consciously. Aside from outright resistance, those involved in the struggle have two principal means at their disposal: an appeal to tradition and rigorous attention to legality. (Colson 1974:76)

Today the state of Oaxaca is divided into districts. Each district is divided into a number of *municipios*, or townships, which vary in land and

population size. These townships administer their own affairs through elected town members and are also responsible for smaller villages and dispersed settlements (*rancherías*) located nearby and referred to as *agencias*, which also elect their own leadership. In a political sense, several *agencias* lie within each township, several townships lie within each district, and all the districts combine to form the state of Oaxaca. Geographically, however, these subdivisions do not lie within one another because both agencies and townships have their own territories with established boundaries that in some cases may date from before the Spanish conquest. Talea lies in the district of Villa Alta and has jurisdiction over three *agencias*. In the decade of the fieldwork reported on here (1957–69), these communities had a combined population of approximately 2,400 people. The municipal building in Talea is the largest in the Rincón. In this building are located the three courts of Talea, which for the purposes of this chapter will be referred to as “the village court.”

Some initial observations about the village court are important at the start. This court is a place where Taleans have been hearing their own cases at least since the founding of the village in the sixteenth century. It hears all cases—family cases, land cases, slander cases, debt cases, and so forth—and with the exception of cases where blood has been drawn, the village has the right to conclude the case if the litigants so wish. It deals mainly with cases involving individuals, but also with matters of dispute between both intravillage and intervillage groups if brought before the court by the litigants. It is a place where traditional ideas are formulated and expressed. It is also a place where legal ideas introduced by the state are applied. It is a place where conformity is promoted and rewarded, where local values are expressed, where images of the external world are built, and where village autonomy is declared. Dispute-handling processes, like endogamy and the prohibition of the sale of land to nonvillagers, contribute to village autonomy.

In my previous research on the Talean village court (Nader 1964a), I analyzed the work of the court, which is both administrative (managing the physical plans of the town as well as events of the life cycle, such as birth, marriage, sickness, and death, and also managing relations with the outside—*relaciones exteriores*) and judicial (having to hear and handle disputes). I studied the users of this court—the plaintiff, the defendant, and the court officials—who they are, what they expect from a hearing in court, and the degree to which they reflect the dispersal of power blocs in the village. But studying what people do to resolve problems and what officials do about disputes is only a small fraction of

what the study of disputing should encompass. The disputing process is neither merely solving problems nor just a study of the manner in which problems are addressed. As described elsewhere (Nader and Todd 1978; Nader 1984), it is a political process whereby divisions are created or overcome and ideologies are formed. It is also a study of why there is any disputing process in the village or why it is that village conflicts have been left to the inhabitants to handle themselves. In what follows, I shall address some of these important aspects of disputing as they relate to the ideology of harmony in relation to village autonomy.

In a paper entitled “Scarcity and Disputing: Zeroing in on Compromise Decisions,” Starr and Yngvesson (1975) suggested that anthropologists have made more of the argument that disputants with multiplex ties will try to compromise their differences than their own published data warranted. After examining the work of three anthropologists, two of whom worked in Africa, they concluded:

Gluckman in *The Judicial Process among the Barotse* (1955), Gulliver in *Social Control in an African Society* (1963), and Nader in “Styles of Court Procedure: To Make the Balance” (1969) emphasize the compromise or reconciliatory nature of the processes they studied among people in multiplex relations. . . . However, some of their case outcomes cannot be described as compromises between competing claims, some settlements to disputes did not reconcile the disputants, and when an outcome of a reconciliatory process was not to the disputant’s liking, he frequently took his complaint elsewhere, sometimes to several different dispute handling forums in order to seek a decision in his favor. We began this inquiry by seeking an explanation for these discrepancies between descriptions of the process and the ethnographic data. (Starr and Yngvesson 1975:562)

As partial explanation they observed:

The literature . . . reflects a bias. . . . A Durkheimian emphasis on harmony or interests and shared goals has heavily influenced our thinking and seems to have shaped the ways in which anthropologists have perceived the handling of disputes. . . . It is important to separate the objectives of the disputants from those of the third party, whose interests most frequently will be in maintaining the status quo. (Ibid., pp. 559–560)

At the time, I wrote Starr a letter in which I remarked that they had still not adequately explained why so many anthropologists had emphasized

harmony and compromise as dominant characteristics of the disputing process, despite evidence to the contrary in their published data.

In my article "Styles of Court Procedure" (1969), to which Starr and Yngvesson refer, I had described the main feature of style in the Talean court as one that values the achievement of balance between principals in a case. I had also completed a documentary film and used the title "To Make the Balance" (1966). Specifically in reference to Talean court styles, I said: "It is compromise arrived at by adjudication or, in some cases, adjudication based on compromise. . . . The aim is to rectify the situation by achieving or reinstating a balance between the parties involved in a dispute" (1969:69). After presenting cases taken from the 1966 documentary, I added: "The judge is a warden of order and fair play among peers. He resolves conflict by minimizing the sense of injustice and outrage felt by parties to a case. . . . He is expected to render a verbal and written agreement for each case—an agreement that *consensus would label equitable*" (ibid., p. 85; emphasis added).

In the same paper I had tried to separate the specifics of the cases as they varied, from case features found to be continuous: "The substantive aspects of procedure which vary from case to case are determined principally by the type of case and type of participants. The continuous features that permeate court activities and constitute the form and manner of the court give the proceedings their style (Kroeber 1957)" (ibid., p. 70). Close observation of courtroom encounters led me to argue the particular settlement to a given dispute may be designed to fine, jail, ridicule, or acquit the principals, but that the desired outcome is rectification. It seemed that outcome rather than decision was the important dimension for style. Outcome centers attention on the desired result of harmony. As Taleans observe: "A bad agreement is better than a good fight." I also said that although the decision must be agreed on by both parties, the "compromise" is not always a result of mutual concessions because it is the judge, rather than the litigants, who after listening to the case decides where the middle ground is or encourages them to make their own agreement. And the decision is often the judge's understanding of what is best for "making the balance," which often means restoring relations to a former condition or to an ideal condition where conflict is absent. Some years later (Nader 1985) I analyzed the cross-sex cases in this village court for the value they have in perpetuating the compromise ideology. Cases between women and men predominate in this court, and the most prevalent decisions associated with such cases—when they involve plaintiffs accusing a man of physical abuse, lack of

support, or abandonment—is some sort of compromise (although the plaintiff is rarely seeking compromise). I argued then that users of the court influence the eventual direction of the law over time, in this instance in the direction of harmony.

An analysis of interviews with former court officials further obscures the picture of what really is going on. I was curious about what the officials thought "justice" was. One judge listed the following types of "justice": judging well, not judging or fining, good justice, bad justice, agreement or resolution, or finding guilt. On "bad justice," the same court official said: "For example, he [the judge] could be drunk and a case come up and he would ignore it. Or he could fine the defendant and the plaintiff without thinking. Or he would take money and not give it to the treasurer but put it in his pocket—all this is bad justice." Or on the subject of judging: "Say you did something, or you're not certain that you hit so-and-so . . . not certain if you hit or didn't hit. Nothing more is said, but you are going to pay a fine. They fine without knowing anything, whether you're guilty or not guilty. That is bad justice." And on the question of how the court officials are held responsible: "Police, *regidores*, and even the *presidente*; if he commits a wrong then the *síndico* fines the *presidente*, and if the *síndico* commits a wrong then the *presidente* fines him or puts him in jail."

So it is possible that a judge is not always a "warden of order and fair play resolving conflict by minimizing the sense of injustice and outrage," as I suggested earlier, but he should be. At the same time, when looking at the whole picture, I could conclude that Talea is a highly ordered town that has a large and active court participation pattern, both at the village level and in the district court. Taleans are low on violent crimes, compared with the Oaxacan average, but active in asserting themselves in order to find remedies for wrongs. It is not so much that these Zapotec like to litigate, but rather that they do not like problems to grow, fester, or escalate. Their presentation of self is associated with balance and equality.

Present court styles in Talea have emerged from the aesthetic and emotional values placed on balance and on equality, the particular activities of this small society that necessitate cooperation, and the requirements of a social organization directed toward village independence and autonomy and away from dependence on the state. These styles also stem from the types of cases brought to the courts, whether they deal simply with human conduct or with the distribution of scarce resources. My mode of analysis was internalist.

At the core, the harmony style and its associated ideology, as I described them for the Zapotec, are internal accommodations to conquest and domination. It is the Crown that presented indigenes like these Zapotec with the semiautonomy that both grows out of and supports Talean values of mutual aid, social order, equity, prevention, and village solidarity. As Wolf (1982:145) reports, "In setting up these units, the Crown followed a double purpose: to break up the pre-Conquest apparatus of power, and to ensure the separation and fragmentation of the resulting jurisdictions." But many indigenous communities like Talea utilized the separation of jurisdiction to promote autonomy, although from the Spanish point of view, dominant ideologies, as with liturgy, were "joined to local belief and practice by missionaries attempting to anchor an ideology in local understandings and by local practitioners, striving to render this ideology expressive of local interests. The outcome was religious structures that varied from community to community and that paralleled in their ideological localocentrism the political separateness of communities" (ibid., p. 148). Taleans see themselves as peaceful, and present themselves as such in public and to outsiders, because keeping the peace, or at least the illusion of peace, is crucial to the maintenance of their autonomy.

In the literature on disputing, theories explaining style or dominant tendencies in this process have been accumulating along the lines of single variables such as the nature of relations between the litigants (Gluckman 1955) or situations where scarce resources form the basis of a dispute (Pound 1959:70; Starr and Yngvesson 1975). Such theories are limited to the internalist perspective. If we look at style as a component of a political ideology, however, we come closer to understanding that the Talean harmony model is a tool for restricting the encroachment of external, superordinate power.

Why have I stressed harmony or balance in my work on the Taleans? In spite of my observations and interviews, which revealed considerable discord in Talean social life, I emphasize the importance of harmony and balance not only because I read Durkheim and the structural-functionalists, but also because I learned from the Taleans that they themselves prefer that disputes be settled on the basis of these principles. Even when one becomes more of an insider and hears of many instances of conflict and division, Taleans still present themselves as peaceful and harmonious. Harmony, they argue, is what differentiates them from others—the people of the sierra or the Valley of Oaxaca or the Cajones, where people are not peaceful. We are thus more in the domain of

ideology than of observational reality. Taleans strongly believe that if they were not living peaceful, harmonious lives the state would interfere in their business. It is also their theory about how their society related first to the Crown and later to the Mexican state. The image of harmony thus dominates how they present themselves to outsiders in what they like to describe as *relaciones exteriores*. As they state: "We are peaceful in this village, and by being peaceful and minding our own business we keep control of our village. We keep it in local hands, and by so doing we can maintain a relative autonomy." And as we shall see, this attempt to present a united front in response to external contact is not an uncommon reaction to colonization and what Wolf (1982:148) called "the tug of war between conquerors and conquered."

The political effectiveness of the Talean court depends on democratic participation, whereby it disperses power and reinforces community solidarity. In the name of harmony the court can hold private power accountable for the general good of the village. In the name of autonomy the court encourages decision-making that is accountable. In the name of solidarity it makes decisions reflecting concerns about long-term consequences. Through its legal processes the court expresses and ranks social values that are important to the village and to its relationship with the outside world. The village court can compete effectively with the district court, for villagers generally opt for local dispute-handling processes (Parnell 1978a, 1978b). The courts are the expression of political interest pursued through democratic legal procedures that are governed by the concepts of harmony and balance. These concepts enable conflicting interests to be accommodated in dispute settlement. In terms of actual case-handling, the harmony model reflects less attention to the facts of specific cases than to the language of disputing in the village court as opposed to that used in state courts. Through their ideology of harmony, villagers create an image of their society as cohesive and independent and thus fend off the outside world.

In earlier writings on the Talean Zapotec (Nader 1964a, 1964b), I sought an explanation for their harmonious relationships through village social organization based on cross-linkage. This mode of social organization promotes order by preventing fragmentation or rifts in individual and group relations. Yet this cross-linked pattern of social organization is also part of the same cultural ideal of harmony. We need to examine the phenomenon of Talean harmony within the broader context of village relations with the Mexican state in order to account for this particular ideology and social organization as resulting from villagers' interactions

with the outside world—Spaniards, Mexicans, and the various “developers” that each epoch has brought them. A straightforward Simmelian analysis might argue that external threat brings internal order, but in the Sierra Juárez and in the district of Villa Alta, not all villages respond to external threat as the Taleans do. The people of Yalalag, a large town also located within the jurisdiction of Villa Alta, are divided and fragmented, with a high incidence of violence (Fuente 1949). According to Kearney (1972), the village of Ixtepeji, located in the district of Ixtlán in the Sierra Juárez, is historically not a village thought of in terms of order or disorder, but a village that achieved unification through belligerence and from raiding other communities. Resistance and collaboration are diverse and inconsistent in these mountains, but members of all these communities agree on one thing: danger comes from the outside. Lack of an integrated Zapotec indigenous policy has left people with various options for response, and different options have been adopted over the years. The terms “closed” and “open” for communities reflect two such responses (Wolf 1959), while the terms “traditional” and “progressive” are sometimes one and the same with “closed” and “open.” But these four terms do not express the crucial issue of autonomy, for autonomy is directly related to ideologies and social structures of unity or division.

It is well known that the divided village is more susceptible to external domination. Thus, general awareness of this fact would encourage those who want to maintain some degree of autonomy to develop the means to promote internal cohesion. The Taleans are explicit on this point. In divided villages, other values override the value villagers place on autonomy. Yet in communities like Talea the strategy is twofold: managing the internal world of the village through systems of social and cultural control, and developing through the court, and more broadly through town meetings as participatory democracy, the ways to maintain communal loyalty and instill a unifying ideology. Jane Collier (1973) provides a vivid description of this strategy in her study of Zinacantan, where villagers and the state struggle for control over domains of relative power. She concludes: “Zinacanteco law will survive as a system apart from Mexican law only so long as Indians continue to use native ideas of cosmic order to justify procedures and outcomes” (ibid., p. 264). With regard to Talea, I argue that Talean Zapotec law will survive as a system separate from Mexican law only as long as village law, rather than Mexican law, is perceived as meeting village needs, *and* only as long as the Mexican state (like the Spanish Crown previously) continues to

regard local rule as in its best interests. As long as the Mexican state can continue to regulate the economy (labor, resources, consumption) outside of law, and as long as local disorder is not a threat to the state, local village law will continue in its present manner, fluctuating around changing issues but ever mindful of the connection between harmony and autonomy.

Zeroing in on Compromise Again

It is worth reiterating that the features of Talean court style have something in common with models presented by anthropologists and sociologists for people in other parts of the world, despite great organizational and cultural differences. While Starr and Yngvesson (1975) argue that the anthropologists were seeing compromise because of a Durkheimian bias, a closer look might suggest that compromise and, more generally, the harmony model are political strategies commonly used by indigenous groups either to protect themselves from encroaching superordinate powerholders or as defense against organized subordinates.

Ethnographies on Africa, as Colson (1974:86–87) has pointed out, report cases of societies managing to maintain local autonomy in face of colonial incursion by using local law. Among the many examples of such societies are the Barotse studied by Gluckman (1956) and the Arusha studied by Gulliver (1963). In describing the Shona administration of justice, Holleman (1974:18) states: “Justice aims at *solving* the conflict between the parties rather than *deciding* its legal aspects in terms of law. Justice . . . then becomes a process of persuasion with the accent on the reasonable behavior of all concerned in a spirit of give and take. . . . The successful end of a tribal process is a judgment which both parties formally agree to accept and observe.” This quotation comes from a book that deals with African law as it faces changes in personal and group aspirations and in obligations and loyalties. Much more is at stake than “a personal search for suitable compromises between the conflicting values of a new and complex world. The legal basis of marriage and legitimate offspring, the respective responsibilities of husband and wife, of parent and child, the nature and strength of their wider kinship affiliations and obligations, in short, the very structure and coherence of corporate kin-groupings, are being affected in the groping search for new norms” (ibid., p. 18).

Compromise is the politics of adjustment, but it becomes a politics of

survival when indigenous communities are threatened by more powerful societies. Community courts become the places where colonials imposed indirect rule that gave the colonized people a degree of local autonomy. Compromise can also serve as a political strategy under quite different conditions. Haley (1982, 2:125–147) describes Japan's decision to introduce mandatory conciliation in landlord-tenant, family, and other disputes between the first and second world wars. In this case, it was the Japanese elite who pressed for conciliation as a political strategy to safeguard family and other traditional Japanese institutions from the impact of litigation under the new civil code. Similarly, some scholars view the alternative dispute-resolution movement over the past decade in the United States as a political strategy to stem the tide of litigation that expanded during the 1960s as a result of the civil rights movement (Abel 1982; Auerbach 1983; Nader 1980, 1984). It is noteworthy that the movement toward the harmony model in the United States is compatible with the concomitant increased popularity of fundamentalist Protestant beliefs about handling and avoiding conflict (Greenhouse 1986). And from the strategists' viewpoint, it does not matter whether this move toward harmonious dispute resolution affects behavior or actually enhances conciliation, equilibrium, or rectification. What is important in this aversion to discord is the ideology. We are dealing with a rhetoric of harmony and compromise—principles extolling the general virtue of “give a little, get a little” over zero-sum win-or-lose adversary strategies, which appear more confrontational.

Groups that support a harmony ideology usually share the belief that the forces of disorder lie outside their group. In fact, it is the recognition of external threat that mobilizes religious-based beliefs in the harmony model. In seventeenth- and eighteenth-century Protestant New England villages, the inhabitants carried unanimity to an extreme in order to maintain harmonious relations that would enable them to remain independent from the influence of the Boston colony leaders (Lockridge 1970; Zuckerman 1970) or to control discord within the group (see Auerbach 1983:23).

One could also make a comparable argument for the rise of the adversary model—for the use of confrontation as a political or economic strategy. The point here is to acknowledge and examine the ideological components of dispute-processing independent of particular cases and of the degree of satisfaction obtained by disputing parties. In sixteenth-century Castile, compromise was the ideal and preferred means for ending disputes (Kagan 1981:18). Kagan reports that lawsuits were thought

to be at odds with Christian belief. Rapid changes—demographic, economic, social, legal, and political—came to be linked to an increase in adversarial behavior and presumably a decline in religious fervor. The medieval tradition that allowed a magistrate to base his decision not on the law but on his own estimation of what was correct was altered to a more formal legal system in which litigants could win cases (*ibid.*, pp. 22–23).

In the United States during the 1960s, adversarial law was highly valued as the means for attaining civil rights. At that time this legal model was broadened to include attainment not only of rights but also of remedies in such domains as civil rights, consumer rights, environmental rights, and the rights of women, Native Americans, and the elderly. Opponents of the adversarial model moved with surprising speed to supplant it within ten years by a harmony model that has been translated into action and institution-building (Abel 1982; Nader, 1986). Again, I believe the rapidity with which the change in styles of dispute-resolution was accepted can be attributed to the growing movement in Christian fundamentalism in the United States. This example of the shift from adversary to harmony models in the United States, as fundamentalism has gained new strength, inspires me to consider the spread of Christianity around the globe as a possible source of the harmony model in reality and in anthropological theory.

In New Guinea, both the spread of Christianity and the absence of colonial courts with indirect rule determine the manner in which indigenous communities handle contention and disputes in contact situations. Reay (1974:219–220) makes explicit reference to the impact of religion:

With the spread of Christianity, a greater proportion of councillors . . . were now directly affiliated with some mission or other, [and] these introduced a new style of court hearing. Often the councillor . . . would rebuke people who spoke angrily, saying that anger belonged to Satan and that God was watching. He placed more emphasis on the restoration of friendly relations than on the allocation of *kumap*, on the principle that all men were brothers in the eyes of God.

Epstein (1974:31) does not attempt to trace the source of the idea of amity, but he does remark that living in amity is a social value to which different societies attach varying importance: “Amity as an ideal is likely to be more strongly emphasized where people find it important, for whatever reasons, to remain together in relative and stable residence.” And in New Guinea some peoples find peaceful separation more advan-

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tageous than village unity—or at least they did so until colonial contact changed the social and cultural ecology. On the other hand, the colonial policies of the Australian administration prevented the development of either village autonomy or village courts. The Australian administration, Epstein reminds us (*ibid.*, pp. 35–36),

consistently refused to recognize or set up “native courts” on the African model, and most disputes could only be legally handled in the first instance by administrative magistrates. . . . Reluctance to accord legal recognition to the work of indigenous dispute settlers has rested on the assumed incapacity of New Guineans to handle disputes with the required degree of impartiality . . . many of the current difficulties relate to the failure to integrate local procedures for settlement into the wider judicial system.

If the Spanish Crown had not developed a policy for the creation of semiautonomous Mexican Indian villages, and if there had not been a powerful policy of converting the Indians to Christianity beginning 400 years ago, there might not be any Zapotec village law today, or any ideology emphasizing harmony and compromise. Colson (1974:87) describes the contrasting situation for North American Indians:

The denial of any local autonomy to Native Americans on their reservations gave them less reason to update their traditions of law and order and so connect past with present. . . . Instead, they were forced to defend themselves in alien courts which were governed by legal rules stemming from another tradition. They could neither withdraw from close supervision by their agents nor use the power of numbers to gain the political power that would affect . . . legislation.

The emphasis on harmony and compromise, whether viewed as philosophy or as ideology, becomes part of the discourse of those “colonies” that were governed by indirect rule. This discourse is useful because of the inherent ambiguity and elasticity of such terms as “compromise.” After initial encounters with European colonists and their missionaries, village law becomes the product of current social conditions and disputes resulting from routine village activities. Village law thus goes beyond being a mere creation of the Crown policies that gave villagers their original options for maneuver. The inhabitants of Talea de Castro have managed to maintain strong local control over both their land and their own problems, and many Taleans feel their justice is evenhanded. Over the past several hundred years, this community has been able to incor-

porate external economic and political pressures without losing its local integrity and autonomy.

Anthropologists, Their Informants, and Anthropological Theory

This chapter has addressed two issues: (1) the close relationships over time between disputing processes, the political conduct of governments and religious institutions, and the people over whom they exercise power; and (2) the more general question of where anthropologists get their ideas. We now look at why anthropologists have sometimes insisted that disputing among non-Western peoples aims to restore harmony to social relations, that harmony is either functional in face-to-face societies or the product of their specific social organization. Because anthropologists are so deeply involved in empirical analyses, they are heavily influenced by what their informants tell them. If the structural-functionalists argued that dispute settlement is aimed at restoring social harmony, it is probably because that is what their informants told them. And in good empirical tradition, the telling that was part of their data became part of the analysis as well. In the case of Talea, harmony is part of the people’s ideology—their theory of how they can maintain some autonomy from the state. The ideology of harmony thus becomes transformed into the image of themselves that Taleans present to outsiders, and it may reflect to some extent what missionaries have preached to them over 400 years—that harmony is the Christian way. This ideology and image of Talean social life has not only been approved by outsiders, but also helped maintain village solidarity.

Anthropological theory is shaped by the ideologies presented to them by informants, as well as by the Western world and such social philosophers as Emile Durkheim. That this ideology may have had Western origins makes it even more interesting as we attempt to trace the origins of anthropological ideas and to determine why Taleans employ the principles of harmony and balance in dispute settlement and in dealings with outsiders. Although I have focused here on how the “natives” use the harmony model, this issue has brought me closer to understanding how anthropologists use the natives’ harmony model and how anthropological theory has been shaped both by colonial policies and by Christianity as preached to indigenous peoples. It thus appears likely that structural-functionalists have influenced colonial policy and been influ-

enced by colonial policies through the resulting indigenous harmony ideologies. In the history of anthropological theory, structural-functionalism becomes more understandable when we realize how our informants have used colonial policies and how these people and their ideology have been reflected in our analyses. Fact, indigenous ideology, and anthropological theory thus become part of a common temporal perspective on law. If the early functionalists were internalist in their analyses focused on structure, continuity, or equilibrium, while contemporary anthropologists are more interested in transformations and in the role of external forces of change, both periods contribute to the understanding of continuity and transformation in law.

What is currently exhilarating about research in the anthropology of law is that we are becoming more critical of certain intellectual paradigms and of the truths that anthropologists construct from such paradigms. We are developing a good number of social scientists who study legal phenomena and who produce a diversity of data. These analyses cover a wide variety of circumstances, some of which are contradictory. Furthermore, we are living long enough to experience enormous change in the societies being studied. The current speed of change makes it possible for us to recognize better the relationship between local cultures and larger external social forces (neglected in earlier studies). These reflect asymmetrical power structures that overlap in interesting ways. As this chapter on the production and dissemination of the harmony model demonstrates, the temporal dimension in anthropology is further complicated because the anthropologist is both instrument and analyst of the people studied. Anthropology was never meant to be only the study of others. It is also meant to provide a mirror for the observers.

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[14]

The "Invention" of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women*

June Starr

Every age has its own gestalt. Sometimes authors use ideas and relationships from earlier times and cultures as implicit contrasts to their own society, but using the past for allusions to the present is hazardous, because everyone has a limited view of the rate of change in the modern era. We now know that the person who in 1909 remarked, "The world changed less since Jesus Christ than in the last thirty years" (quoted in Durant and Durant 1968:12), was quite mistaken.

In addition to a foreshortened sense of history, false analogies, and too much importance attributed to one's own times and values, other problems arise when authors use the past to illuminate the present. The most formidable obstacle is perhaps shallowness of insight into a former time. Asking "Do we really know what the past was," what "actually happened," or is history "a fable" not quite "agreed upon?" historians Will and Ariel Durant (ibid., p. 11) caution us about the interpretative task of historical analysis: "History as usually written . . . is quite different from history as usually lived: the historian records the exceptional because it

*The "perpetual tutelage of women" is a phrase used by Maine (1977:90). Under the *XII Tables* and in classical Rome, a woman of any age who was *sui iuris* needed a guardian, called a "tutor." In his will a man appointed a guardian for any woman under his *manus* or *potestas* (protection), who would become *sui iuris* at his death. No woman could be a guardian. See Jolowicz and Nicholas 1972:121.