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Governing Laws – on the Appropriation and Adaptation of Control in Mumbai[1]

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Abstract

Studies of legal pluralism have stressed how the rules operative in different semi-autonomous social fields are constituted by the interaction, mutual influence and situational use of state and non-state legal orders. Often, however, state law is treated not as semi-autonomous but (implicitly) as autonomous, as shaping but not as being shaped. The topic of this paper is how various actors involved in the field of conflict regulation, such as different state agencies, community organisations, NGOs, commercial (legal and illegal) enterprises etc. define legal institutions in their practices and thus shape an operative legal order. The organisations that are involved in governmental roles, be they administrative, charitable, judicial or others, are intent on "capturing the state" and having their version of law endorsed by state agencies. They transform state law – by entering the "unnamed law" generated in their operations into state practices rather than into legislation. My focus is on the practices of the Shivsena, a regional political party of the Hindu Right. The interactions of the Shivsena with state agencies show how the "unnamed law" generated in the organisation's regulatory and judicial practices is introduced into the practices of state agencies. However, the party's generation of rules and regulations is intricately shaped by its competition with other organisations involved in the field of conflict regulation. And this competition is in itself again structured by law, in this case by the procedural rules of democracy. Thus the generation of an operative legal order sways between domination and adaptation, between homogenisation and pluralisation.

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Introduction

The topic of this paper is the re-organisation of governance and its relation to the transformation of law. The question is how an operative legal order is affected by the interaction of various judicial institutions, formal as well as informal ones. My thesis is that various actors involved in the field of conflict regulation, like different state agencies, community organisations, NGOs, commercial (legal and illegal) enterprises etc. define legal institutions in their practices; they offer frames of interpretation and act themselves on specific interpretations of a legal framework; they set rules and practice sanctions and enforce thus certain norms and certain versions of a legal order. They produce in their interactions, inter-dependencies, co-operations and competitions, checks and balances for each other that bind them to their various constituencies, and bind them to the (legal) norms of their competitors.

The ways they relate to each other are, at the same time shaped by the operative legal order within which they operate, and thus also – but not alone-, by state norms and state procedural rules. Whether these different institutions stand in a hierarchical relation compete with or are relatively autonomous from each other is also determined by the policies and legislation concerning the administration of law as they are formulated by new conceptualisations of the role of the state, the efficacy of forms of adjudication etc. "The centrality of the state lies to a significant extent in the way the state organises its own decentering…" (de Sousa Santos 1995: 118). Current processes of the formal or informal devolution of judicial competences by the state to alternative organisations can take at least three principal forms that spur other, unintended processes: a) the devolution of state productive and distributive tasks to private organisations – and thereby possibly the informal devolution of regulation; b) the formal decentralisation and devolution of regulatory tasks in specific fields – that will most probably also effect other fields and those not immediately concerned; and c) the independent establishment of parallel centres of judicial authority related, for example, to international legal regimes or NGOs and corporations financed by international sources. The idea of decentralisation and devolution assumes the persistence of hierarchy of jurisdiction. It still centres on the state that delegates judicial and regulative competences beyond it as well as within it; the state retains the competence to delegate competences. However, the processes of delegation, devolution and appropriation are not always clearly distinct or distinguishable. These different processes will shape differently the constellations of actors involved in the production of law. They will have different results regarding the questions of how the "law" is affected by their interaction; of who the social actors

involved in encoding the content of legal plurality are; and they will have different results regarding the shape of legal pluralism itself. They will differ as to the degrees of pluralisation or homogenisation, the nature of the borders between various "sets of law", between different "semi-autonomous social fields" (Moore 1973), how these borders are drawn and by whom.

The generation and transformation of law (also of state law) in the organisational practice of state and non-state agencies that take on judicial as well as other local governmental roles, is, thus, itself structured by law. There are, on the one hand, the "official" processes whereby social and political norms are incorporated into state legislation or wherein law is "shaped" by its official interpretation. At the same time the frames that legal norms create influence the ways law is generated in organisational interaction.

Studies of legal pluralism have thus stressed how the rules operative in different semi-autonomous social fields are constituted by the interaction, mutual influence and situational use of state and non-state legal orders. Often, however, state law is treated not as semi-autonomous but (implicitly) as autonomous, as shaping but not as being shaped. Moore, for example, mentions that state law might be affected (Moore 1973: 745) but she shows only how it is part of the operative "rules of the game" (Moore 1973: 743).[2] On the other hand, studies that consider state law generally and principally to be shaped by "general social or political norms of the community" (Woodman 1998: 52), dissolve the term "legal pluralism" as meaningless since they consider all normative orders to be essentially plural (Woodman 1998: 51). However, although more radical in their concept of plurality, they do not analyse the particular processes that produce specific relations between various norms: the "officialisation" of some and the subordination of others, for example. Likewise, other authors consider the particular shape of legal pluralism and the relation of state law and non-state law to be a function of power structures, as congruent with and determined by elite interests, as for example in de Sousa Santos' analysis of legal pluralism in Brazil.[3]

If we consider state law and non-state law as constitutive of each other, or if we consider their relation as a function of power relations, we need still look at the particular constitutive processes of a legal order, i.e. at the processes that produce, re-produce and/or transform it. Fitzpatrick's notion of "combined law" (Fitzpatrick 1983, 168) considers the mutual interdependence and

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[2] Merry thus finds the way state law is shaped particularly understudied (Merry 1988: 884).

[3] Sousa Santos finds that the "asphalt law" that he studied in a *favela* in Brazil is "probably functional to the power structures of Brazilian society" (Sousa Santos 1995: 236). His own description of the interplay between state law and the emergence of "asphalt law" seems to tell a much more complex story of their relation, shaped by antagonisms, adaptations and evasions, than his analysis admits.

mutual constitution of legal orders but maintains that they cannot be reduced to each other: it takes apart the conglomerate and analyses it towards its component elements that are combined in historical processes. Fitzpatrick too, considers the particular form and constellation of legal pluralism to be a function of the mode of production, but his conceptualisation of legal pluralism draws attention to the precise processes of "combining" and the plurality of *interactions* between various actors that are involved in shaping the "combined" legal institutions. Here the history of the establishment of these institutions is one of social, political and economic struggles that shape their particular combination. Thus, both the transformation as well as the preservation of legal orders, their pluralisation as well as their homogenisation, can be considered dynamic processes that involve human agency.

I want to elaborate on these processes of generating an operative legal order in the interactions of various actors with reference to the administration of law in Mumbai (formerly known as Bombay.) My focus will be on the practices of one particular organisation active in the field of law and conflict regulation, namely the Shivsena, a regional political party of the Hindu Right, and its interaction with other organisations. The establishment of independent courts by the Shivsena is an example for the establishment of a legal order often termed "unnamed law". The interaction with the state agencies by the Shivsena show how "unnamed law" can be re-introduced into the practices of state agencies and thus enters – via practice rather than legislation – the state legal order. However, the interactions of both, the Shivsena as well as the various state agencies with other non-state organisations active in the field of regulation and adjudication in Mumbai's neighbourhoods also highlights how this generation of unnamed law, and its introduction into state practices, is bound and shaped by competing versions of unnamed law. The operative legal order is thus a conglomerate of these competing versions, swaying between monopolisations of one version and pluralisation. However, the competition between these different versions of unnamed law is itself again shaped by law, and in this case by the procedural rules of democracy.

The Shivsena is political party, government (of the city of Mumbai), local NGO and criminal gang all at once. The organisation thus spans the whole range of social and political life in the city. It is thus an extreme example for the issues in question because here the processes of the de-etatisation of regulation and adjudication involve a considerable degree of autonomous coercive force that is not formally delegated by the state but has been appropriated by the Shivsena. However, particularly because it is an extreme example, it sheds light on the complex matters of the use and transformation of law and the precariousness of power relations; the fact that the

organisation, despite having obtained a considerable degree of regulatory autonomy and implementation powers, is still bound to the offers of its competitors (among them the state) of normative and legal interpretations, highlights the conditions under which an operative legal order is shaped by plural pressures.

The Shivsena Shakhas

The Shivsena was founded in 1966 by its still uncontested leader Bal Thackeray. First espousing regionalist claims within the newly created state of Maharashtra, it has made Hindu-nationalism its central issue of mobilisation since the early 1980s. The party has been governing the city of Mumbai since 1985, and formed the state government of Maharashtra in coalition with the BJP (Bharatiya Janata Party) from 1995 to 1999. Since 1998 it has been part of the governing coalition in the central government of India. Its distinguishing feature, however, is its strong local presence. It has established local party offices, the *Shakhas*, in every part of Mumbai as well as in most towns and villages of Maharashtra. These have become the dominant centres of local governance in many places, offering social services ranging from counselling to infra-structural improvements or protection.

The Shivsena and the *Shakhas* present themselves, and are seen by many people as providers who "get things done". The offer of efficient pragmatism answers to needs felt in many areas of the city. These needs are tangible but also shaped by the expectations and norms of governance that the promise of development by the state has affirmed. The state's ambiguous deliverance of its developmental promise – sometimes too much and often too little – opened spaces for the substituting of the state by various institutions, which constitute themselves bases of (local) power.

The Shivsena is explicit in its critique of the state and propounds to correct both the "too much of the state", the inefficient, bloated, expensive, inaccessible bureaucracy as well as the "too little of the state", the perceived failure of the state to fulfil its developmental promise. It thus connects to the widely pronounced disillusionment with the capacity of state bureaucracies in matters of administrative services and poses as a critique of both the bureaucratic organisation of the developmental state as well as political deliberation in parliamentary democracy. And at the same time its leaders – sometimes explicitly – answer to and reaffirm understandings of politics as the paternalist administration of distribution. They thus also cater to the idea of the providing and productive state once introduced by the Nehruvian ethos, and turned into mass populism by Indira

Gandhi's programme of *Gharibi Hatao* ("abolish poverty"). These rhetorics are contradictory only at first glance: they combine the advocacy of the neo-liberal critique of the state with images of a strong authoritarian providing state: Bal Thackeray calls for "benevolent dictatorship", and lays the blame for state inefficiency on parliamentary procedures and on democracy which in the Sena's view are responsible for corruption and indecision. The *Shakhas* are thus the "better state", a "benevolent dictatorship" on a local scale; they fulfil what the state promised to offer but failed to deliver: They offer local services, organise infrastructural measures, such as water connections, garbage collection, public toilets or roads; they initiate employment schemes, youth activities, crèches and tutoring; they put up festivals, help in obtaining admission to schooling, and thus address a wide variety of concerns and a wide variety of every day issues of urban life. "What is politics? Politics is just good administration. So our politicians don't know politics," was the opinion of the Shivsena leader Shrikant Samolkar. "They just come and talk and go. We solve their problems," felt Vinodh Kumble, an older member of the movement. Many party members of the Shivsena, the *Sainiks* (soldiers), claim that their own activities are not "politics", but are instead based on "obvious" notions of what is good and what needs to be done. "We want to get things done. India has so many problems and our Mumbai will die. But the politicians only talk. You need to do something," a young *Shakha Pramukh*, the leader of one of the Shakhas, urged. *Sainiks* have projected their acts of protest and their acts of resolution as a model for a counter-project of politics. Thus "getting things done" is their credo: Direct action replaces parliamentary politics and is superior in efficiency and moral rectitude.

The Shivsena's *Shakhas* supplement various functions of the state and are legitimated by their accessibility as well as their short-term efficiency. They are central in matters of distribution as well as (access to) productive services. Along with these distributive and productive tasks come regulative functions inherent in this organisation of allocation. The Shivsena takes on regulative functions explicitly, as the party connects its local (formal and informal) governance role with its particular concepts of substantive rights. However, rather than the explicit regulative claims of the party, the regulation implicit in its distributive and productive tasks shapes the operatives rules of Mumbai's neighbourhoods. Firstly, certain strategies or ideas of just allocations are involved; moreover, the *Shakhas* as centres of distribution and production are accessible and relevant to the organisation of everyday life and are therefore the vehicle of regulation.

Such regulative functions can also be attributed to the practices of the party in the city's administration, its role in the municipal housing projects and in all infrastructural matters. But the topic of this paper is not the intricate connection of distributive and regulative tasks but more

strictly the connection of judicial and legislative functions. These are most clearly exemplified by the Shivsena's courts. These courts are among the most sought after services the party offers in the neighbourhoods of Mumbai.

The Shivsena courts deal with family matters, conflicts over property and contracts, with questions of land ownership, alimentation, labour issues and disputes relating to everyday living in the city. Issues range from quarrels about the rights to a specific location of a hawker's stall, disputes over garbage dumps or noisiness, petty crime and cheating, to litigations over loans and property and to real estate disputes – which easily become deadly serious in a real-estate market like Mumbai's. Thus they deal with civil as well as criminal matters, and often also with administrative regulation.

Mostly issues are brought before the *Shakhas Pramukh* by one of the litigants; sometimes the Shivsena intervenes on its own behalf. Judgements always attempt to produce the results demanded by the party whose claims are affirmed: a piece of land changes its proprietor, a building is demolished, a garbage dump is removed, a hawker is expelled, money is paid or not, etc.; often, of course it also involves the physical threat or punishment of "the culprit". Judgements are certain to be carried out – and that is one reason for the use of the courts – as they are swiftly enforced by the *Sainiks*.

The establishment as well as the use of the Shivsena courts by the clients of the party relates directly to the inefficiency and inaccessibility of the state courts. This is reflected both in the explanations of people who have sought the assistance of the Shivsena courts as well as in the self-representation of the Shivsena.

> "For the people, anything is better than paying lawyers' fees and then waiting endlessly for judgements. We have had *lok panchayats* [local governing councils, JE] long before they were introduced by law and I think this is just like common *lok adalat* [customary law, JE], as now favoured by the government."[4]

The backlog in state courts in India means that procedures last over decades. This has prompted the World Bank, for example, to suggest delegation of judicial tasks to alternative institutions of dispute regulation (ADR) as part of its programme of judicial reform and good governance (World Bank 2000: 45). Although the Shivsena is probably not the candidate for decentralisation and privatisation programmes that international organisations have in mind, the party's justifications of its courts often speak the same language and are in line with widely pronounced

[4]Interview with Sudha Churi, March 1997, while she was the leader of the Sena's women's organisation *Mahila Aghadi*.

analyses of the crisis of the state. They are part of the party's general stance that its *Shakhas* fulfil state tasks better than the state itself, and that such tasks should be delegated to private or communitarian organisations.[5]

The criticism of, and the distinction from state agencies are not sought (or at least not explicitly, in the case of law) in terms of the norms and values of state law but in terms of the alleged inefficiency and inaccessibility of state procedures.[6] The Sena courts do not contest the validity of state law, rather they contest the efficiency and accessibility of state courts. In fact, in terms of legal institutions the Shivsena refer to various legal "traditions": to the official law, to ideas of human rights here understood as essentially defined collective rights, and to the *lok adalat*, the customary law. *Lok adalat* was once introduced as a local form of judiciary connected to the *panchayat* system, the village councils, to administer state law by the state itself as part of its decentralisation programme (Galanter 1997: 68). Nowadays *lok adalat* courts are part of the judicial reform programme introduced by the central state and function as mediation institutions. The Sena does not name an alternative normative order as more valid or legitimate; it does not refer to religious law or other sources of legitimate ideas of justice. Rather, it refers – in name – to just those sets of laws that the state too deems legitimate and re-interprets them in a majoritarian, Hindu-nationalist, or: vigilantist manner.

Thus in the courts as well as in its administrative role in the localities of Mumbai the Sena propounds to be "the better state": it tunes in with a general critique of state administration, decentralisation programmes introduced by the state itself as well as international organisations, and "good governance" concepts of by-passing the state. The Shivsena, too, by-passes the state and organises the new world not only in an ideological manner of rights to participation, but also

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[5]The Shivsena government itself has frequently delegated governmental tasks to the party's own "NGOs", for example the Shiv Udyog Sena. Members of the Shivsena government considered the governmental employment exchanges to be inefficient, and rather than improving government services they chose to form an independent Shivsena employment unit, through which the "son of the soil" policies, i.e. employment priority for those of Maharahstrian origin that the Shivsena demanded in the 1960s and 70s could be taken up again. Apart from providing an arena for Raj Thackeray, one of the possible heirs to the throne of Bal Thackeray, the Shiv Udyog Sena served to dissociate the Shivsena from the dysfunctional government institutions, or rather: the failure of the Shivsena government to tackle the problem of unemployment. The Shiv Udyog Sena, for example, claimed to have organised 2.7 million jobs for the 3.79 million unemployed of Maharashtra, while the 732 crore (7320 Million Rs.) job scheme initiated by former Chief Minister Manohar Joshi floundered. Unlike for government services, the lack of large-scale successes of the Shiv Udyog Sena could be blamed on adverse circumstances, such as the bureaucratic structures of the state. Such non-governmental organisations could thus provide their mother organisation, the Shivsena, with a legitimacy which the Sena-run government – inefficient as any other – could not. Moreover, the Shakhas' services as well as those of the Shivsena's organisational wings are supposed to be given as "gifts", not as the fulfilment of administrative tasks; they are presented as "voluntary services" to the community.

[6]The exception is the dispute over minority rights and the plural personal laws instituted in India. The Shivsena, as other Hindu Nationalist organisations, favours a uniform civil code and the abolition of caste or religion based minority rights and quotas.

in a practical manner, establishing intermediary institutions which realise the particular explicit and implicit norms of regulation the party espouses.

Transformations and Authenticity

The criticism of legal procedures as inefficient, and the concentration on substantive law is central to the transformations of material law effected by the appropriation of regulative tasks by the Shivsena and other non-state actors. The substantive content of the legal institutions that the Shivsena refer to is defined by the party's practices. Thus, *lok adalat* becomes what the Shivsena does in its courts; *mediation* "like you in the West also have now" is what the Shakha Pramukh does presiding over the courts; *human rights* is what is declared by the Shivsena to be "nationalist and human" and justification for the party's anti-Muslim stance.

This re-definition of law and the identification of various institutions with the Sena's practices are accepted at first only by those who are members of the party. It is very often also reproduced in academic and charity descriptions of the life of Mumbai's poor as the authentic culture of the people, the mythical "common man" (see for example Hansen 1996: 166; Heuzé 1995; Patel 1995). It has in some areas indeed become the "culture" of every day life as the Sena's institutions govern everyday practices in the locality and thus become part of the everyday governance of the city. Particularly within their local, accessible establishment and their every day use, the Sena's modes are naturalised as authentic: The Sena's courts are presented as accessible and therefore as more participatory and "close to the people". They are presented as representing the "common man's" sense of justice and making that sort of justice available to that very "common man". The party naturalises its forms and practices by merging and identifying them with everyday institutions of urban life. The particular transformation of the latter in the course of their identification with, or occupation by the Sena becomes easily invisible within the legends of the culture of the "common people". The Sena has been very active in defining the content and limits of the "people's culture". It has elevated strands of urban public culture to the heights of popular authenticity; and it has equally violently fended off what it considered "alien" and subversive in the name of tradition and of Indian culture. In its everyday reproduction of these institutions its version takes on the nimbus of the "authentic" – mostly by involving their clients into the production of these transformed institutions.

The participatory manner of making law available affirms the redefined norms and practices. The clients often adhere very selectively to the service offers of the Shivsena. They often might

not approve of the party's practices, or its norms but use its offers anyway because they are indeed more accessible than those of the state. The use of these institutions is thus no indication of their overall legitimacy, nor of a general "trust" in them; rather, this use is pragmatic. What is legitimate is thus their efficacy in certain matters. However, the use of these institutions, which is at first instrumental and pragmatic, might produce their legitimacy; the fact that adherence to the Shivsena's ideological and practical offers is merely selective does not hinder the reproduction of the party's overall stances through this very use. The selective adherence to the Sena's various offers which many people espouse dissolves within the merging of these offers in the institutional integration within the *Shakha*. The "pragmatic legitimacy" produced through the availability and use of one particular service is transferred onto the party as a whole. Therefore, its other activities can share in the legitimacy of the whole organisation. Institutional integration and selective use both affirm the overall *Shakha* structure and reproduce its norms; they create the authenticity attributed to the *Shakhas*' practices. The production of legitimacy, i.e. the affirmation through use, the normativity of the factual produces an "authenticity" wherein the history of the establishment of these institutions has become invisible.

The practices of the Shivsena thus define 1. the substantive content of those institutions the procedures of which the Shivsena pays reference to; 2. the "essence" of the substantive content in terms of the party's ideas and representations of "the common man". That the culture of the common man is created within and through the practices of the party disappears into oblivion.

Re-entering the State

The identification of certain legal institutions with the practices of the Shivsena does not stop at the self-representation of the party in word and deed. It is implicit also in the acceptance and adoption of the Sena's practices by state agencies. Of interest is how these transformed concepts are re-introduced into the practices of state agencies and how they are made official by the cooperation with or delegation of certain tasks of these agencies to the Sena's *Shakhas*.

The most obvious form this acceptance takes is the frequent non-intervention of the police into the illegal activities of the Shivsena. What is of more immediate relevance to the transformation of law, however, is the cooperation between state-agencies and the Shivsena, and in particular the police and the Shivsena. It involves the explicit delegation of tasks to the Shivsena and thus the implicit "officialisation" of its practices.

In most areas of the city the police is addressed in many a dispute; these range from family disputes (between mother and daughter-in-law, between father and son, between brothers, between spouses), quarrels over water taps or other public facilities, over financial transactions that have gone wrong, over fraud and violence. In many areas the police delegates the resolution of these disputes to the *Shakhas*: "If you want to solve anything with the police you have to be with the *Shakha*. The police will send you to the *Shakha*," explained a Muslim resident of Mumbai. As Madhokar Sarpotdar, a prominent Shivsena leader, explained: "Some people go to the police, some go to the *Shakha*. We then cooperate with the police." The police likewise cooperate with the *Pramukhs*, the leaders of the *Shakhas*, and are legitimised, as former Police Commissioner Tyagi[7] put the matter in an interview, by the new policy of "community policing like in America."

In matters of law and order the police frequently co-operates with the *Shakhas* and relies on their executive powers as well. The various constellations of "illegality" present in the so-called informal economy of the city are "supervised" by the *Shakhas*: licenses or tenure are granted, checks placed on certain activities and access is channelled by the *Pramukhs*. Moreover, the police often operate according to the orders of the *Shakha Pramukhs*.

If someone wanted to contest a ruling by a *Shakha* court in a state court he or she is not only faced with the efficient and violent ways of the Shivsena to impose their rulings, but also with the fact that hardly any case against a member of the Shivsena has been decided against the Shivsena. Most of them are pending, and many lapse somehow or other. The reluctance of the judiciary to act against the Shivsena is explained partly by what a police officer once related in his disposition before the Srikrishna commission[8]: Fear of chaos prevented taking counter-measures against the party's activities. The Srikrishna Commission's initial ineffectiveness is the best example of the immunity awarded to the Shivsena: While the commission held the party and its leaders responsible for the 1993 riots in Mumbai (Srikrishna Commission Report 1998), its findings were not admitted as legal evidence and its indictment did not have any legal (let alone other) consequences for those indicted. Now the Supreme Court ordered the government of Maharashtra to open criminal investigations – but not against the Shivsena; only police officers charged with

[7] Former Police Commissioner Tyagi has become a member of the Shivsena. He also has a case of murder pending against him in relation to the killing of nine unarmed Muslim youths during the riots in Mumbai in 1992 on his orders.
[8] The Srikrishna Commission was commissioned to inquire into the circumstances of the riots in Mumbai in 1992/93. In his report Justice Srikrishna indicted many Shivsena leaders, and above all Bal Thackeray to have instigated and organised rioting.

atrocities were investigated. The fact that the state, independent from the Hindutva forces,[9] took – implicitly – the side of those whom it held guilty of offences punishable by law by not sanctioning their activities, made the system appear as a farce in the eyes of those who had been victims of the Sena's violence. The claim to the justness of Hindu dominance and to the justness of Hindu violence (or at least its understandable and excusable "irrational" nature) seemed to be affirmed by the fact that legality and illegality were irrelevant in relation to Hindu-nationalist violence.

The transformation of the democratic idea under the slogan of "unity in diversity" into a majoritarian definition of citizens' rights succeeded not simply via the electoral expansion of the parties propounding such a vision of legitimate participation; rather, the spread of this logic of entitlement succeeded through its increasing "presentability". This presentability was produced not simply by the increase in formal powers of the parties advocating such a vision of the body politic but even more so by the fact that the limits to their control over the formal institutions of power did not affect them detrimentally. That the independent institutions of the state joined in their endeavour simply by not sanctioning their undertakings enhanced the power of these majoritarian definitions of rights and entitlements, as these were not imposed onto the social environment but recreated in the environment's practices. The acceptability awarded by the political competitors tolerating the lack of sanctions against the braking of state law, this "third party acceptance" paved the way for the expansion of the new conceptualisation of the relation of legality and legitimacy. It was not that the contending parties and institutions adopted the justificatory logic of the Shivsena. Rather, the lack of sanctions was due to a complex intermeshing of strategies and motives by the various institutions. It is those various strategies of instrumentalisation and of avoidance that parties like the Congress follow which narrow the limits of civil society. Public acceptance, whatever its diverse reasons may be, opened the space for the attempt to re-set the issues of public norms and to monopolise the determination of the primacy of issues. Moreover, it entrenched the situation set by these practices.

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[9] *Hindutva*, literally „Hindu-ness" is the self-description of the programmatic stance of the various Hindu-nationalist organisations. The "Sangh Parivar" the "family" of the RSS (Rashtriya Swayamsevak Sangh – National Association of Volunteers), i.e. the RSS and its sub-organisation, like the BJP (Bharatiya Janata Party – National Peoples Party), VHP (Vishwa Hindu Parishad – World Hindu Council), Bajrang Dal, etc. are the dominant force; but there are also independent Hindu-nationalist organisations, like the Shivsena, that espouse *Hindutva*.

Pluralist Pressures

Shakha Pramukhs are not the only providers of services, and they compete with a variety of "local leaders", social workers – a rather vague term which can relate to a wide array of activities in the city -, *dadas* (strongman), "slumlords", *goondas* (local gangsters), as well as self help organisations, NGOs and the police in the field of setting rules and generating law (see also Panwalkar 1998). The institutions of *Dada* and *Dalal* (middle men) have been part of the city's modes of governance ever since its rapid expansion during industrialisation (Chandavarkar 1981; 1994: 168-238). The Shivsena has in no way driven out other organisations, nor has it won predominance over its competitors everywhere. The degree of dominance of the *Shakha* differs from area to area and depends on various factors: the strength of the competitors, be they gangs or *dadas*, political parties or NGOs; it depends on the potential of the area in terms of revenue and votes; or the need in an area for extra-state services. In some areas the Shivsena is hardly active at all, for example in some of the Muslim areas of central Mumbai, but also in others were it lost the competition with its rivals or where the specific services of the organisation are of little value to the residents.

The positions of the various agents in matters of conflict, of distribution and allocation have always been precarious (Chandavarkar 1998: 191-193). They have been and are restricted by demands of reciprocity, competition with rivals, and the expectations of their clients. Communities can and do reject leaders. Moreover, the term "community leader" is often misleading; it assumes a higher degree of social integration of neighbourhoods than is often the case and it assumes a higher degree of authority than those leaders necessarily hold: their "lead" is often situational, as is the "community" formed around particular issues. As a "community" they make use of "community leaders" in particular situations when such collective representation towards a situational outside, be it the state or another "community", is demanded. Thus, leaders are leaders in particular situations and the integration of the entity they represent is often subject to the issues at hand.

Above all, the sway of self-proclaimed leaders is shaky. The influence of the *Dalals* derives from their connection to political parties. Political parties are interested mainly in voters. Local leaders, in order to be able to provide parties with voters and thus get influence within the state administration in return which is the base for their local support, need to pay heed to the interests of the residents – as these have the option of favouring the competitor. The competition between

various local leaders or local strongmen over an area constitutes a possibility for the residents of an area to bind these local leaders to their interests. Thus, because of the direct or indirect involvement of these various local agencies in democratically organised party politics, competition means the adaptation to demands from the side of voters as well as to offers of competitors to voters.

This also holds for the competition of *Shakha Pramukhs* over party posts within the party structures. For party-internal competition the rule is: "If you can't bring a mob you are a flop," as one *Shakha Pramukh* who hoped to rise high in the party put it in an interview. A "mob" can be bought, but a "mob" knows its price. And a "mob" is a "mob" only when the right price is paid, because otherwise it is a "community" with its own priorities and demands towards the bidders. One housing society of a Mumbai slum, for example, agreed to operate as a "mob" in turn for the improvement of local water connections. Another demanded public toilets in return for agitating for the Shivsena leader. The influence of the competing bidders is thus dependent also on the offers they can make in terms of these priorities and demands even where the competition between the various agents has turned into an arms race – as it has at times.[10]

An example of such strategic adaptations would be the definition of women's rights as practised in the Shivsena courts, as they often deal with family matters of alimentation and violence. Women's rights are generally one of the favourite subjects of Hindu-nationalism where they are redefined in terms of communal antagonism: Protecting women's rights turns into a way of protecting Hindu culture (and protecting Muslim women from their men).[11] In the daily practice of the Shivsena these issues are often dealt with in contradictory ways, differing from one Shakha to the other, as well as depending on the specific local constellation and demands. While in one case of a women demanding alimentation from a gambling or drinking husband a Shakha Pramukh might tell her of her wifely duty to endure and send her away, in another case a Pramukh might gather a group of women, search for the husband, beat him up and threaten him with further action if he does not comply to his duties as head of the family. Through the Shakhas, but also independently, some of these newly defined ideas of women's rights have entered also into the practices of the police.

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[10] Political parties compete not only in winning over individual candidates but also in who can put up the candidate with more clout. Thus, Abu Asim Azmi, the president of the Mumbai branch of the Samajwadi Party, claimed shortly after the municipal election of 1997 that the party had seen itself forced to put up candidates with dubious credentials but enough muscle-power to stand up to the Shivsena candidates. Such a race tends to turn into an arms race, so that in the end local standing is only determined by muscle-power and its technical equivalents.

[11] See Butalia and Sarkar (eds.) 1995, on the Shivsena in particular Sikata Banerjee 1995, p. 216 – 232.

More complex are labour issues where the Shivsena has also espoused contradictory positions not only consecutively but even simultaneously. It generally favours a management friendly policy[12] and self-help schemes for those made redundant (Purandare 1999). It has affirmed this stance by busting unions unfavourable to management (Gupta 1982; Purandare 1999). It has often been able to gain employment for its own clients when members of radical unions were sacked. This trapped the Shivsena unions in a difficult position because they had to pay heed to the demands of the new workers towards the management as these were their clients. On April 25th 2001, for example, the Shivsena Unions took part in a general *bandh* (closure, strike) protesting the governments suggestions to make labour laws more flexible (Hensman 2001), a measure that was clearly out of line of their general management-friendly stance and their hostility against militant unions. Earlier they had taken up the workers stance against the closure of the Balco steal plant in Chhattisgarh. Both were possibly strategies to strengthen the Sena's base among unionised workers.

The Shivsena is particularly apt at programmatic adaptations as it has never given much concern for programmatic consistency but has favoured action. "I don't believe in programmes," declares Bal Thackeray. "In the last 40 years too many manifestos have been published and then consigned to the dustbin. I believe in implementing..."[13] The party has shown a considerable degree of flexibility or opportunism and once, for the period of two weeks, even voiced socialist demands. Its vague reference to all sorts of traditions and its practice of singular rulings specific to a case keeps its "content" flexible, to be adapted to opportunity structures in the public discourse. It can shift its militancy from one daily issue to the next and re-interpret its agenda in terms of the demands made by its clients and in terms of public discourses. Thus the "occupation" of a definition of a legal institution is never complete, nor is the definition of the Shivsena final but always dependent on the relations determining the specific issue at hand.

These shifts in positions are closely related to local relations of power and dependent on the individual *Shakha Pramukh's* interests: interests in votes are opposed to interests in kickbacks from industry. Both have an ambivalent relation to "donations" from residents who might on the one hand have to pay for the jobs that they get due to the Shivsena's pressure politics in local companies, and who on the other hand might detest the extortion and shift their electoral allegiance elsewhere. Whether the swap of patrons is possible and is actually done is dependent

[12] See for example the Guidelines of the Bharatiya Kamgar Sena, the Sena's general Union, published in Marmik, the Sena's weekly magazine, in 1968.
[13] Bal Thackeray in an Interview in The Week, 10-16.7.1988, p 45.

again on whether the competitors to the Shivsena in the area are alternative political parties or mainly commercial criminal enterprises – in which case many will prefer the Shivsena's extortion to that of a purely criminal gang, as the latter are less efficient in bringing about public services because they are less well connected to the Municipality than the Shivsena. If however, the Shivsena's competitors are other political parties with an alternative system of patronage or their own party comrades, the competition will take another course.

Within the logic of competitive patronage the exclusionary principles of the Shivsena are partly modified. Populism takes precedence. As long as people seek access to the Sena, they can lose possible stigmata of being an illegitimate participant in the city's largesse - at least as long as their votes are considered relevant: Belonging to the Sena is a means of belonging to the legitimate in-group simply because the Sena relies on its mass base. As a political party with aspirations for the formal institutions of government and therefore tied to democratic procedures, it is interested in as large a mass base as possible. Where minority groups or those that the party defines as the public enemy are relevant in terms of local elections, they might – at least temporarily – be considered in their demands. A continuous example of this opportunism is the party's stance towards the rights and demands of the various Dalit groups in the city and the state of Maharashtra: Generally fiercely opposed to caste based quotas (while in favour of regional quotas and son-of-soil policies) and often having made explicit this opposition with violence against Dalit political organisations, the Shivsena has wooed all sections of the Dalits ever since they have entered into a successful coalition with the Congress party (and the NCP) and ousted the Sena from the state government. The "others" are always those "who won't cause us damage because they are not included into the voters list" (Manohar Joshi, former Shivsena Chief Minister of Maharashtra, in Asian Age).

However, while the Shivsena competes in terms of clients with NGOs, community leaders or *dadas*, and while it competes for these clients in terms of votes with other political parties, it has an advantage in its integration of the various positions of the formal and informal positions of power. This advantage is shared with few other organisations, and when the party perceives competition as threatening its specific offer and thus its niche in the landscape of relations of domination, its reaction is fierce. It once but eliminated the gang of Arun Gowli with the help of the police; Gowli had started Shakhas himself and had been successful in attracting many Sainiks. Thus the checks and balances inherent in the competition and the dependency on voter support are precarious as the Shivsena can, where it has enough strength, eliminate its rivals and base its local rule on a clearly defined in-group, excluding many completely.

Moreover, some of its competitors, particularly the Congress party, have made good use of the Sena's services themselves and have locally developed more cooperative than competitive relations with the party (Gupta 1982, 176/177; Ribeiro 1999). Alliances restructure and diminish the checks and balances inherent in the competition over voter support. However, party alliances do not diminish internal party competition. To repeat: There the rule that "If you can't bring a mob you are a flop" binds Pramukhs with aspirations to higher posts to the frequently diverse interests of their clients.

The processes described above could be analysed as the shift from the rule of law to the rule of force. However, this rule of force is precarious. It is precarious in a particular way that is determined by the rules governing the interaction of the actors involved in local governmental tasks. In many ways the terms of the competition between the various agencies active in the field of adjudication and regulation, up to the competition between *Shakha Pramukhs* over party posts are structured by state law. On the one hand the state and state law are central as they are to be occupied, to be captured, to be the vehicle of a particular set of law. On the other hand the state and state law are central in that they still structure the terms through which non-state actors introduce their laws into state practice, as well as the conditions within which they act and compete with each other. Above all the form and means of competition are shaped by the compulsions of democracy. The rules which govern the chances to succeed in this competition are those of democratic party competition – because those offices are acquired through democratic means – are also those which provide the easiest access to and control over the still lucrative resources of the state.

However, this suggests a process more ambivalent and more open than is necessarily the case: to what extent state structuring of the competition in the field produces the continuous precariousness of emerging monopolies and binds the competitors to the demands of their clients and to what extent state law is one instrument to bind power by dispersing it, or whether it creates monopolies in itself is an empirical question.

However, the formal and informal decentralisation of judicial tasks in this case has the paradoxical effect that it triggers the "capturing of the state" by those non-governmental organisations that have posed as the alternative to the state, by the entering into state practices of their particular versions of law. At the same time this "capturing" of the state triggered by de-étatisation is inhibited or structured in its means by state law which inadvertently forces the "captors" to adhere to the demands and ideas of law brought into the fray by their clients. It is the rules of the common political space which most of these actors are directly or indirectly involved

in. In Mumbai the power of the various actors and the establishment of monopolies over jurisdiction and legislation are always subject to the competition within the democratically organised access to control. This produces a specific form and determines specific means of competition, not abolishing other possible means but limiting them within the confines of really existing alternatives. It opens up the process of the generation of law to continuous transformations related to the plurality of demands. Other political situations might generate other rules of interaction and interrelation and therefore other possibilities for monopolisations or pluralisations.

New modes of governance

Looking at the local establishment of the Shivsena it becomes clear that organisations that are involved in governmental tasks, be they administrative, charitable, judicial or others, transform the operative legal order in their practices. Not only is the relation between productive, distributive and regulative/legislative tasks more intricate than currently fashionable policies of subsidiarity assume, and law is generated in practices that are formally not concerned with legislation. Also, the "laws" generated in organisational practices become part of the operative legal order and are, through the interaction of these institutions, re-introduced into the practices of state agencies. The character of the institutional integration which the Shivsena has achieved with agencies of the state is quite novel and differs from the earlier versions of the complementation of the state agencies in governance by alternative institutions. The Shivsena's competitors and its forerunners and models in urban governance systems have all operated as intermediaries between the locality and the state (or industry). They have mostly earned their incomes from both sides and many have integrated activities of control and those of provision or articulation. In terms of law making, earlier settings were plural in the sense of various distinct rules covering distinct settings; now, most actors involved in the field are intent on "capturing the state". This competition is carried out not merely by advocating as "right" specific versions of law (possibly all referring to the same institution), but rather by creating them in practice and striving to integrate these into the practices of state agencies. The different versions and interpretations of law that are the outcome of different organisational practices, different organisational interests and compulsions resulting from different positions within the institutional constellation, stand in direct competition with each other to be endorsed and incorporated by the state agencies. Partly related to this intent, partly resulting from the state agencies' efforts at delegating particular tasks, the institutional

integration between some of the non-state actors and state agencies is intricate; particularly so in the case of the Shivsena.

In this situation of governance, state law is transformed by the practices of non-state actors that take on governmental roles. State law is transformed both through its incorporation into the competing versions of unnamed law and through the introduction of unnamed law into the practices of state agencies. What is at stake is thus the production of a relatively integrated operative legal order in the interactions of various actors involved in the field of regulation and adjudication. This distinguishes these processes of legal pluralism from situations where distinct sets of law operate parallel, in competition with or in subsidiary relation to one another. In question are thus the conditions under which these processes of the generation of an operative legal order tend towards homogenising or monopolising norm setting, or sway continuously between phases of homogenisation and phases of pluralisation. We have seen in the case of Mumbai the role of the state and of state law in structuring the institutional constellation and in determining, or at least influencing the terms and means of pluralisation as well as monopolisation.

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