

**THE LAW OF THE OPPRESSED: THE
CONSTRUCTION AND REPRODUCTION OF
LEGALITY IN PASARGADA**

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In a capitalist society the State legal system is in general an instrument of class domination both at the level of the relations of production, as in the factory, and of the relations of reproduction, as in housing. Housing conditions are particularly illustrative of class domination in the squatter settlements of all major cities throughout the capitalist world. Pasargada is the fictitious name of such a settlement in Rio de Janeiro. In a nonrevolutionary situation, and particularly under the yoke of economic and political repression imposed by the fascist State (as in contemporary Brazil), the struggle against housing and living conditions in these settlements is a very hard one. Because of the structural inaccessibility of the State legal system, and especially because of the illegal character of these communities, the dominated classes living in them devise adaptive strategies aimed at securing the minimal social ordering of community relations. One such strategy involves the creation of an internal legality, parallel to (and sometimes conflicting with) State legality—a kind of popular justice. The article describes Pasargada legality from both the inside (through the sociological analysis of legal rhetoric in dispute prevention and dispute settlement) and in its (unequal) relations with the Brazilian official legal system (from the perspective of legal pluralism).

TABLE OF CONTENTS

I. Introduction	6
II. Conceptual and Theoretical Framework	10
A. Law in the Context of Disputing Behavior	10
B. Legal Reasoning, Argumentative Discourse, and Rhetoric	14
1. <i>Topoi</i> and Judicial Protopolices	18
2. Explicit and Implicit Issues: The Object of the Dispute as the Result of a Bargaining Process	18
a. The breadth or narrowness of the dispute ...	20
b. The processed dispute and the real dispute	25

This is a shortened and revised version of my doctoral thesis, submitted to Yale Law School in 1973 with the title "Law against Law: Legal Reasoning in Pasargada Law." I am grateful to Ivan Illich for his kind interest in my work, which led to its publication in English by CIDOC (Centro Intercultural de Documentacion, Cuernavaca, Mexico) in 1974. At different stages of the development of this study many friends offered me valuable help and advice both as to scientific content and as to style. I am specially indebted to Richard Abel, David Trubek, Laura Nader, Richard Schwartz, Leon Lipson, Marc Galanter, Mara Taub, Stanton Wheeler, Donald Black, and William Felstiner.

3. <i>Topoi</i> , Forms and Procedures:	
Forms as Arguments	26
4. Language and Silence in Dispute Processing	29
III. Dispute Prevention and Dispute Settlement	
in Pasargada Law	38
A. The Setting	38
B. Dispute Prevention in Pasargada	43
1. The Ratification of Legal Relationships	
by the RA	43
2. Substantive Norms Defining the Type and	
Range of the Relationships	51
3. Forms and Procedures for Legalizing	
Relationships.....	57
C. Dispute Settlement in Pasargada	64
1. Process	64
2. <i>Topoi</i> of Dispute Settlement	68
a. The <i>topos</i> of fairness	68
b. The <i>topos</i> of the reasonable resident	80
IV. Conclusions	89
A. The Structure of Legal Pluralism	89
B. The Inside View	93
1. Nonprofessional	94
2. Accessible	96
3. Participatory	97
4. Consensual.....	98
C. Law and Revolution.....	101
APPENDIX: Sociological Note on <i>Favelas</i> , Pasargada,	
and Residents' Associations	106
I. Socioeconomic Structure	106
II. Political Structure	111
III. The Residents' Associations	118
REFERENCES.....	124

I. INTRODUCTION

This study arose out of my interest in unveiling the function of the legal system in a class society, namely Brazil. I started with a rather naïve perspective of the problem by defining my research as a study of the attitudes of the urban lower classes (the working class and the lumpenproletariat) toward the official legal system. The ideological bias of such a perspective was that it assumed that the official legal system did not itself have an "attitude" toward the lower classes. Once I became aware of this bias I could see that the "attitude" of the lower classes toward the official legal system

was affected by their oppression in a class society, because the legal system is one of the instruments of class domination. I therefore decided that it would be far more fruitful to study the legal problems with which the oppressed classes are confronted, and how they deal with them.

Since these people invoke the official legal system in a highly selective way I could follow two alternative research strategies, each of which could reveal part of the function of the legal system in a class society. I could study the selective use of the official legal system by the lower classes, focusing upon the case load of the different agencies that provide "free legal services for the poor" in Brazil, or I could study how legal problems are solved *within* the communities where the lower classes live, with community resources. Unable to pursue both paths, I have opted for the latter: the view from the bottom.

In Rio de Janeiro there are more than two hundred squatter settlements (*favelas*), where approximately one million people live. Not all the poor of the city live in the *favelas*, nor are those in the *favelas* all poor. We find many lower class people living outside the *favelas* (including some of the poorest), and lower middle class people do live in the *favelas*. It is undeniable, however, that the large majority of people in the *favelas* belong to the lowest strata. I chose for my study one of the oldest and biggest *favelas* in Rio. I called it Pasargada, from the title of a poem by the great Brazilian poet Manuel Bandeira.

The dispute settlement studies produced in recent years by legal anthropology provided me with an adequate analytical framework. In the course of my work, however, I came to pay as much attention to dispute prevention as to dispute settlement, since the ways in which people prevent disputes are related to the ways in which disputes are settled when they occur. As I concentrated my research on the dispute prevention and dispute settlement mechanisms associated with the Pasargada Residents' Association I came to conceive of these mechanisms and their institutional setting as forming an unofficial legal system, which I called Pasargada law. I then analyzed this law in its dialectical relations with the Brazilian official system, as an instance of legal pluralism. This perspective saved me from the temptation to study Pasargada as an isolated community, a serious shortcoming of most legal anthropological work. Furthermore, I employed a class analysis, examining legal pluralism as the relation between a dominant legal system (the official legal system controlled by the Brazilian dominant classes) and a dominated system (Pasargada law controlled by the oppressed classes).

14 LAW & SOCIETY / FALL 1977

Except for the work of Gluckman (1955), Fallers (1969), and Bohannan (1957), previous studies in legal anthropology and legal sociology have given only scant attention to the structures of legal reasoning and argumentation in sociolegal processes. The analysis of legal rhetoric has been left to legal philosophers, who have characteristically ignored the sociological context in which legal discourse operates. As a consequence, a fruitful line of anthropological and sociological research has remained unexplored. The present study is an attempt to open it up. Drawing upon ideas and concepts developed in European legal philosophy, I identify some basic structures of legal reasoning and argumentation, and correlate them with other features of the social and legal structure. In Part II, I develop a conceptual and theoretical framework which will allow us to reconstruct scientifically the structure of legal reasoning and argumentation (that is, legal rhetoric). In Part III, I analyze in depth the legal rhetoric underlying dispute prevention and settlement in Pasargada as it is processed by the Residents' Association.

In the tradition of legal anthropology I employed the method of participant observation, if sometimes in an unconventional way. I felt at home in Pasargada for many reasons: my nationality, language, and class origin. I lived in Pasargada for three months in 1970, participating in the community life as much as I could. Although the period of field work was short, I could engage in participant observation from the start, since Portuguese is my native language. I am convinced that a profound knowledge of the native language is indispensable if the social scientist is to discover (or to invent rightly) the structures of legal reasoning and argumentation in the group he chooses to study. This may explain, in part, why rhetoric has received so little attention in legal anthropology—under the imperialistic mode of production of modern science, anthropologists tend to be *foreigners* doing research on *natives*. (The linguistic problem does not necessarily disappear when natives do research on natives for class differences may still divide scholar and subject.)

In its published form, one's work is always linked in one's imagination to a broader plan for the future, particularly when one is initiating the scientific *via sacra*. I am no exception. Indeed I should like to believe that this paper, along with some other recent work by myself (1976) and others (e.g., Pospisil, 1971; M.B. Hooker, 1975) may establish the basis for a social theory of legal pluralism and a social theory of legal reasoning and argumentation.

Since the ideological cohesion of a class society is superimposed upon irreconcilable class conflicts constantly created by the relations of production, the dominated classes, or specific groups within them, tend to develop legal subcultures which, under certain circumstances, may be connected with a more or less autonomous institutional praxis of varying scope and level of organization. To recognize this praxis as legal and this law as parallel law (i.e., to characterize the situation as legal pluralism), and to adopt a theoretical viewpoint that considers this law as the equal of State law, involves both a scientific and a political option. It implies the denial of the "radical monopoly" of the production and circulation of law by the modern State (cf. Illich, 1973:51).

Research must be directed to the conditions under which class-determined legal pluralism occurs and to the specific class conflicts that it embodies. Though parallel law organized by the oppressed classes is in itself stateless (or statefree) law, the State is very much present in it as a structural enemy against which the oppressed classes react. The form and the content of this reaction, and thus of the class conflict, vary widely. The reaction may be adaptive, and therefore self-defeating, or it may be a revolutionary confrontation. Let me illustrate each. Pasargada law is an example of a parallel law used by the urban oppressed classes to survive in (and adapt to) a rigid class society, such as that which characterizes Brazil today. The relation between the official law (the "asphalt law," as it is called in Pasargada and in this study) and the unofficial law of Pasargada reflects the broader class relations and conflicts in Brazil in a very specific way (implicit confrontation together with adaptation in order to guarantee survival in a hostile society). On the other hand, the revolutionary popular courts in Portugal after the Revolution of April 25, 1974, represent an explicit and sometimes violent confrontation with the class structure of Portuguese society. In most cases these courts were organized by the oppressed classes (particularly those living in the slums around Lisbon) in order to assert their right to decent housing through legal recognition of their de facto occupation, considered illegal by official Portuguese law. This latter case of legal pluralism illustrates not adaptation to a class society but rather the possibility of revolutionary change of such a society and the overthrow of class domination (Santos, 1976).¹

1. In addition to these instances of legal pluralism, which express class conflicts, there are others in which secondary conflicts within the dominant or the oppressed class are handled, e.g., dispute settlement among businessmen and between political leaders, or the settlement of family disputes.

Guided by a Marxian theory of society and of law in society, the systematic comparison of the different types of legal pluralism will establish the possible relations between official and unofficial law (vertical or horizontal, integration or confrontation, etc.). The levels of reciprocal deviance will be analyzed, among others, in the following areas: norms (for instance, the inversion of the basic norm in Pasargada, the legalizing of house occupation in Portugal), procedures (the informality of Pasargada law or of dispute settlement among businessmen), legal reasoning and argumentation (legal rhetoric in a dominant and in a dominated legal system), sanctioning devices (positive or negative, specific or diffuse), role differentiation (the kinds of law jobs and who performs them).

The social theory of legal pluralism will provide answers to such questions as: under what circumstances and conditions are situations of legal pluralism likely to occur; how do they correlate with other ideological, social, political, and economic conditions prevailing in the global society; what functions do they perform in society—in particular, to what extent do they contribute to the consolidation or the subversion of the class nature of society? Other questions, such as the extent to which legal rhetoric relates to class domination, will only be partially answered since their problematic field transcends the situations of legal pluralism. A scientific strategy of a broader scope will be necessary for a social theory of legal rhetoric.

II. CONCEPTUAL AND THEORETICAL FRAMEWORK

A. Law in the Context of Disputing Behavior

For the purpose of the present study, law will be conceived as *a body of regularized procedures and normative standards, considered justiciable in a given group, which contributes to the creation and prevention of disputes and to their settlement through an argumentative discourse, whether or not coupled with force.*

Justiciability is defined by H. Kantorowicz as the characteristic of those rules "which are considered fit to be applied by a judicial organ in some definite procedure" (1958:79). By "judicial organ" Kantorowicz means "a definite authority concerned with a kind of 'casuistry,' to wit, the application of principles to individual cases of conflict between parties" (1958:69). As we can see, Kantorowicz uses the concept of judicial organ in a very broad sense or, as he puts it, in a very "modest and untechnical sense" (1958:80) since it includes state judges, jurors, headmen, chieftains, human gods, magicians, priests, sages, doomsmen, councils of tribal elders, kinship tribunals, military societies, parliaments,

areopagi, sports umpires, arbitrators, church courts, *censores*, courts of love, courts of honor, *Bierrichter*, and eventually gang-leaders. It is precisely this breadth and flexibility that makes the concept useful here. I want to emphasize that the normative standards I am discussing are applicable by a third party—to use a concept with wide currency in recent legal-anthropological literature²—within a dispute context and according to certain regularized procedures.

According to Abel:

[A] dispute . . . [is the assertion of] inconsistent claims to a resource. . . .

. . . it is commonly justified in terms of a *norm*—the party or his spokesman argue that the claim *ought* to be satisfied. [1973:226-27; my italics]

In much the same way, but using a more phenomenological approach, Gulliver defines dispute as follows:

A dispute arises out of disagreement between persons (individuals or sub-groups) in which the alleged rights of one party are claimed to be infringed, interfered with, or denied by the other party. The second party may deny the infringement, or justify it by reference to some alternative or overriding right, or acknowledge the accusation; but he does not meet the claim. The right-claimant may, for whatever reason, accede to this, in which case no dispute arises. If he is unwilling to accede, he then takes steps to attempt to rectify the situation by some regularized procedure in the public arena. [1969:14]

Law can be actualized in the dispute context in three basic ways:³ dispute creation, dispute prevention, and dispute settlement. These phenomena are structurally related; consequently, the full understanding of one requires the analysis of the others. To say this amounts to an acknowledgment of the limitations of the present study, which is mainly concerned with dispute settlement and dispute prevention.⁴ At the time of my field research I was not aware of this deep relationship. For instance, if we take the dyad, dispute creation/dispute settlement, the use of the case as the unit of analysis necessarily leads us to conceive of the creation of a

2. Richard Abel (1973:247) uses the term "intervener" because, although "an ugly neologism," it is "free of the connotations which attach to such alternatives as judge, mediator, or dispute settler." "Third party" is at least as ugly. It is a pity that our technocratic science encourages scientists to violate aesthetic values.
3. I recognize that the *actualization* of the law is a very vague concept. I mean by it "the expectation that norms will play *some* part in most disputes we encounter," as Abel (1973:236) puts it, referring to Moore (1970:330), and criticizing the distinction between legal and political disputes drawn by Fallers (1969) and Gulliver (1963), among others.
4. Law always embodies a specific regulation of social relations which reflects the correlation of forces between different classes or groups, or factions of the same class or group, in a given society. This legal regulation excludes other possible resolutions, and thus the settlement or prevention of a given dispute according to the law may be the source of a partially or totally new dispute between the same or different parties. It may even happen that legal regulation creates more conflicts or disputes than it settles.

dispute as logically and chronologically antecedent to its settlement. This remains true even if we extend the analysis to the prehistory and long-range consequences of the case. But if instead of analyzing isolated cases of dispute we examine the constant flow of disputing behavior in a given society, the logical and chronological relationship just mentioned breaks down. The basic premises upon which disputes are created and framed are structurally related to settlement in two opposing ways: (1) by anticipating and accepting the established settlement norms, procedures, and structures; (2) by consciously refusing such norms, procedures, and structures, and proposing others. Creation, settlement, and prevention of disputes are stones in a fast creek coming down from the mountains in early summer: they stay together in the current but they change their relative positions all the time.⁵ Therefore, the fact that settlement of disputes in one society is dominated by adjudication ("win or lose") and in another by mediation ("give a little, get a little") will not be fully explained until we analyze the different structures and processes of dispute creation and prevention in those societies.⁶

5. A similar point is made by A.L. Epstein (1967b:205 ff.), van Velsen (1967), and Gluckman (1967) in their discussion of the extended case method—or of the situational analysis, as van Velsen prefers to call it. But while these authors want to emphasize the existence of conflicting norms which, by imposing normative choices upon the parties, become a source of dispute whose social meaning can only be captured by a close diachronic analysis, I am mainly concerned with the fact that a given norm, or a set of nonconflicting norms, may also, over time, be a source of conflict within specific social relations, determining both the creation and the settlement of disputes. Our point of agreement is a common concern with social processes, with the dynamic dimension of the social structure or, as Gluckman says, "[with] an ongoing process of social relations between specific persons and groups in a social system and culture" (1967:xv).

On the other hand, my interest in the role of law in creating disputes seems to be at odds with the view, common among sociologists of social conflict, that law is created and modified by conflicts. Coser, referring both to Simmel (1955) and Weber (1954) concludes:

We need hardly document in detail the fact that legislative enactment of new statutory laws tends to occur in areas in which conflict has pointed out the need for the creation of new rules Conflicts may be said to be "productive" in two related ways: (1) they lead to the modification and the creation of law; (2) the application of new rules leads to the growth of new institutional structures centering on the enforcement of these new rules and laws. [1956:126]

In fact the two perspectives stand in a dialectical relationship in the loose sense that, although they are antagonistic if seen in isolation, together each corrects the deficiencies of the other.

6. Richard Abel has convincingly argued that in any given society we may find different styles or types of dispute settlement, or "outcomes," as he prefers to call them (1973:228). Criticizing Nader, he asserts that either/or decisions are extremely rare in any legal system (1973:fn. 60). Abel has also helped to elucidate, both at the microsocial and at the macrosocial level, possible correlations between dispute structure and dispute process, by means of an elaborate set of variables. My point in the text is merely that, in order to account for the actualization of law in the dispute context, both dispute structure and dispute process must be analyzed in terms of the creation and prevention of disputes, as well as their settlement.

Dispute prevention occupies a peculiar structural position halfway between the absence of a dispute and its creation. This may seem misleading not only because dispute prevention appears to provide the "matrix" for the absence of disputes but also because, whenever the movement away from this situation begins, we are already in the field of dispute creation. Nevertheless, it is as absurd to speak of dispute prevention after the dispute has been created as it is before the conditions for the creation of the dispute are present. A dispute may be prevented when the conditions for its creation are present in an inchoate, latent, or potential form. From another perspective, a dispute may be prevented when, through a kind of short-circuit, it is settled before it has been actualized. For instance dispute prevention, thus conceived, is what people do when they have decided to enter a contractual relationship and work together to make their agreement explicit, following certain established procedures.⁷ There are at least two ways through which law can be actualized in the context of dispute prevention. On the one hand, it proposes not only procedures but also normative standards—to inform participants about the consequences of the presence and absence of such procedures and other remedies, among other uses—which are directly oriented to apply in the context of dispute prevention. On the other hand, the norms and procedures that apply to the settlement of the dispute and their actualization (costs, anticipated outcomes, etc.) in such a context may affect not only the degree of desirability of dispute prevention but also the ways in which such prevention actually takes place.

One or more individualized third parties may be identified as dispute preventers and all of them (or only one) may be the third party that would intervene as dispute settler were the dispute not effectively prevented. The relevance of this fact will become clear when we analyze, in the empirical part of this study, the feedback mechanisms between the dispute settlement and the dispute prevention functions of the third party. The norms that "govern" cooperative behavior between parties in a given relationship (the dispute prevention context) relate in significant ways to the norms that "govern" settlement when a dispute arises between those parties.

We know very little about the actualization of law in the contexts of dispute creation and prevention, whereas the actuali-

7. Richard Abel (1973:227) uses the term "conflict" for disputes that have not yet been articulated. Using his conceptual model we could say that being involved in a significant *interaction*, which contains an element of *conflict*, the parties move to eliminate the latter in order to prevent the *dispute*.

zation of law in dispute settlement has been discussed for thousands of years. I will follow this intellectual tradition. But I hope that my empirical analysis of Pasargada law will show that the role of law in dispute prevention also can be studied using a similar theoretical framework.

B. Legal Reasoning, Argumentative Discourse, and Rhetoric

For the purpose of this study it is assumed that argumentative discourse (rhetoric) is the structural mode of actualization of law in the dispute settlement context. Rhetoric is argumentative discourse aimed at seeking adherence on the basis of persuasion. The backbone of such discourse is language, used both as a means of argumentation and as a magical form of action. Language, however, includes moments of nonlanguage, such as silences, implicit language, and even deeds.⁸

Ever since the Greeks, Western thought has distinguished between two modes of reasoning (and of knowledge): apodictic reasoning, seeking to demonstrate necessary truths by means of analytical proofs in the form of logical deduction or empirical experimentation; and the dialectical and rhetorical reasoning, seeking to deliberate about or argue for what is credible, reasonable, plausible, or probable, by means of dialectical and rhetorical proofs that reason from generally accepted opinions and arguments (*topoi*).

We know that legal reasoning in Greece and Rome was dialectical and rhetorical, so much so that general rhetoric was taught using the model of forensic rhetoric. Vico (1708) emphasizes that the old rhetorical method has been highly developed in judicial reasoning, and Curtius (1963:64 ff.) has shown how, in the Middle Ages, students of rhetoric were trained through the discussion of fictitious legal cases. In modern times, however, a whole set of circumstances (including territorial unification, centralization of power, general discredit of rhetoric, growth of the legal profession, and economic development) has led to a new ideal of the law as scientific as a result of which, categories of rationality and generality have been substituted for the concepts of reasonableness and concreteness. Today lawyers and legal scholars emphasize the elaboration of general principles of an axiomatic nature, from which necessary legal solutions can be deduced logically within the premises of a closed system.⁹

Against this background we are able to understand the impact produced in the mid-1950s by Viehweg's provocative essay, *Topik und Jurisprudenz* (2d ed., 1963), and Esser's *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956). Viehweg is directly inspired by Vico's identification of judicial reasoning with the "old rhetorical method." He shows, both historically and structurally, that legal reasoning has always been, and still is, dominated by rhetorical elements. No matter how precisely a norm is written, nor how carefully a legal concept is defined, there is always a background of uncertainty and probability which cannot be removed by any deductive or apodictic method. The only solution is to employ the inventive art (the *ars inveniendi* or *ars combinatoria* of Leibniz) of finding points of view or "common places" (*loci communes, topoi*), which, being widely accepted, will help to fill the gaps, thus rendering the reasoning convincing and the conclusion acceptable.

Viehweg provides us with many examples of such points of view, which originally were conceived as *topoi* but in the course of legal history were transmuted into general principles from which necessary conclusions could be drawn deductively: *Nemini casum sed culpam imputari* (guilt and not accident is what makes people liable); *publicam utilitatem privatorum commodis praeferendam* (public utility is always to be preferred to private interests); *plus cautionis in re est quam in persona* (there is more security in things than in people); *nemo plus juris ad alium transferre potest, quam ipse haberet* (nobody can transfer to others more rights than he has).

These *topoi* (sing. *topos*),¹⁰ in their original form, are endowed with conviction power, not with truth power. They refer to what is evident, to public policies or to *communis consensus* and, as Esser points out (1956:46), these references substitute, in an open system, for the necessity of axiomatic deductions. The same is true of the concepts of classic Roman jurisprudence. For instance the notion of *causa* (as in *justa causa*) is not a technical expression but rather an "unburdened general concept of forensic rhetoric" (Esser, 1956:45). It is with this rhetorical foundation in mind that Perelman, after contrasting demonstrative reasoning with commonsensical argumentative (legal) reasoning, concludes: "Unlike demonstrative reasoning, arguments are never correct or incorrect; they are either strong or weak" (1965:1).

8. Consequently, the theory of argumentation from which I start is significantly broader than the one advanced by Perelman and Olbrechts-Tyteca (1969), even though I draw upon them at length in the following.

9. Starting with Max Weber (1954) the sociological literature has dealt with this topic quite extensively. Richard Abel (1973:264 ff.) converts the

"rationalization of the law" into a social science variable. See also Trubek (1972) and Unger (1975, 1976).

10. I prefer the Greek expression since English phrases like "topics," "points of view," or "commonplaces" have experienced a complex semantic evolution.

Topoi are based on common sense, on "the logic of the reasonable" (Recasens-Siches, 1962:204 ff.), or on public policies. Following Aristotle (1909:1, 2, 1358a; 1952:II, 109a), I distinguish between general and special *topoi*. General *topoi* can be used in any domain of rhetoric without belonging to any one of them, for instance, the *topos* of quantity (the bigger the better) or even the *topos* of the exemplary figure (upright individual behavior as a model of action). Special *topoi* belong to a specific domain of rhetoric, such as the law. Legal *topoi* may at times be very similar to *topoi* used in political or moral rhetoric, and in the context of some problems these may be so intertwined that it becomes impossible to distinguish them.

There are hierarchies among the *topoi*, not in the sense that one can be deduced from the other, but rather because, in a given problem, one can be applied only within the boundaries previously established by another or only after another has failed to fit. *Topoi* may also be antithetical, and clash in the discussion of a particular problem.¹¹

Given that *topoi* are not only the windows by which the legal system remains open to (and an integral part of) social life but also the wind of social evaluations that blows through those windows, the importance of the sociological study of *topoi* is obvious. *Topoi* can be correlated with other features of dispute processing or they can be analyzed as indicators of the ways in which dispute processing is related to other aspects of social life.¹² Specific hypotheses and correlations will be advanced below, but at this point a few general suggestions seem adequate.

Even though *topoi* refer to zones of agreement, the latter can be broader or narrower and the agreement more or less intense. The norms that *topoi* embody may also favor the interests of certain groups against those of others. This aspect can be related to how explicitly *topoi* are used in dispute processing. *Topoi* can

11. This is frequent in general rhetoric. Perelman and Olbrechts-Tyteca (1969:65) give the example of the classical *topos* of the superiority of the lasting which may be opposed, in the course of the argument, by the romantic *topos* of the superiority of that which is precarious and fleeting. Similarly, in legal rhetoric the *topos* of equity very often clashes with the *topos* of certainty, or the *topos* of equality with the *topos* of responsibility and merit.

One of the defining characteristics of *topoi* is also a feature of customary law, namely that norms do not form a consistent whole, but overlap and contradict, so that several are always pushing in different ways within a particular problem. (I am grateful to Richard Abel for this observation.)

12. The social variables used by Richard Abel (1973) to correlate structure and process of dispute institutions in society may also apply in a social analysis of legal reasoning and argumentation and thus of *topoi*, a task which is beyond the scope of the present paper.

remain implicit, in which case they can only be detected through careful analysis of the logical connections of the discourse. And without being fully explicit, *topoi* can be used in what I may call semi-formulations.¹³ These semi-formulations are excellent instruments for manipulating positions in such a way that tactical agreements can be reached. They can also further genuine agreement in those areas where a penumbra of uncertainty is preferable to both light and darkness.

We must also emphasize that *topoi* retain a close connection with problem thinking, and in a sense are recreated from problem to problem, allowing for infinite nuance. That is why they cannot be systematized. They are fragmentary insights, points of view, that orient the discussion of the problem and open a set of possible solutions. By pointing out what is not controversial, they provide guidelines for the processing and conclusion of the dispute. Described in general, *topoi* appear to be extraordinarily vague, almost devoid of content. But to present them in this way is to distort them, for their content emerges only in the discussion of specific problems. The formulation of problems (whether social, political, or philosophical) presupposes the idea of a system (of social or political action, or of thought) within which those problems arise, just as the formulation of a system presupposes the notion of fundamental problems to be mastered, however implicit these may be. Which element, problem or system, is dominant will depend on the field of inquiry. Both Viehweg (1963) and Levi (1949) have shown that in law the dominant element is the problem, not the system.

The theory of dispute processing, because it focuses on problems (cases) rather than on normative systems, is particularly well suited to bring out the topic-rhetorical structure of legal reasoning. However, the characterization of this structure in the existing literature provides us with no more than a general orientation and framework.¹⁴ My goal is to refine this topic-rhetorical theory of legal reasoning, derived from observation of the "most developed" legal systems, as a tool for the empirical analysis of Pasargada law-ways.

13. Semi-formulations have a mixed structure of explicitness and implicitness. They disclose only part of the reasonable and logical implications of what is said, but in such a way that the openness and ambiguity of what remains implicit feeds back upon what is said, thus investing speech with an overall duplicity of meaning.

14. Viehweg is content to settle the question of method and to identify some general features of its practical relevance. Both Viehweg and Esser lack a sociological perspective, though Esser's constant reference to the "social evaluations of the community" leaves the door wide open for it.

1. *Topoi and Judicial Protolicies*

Judicial protolicies are organizational principles, principles of action, or rules of thumb, on the basis of which strategic decisions are made about how to proceed. These policies are derived from the interests, needs, limitations, and potential of the dispute processing mechanism itself, as these are perceived by the social groups that control it or by the dispute settler. Judicial protolicies are thus distinct from *topoi*: they are not an integral part of the argumentative discourse, though they condition it.

2. *Explicit and Implicit Issues: The Object of the Dispute as the Result of a Bargaining Process*

To fix the object of a dispute is to narrow it. That is exactly what the legal process does in defining what is to be decided. This selection is determined by the needs and purposes of the legal process. The evaluation of those issues selected is accompanied by an implicit and parallel evaluation of those that are excluded.

A dialectical relationship exists between the totality and the selected parts, between the relevant and the irrelevant issues. This is best illustrated in the operations of *topoi* and, particularly, in their interaction with legal rules. The narrowing of issues is the result of the gradual exclusion of alternatives, and not vice versa. On the other hand, this tendency (from breadth to narrowness) is not irreversible; during the processing of disputes shifts of direction are frequent, which expand the inquiry into new areas.¹⁵ And the key to a deep understanding of the legal process lies in the explanation of this dialectic.

Such an explanation can most profitably be attempted by analyzing structural interactions between the participants in the dispute process, and between them and the relevant audience. At any given point, the selection of issues is a product of the needs and purposes of the dispute process mechanism, and of the ways in which participants and audiences accommodate or react to these needs. The contribution of the parties is not limited to bringing the dispute to the third party, thus setting the process in motion. Throughout the dispute, by allegations and motions, gestures and postures, words and silences, each party tries to frame issues, introduce facts, direct the analysis, and advance evaluations, that best fit his purposes.

15. This feature is formulated by Abel (1973:272) as a processual variable. Since I have not dismissed the concept of law, my analytical strategy aims at a general characterization of the legal process. But I do not mean to preclude the possibility of transforming general characteristics into variables.

However, the parties are involved in a dialogue with the judge as well as with each other, and their actions are perhaps even more likely to be a response to his strategy.¹⁶ The neutrality of the third party is a myth, more useful in certain times and situations than in others. The interests of the parties are never the only ones involved. In addition, there are the personal interests of the third party, the interests inherent in the role he performs and the interests of the audiences to whom he looks for rewards. The third party organizes his own strategy in light of a complex weighing of these interests. It is probably useful to distinguish two situations in which different interests dominate the third party's strategy.

On the one hand, the third party may aim at satisfying an external audience. If he is also part of this audience he may become its representative in the dispute process, especially when its interests are particularly pressing. This may be illustrated by Max Gluckman's discussion of the role of the *Lozi kuta* in certain cases:

The *kuta* may have before it a different kind of case which compels it to widen the field of its enquiry. The *kuta* is not only a judicial forum but also a council watching over the public interest in land, in schools, in prices, etc., etc. A dispute may raise a question of public policy: the *kuta* will then speak as a legislative and administrative council, and enquire into any issue, though as a court it should only punish offences against the law. [1955:69]

In these cases, the court's strategy produces shifts of direction in the processing of the dispute, which here lead to a widening of the object of inquiry beyond those issues originally raised by the parties. For the *kuta*, as members of an external audience, the dispute has social implications which the parties do not care about or which they may actually prefer to avoid. The *kuta* is successful only because it has sufficient power to override the interests of the parties.

On the other hand, the judge's strategy may be governed by interests that are predominantly internal to the dispute. Here, again, it is convenient to distinguish two situations. In the first, the judge may conclude that the outcome he seeks cannot be secured by pursuing the issues posed by the parties. Therefore, he may himself raise issues or advance facts and interpretations, or induce the parties to do so. In the second, the judge's strategy is governed by his interests as a dispute settler, or by what he perceives to be the needs, limitations, and potentialities of the dispute processing context itself: here judicial protolicies dominate. The dispute settler may fear that the process will take directions and raise issues which he either cannot control or solve, or which

16. By the judge's strategy I mean the strategy of the person, group, or class who controls the dispute institution (or what I call, more generally, the dispute context).

would be too threatening for the survival or identity of the role he performs or the context in which he operates. Conversely, he may want to raise issues or choose directions either because they are particularly suited to his role and the dispute processing context, or because both his role and the context will be rewarded by dealing with them. His capacity to engage in these manipulations will vary with his power relative to that of the parties.

On the basis of the preceding discussion I feel warranted in concluding that the object of the dispute is the result of a complex bargaining process between the parties, the third party, and the relevant audience. This seems to be true irrespective of the type of relationships underlying the dispute or of the structural features of the dispute processing context, even though the extent to which (or the ways in which) the bargaining process operates may vary according to the circumstances. This perspective can be helpful in clarifying points previously obscured. Two will be mentioned here: the breadth or narrowness of the dispute, and the discrepancy or coincidence between the object of the dispute as presented by the parties and the *real* dispute between them.

a. *The breadth or narrowness of the dispute.* The criterion for measuring the breadth or narrowness of a dispute is very elusive. Gluckman was the first to deal with this question systematically. He advanced the idea that when the parties in a dispute were involved in a multiplex relationship the *kuta* tended to broaden the inquiry in order to reconcile the parties and preserve the relationship. On the other hand, when strangers disputed, the *kuta* tended to concentrate on narrow issues without making a serious attempt to reconcile the parties (1955:67, 78).

Although this idea can easily be translated into a testable hypothesis, there is a substantial risk of reducing it to meaninglessness or tautology. For the difference in the breadth of the inquiry in the two situations may be explained not by the importance of the relationship and thus of reconciliation, but rather by the simple fact that disputes involving multiplex relationships raise more issues by definition. Correlation is not possible because the variables are not distinct. In order to measure the breadth of the inquiry, the number of issues dealt with in the dispute process must be compared with the totality of issues emerging out of the relationships between the parties. If this were the index, it would be possible for a dispute between strangers to be broader than one between persons in a multiplex relationship despite the fact that the absolute number of issues raised in the former case was smaller than in the latter.

If we control for the type of relationship, we can then test Gluckman's hypothesis by asking under what conditions the inquiry tends to be broader or narrower. I suggested above that the range of inquiry is influenced by the relative strengths of parties, third party, and audience. I also suggest that when this is controlled, the inquiry tends to narrow as the processing of the dispute becomes more formalized.¹⁷ But even this formulation of the hypothesis has to be qualified.

The first corrective concerns the problem of false comparisons. The real question of the division of labor within the total dispute processing context must replace the false question of the narrowing of issues. In the last chapter of his book Fallers compares the Soga of Uganda (1969) with the Lozi of Zambia (Gluckman, 1955), the Tiv of Nigeria (Bohannon, 1957), and the Arusha of Tanzania (Gulliver, 1969), and concludes that

there appears to be a quite clear correlation between the differentiation of the bench, in terms of authority, and the legalism of the proceedings, in the sense of differentiation between law and popular morality. [1969:329]

The narrowing of the issues to be processed is one expression of this legalism. It is illustrated by a case method of analysis in which a case in a court of a "simple" society is compared with a case in a court of a "complex" society. The inevitable conclusion is that judges in the first permit a very broad definition of the cause of action and the parties are free to vent their grievances, whereas judges in the second insist upon a more rigid object of inquiry and impose narrower criteria of relevance so that many "important" issues are excluded.

When, however, one shifts from a focus upon the individual case to a perspective that encompasses the constant flow of cases in both courts, one may well see that where a court in a "simple" society raises and responds to a large number of issues in a continuous process, a court in a complex society breaks down these issues and distributes them to different judges in the same or different courts. The perceived narrowing of the issues is thus an artifact of the case method of analysis which uses a concept—the "case"—that itself may vary between societies; this perspective is therefore inadequate to define, and measure, legalism.¹⁸

The second corrective is that the breadth of the inquiry tends to be discussed in terms of which issues are handled rather than

17. For an elaboration of Fallers's idea (1969), see Abel (1973:272).

18. The fact that both complex and simple societies treat a wide range of issues should not obscure a significant difference between them: it does make a difference whether those issues are handled together in a single process or distributed among many. (I am indebted to Richard Abel for this observation.)

how they are handled, despite the fact that the latter question may be equally important. It can be analyzed along three dimensions: direction, interpretation, presentation.

Direction refers to the overall orientation of the values by which the disputed issues are to be resolved. Without determining that direction it is impossible to determine the content of the dispute. The sense of direction is perceptively observed by Gluckman when he comments that the cross-examination conducted by the judges "soon indicates the lines on which they are formulating the merits of the case" (1955:270). This does not mean that the judges reach a definite decision of the case at the outset, but simply that a range of possible solutions is quickly established. When the parties and the judge agree on the direction to be followed they also tend to agree on what issues and facts are relevant. But when they disagree on the direction, relevance will depend mainly on the relative bargaining position of the participants. Accordingly, the parties may be prevented from raising certain issues; or they may raise them but the judge will ignore them in his decision; or they may force the judge to consider such issues in this or another (appeal) process.

Interpretation refers to the evaluation of specific facts and issues as they are selected in accordance with the overall direction of the dispute process. Interpretation is far more important than mere introduction, for a fact or an issue introduced by one party may become the possession (and weapon) of his opponent. It is through interpretation that certain issues are clarified and others obscured; clarification and obfuscation are dialectically related functions of communication. Indeed, in order to reach a given outcome it may be necessary to clarify an issue not because its clarification is important, but because another issue is thereby obscured which would otherwise tend toward the opposite outcome.

Interpretation also governs the depth in which a given fact or issue is discussed. The processing of a dispute may be stalled, accelerated, or redirected through manipulations of the depth of discussion. Again, the orientation and the success of these manipulations depend mainly on the relative strengths of the participants. This dimension of depth further complicates the question of the breadth of inquiry. If a few facts and issues are discussed in depth, is the inquiry broader or narrower than if many facts and issues are discussed superficially? It seems to me that it is necessary to distinguish between these two dimensions of breadth: vertical (depth) and horizontal (number) (Abel, 1973:272).

Presentation refers to the style of dispute processing and how it affects the way in which facts are adduced and issues framed. An attempt to introduce an issue in a style that is alien to the dispute processing context may not only fail but may also influence the outcome of the case. One way in which style of presentation constrains the parties is illustrated by Fallers's comments on the nature and use of legal concepts in Soga courts:

Such a concept has already begun to shape and narrow the issues by the time the accuser reaches the court with his complaint, for only if he can describe his cause in a word or phrase that corresponds to a wrong recognized by the court will the court summon the accused and allow the action to proceed. [1969:107]

Parties must present their cases not as isolated and unique phenomena but rather as typical instances of a recognized rule. It is this very typicality that helps the third party to outline the horizon of expectations and make it comprehensible to the participants. The role of representatives, supporters, and advocates is precisely to emphasize the typical character of their party's claims and thereby bend the horizon of expectations in his favor (Esser, 1970:140). The style of the dispute process will also condition the way in which this can be done.

The third criticism of the conventional treatment of breadth is that it usually measures that quality in terms of the issues explicitly introduced. But there is no reason to overlook implicit issues other than the greater difficulty of detecting them. Because they cannot be perceived by passive observation and recording they have to be extracted (and, in a sense, invented) from the logical connections of the discourse and from the dialectic between language and silence, to which I will refer later. What is not discussed, or even mentioned, because it is self-evident to the participants is crucial to an understanding of the internal dynamics of the dispute process.

The implicit discourse is the fluid from which the explicit discourse emerges and becomes meaningful. They interact in two ways. In the early stages of the process, when the preunderstanding of the case, the *topoi*, and the valuations together contribute to a gradual approximation of facts and norms, implicit discourse progressively excludes implausible solutions. As the dispute proceeds, and facts and norms are clarified, implicit discourse is redirected to making the selected solutions appear self-evident.

In this respect, it is useful to distinguish between the implicitness of concepts and of facts, since each can contribute to the self-evident quality of the solution. Although both facts and concepts may be implicit because of shared knowledge and normative

agreement, the implicitness of concepts may also be explained by the absence or limited development of a legal profession.

Fallers should be given substantial credit for initiating the analysis of implicitness, which he relates to the accessibility of Soga law:

Since the grounds of decisions are so little spelled out, and since crucial subsidiary concepts are so little open to overt statement, everything must be put to the test of courtroom argument. [1969:314]

Furthermore, his distinction between the implicitness of concepts and of facts (1969:319 ff.) allows us to perceive a second correlation: under certain conditions, the implicitness of concepts may lead to a greater explicitness of facts.

The notion of relative explicitness must be applied to a whole range of intermediate communication processes, because statements that explicitly express one thing may implicitly symbolize another. The third party may not express his hostility to the introduction of an issue but may transmit symbols of his feelings. A party who fails to recognize such symbols may be adversely affected. Any participant can evoke symbolic meanings favorable to his claim. But when the role of the third party becomes significantly professionalized, it may be more difficult for the disputing parties to perceive and interpret the symbolic meanings of the third party. This is probably one of the reasons why the professionalization of the dispute settler tends to lead to professional representation of the parties.¹⁹

I would like to mention two other intermediate communication processes: signs and indices. Both have a double meaning: the face meaning and the evoked meaning. But while signs are intentionally used to evoke a certain meaning, indices evoke a meaning regardless of intent (Perelman and Olbrechts-Tyteca, 1969:122 ff.). Signs have a closed texture in two senses: the meanings they evoke are specific, and those meanings may be comprehensible only to certain interpreters. Indices, by contrast, have an open texture.

We have a sign when the dispute settler, lacking formal power to summon someone to "court," sends him an invitation through a policeman on duty in the community with the intention of evoking the meaning that adverse consequences might be expected if the "invitation" is not accepted. We also have a sign when, during the

19. This assumes that only parties will possess an ability to manipulate symbols, and equal to that of the judge only if they are represented by members of the same profession, and further that inequality will lead either to an authoritarian process dominated by the judge, or abandonment by the parties of the dispute process. This imbalance also exists when great cultural differences separate the participants, especially the parties and the third party, and explains some of the peculiar features of such a process.

proceedings in court, the representatives of the parties make a gesture or utter a word which, by prearrangement, signifies that their constituents have allowed them to pursue a given path toward settlement. We have an index when a gesture or word is interpreted by any of the participants as evoking a certain meaning without prearrangement, even though the party who gestured or spoke did not want to communicate that meaning. I suggest that as the professional, social, or cultural gap between the parties and the third party increases the use of indices tends to decrease and the use of signs to increase.

b. The processed dispute and the real dispute. The degree of discrepancy or coincidence between the dispute as it is processed and the real dispute between the parties²⁰ is obviously related to the preceding variable of breadth, but it must be analyzed separately. The distinction between processed and real dispute is only legitimate if (1) we know a number of instances of disputing behavior involving these parties, and (2) one of these has been selected for processing by the third party.

Whenever a discrepancy is perceived between the processed and the real dispute it can be analyzed in terms of both the causes of disputing and the purposes of dispute processing. Among people bound by multiplex relationships, or by simplex relationships persisting over time, it is likely that numerous disputes will arise. Many of these disputes will not come to the attention of a third party, either because the parties feel that they can handle them, or because the third party offers no remedy or because the remedy is too costly or otherwise dysfunctional. If one or both parties do choose to submit the dispute to a third party, it may not be possible to tell from the processed dispute, by itself, why this has happened. Such an explanation has to be found in the overall history of disputes between the parties. One or both parties may want the third party to consider all past disputes (see, e.g., Gluckman, 1955:37 ff.), or they may prefer to restrict the intervention of the third party to the immediate issues. Unless all participants agree, the processing strategy will depend upon their relative bargaining power. If one of the parties is only pretending to make the claims that create the dispute, there is also a discrepancy between the real and the processed dispute, which may or may not be maintained until the end. The purpose of the party in seeking the intervention of a third party is at odds with the explicit purpose of the processed dispute (see Gluckman, 1955:79).

20. The distinction between processed dispute and real dispute is similar to the distinction, drawn by Abel (1973:265 ff.) between dispute in the society and dispute in the dispute institution.

It is necessary to determine the social factors that account for both the emergence of the discrepancy between the real and the processed dispute, and the permanence or elimination of such discrepancy during the process. I suggest that the more formalized and bureaucratized the dispute process the greater the probability that the discrepancy between real and processed dispute will be maintained.²¹ When it is, there is a lower probability that the outcome of the dispute process will also be the final settlement of the dispute.²²

3. *Topoi, Forms, and Procedures: Forms as Arguments*

Forms are gestures made, words uttered, formulae written, ceremonies performed, when these must occur in specific ways and at specific times so that their objective in the dispute process is achieved. Procedures are sets of forms. Forms and procedures determine, in an automatic way, decisions about the processing of the dispute. In the legal systems of modern technological societies forms and procedures are not supposed to raise questions of substance. The latter are to be answered in terms of the rights and wrongs (the merits) of the situation, whereas questions of form turn upon the presentation of the situation and its conformity or nonconformity to a preformulated model.

These categories have been used to distinguish formal from informal dispute processing contexts and to measure formalism.²³ Fallers observed that in more "developed" legal systems temporal limitation (the passage of time under the statute of limitations) and *res judicata* are models of presentation: they involve questions of form or procedure. Soga law, however, treats them differently. Neither the fact that a long time (never precisely determined) has elapsed since the offense was committed, nor the fact

21. Abel (1973:264 ff.) sees the changes in dispute processing as a function of increasing functional specialization, role differentiation, and bureaucratization.

22. This may help to explain the relatively high rates of criminal recidivism in complex societies. In fact, given the high formalization and bureaucratization of the criminal dispute process in such societies, the real dispute between the defendant and society, represented by the State, tends to be ignored. Instead, the process concerns either a fictitious dispute generated by the State or the defendant, or a less significant dispute within the sequence of disputes between the two. It is in relation to the processed dispute that the punishment tends to be appropriate: an illusion that creates reality (recidivism).

23. If the purpose of inquiry is to establish some basic procedural structure common to all dispute processing contexts, then we will need a much broader concept of procedure (Santos, 1974: Ch. III). The distinctions and categories presented in the text are taken from bureaucratized and formalized legal systems in more complex societies, but they have also been used by legal anthropologists and sociologists. Thus Gluckman comments that "Lozi courts are little restrained in their attempt to obtain justice by high demands for ceremonialism or formal conformity in the transactions of everyday life or in the procedure of the courts" (1955:233).

that the same case has already been processed and decided by the court, constitutes an automatic bar to hearing the case. Rather, judges should take these factors into consideration in assessing the evidence and judging the credibility of the claimant (Fallers, 1969:267, 283). Because temporal limitation and *res judicata* are substantive questions, we can say that the Soga legal system is less formal than Western law.²⁴

Since *topoi* involve points of view that relate to questions of substance, it can be assumed that as formalism increases topic-rhetorical legal argumentation decreases. In a highly formalized legal system, large portions of the dispute processing will be insulated from such legal argumentation, and thus rhetoric will appear in a recessive form. In Pasargada I would expect to find extensive use of topic-rhetorical argumentation.

If the official legal systems of "modern" technological societies never reach the ideal type of automatic application of rules, forms and procedures deviate even more from this extreme in both the legal systems of "traditional" societies and the unofficial legal systems of "modern" societies. Pasargada cases will illustrate this. The third party may apply different formal standards to cases that are apparently identical (at least with respect to the legally cognizable issues). Modern legal systems derogate such lack of uniformity as manipulation and arbitrariness. From the point of view of a topic-rhetorical conception of the legal process, however, the lack of formal uniformity may be interpreted as teleological faithfulness—a deeper understanding of the instrumental, subsidiary character of forms in relation to the substance or merits of the case.

Just as *topoi* interact with substantive norms, so they interact with forms and procedures to produce the gradual approximation of facts and norms. Forms and procedures may be used as arguments for the exclusion of implausible solutions. This is why informal legal systems do not decide cases on the basis of technicalities but construe forms and procedures as arguments that touch upon the merits of the cases.

Here two issues must be raised: the relationship between formalism and ethics in capitalist societies, and the emergence of folk systems of formalism. The official legal system under "modern" capitalism tends to be strict on formalism and loose on ethics.²⁵ The forms and procedures governing each stage of the creation,

24. Based on Fallers and other ethnographic material, Abel (1973:273) analyzes the changes in the temporal limitation.

25. See Abel (1973:272) for a correlation between increased role differentiation and the tendency for procedural issues to replace substantive issues.

development, and extinction of legal relationships are described in detail, but very little is said about the ethical content of such relationships. Thus, though any violation of forms and procedures prompts the intervention of the legal system, the unjust or unethical character of the relationship must reach extreme proportions before legal intervention will occur, and then only reluctantly.

The reasons for this are manifold and their analysis is beyond the scope of this study. I will mention only a few: the dominant structure of the relations of production; the bureaucratization of social processes aiming at efficiency and predictability (Abel, 1973:270); the professionalization of actors within the legal system and the rewards they obtain from the belief that the legal order has attained the ideal-type of complete autonomy (such as compliance with those rules irrespective of their ethical content); the cultural tradition of abstract individualism, particularly after the Enlightenment, which made it possible to convert the lack of ethical content into an ethical creed (autonomy of will, freedom of contract); and the fact that modern legal systems were organized in urban societies, composed of strangers.

In societies where these factors are not present, and in those parts of modern capitalist society that are not, or are only selectively, penetrated by the official legal system, folk systems of legal formalism may emerge that are strict on ethics and loose on formalism. The degree of legal formalism that people require will vary with the relationship in which they are involved, among other things. As a consequence different groups and classes in society may develop different folk legal systems of formalism which they superimpose upon the official legal system of formalism. In Pasargada—a community consisting largely of those exploited by the capitalist relations of production, who are connected by primary relationships, and served by a legal system that is neither bureaucratized nor professionalized—I would expect a folk system that would be relatively less formal and more ethical.

In modern societies the forms used in the folk system are often derived from the official system and then modified in order to fit the needs of the group. Thus folk and official systems may share cultural postulates but differ in the way they specify them, and in the use to which forms and procedures are put. This may be illustrated by the meanings that western culture attributes to writing as a ceremony and to the written product as expression of commitment. When a person expresses himself orally, his words are never fully divorced from their author. This is true even when these words are heard by witnesses, who later confront the speaker, because of the plastic and transitory character of the medium.

Written words, on the other hand, create a gap between the author and his expression, between a personal affirmation of will and an impersonal fetish living its own life. This gap, which closely follows the myth of the sorcerer's apprentice, consists of two sides, dialectically related. On the one side, there is the autonomy of the written commitment, and the possibility of its use against the committed self. On the other, there is the sense of alienation experienced by the self before his own creation, the sense of dispossession and thus of powerlessness to confront and control the commitment as his own.

This dialectic of autonomy and alienation explains why the greater the personal alienation felt by the self the greater the likelihood that he will perceive others as linking him to his commitment. Thus, he may be persuaded to overcome his sense of alienation by actually honoring the commitment.²⁶

It appears, then, that the writing and the written is a rhetorical *topos* in our sociolegal culture. But antithetical *topoi* frequently exist. We know that in our culture the *topos* of the obligatory character of the written promise is opposed by the *topos* so beautifully expressed in the old saying: "My word is as good as my bond." It is difficult to elucidate the hierarchical relations between the two, for we lack much of the necessary sociological information. My suspicion is that the *topos* of the written word has a predominantly legal outlook, while the *topos* of the spoken word is predominantly moral. But I acknowledge the possibility of a sociological *petitio principii*: the kind of discourse that predominates in a given situation may be a result of (rather than a condition for) the use of the particular *topos*. In any case, seen from a topic-rhetorical perspective, the distinction between the moral and the legal is never a clear one.

In this context the most important research task is to investigate how the basic cultural meanings expressed by these *topoi* have permeated both the official and the folk systems of formalism, and how the specifications of their meaning differ in each.

4. Language and Silence in Dispute Processing

The legal reasoning analyzed above was largely limited to argumentation, making language the nuclear reality of dispute processing. Nonlanguage arguments may also be included within this framework: gestures, postures, flags, furniture, bibles,

26. In manuals of magic written charms and curses are always considered more powerful, more dangerous, and more difficult to neutralize. In love manuals one is advised to keep all letters received, and to write none, because to write a letter is to commit oneself.

crucifixes, pictures of political or religious leaders, files, written papers, gavels, typewriters, dress, division and allocation of space in the courtroom, rituals of initiation and termination of proceedings, stratification of floor levels and of visibility, etc. But all these remain subsidiary to language. The importance of language makes it necessary to discuss two issues: the common language, and the relations between language and silence.

At first sight, common language does not appear to be an issue: either the participants in the dispute process speak the same language or interpreters must be used. The stakes are too high, however, for such an assumption to go unquestioned. Articulation, communication, and understanding depend on common language; without them legal reasoning becomes an absurdity. Closer analysis reveals a myriad of intermediate situations between "the same language" and languages perceived as so different by the groups dominating the dispute processing context as to require the intervention of interpreters.

Except in the context of magic and ritual, words are not exchanged as words but rather as meanings. Thus people with different cultural backgrounds may speak different languages with the same words (cf. Swett, 1969:97-98). Furthermore, each language has both a potential and an actual vocabulary. Different social and cultural groups carve out different actual vocabularies from the same potential vocabulary.

In addition to the potential and actual vocabularies recognized by those groups with the power to define the official language, there are all kinds of "deviant" vocabularies which demonstrate the tremendous innovative capacity of the language, becoming "official" vocabularies for the subcultures generating them. If it is true that people belonging to the same group tend to solve their disputes internally, while disputes between people belonging to different groups tend to be processed by the official legal system (Black, 1971), then the latter will most often be the arena for competition between different vocabularies and the different labels. Such competition must be further analyzed in terms of the kinds and degrees of damage it inflicts on the communication processes.

Another hindrance to communication resides in the distinction between technical and everyday language. Professions develop their own languages because it is through professional languages (probably more than through professional actions) that they are professions. The legal profession is no exception.

Whenever the third party and the representatives of the disputing parties become professionalized a professional language

tends to develop. The more professionalized these roles the more esoteric the language becomes.²⁷ Whenever technical language comes to dominate the dispute process the nonprofessional participants, such as parties, witnesses, jurors, and audience, run the risk of alienation.²⁸ They become objects of the process rather than its subjects. Communication is controlled by the professional participants.

This alienation is particularly evident when the professionals have to communicate with nonprofessionals. Some deprofessionalization is a prerequisite: the professional must peel off legal concepts until the commonsensical reasoning that they simultaneously contain and cover becomes visible, expressed in everyday language. This process is not an easy one. Prolonged routine work with technical language may blind the professional to the common sense upon which such language is based; common sense may even appear as an absurdity to him.

When the dispute process is only partly professionalized, the distinction between technical and everyday language is also blurred. Fallers writes of the Soga:

The [legal] phrase is made up of everyday words, but it is strongly associated in people's minds with the courtroom context and with a particular recognized wrong. [1969:108]

In Pasargada, where there is an even lower degree of professionalization, I would expect legal argumentation to be based on everyday language. But we must refine this hypothesis by specifying further the relations between technical and everyday language. In the preceding analysis it has been assumed that technical language derives its basic meanings from the common sense expressed in everyday language. But the reverse may also be true: technical languages develop verbal formulas and technical meanings which are then popularized and infused with commonsensical connotations. Thus what happens with formalism may also happen with technical language: parallel to the official technical language a folk technical language may develop. Everyday language must then be conceived to include the folk technical language.

The second issue—the relationship between language and silence—deals with the internal rhythm of communication and the

27. The professionalization of language may affect some areas of discourse more than others. I suspect that this may explain, in part, the distinction between questions of fact and questions of law, or at least the acceptance of such a distinction as self-evident.

On the other hand, the esoteric professional language must be positively correlated with the tendency of the dispute institution to produce an esoteric body of norms, known only to interveners and other specialists (Abel, 1973:271).

28. On the variation in initiative and control within the dispute process see Abel (1973:270).

alternation of communicative strategies in dispute processing. Although some may dismiss this issue as trivia, I regard it as crucial. It may be said that silence is merely the chaotic vacuum between spoken words and therefore cannot be analyzed by itself but only in terms of the words whose absence creates it. This objection does not strike me as convincing. On the contrary, I will argue that silence is as significant a reality as language itself, and that without the recognition of a dialectical relationship between silence and language it is impossible to reach a deep understanding of the internal dynamics of dispute processing.

Many reasons can be suggested to explain why silence has been neglected as an object of scientific research.²⁹ Because social studies in the West have centered around language behavior, the social study of silence constitutes a threat not only to accepted scientific boundaries but also to established methods of social research. Secondly, social scientists tend to feel more confident in speculating with words about words than in speculating with words about silence, since the similarity between the object and the instrument of speculation in the former creates an illusion of control.³⁰ Thirdly, the usefulness of studies of silence has not yet been demonstrated, and will not be actualized until the language/silence rhythms in different societies begin to be decoded. Fourthly, and most importantly, Western civilization is inherently biased against silence and this necessarily affects our scientific preferences and capabilities. Western civilization is constructed out of words as much as some Oriental civilizations are constructed out of silence. If one compares the philosophical works of Hegel, particularly his *Science of Logic* (1969), with the philosophical works of Shankara—the great philosopher of Hinduism—particularly with his treatise *Crest-Jewel of Discrimination* (1971), one is overwhelmed by the fact that while Hegel desperately seeks to eliminate silence, Shankara effortlessly creates and harmoniously orchestrates silence with words.

Silence is not equally distributed across cultures, nations, or even groups and classes in the same society. Silence is a scarce resource and the ruling classes in every society tend to allocate it according to their convenience and their cultural postulates. When

29. But see Steiner (1972:vii), who addresses himself to the following question: "Are we passing out of an historical era of verbal primacy—out of the classic period of literate expression—into a phase of decayed language, of 'post-linguistic' forms, and perhaps of partial silence?" Goffman has also discussed communication through silence (1971a, 1971b). And John Cage has written about silence in music (1966).

30. But scientists also speculate with silence about words (and deeds), which explains why science is as much a system of production of ignorance as a system of production of knowledge.

language is important, the ruling classes tend to appropriate it, imposing silence upon the people. Thus in a totalitarian society the ruling classes will distribute silence to the people, keeping language for themselves. Conversely, when silence is important, the ruling classes tend to appropriate it, relegating language to the people. In a formally democratic society, people may be freely endowed with language while a few silent actors make all the crucial decisions pertaining to the nation.³¹ But societies cannot be evaluated only in terms of the amount and distribution of silence, for there are different kinds of silence and these differences may be even more important.³²

Silence is not an amorphous infinite but a reality delimited by language, as much as language is delimited by silence. Equally, silence is not an indiscriminate absence of language, but rather the self-denial of specific words at specific moments of the discourse so that the communication process may be fulfilled. What is silenced, therefore, is a positive expression of meaning.³³

It seems to me that the analysis of the relationships between language and silence may contribute significantly to our understanding of features of the dispute process that have thus far been neglected. Watching Laura Nader's film on dispute settlement in a Mexican Zapotec court of law (1969:69 ff.), I was fascinated by the prolonged silences of the dispute settler (the *presidente*). The lively speeches by the parties and witnesses crossed his desk only to meet the impenetrable ear of a silent listener. After a while the *presidente* would ask some questions and then move to decide. What is the meaning of the *presidente's* silence? How is it interpreted by the parties? How does it affect the language behavior of parties and witnesses? When does the *presidente* ask questions?

31. At times a totalitarian power may require language rather than silence, when it forces people to say what it wants through torture and other means. By contrast, a democratic society that actually respects the formal right against self-incrimination should guarantee the people control over their own silence. However, in the formally democratic capitalist societies the State has more "civilized" ways of forcing people to speak (e.g., through data banks, welfare agencies, etc.).

32. The "development" of societies thus far has been measured in terms of material goods produced. But it could also be measured in other terms, for instance the kinds, distribution, and amount of silence that societies "produce." According to the latter criteria, I suspect that the "developed" nations of the West would appear as underdeveloped or decadent.

33. Arjuna, the warrior, in the *Bhagavad Gita*, is in possession of such knowledge when he asks Krishna:

How is the man of tranquil wisdom, who abides in divine contemplation? What are his words? *What is his silence?* What is his work? [2, 54, my italics]

Arjuna recognizes that words alone will not tell him the full meaning of an attitude or behavior. That is why he asks about silence and about words. Words, silence, and works are thus conceived as a necessary triad of communication and knowledge. Arjuna also shows that he is not interested in knowing just any kind of silence, but rather the silence of the man of wisdom, that is, a positive and delimited reality.

What is the rhythm between his questions and his silences? Are the lively arguments of parties and witnesses related in some way to the *presidente's* silence? Is the *presidente's* silence monolithic or are there different kinds of silence at different stages of the process? Is it possible to establish correlations between the amount and the kinds of the *presidente's* silence and other features of the dispute processing context, such as the object of the dispute, the seriousness of the offense, the involvement or noninvolvement of public officials, the status of the parties in the community, the relationships between the parties, etc.?

Barbara Yngvesson, in her study of dispute settlement in a Swedish village, advances the important concept of nonaction to express the period of time in which the community limits itself to merely watching deviant behavior (1970). If the concept of nonaction is expanded to include what is not said about the deviant behavior we are confronted again with the question of the relevance of silence in dispute processing. Here the silence is not appropriated by a particular person; it is a communal possession. This collective silence seems to indicate that the community goes through a period of collective brooding about the deviance: how it occurred, its development, the further behavior of the deviant person, the need for and timing of an overt reaction, etc. Is it then possible to establish correlations between the amount of collective silence and the type of deviance, the relations of the deviant person with the community, etc.?

One measure of the dispute settler's control over the processing of the dispute is the number of questions he asks and the number of times he interrupts the parties and the witnesses. But at least one limitation must be introduced: such control can also be expressed by the absence of questions and interruptions, that is, by silence. To take one example from Hinduism, it is instructive to observe the contrast between two of the officiants in the ancient Vedic rituals which are, after all, dispute settlement processes between people and gods. The *hotr*, though he recites extensively and loudly, has little control over the ritual while the *brahman*, though he remains silent, exercises full control.³⁴

34. Louis Renou contrasts them in the following way. The *hotr*, who was originally the libation pourer (as the etymology of the word suggests), later becomes primarily a reciter; but his invocations, though impressive, play only a small part in the liturgy, rather like the music of the chanters. The *brahman* is the repository of the unexpressed power of the formula, a silent spectator who is responsible for seeing that the ritual is carried out with accuracy; he is a professional expert, like the Roman Catholic priest. *His silence is just as valuable as the speech and melodies of his colleagues* (1968:32).

Gluckman (1955:9) gives another example:

Usually the ruler does not attend the hearings of cases, though

The structure of language and silence in dispute processing is very complex because, at any given stage, different kinds and amounts of silence may be expressed by different participants (judge, parties, witnesses, audience), each having different meanings. Various classifications of silence are possible. The first distinguishes between procedural silence (for instance, when I am silent in order to let someone else speak) and substantive silence (for instance, when I am silent in order to express my assent). The third party may exert more or less control over the distribution of procedural silence among the parties and audience. In the formal processes of complex societies he exerts an almost absolute control. In any case he tends to have little or no control over the substantive silences of the other participants.

Within the category of substantive silence, further classifications are possible: acceptance, rejection, assent, reprobation, intimidation, total disagreement, unenthusiastic acceptance, emotional approval, revolt, powerlessness and resignation, respect or disrespect, expressions of the existence of explosive tension or of the need for calm and further deliberation.

Other distinctions may be helpful. From the perspective of the other participants and the relevant audience there is deviant silence and normal silence. Deviant behavior in court can be explained in part by the tension between contradictory definitions of deviant and normal silence. The relative bargaining positions of the participants will dictate which definitions will prevail. The sanctions for deviant silence may be formal or informal, and may be applied in the same process in which the deviance occurred or in a separate appeal process.

From the point of view of its weight in the communication process, there is the distinction between heavy silence and light silence. Although the expression "heavy silence" occurs in everyday language, I do not use it as metaphor—since I take figures of speech to be failed reality—but rather as a factual description; there is no reason why the weight of things should be measured only in kilos or pounds. Heavy silence takes place in moments of particular tension in the dispute process, when important decisions are made and dramatic turning points are reached.

The more formalized the dispute process the greater the tendency for a specific meaning to be assigned *a priori* to the silence of a particular party at a particular stage. If the party remains

the *kuta's* judgment is referred to him for confirmation. Even if the ruler chooses to sit in the *kuta* while a case is being tried, it proceeds as if he were not there.

silent at a given moment or after being asked a given question, his silence will have legal significance (assent or admission, for instance). If, after the decision, the losing party remains silent for a specific period of time, this will constitute legal acceptance of the decision and preclude the possibility of appeal. It is in this sense that I speak of the formalization of silence in formal dispute processing. It seems to me, however, that the language/silence structure of the audience remains informal (in this sense) even in formal dispute processing. To be sure, the judge can distribute procedural silence and can even sanction violations (clearing the courtroom). But he cannot force the audience into substantive silence. In this respect, the judge is himself an object of judgment by the audience.³⁵

The meaning of a specific instance of silence has to be inferred from the logical connections of the discourse, from the structural position of the silent participant and from the language of that participant and the others that precedes and follows the silence. I will illustrate this with an analysis of the silence of the third party in a hypothetical context of adjudication (which, therefore, should not be taken as a factual description of other processes).

The language/silence structure of the judge can be divided into two phases. In the first the judge has begun the process of excluding implausible decisions but the range of those that remain is still very broad. Either the judge has not yet reached a decision, or else his preferences are still shaky and inarticulate. In the second phase, either the range of plausible decisions has narrowed to the point where the judge concentrates on weighing the relative merits of a few alternatives, or he already has a definite preference and has begun to clarify the reasons for it.

In the first phase, the judge uses silence in order to obtain all the information that his initial understanding of the case suggests he may need to reach a decision. The judge shows no preference for either specific pieces of knowledge or specific pieces of ignorance.

35. If one compares the language/silence structure of the audience in a soccer or baseball stadium with that of the audience in a courtroom, the differences are striking and are mainly due to the different structural relationship between audience and spectacle. In baseball or soccer a silent argument takes place, an argument of movements and thoughts. Thus the audience is free to choose between silence and language. For instance, excitement and enthusiasm will be shown through language rather than silence (though intense excitement in a game may be displayed through sudden silence in the midst of great noise). In the courtroom, on the contrary, words play a central role in the argument. Accordingly, silence is the expected behavior of the audience (at least in formal processes). Silence usually signifies excitement or enthusiasm, but words are sometimes used to express disapproval of the judge's conduct, or of the proceedings in general. In such cases the judge's need to command silence is an expression of his own failures in the processing.

At this stage the parties retain the right to knowledge and ignorance, to decide the ratio of knowledge and ignorance upon which they want to base their claims. But since the judge's silence is only rarely punctuated by language, it becomes very difficult for the parties to control the meaning of that silence. Furthermore, what little the judge does say is also ambiguous. The questions asked tend to be open and multidirectional, less questions than invitations to speak freely. The judge is aware of the fact that the less he asks the more he knows. Consequently, the parties are induced to produce information that they might otherwise suppress or withhold until a later stage.

In the second phase the language/silence structure of the judge undergoes profound changes. To decide is to specify and to intensify both knowledge and ignorance. To achieve this, however, it is necessary to control the direction of the inquiry. For this purpose the judge is likely to alternate between specific silences and specific questions. In this way, the judge reaches two objectives. On the one hand, he assures himself that he will know more of what he already knows and ignore more of what he already ignores, thus supporting his preferences for a particular decision. On the other hand, he communicates these preferences to the parties, inviting them either to share or to oppose them (particularly when a few alternatives are still open). Thus in this phase, the questions and silences, though they appear to be factually related to knowledge and ignorance, are in essence normative. They point to what *should* be known and ignored. They also indicate that the right to knowledge and ignorance now belongs to the judge.

The objectives of the third party are different in mediation, and so the language/silence structure also differs. In mediation the parties never fully relinquish the right to knowledge and ignorance. They may even retain full control until the end of the dispute process, as is the case when the third party is merely a go-between or errand boy. But when the third party has the power to participate in decisions about what is to be mediated and how it is to be mediated, then the right to knowledge and ignorance is shared by the parties and the judge.

In mediation, the judge is mainly concerned with participating in the creation of a horizon of concessions. He does this through the elaboration of *ad hoc* criteria of reasonableness and of legitimate expectations. By making the horizon visible he transforms it. Assuming that the parties belong to the species of *homo juridicus*, they advance their proposed concessions according to a plan of minimum risk. It is up to the third party to transform them into maximum risks. That is why the parties in mediation are often

confronted with proposals that appear to be their own but are somehow alien to their intentions and even to their interests. When they try to pull back from the mediator's proposal they may, depending on his skills, go not to their original positions but to some different position. Thus a step back may, in fact, be a step forward. It seems to me (other factors remaining constant) that control of adjudication may be achieved (at certain stages) through prolonged and ambiguous silences, but that control of mediation requires prolonged instances of language coupled with short and unambiguous silences.

In this section I developed the features of the legal process and of legal reasoning that seem most relevant for the analysis of Pasargada law. After postulating a definition of law adequate to the purposes of the present study I discussed the nature of legal reasoning using the rhetorical concept, *topos*. I distinguished *topoi* from what I call judicial protopolicies and also from forms and procedures, although I did, at some length, consider the use of forms as rhetorical arguments. I then conducted a closer analysis of certain features of legal reasoning, such as: the conceptualization of the object of the dispute as the result of a bargaining process, which led me to distinctions between explicit and implicit issues, the breadth and narrowness of the object of the dispute, and the subtle and complex relationship between language and silence in legal discourse. I recognize that the preceding analysis may have been, at times, a *via dolorosa* of abstraction and prolixity but I hope to demonstrate in the following section that this was necessary to capture Pasargada law in the setting of its natural dramaturgy.

III. DISPUTE PREVENTION AND DISPUTE SETTLEMENT IN PASARGADA LAW

A. The Setting³⁶

Pasargada is one of the largest and oldest squatter settlements in Rio de Janeiro. (For a fuller description of the setting, see the Appendix.) In 1950 its population was 18,000; by 1957 it had doubled; today it is more than 50,000. The settlement began about 1932. According to the oldest residents, there were then only a few shacks at the top of the hill; the rest was farmland. It is clear that

36. For a detailed analysis of the ecological, socioeconomic, political, religious, associational and cultural characteristics of the *favelas* of Rio, and of Pasargada in particular, see Santos (1974: Ch. I, II); see also Appendix, *infra* p. 106. Fieldwork was conducted between July and October, 1970. In what follows, I will use the anthropological present to refer to that period.

the land was privately owned, but to whom it belonged and how it subsequently became government land are uncertain.

Physically Pasargada is divided into two main parts: the "hill" (*morro*); and the flat section on the two sides of the river that flows at its foot. The latter is very small, muddy, and subject to flooding. Many of the shacks are built upon stilts. It is here that the most precarious dwellings are to be found. The streets—whenever they are more than mere gaps between shacks—are narrow and muddy. Sewage sometimes runs through them freely, underneath the miserable wooden huts, into the heavily polluted river. There are a few shaky wooden bridges connecting the two sides of the river.

Most of Pasargada lies on the hill, which is neither very high nor, with a few exceptions, steep, and is therefore well suited for construction. Brick and cement are the most common building materials, though the quality of construction varies widely. Most houses have electricity and running water. There are several water networks in Pasargada, drawing from the city main, whose quality varies greatly. The irregularities are due either to financial mismanagement or technical problems, such as pipe repairs or lack of pumping power. Residents in houses and shacks without running water get it from public taps or neighbors. About 80 percent of the households belong to the electricity network administered by the electricity commission; the rest are served by other small networks.

Today Pasargada is practically in the middle of the city, so that access to the surrounding areas is good. But at its inception, Pasargada was located at the periphery, land which had no speculative value since the pressures generated by later population growth were not present. Thus Pasargada was able to develop more or less freely for three decades. And when land prices began to inflate as the city grew around Pasargada—its land presently is highly desirable for both housing and industry—the *favela* was already so big and so developed that outright removal would have involved dangerously high social and political costs.

Pasargada's internal economic life is very intense, including both the traditional "primitive" commercial houses and modernized grocery stores and bars. Many factories surround it, a dozen (or more) of which can be reached in a five-minute walk. The bulk of the active population are industrial workers in nearby factories. The remainder are entrepreneurs inside Pasargada, low level public officials, municipal workers, and odd-jobbers. Most industrial workers earn the legal minimum wage, but per capita income within Pasargada is about one-quarter of the minimum salary.

Associational life in Pasargada is very intensive. There are recreational clubs, soccer teams, churches (whose members often organize themselves in social clubs and charitable associations under the aegis of the pastor), the electricity commission, and the Residents' Association. Because of its relevance for the analysis of Pasargada law-ways the last (hereafter abbreviated RA) will be described more fully.

The RA was the first community-wide, community controlled social action agency in Pasargada. It was created with the protection and assistance of the State to organize the autonomous and collective participation of Pasargadians in the physical and civic improvement of the community. Founded at the end of 1966, its statutes were approved by the general assembly of members in mid-1967, and it was officially incorporated in 1968.

The RA's objectives, which resemble those of other such associations created as part of *Operação Mutirão* in the early 1960s, emphasize:

- I. To plead before the competent state or federal authorities measures intended to ameliorate the public services concerning its associates.
- III. To act as a linking element between the local population, assisting the latter in the resolution of all the problems concerning the community.
- V. To act legally and with great zeal for the maintenance of order and for the security and tranquility of the families.³⁷

The RA rapidly became known in the community. Though many people may not know its organizational details or who its directors are, few today are ignorant of its existence. Despite its statutory functions, the RA is identified in the community with "improvements and as a place to go when one has a house or shack problem." The folk meaning of this very broad expression is actually much narrower. Nobody would think of seeking the Association's help in solving a technical construction problem. But a resident may look to the Association when he wants to organize communal work on his house or shack, or thinks he should obtain authorization to repair or expand it; or wants to make (or renounce) a contract concerning it; or has a dispute with a neighbor over construction rights, demarcation of boundaries, passage rights, or occupancy rights. This enumeration suggests that residents bring to the Association only those housing problems that involve their public legal relationships to the community as a whole, or their private legal relationships to each other.

Although the RA has done little, recently, in the way of public works, because the State has reneged on the material assistance

37. A detailed analysis of the RA's statutory objectives can be found in Santos (1974:98 ff.); see also Appendix, *infra* p. 118.

promised, its original commitment to the community development was strong. This connection with construction, both public and private, was reinforced by the power it then had to authorize, and supervise, any house repairs, and to demolish any house built without its authority.

The RA soon became known as having subject-matter jurisdiction over questions involving land and housing, and territorial jurisdiction throughout Pasargada. The genesis of this, as of any informal social function, is obscure. The power to authorize repairs and to promote public works was certainly a factor. On the other hand, the directors spoke of the "official character" of the Association implying—fictitiously—that all actions were backed by State authority.³⁸ Finally, there was the belief that the Association not only reflected the stability of the settlement but would also enhance the security of social relations by giving the settlement legal status. All these factors may have contributed to the emergence of the idea of jurisdiction, by way of analogy.

As the RA conceives of its role in the community, it claims no jurisdiction over criminal matters. When confronted with a situation that appears to involve a crime, the Association neither handles the matter nor reports it to the police. All it will say to the alleged victim is: "This is not a question for us to solve. This is a question for the police." The RA abstains from criminal matters for several reasons. First, although maintenance of order was one of the statutory objectives of the RA, its primary goal has always been community development, not social control. Second, were it to assert criminal jurisdiction, the RA would inevitably devote more of its energies to the "bad neighborhood" of Pasargada, where drug dealers, career criminals, and prostitutes are concentrated, and crime is more frequent (though not as pervasive as outside criminologists tend to believe). This would not only divert the RA from tasks that it and the community deem more important, but would also damage its image in the more respectable neighborhoods. Third, the authority of the RA has been progressively undermined by an increasingly fascist State that has abandoned the community development policies of the early 1960s,

38. This expression, like others used by the directors, is full of ambiguity and is used to suggest different meanings to different audiences: the social workers, State agencies, and other outsiders on the one hand, and the ordinary residents of Pasargada on the other. This strategy reflects the precarious position of the Association, situated between two antagonistic audiences: the State agencies, which are increasingly seeking to control the Association, and the people of Pasargada, whose trust in their Association declines as they learn about the increase of external constraints. But the strategy also strengthens this position as far as possible. For a detailed analysis of the position of the Association, see Appendix, *infra* p. 118-24.

thereby denying the Association the material resources necessary for it to provide the services and public works it had promised the residents. Because criminals, in particular, would deny the legitimacy of this weakened RA, any attempt by its officials to exercise power over them would be physically dangerous. Finally, many State officials view *favelas* and crime as nearly synonymous, an ideological perspective that transcends the State apparatus. State action against the *favelas*, from the almost daily police raids to the removal of entire populations and the razing of shacks, is often justified in the name of the fight against crime. By getting involved in criminal matters the RA would expose itself to the arbitrary actions of an authoritarian state, and might be outlawed. It is true, as will be seen later, that the RA handles many disputes involving some kind of criminal conduct. But in such cases the Association proceeds as if the matter were exclusively civil. On the other hand, the RA conceives its civil jurisdiction as limited to cases involving land and housing rights, although disputes will be processed in which other issues are raised.

The relations between the RA and the State agencies operating in Pasargada are a model of ambiguity. In the early 1960s the populist State seemed to be committed to a policy of more or less autonomous community development in *favelas*. This policy was abandoned when the fascist military dictatorship came into power in 1964, and since 1967 the State has emphasized control of *favela* organizations and leadership and the elimination of any "dangerous" autonomy. Community organizations are presently offered "assistance" by various State agencies, but sanctions are imposed should they fail to accept the offer. Under these circumstances, Pasargada's RA has been using different strategies to neutralize state control: refraining from refusing assistance explicitly yet continuing to ignore the orders that accompany it while seeking to evade the formal sanctions that are threatened.

The relations between the RA and the police, who are stationed near the Association in the central part of the *favela* are very complex. Police and community exhibit reciprocal hostility. The community avoids the police, who are aware of this fact and of its negative consequences for social control. In order to increase its penetration within the community, the police have tried to maintain good relations with representative associations, particularly the RA. Thus they have offered their "good services" to the RA, which the RA has accepted, while conscious of the purpose behind it. In extreme cases, the RA may resort to the police in order to implement a decision, as will be seen below. But most of the time the RA will only threaten the recalcitrant resident with police

intervention, without taking further action to punish noncompliance. For the RA knows the risk of becoming too closely identified with an institution the community has ostracized. As a consequence, the Association and police engage in ritualistic interaction in the course of which they exchange signals of mutual recognition and goodwill that are not followed by substantial cooperation.

The RA's office is located in the central part of Pasargada and occupies a brick and cement two-story house. On the ground floor are two rooms: a very spacious front room with a large door opening to the street and a small back room that gives access to the first floor, which is still under construction and almost unfurnished. Most of the activities take place in the front room. The back room and the first floor are occasionally used by the *presidente* to hold closed meetings (with the parties in a dispute, for instance). The front room is modestly furnished: a long bench against the wall and three desks with chairs—one for the *presidente*, another for the secretary, and a third for the treasurer. Behind the desks are the files.

Though the statutory functions of the *presidente* are limited to coordination and representation, he is currently the central figure of the RA. When incumbent directors resign, the *presidente* may temporarily assume their jobs. He and the treasurer are the only members of the board of directors who work daily in the RA's office. The *presidente* arrives about 9:00 or 10:00 A.M., leaves for lunch from 2 P.M. until 5 P.M., and stays until 8:00 P.M. The evening is usually the busiest part of the office day. Whenever he presides over meetings of the board of directors he does not leave the building before 10:00 or 11:00 P.M.

Membership in the RA is restricted to Pasargada residents (or people otherwise integrated in the community) who pay a monthly fee. The RA has about 1,500 members (heads of family) but not all pay their fees regularly. Even though only members can participate in the general assembly, the Association does not restrict its benefits to them. Occasionally, however, nonmembers who solicit services from the RA may be induced to join it.

B. Dispute Prevention in Pasargada

1. The Ratification of Legal Relationships by the RA

When residents want to draft a contract or enter any other type of legal relationship they may come to the RA to see the *presidente*. Usually they are accompanied by relatives, friends, or neighbors, some of whom will serve as witnesses. The parties explain their intentions to the *presidente*, who may question them

about the legitimacy of the contract. For instance, if the contract involves the sale of a shack or house, the *presidente* will request the prospective seller to prove ownership. He will also ask both parties whether they are firmly committed to the contract and willing to comply with the conditions agreed upon, and may seek more detailed information about those conditions.

The secretary or treasurer then writes the contract. The parties may bring a prepared text, which they dictate to the typist, or they may ask the *presidente*, treasurer, or secretary to draft the text in accordance with the agreed terms. In the latter instance the official will read the draft to the parties, who must agree to it before it is typed. In certain types of contracts—leases, for instance—the official may also resort to routine formulas. After the contract has been typed the *presidente* will read the text to the parties, who will then sign it in his presence. Two witnesses will also sign it. The *presidente* will imprint one or more of the stamps of the Association on the document. One copy is given to the parties; the other will remain in the Association's files.

This intervention of the RA in the mutually agreed creation and termination of legal relationships—similar to the function performed by a notary—is here called ratification. In this way the RA contributes to the prevention of disputes in Pasargada, which is thus the joint enterprise of a legal forum and the interested parties.

Ratification not only invokes the norms that will govern the relationship while the agreement between the parties endures, but also anticipates the consequences of failure, as when a dispute erupts. Each point of agreement embodies a potential for conflict. Indeed, the agreement itself derives from the perceived potential for conflict, which is why the parties do not agree explicitly where they do not foresee such a possibility.

Ratification is a constitutive act in two senses. First, the RA not only ratifies the agreement proposed by the parties but may also suggest additional clauses. This happens when the *presidente* foresees a possibility of future conflict not anticipated by the parties and brings it to their attention in order to prevent it. The dialectics of dispute prevention and settlement are graphically illustrated here, for by anticipating conflict the RA creates new possibilities for breach of contract, and thus adds new legal qualifications to the conflicts that do occur.

But ratification is constitutive in another sense: it is perceived by the parties as an autonomous source of security for their relationship. It is imperative to analyze the factors that contribute to this perception. I suggest that it is produced by an act of institu-

tional rhetoric, a persuasive institutionalization of forms and procedures conceived as topic-rhetorical arguments. This is a process of re-institutionalization (to paraphrase Bohannon, 1967:45) in the sense that some of the forms and procedures are customary, but have now been integrated with new ones in a totality that invests its constituent parts with new meanings and orientations. This institutionalization is intimately related to the atmosphere of officialdom. Since the RA is a juridical person in which State authorities have vested administrative functions, these forms and procedures derive their persuasive power not only from themselves but also from the institutional setting in which they are followed.

The forms and procedures that constitute the ratification process are conceived here as rhetorical arguments not only because they contribute to the discussion of the merits of the case, but also because their role in dispute processing can only fully be understood when we take into account how, when, and by whom they are introduced into the process.

I will begin by considering those nonlinguistic arguments that antedate the ratification process and operate throughout it, for they are at the core of the institutional rhetoric and are some of the new forms and procedures through which the RA accomplishes the reinstitutionalization. Elements of this institutional setting include the building where the RA is located, which is one of the more substantial structures in Pasargada; the furniture of the front room—desks, the typewriter, the flag, the rubber stamps, and the documents upon the desks, the files where documents are kept, the posters on the wall advertising the latest State programs seeking popular participation (for instance, the campaign against illiteracy, the vaccination campaign); and finally the officials standing or sitting at their desks. The integration of all these arguments within a spatial and temporal unit helps to imbue the interactions of parties with normativity, especially since their participation is voluntary. Moreover, the normativity created here is predominantly an ordering normativity, in contrast to the compulsory participation of people in the State institutional discourse, which is more likely to create sanctioning normativity. For though the RA invokes the threat of sanctions, its rhetoric focuses more on the desirability of compliance to achieve shared objectives, as will be seen later.

The questions asked by the *presidente* about the nature, legitimacy, and conditions of the contract perform different functions. First, they provide the information with which he will decide whether the relationship should be ratified. Ratification is

most commonly denied when the RA does not have territorial or subject-matter jurisdiction. But the *presidente* may also refuse to ratify when, through questioning the parties or from personal private knowledge, he comes to suspect fraud, for instance, when the would-be seller does not own the property. Ratification was never denied in my presence.

I want to suggest, however, that the main function of questioning is not to obtain information but rather to assert the right of the RA to ask such questions. By doing so the RA reasserts its jurisdiction, reinforces the atmosphere of officiality, and claims to represent the concerns of the community about the eventual consequences of the relationship. The rhetorical aspect of such questions lies in the fact that they have an impact independent of the answers obtained. Moreover, the act of questioning seems more important than the questions asked. This does not mean that the questions are framed arbitrarily. To question the parties on the nature and conditions of the contract is to assert that the freedom of contract is not an absolute principle in Pasargada, but can be restricted to protect overriding interests of the community. The answers also contribute to the ratification process. By answering the parties not only clarify their commitments for themselves but also make such commitments public, which intensifies the motivation of the parties to honor them.

From a structural perspective the drafting of the contract, like the object of a dispute, is a process of bargaining between the parties, and between each of them and the officials. The RA is oriented toward championing community interests and protecting the weaker party. Both goals restrict the freedom of contract.

Whenever the parties bring a prepared text of their agreement the bargaining process between them has already taken place and there is little room for the RA to intervene. The parties have shown a degree of determination that the officials prefer not to upset, although in extreme situations community interests are more likely to stimulate intervention than protection of the weaker party.

Whenever a routine formula is used, as in the case of leases, the influence of the RA is embodied in the formula, and is effective when the parties accept it. But the formula has substantive value and creates ordering normativity beyond the mere content of its clauses since the parties, in subscribing to phrases that have been used routinely by many other residents, come to perceive themselves as involved in an ongoing legal structure that antedates, and survives, their relationship. Furthermore, even though the terms of the formula become part of the contract only after they have been accepted, the parties perceive the preformed verbiage as manifest-

ing a normativity that transcends their will. Thus, a legal hypothesis is perceived as a legal thesis. The routinization and standardization of legal formulas are a constitutive part of their normative content. Nevertheless, formulas are not mechanically applied. Beyond the obvious need to fill in the blanks (prices, dates, etc.), some formulaic clauses may be eliminated and other spontaneous clauses may be added.

The RA helps to clarify the content of the relationship. It stimulates a dialogue between the parties about unanticipated possibilities for conflict, thus forcing a reopening of the bargaining process. It serves to diffuse legal knowledge by advising the parties about the consequences of their certain conduct, such as the failure to pay, or to sign, a promissory note. It intervenes in the phenomenology of the relationship when it learns, for instance, that the poorer, less articulate party is accepting a particularly onerous commitment, and may suggest different conditions, such as a longer time to pay the balance of the purchase price.

Once the terms of the contract have been settled it must be reduced to writing. Here we must distinguish between the act of writing and the written product. I have already mentioned that a written formulation of will creates a particularly firm sense of commitment, according to Western cultural postulates. Though I did not systematically collect information on this point, it seems to me that in Pasargada the *topos* of the written word dominates that of the spoken word, suggesting that such relations are permeated by a legal rather than a moral discourse.

With respect to the activity of writing, its substantive value is not limited to progressively separating the promise from the promisor, and thus expressing the dialectics of autonomy and alienation that appear fully manifested in the written document and its future relations with the committed Self. Writing is a ritual with its own dynamic, oriented to the creation of a mythic legal fetish which it superimposes upon the material base (the elements of the contract, the paper, the writer). The RA performs this superimposition by the substitution of typing for handwriting. The keyboard of the typewriter extracts from the white paper a legal fetish in much the same way that the chisel extracts a statue from stone. The fact that a technological medium stands between the writer and the writing only enhances the myth of impersonality and transcendence, particularly in a community like Pasargada where typing is not a generalized skill and a typewriter is a rare object. On the other hand, the persuasive power of the *topos* of the written word increases to the extent that writing apparatus is per-

ceived as less destructible (closer to printing than to handwriting).³⁹

After being typed, the document is read to the parties. This is probably the first full manifestation, to the parties, of the dialectics of autonomy and alienation. Through the reading the written agreement appears to stand on its own feet reflecting, as in a distorted mirror, a strange travesty of the personal affirmation of will. The fact that the document is read aloud by a third party only increases the independence of what is read from the parties who conceived it. Thus, the reading is an important moment in the process of dispute prevention through ratification. The RA presents the agreement to the parties, thus increasing the sense of externality and of alienation which is at the core of any normative structure.

The reading is followed by the signing. Superficially this may appear to be the dialectical synthesis, the moment at which the parties overcome their alienation and reappropriate their commitment for themselves. On further reflection, however, it can be seen that this is a false overcoming. The moment of signing represents the greatest polarization between promisor and promise. In the presence of others the parties have to certify as their own something that has just been handed to them, thereby denying their role as creator. True synthesis will come later when there is actual compliance with the terms of the contract.

The recognition of polarization rather than synthesis at the moment of signing is what justifies, at the deepest level, the complementary signing by two witnesses, because the witnesses testify to the autonomy of the written agreement from any claims by the womb of personal freedom that gave it birth. Thus the witnesses intensify the gap between the parties and the agreement before them. If the signing represented a true synthesis, the witnesses would be not only useless but dysfunctional. But the structure of their participation is much more complex.

39. Richard Abel has suggested the following elaboration of this interpretation:

Typed documents have other symbolic features. Typing produces uniformity in the shape, size, and spacing of characters, which increases the fetishistic nature of the typed document, and its power to command a uniform response from people. The electric typewriter takes this one more step, since it produces letters that are uniform in darkness as well. Printing lies still further along this continuum, which explains why lawyers use printed forms and fill in blanks. But now, with typewriters directed by computers, lawyers instead have the entire document typed, which avoids the distinction between that which is printed and that which is filled in by typewriter. Typing also eliminates errors, which means that the document is infallible, and cannot be questioned.

So far we have lumped the parties together in our analysis but it must be recognized that the agreement establishes a division of labor in which the parties assume different and sometimes antagonistic positions, which the witnesses may help to secure. For instance, each may regain some sense that the agreement belongs to him through his perception that the agreement is autonomous in relation to the other party. The presence of the witnesses corroborates and reinforces such perception. On the other hand, the witnesses make a grass roots contribution collectivizing the relationship between the parties, imbuing it with popular normativity. They represent not only social consensus and social control but also an ongoing legal process with its aura of continuity and tradition within which the individual agreement must be integrated. From a structural point of view the witnesses are very similar to the routine formulas mentioned above—in a sense they are human formulas.

Since the RA is also interested in the collective and popular construction of normativity, it and the witnesses work in tandem, but from different perspectives, for the RA belongs to the institutional superstructure, whereas witnesses are an unmediated part of the social base. The collectivization of the legal relationship to which the witness contributes reflects upon himself, which is why one witness is not enough. A single person is an individual, an expression of freedom, while two persons are a community, an expression of social control. By negating each other's individuality the two witnesses create an autonomous entity which can function as a source of normativity, an efficient community that symbolizes the actual community.

After the document is signed, the *presidente* will stamp it. Here again it is useful to distinguish between the stamps as end products and stamping as an activity. Stamps are signs through which the RA symbolically manifests its prerogative to participate in the creation of the normativity embodied in the relationship. Structurally, they resemble the questioning at the beginning of the ratification process. In both the RA asserts its right to extricate the relationship from the intimacy of the parties. The difference is that this assertion is hypothetical in the questioning, whereas it is definitive in the stamps. In a sense, the stamps are the answer that the RA gives to its own questions. The normativity symbolized by the stamps is enhanced by the fact that they are also used in administrative documents of the RA. Thus the atmosphere of officialdom is communicated to the ratification process.

Stamping as an activity has its own meaning. It is an up-down movement in which the stamp hits the paper firmly and strongly.

The activity is structurally similar to the irate Latin father banging his fist upon the table to command obedience from his children, the priest banging his hand upon the edge of the pulpit to stress an important point, or the angry child hurling his toy or stamping his foot against the floor. All of these activities symbolize command, they stress points, reinforce normativity. Just as a writer puts in italics what he wants to emphasize, so these activities are the italics of social relations. Indeed, since some of the stamps may be printed, the stamping is more important than the stamps. It symbolizes the finality and the irrevocability of the transaction.

Finally, one copy of the document is given to the parties, the other to be kept in the RA's files. Just as funerals and mourning are ceremonies that adjust relationships among the survivors, and between them and the deceased, by reenacting the death, so the filing reenacts the ratification process. The parties do not take home the document, which is interred in the files, but a copy of it, much as relatives take home a photograph or other memento of the deceased. Filing symbolizes security for the relationship, and thus affirmation of collective normativity, because from now on the behavior of the parties will be supervised by the document, which is out of their control. For the document can reveal discrepancies between the terms of the agreement and the actual behavior of the parties.

In the preceding discussion I have argued that the ratification process is a constitutive act both because it introduces normativity into the relationship between the residents and because it may influence the future of these relationships.⁴⁰ Earlier I predicted that forms and procedures in Pasargada will lack the mechanical character of those in formalized legal systems. This prediction seems to be substantiated by the ratification process: agreements may be drafted by the parties, by the *presidente*, or by all in cooperation; the number of stamps is not fixed; and even the number of copies of the document may vary. In particular, the extent to which the *presidente* questions the parties is highly variable. Although I did not observe enough cases to be confident of my conclusions, I was left with the impression that the length of the questioning was inversely correlated with the *presidente's* knowledge of the parties—their honesty and reputation for fulfilling their commitments—and directly correlated with the value of

40. The analysis of the ratification process was based on the model of contractual relations because these are dominant. But the same process is used for other types of relationships and declarations of will; the preceding analysis must be adapted for such phenomena.

the property transacted. These variables, though superficially different, are structurally related. The ratification process is aimed at investing transactions with a load of normativity which will increase the security of contractual relationships in Pasargada. The *presidente* perceives those threats as greater when he does not know the parties, and as the value of the property increases. Thus, the ratification process is structured to give greater security to those relationships that need it more. In this way, the instrumental character of forms and procedures is maintained.

2. Substantive Norms Defining the Type and Range of the Relationships

Since this study seeks to conduct a sociological analysis of Pasargada law as a dispute processing mechanism within a framework of legal pluralism, some comparison to the official law of Brazil is necessary.⁴¹ There are striking differences between the types and range of legal relationships handled by the RA in Pasargada and those handled in the city by the offices of the Free Justice, a State agency similar to the legal aid offices in the United States. At the time of my empirical research, roughly 85 percent of the caseload of the Free Justice offices was devoted to alimony and child support. Brazilian legal officials tend to conclude from this that such cases are typical of the legal problems of the poor.⁴²

On the contrary, the pattern of relationships processed by the Pasargada legal system shows that even though most Pasargadians are poor they are involved in a wide variety of relationships, many of which are structurally (though not substantively) similar to relationships that Brazilian legal officials would consider typical of the middle classes. I will demonstrate this here in the context of dispute prevention, and later in the context of dispute settlement. I begin by analyzing contracts of sale.

Case No. 1

I, EL [full identification], declare that I sold to Mr. OM [full identification] a *benfeitoria* of my property located at [location].

41. Legal documents in Pasargada contain references to the "laws in force," a technical expression meaning the "official laws." In more informal oral discourse Pasargadians refer to the official laws and to the official legal system in general as the "law of the asphalt" because it is the law that governs social relations in the urbanized areas which unlike Pasargada, have paved (asphalt) roads and streets. Depending on the circumstances, this folk category is used to connote either that the law of the asphalt is also applicable to Pasargada or that, because Pasargada is not in the asphalt, official law does not apply. I use the expressions "law of the asphalt" and "official legal system" interchangeably.
42. Throughout the world legal aid tends to be overwhelmed with family cases to the exclusion of all others, unless it does something to restrict their numbers (see generally Cappelletti *et al.*, 1975). The reason may be that such cases involve a badly needed supplement to the low income of the applicant—a supplement that costs little to obtain since, at least in Brazil, the legal procedure in these cases is both simpler and more expeditious than the usual civil procedure.

He paid [amount] as down payment and the balance of the price will be paid in eight promissory notes beginning [date]. In case Mr. OM defaults in making the payment for three months, this document will be declared invalid. This agreement is free and legal and the property is free of charge and encumbrances. The land does not enter in the transaction because it belongs to the State.

This contract will be signed by the parties and by two witnesses in two copies, one of which will be kept by the Association for any contingencies that may arise.

Date:

Signature:

Witnesses:

The normative structure of Case No. 1 is complex, as can be seen through an analysis of the object of the transaction. Even though that object is a house, it is called a *benfeitoria* in the document. *Benfeitoria* is a technical expression used in the official legal system to refer to improvements upon material things (movable or immovable). These improvements may or may not be transferred separately from the things to which they are attached. It is important to explain the borrowing of this technical expression both because I predicted that legal language in Pasargada would be very close to ordinary language and because the expression is extensively used in Pasargada.

In Pasargada law the term *benfeitoria* does not refer to any kind of improvement, as it does in the official legal system, but mainly to houses and shacks, revealing the selective character of the borrowing. Moreover the term is used in Pasargada to certify that the parties do not intend to transfer the land upon which the house or shack is built, for this belongs to the State. To include the land in such a transaction would be a crime, if done intentionally; the use of the term *benfeitoria* precludes that possibility.

In order to understand the use of this term it is necessary to conceive Pasargada law not as a closed system which, despite borrowings, remains independent, but rather as one element within a situation of legal pluralism involving a complex network of relations and feedback. The term *benfeitoria* is addressed not to the Pasargadians themselves but rather to Brazilian legal officials. For this audience what matters is the certification of a specific legal intention. At the same time, from the point of view of Pasargada law, the actual transaction involves both the house or shack and the land.

It may appear that, with reference to houses and shacks, Pasargada law has borrowed the official norms concerning *benfeitorias*. But according to the official legal system, permanent buildings are the outstanding example of *benfeitorias* that cannot be transferred without the land upon which they are built, which is precisely the opposite of what is done in Pasargada. Pasargada

has borrowed not the norm but simply the idea of the logical separability of things that are physically attached. This idea has then been adapted to the needs of Pasargada and in such a way that the resulting norm is the antithesis of the official rule.

To be sure, this contradiction is not based on any profound cleavage in the cultural postulates underlying Pasargada law and the official law, but derives from the dependence of Pasargada law upon the official law in the determination of the legal status of land. The autonomy of Pasargada norms on *benfeitorias* is thus adaptive and instrumental, aimed at minimizing conflict with the official legal system. The basic conflict over the legal status of land is transformed into a superficial conflict between norms on *benfeitorias*.

Because the minimization of conflict in situations of change has often been achieved through legal fictions, I suspect that Pasargada norms on *benfeitorias* embody the fiction that the land is not included in the transaction. This fiction recurs in different forms, for it expresses a conflict between the basic norms of Pasargada law and official law.⁴³ In terms of the basic norm of the law of the asphalt, land tenure in Pasargada is illegal and the land belongs to the State. This basic norm and its consequences are known in Pasargada not only through repeated experience (the State uses the illegality of land tenure to justify its failure to provide public services) but also through the contacts of Pasargadians with legal officials. Indeed, it underlies all their behavior toward State agencies in general, and those in charge of the "squatter settlements problem" in particular. Even the movement in the early 1960s toward progressive legalization of *favela* land tenure started from the acceptance of the same basic norm.

Within Pasargada, however, this basic norm is inverted by means of the legal fiction mentioned above, rendering land tenure legal. The Pasargada basic norm provides the foundation of legitimacy for transactions among Pasargadians involving houses and shacks viewed as real objects, and not as *benfeitorias* in any technical sense. Although these transactions are officially invalid, because a house cannot legally be transferred without the land on which it stands, and *favela* land cannot be privately owned, this official label of invalidity remains inoperative among Pasargadians as long as these transactions and the social relations they

43. I borrow the term basic norm (*grundnorm*) from H. Kelsen (1962:2 ff.) though I use it in the broader sense of the norm or set of norms that establish the general legal foundation for the regulation of specific areas of social life, rather than in Kelsen's sense of the constitutional norm, conceived as the logico-transcendental presupposition of the legal pyramid.

create are kept within Pasargada and under the jurisdiction of Pasargada legal institutions and mechanisms. Thus the basic legal fiction permits two mutually contradictory ideas of legality to coexist without interference so long as their jurisdictions are kept separated.

These normative dynamics, to which I shall return, elucidate the structure of borrowing in Pasargada law. Borrowing is innovative and selective in order to (1) guarantee the normative survival of Pasargada law in a situation of legal pluralism in which the official law has the power to define normative problems, but cannot solve them; (2) respond to social conditions and institutional resources of the community that differ from those in the larger society that gave rise to the official law. While the first process may require clear-cut innovation, as I tried to show in the preceding paragraph, the second tends to preserve the general outline of the borrowed norm, innovating at the level of substantive or procedural technicalities.

Case No. 1 involves a contract of sale without conditions other than payment of the balance of the purchase price. But sales in Pasargada often include additional conditions.

Case No. 2

I, UL [full identification], declare that I sold to Mrs. AM one room of my house located at [location] for the price of [amount]. We agreed that in case Mrs. AM intends to sell the room I will have the right of first refusal.⁴⁴ Made in the presence of two witnesses.

Date:
Signature:
Witnesses:

Case No. 3

I, ED [full identification], declare that I received [amount of money] from Mr. JM as the first installment of the total price [total price] of the *benfeitoria* I sold him. Mr. JM has the obligation to move the second wall backwards to the level of the third wall. The house has three rooms with the following measurements [width and length].

Date:
Signature:
Witnesses:

In Case No. 2 the object of sale is a room in a house. Although I will not pursue them here, technical problems would arise in the official legal system in such a sale (for instance, the problem of the ideal quota of *terra firma*. In Pasargada, however, the sale of individual rooms is not only frequent but does not create any legal problems. Given the unavailability of land for new construction

44. The right of first refusal appears in Pasargada documents in much the same form as it does in legal documents in the official system, because Pasargadians have been socialized in the official legal culture and neither conditions in Pasargada nor relations between Pasargada law and the official legal system require normative autonomy in Pasargada.

and the rise in housing prices, there are people in need of shelter who can afford to buy a room but not a house. In addition, there are homeowners in urgent need of cash who find that selling a room is an ideal solution, because they retain their own shelter and yet raise an amount of money that mere rental would not produce. Since these transactions do not endanger the overriding interests of the community, there is no reason for Pasargada law not to legitimize them.

In Case No. 3 Mr. ED requires Mr. JM to reconstruct one of the walls, probably because he owns the contiguous house and wants to guarantee access to the street. Since demolition and reconstruction are involved, Mr. ED gives a full description of the house, with complete measurements. In the law of the asphalt it is always necessary to include a full description of the house. Pasargada law does not rigorously insist on this, and many documents merely indicate the location of the house. (Part of this difference may be due to the fact that transactions outside the *favela* involve land, which may lack clearly defined natural boundaries, whereas those within Pasargada are confined to houses and gardens, which have definite unambiguous limits.) In this case, however, the obligations created by the contract justified and demanded a description of the house. This also reveals the instrumental character of formalities in Pasargada law.

In the preceding cases contracts of sale created social relationships. Other contracts terminate relationships, exchange houses or shacks for others located in Pasargada or in a different squatter settlement, or for cars or plots of rural land, and create or terminate a landlord-tenant relationship. Gifts and wills are also among the legal agreements, as illustrated by Case No. 4.

Case No. 4

I, SE [full identification], live in a "*benfeitoria*" of my property [detailed description of the *benfeitoria*]. For ten years, Mr. and Mrs. XO have lived in my company and have helped me and treated me with respect, love, and tenderness. For one year I have been paralyzed on my left side and have lain in bed all the time and moved only with the help of this couple. Having received from this couple so many attentions and assistance and not having any other resources with which to compensate them for so much [again the same expressions about care and help], I decided in full lucidity and consciousness, that after my death my "*benfeitoria*" will become their property. This is my way of showing my gratitude for so much [again the same expressions]. Since I am illiterate I put my fingerprints in the presence of two witnesses.

Date:
Fingerprint:
Signatures of the couple and witnesses:

Case No. 4 involves an action that expresses attitudes at the same time that it produces legal consequences. Moral discourse

tends to dominate legal discourse. It has topic-rhetorical value, creating a persuasive argument in favor of the legality of the action undertaken, and thereby enhancing the security of the relationships that result. The need for rhetoric stems from the fact that the legality of the action may be doubtful, and there is a significant probability that it will be challenged by others.

All the cases previously analyzed are governed by materialistic motives. Here, however, the donor suffers a clear material loss; his only gain is emotional, and also personal in the sense that it cannot be transferred to other people who may later assert rights to his property.⁴⁵ Therefore the parties in this case are anxious to neutralize subsequent legal claims by the wife or heirs, by emphasizing the close connection between the ethical imperatives and the legal consequences of the gift in order to prevent a conflicting norm from later overturning that result.

This rhetorical strategy is visible at different levels. In the first place the *topos* of repetition is widely used. The same expression of gratitude for love, care, tenderness, and respect appears over and over. Far from being a product of clumsy legal drafting, this is intended to stress the norms that create the intended legal consequence.

At the same time, this moral argument suggests a parallel legal argument, thus undercutting the attempt to isolate the transaction from legal discourse. The rhetoric of the moral argument employs the *topos* of retribution and restitution, through which future and past are connected. It emphasizes the need to compensate the donees for the services they have provided to the donor by presenting a detailed and dramatic description of his illness, thereby implying the magnitude of their services. Performance of these services has created a legal right to compensation. Thus the moral discourse is aimed at transforming the gift into a bilateral contract in which the services are paid for in property. Through its ambiguity the moral discourse can meet a legal attack on its own ground: the donees were not benefited by the arbitrary generosity of the donor; they were not in fact donees, for they had a legal claim to payment for their services and the legal actions undertaken were the only way to pay them.

Contracts in Pasargada are remarkable well-adapted to the needs and interests of the parties. They clearly display the inten-

45. Richard Abel points out that I may be overlooking a possible materialistic motivation of the donor: to increase his hold over the services of the donee by offering the prospect of inheritance. Even so, his compensation remains strictly personal and thus justifies the narrative-rhetorical strategy used in this case.

tions of the parties to obtain the mutual advantage that they anticipate.

These contracts also reveal the dialectical relation between dispute prevention and dispute creation. By expanding the areas of anticipated conflict, and drafting clauses to handle them the parties enhance the dispute prevention function of the contract. At the same time, by multiplying the terms of the agreement the parties increase the probability of contract violation, and thus of dispute creation.

From the perspective of the law of the asphalt these contracts are very "complex"; were they to conform to all the requirements of that law they would require cumbersome legal preparation. In Pasargada law, however, they remain extremely flexible and yet do not demand much time or great skill to draft.

In this section I have dealt with the substantive norms of Pasargada law. I now turn to the study of the formal normative structures. The generally valid argument against the distinction between form and substance becomes even more compelling in Pasargada law in view of the instrumental character of its forms. Yet the distinction is still useful as both a descriptive strategy and an analytical category. At the same time, it is necessary to bear in mind that the deep understanding of sociolegal phenomena demands an integrated view in which the distinction is superseded. Thus in the preceding section I have mentioned questions of form and the following section will also consider substantive questions.

3. *Forms and Procedures for Legalizing Relationships*

Legal forms may be nonverbal or verbal; if the latter, they are couched in legal-technical language. I will argue in this section that Pasargada legal forms are consistently instrumental, oriented to the substantive goals that they are supposed to serve. Pasargada law is loose on formalism and strict on ethics. Where it has borrowed legal forms from the law of the asphalt, the pattern is similar to that observed for substantive norms. The relative autonomy of Pasargada formalism in this situation of legal pluralism suggests that a folk system of formalism and a folk technical language have evolved.

The ratification process previously mentioned—which has shown how forms can be used to create or reinforce normativity—centers around the written document that certifies the legal transaction. In the law of the asphalt two major types of legal documents can be identified: private and public. The latter are written by a notary public according to special procedures and are mainly used to certify the transfer of legal title to immovable property.

They are attached to the official files of property in the appropriate registry of titles. Both private and public documents are usually signed by the parties and by witnesses. Pasargada documents are structurally similar to the private documents of the asphalt, and are signed by the parties and two witnesses. But Pasargada law uses these documents to certify legal transactions (transfer of title to immovable property) that would require a public document in the law of the asphalt.⁴⁶

Pasargada law borrows the general outline of a form. A written document is considered necessary to certify contractual intentions and deeds, but the security thus obtained is not dependent upon compliance with the technical distinctions and procedures prescribed by the law of the asphalt. Witnesses are used because they are important symbols, are inexpensive, and do not create delays.

Forms are flexible and are adapted to the circumstances. The document must be signed by the parties, but they may be illiterate. Both Pasargada law and the law of the asphalt accept the fingerprint of an illiterate. But while in the law of the asphalt the fingerprint has to be printed in the presence of a State official according to formal procedures that establish its authenticity, in Pasargada law nothing more is required than its printing on the paper in just the way that a name is signed. These are not mere differences in form, but in functional conception. While in the law of the asphalt the fingerprint can *substitute for* the signature, in Pasargada law one *signs by* fingerprint. Sometimes the same expression is used for signature and fingerprint. What has been borrowed is the logical structure of the fingerprint, the possibility of an alternative material sign to express a legal commitment.⁴⁷

Other contingencies may affect the form of the contract. In the following case the seller's son had publicly expressed misgivings about the sale. The buyer was concerned that the son would use his mother's illiteracy as a pretext to try to upset the sale. He therefore

46. Pasargadians could not possibly have their legal transactions certified in the public documents of the asphalt not only because their land tenure is illegal but also because their houses violate the housing code (they have not been granted the *habite-se*). I would speculate, however, that Pasargadians would not use public documents even if they could, not only because they are expensive but also because the extra security they provide is not considered necessary in Pasargada. From the point of view of the law of the asphalt the private documents used in Pasargada might be viewed as valid transfers of rights to possession, not property. But Pasargadians only make this distinction when speaking with reference to the official legal system. Under Pasargada law, these transactions transfer property, and indeed the rights transferred exceed mere rights of possession as these are conceived by the law of the asphalt.

47. Pasargadians could fingerprint according to the law of the asphalt but it would be expensive and cause delays.

refused to buy the shack unless the seller convinced her son to sign as a witness.

Case No. 5

I, CE [full identification], declare that I received [amount] as the just value of a *benfeitoria* I sold to Mr. LP [full identification]. The *benfeitoria* is [measurements of the shack, a very small one]. It is made of wood and French tiles; with water and light. The buyer has full rights over the *benfeitoria* from now on and he can do with it whatever he pleases.

Since I am illiterate I present my oldest son to answer for this sale, signing as an eye witness (*testemunha de vista*) of the contract.

Date:

Signature of the buyer:

Witnesses (one of whom is Mrs. CE's son):

Mrs. CE's son signs as more than a simple witness to the contract, for he is her legitimate heir, and thus a party whose consent is relevant to the security of the transaction. Indeed, this concern with security is also evident in the full description of the measurements of the shack and of the rights that the buyer acquires.

This case indicates that the parties to a transaction under Pasargada law are not limited to those who buy and sell but may include persons whose consent is considered relevant. These persons are not agents of the parties because their consent is autonomous. And this consent may substitute for, reinforce, counteract the consent of the person with whom they have a relevant relationship. The cases that follow illustrate this.

Case No. 6

Mr. NT enters the Association and explains his case to the *presidente*. The following is their dialogue.

MR. NT: I bought my shack from Mr. SD. He promised to give me a receipt six months later, after I completed the payment. But he never did and in the meantime four years went by. Now I sold my shack to Mrs. CA but first she wants to see the document showing that I in fact bought the shack from Mr. SD. But I don't have it.

PRESIDENTE: I understand your problem. You don't have any evidence to show that you are the owner of the shack. In that case you have to ask Mr. SD to come to us. He will sign the document concerning the selling of the shack to you and after that you can sell it to Mrs. CA.

MR. NT: But the problem is that Mr. SD does not live in Pasargada anymore. He lives very far away and I don't have money for the transportation. But his sons live in Pasargada and they know of everything. They saw me buying the shack from their father.

PRESIDENTE: In that case what you have to do is to try to bring Mr. SD to us. If you can't, then bring his sons and they will testify concerning the contract between you and Mr. SD.

Case No. 6 illustrates the importance of the written document in certifying legal transactions in Pasargada in two different ways. When Mr. NT bought the shack from Mr. SD they agreed that the payment would be made in installments. Mr. SD did not trust Mr.

NT and promised to sign a document of sale only after the payment was completed,⁴⁸ for without this Mr. NT would not be able to prove the sale and thus assert his rights over the shack. But Mr. NT never needed the document and thus did not press Mr. SD to sign one. Now he wants to sell the shack and the buyer wants to see the document first.

Mr. NT comes to the RA because he knows that it is in charge of solving this kind of problem. The *presidente* recognizes the problem and rephrases it in a way that, though more precise and technical, is readily understood by Mr. NT: "You don't have any evidence to show that you are the owner of the shack." The legal skills of the *presidente*, though greater than those of Mr. NT, are not expressed in esoteric language. The problem is not the existence of Mr. NT's right but its proof. It is therefore morally and legally imperative that he be helped because problems of form must be subordinated to the normative substance.

The solution is approached by logical steps. The best solution would be to have Mr. SD sign a document, but Mr. NT tries to convince the *presidente* that this would be very onerous. Instead, he proposes an alternative. If the adult sons of Mr. SD testify to the sale, their consent substitutes for his. They are not just witnesses, but surrogate parties because their material interests are presumed to be identical to those of their father.

This legal reasoning is shared by the *presidente* but there are some subtle differences. The *presidente* wants to stress the logical order of the solutions. First, Mr. NT should try to bring Mr. SD; only if he cannot do so (not an absolute impossibility, but perhaps an impossibility for Mr. NT) will the second alternative be accepted. The solution ultimately adopted is the most feasible among several that achieve the same substantive goal.

This case shows that there may be bargaining over forms just as I predicted there would be over the object of the dispute. Mr. NT actively participates in the creation of the form that will be followed in his case. This is possible because forms are not applied automatically in Pasargada. There is a basic structure (the need for a signed document) from which different paths can be followed. That one is the most logical is not sufficient, since this must be weighed against the burdens it imposes. It would not be just to

48. Though installment sales are common in Pasargada its law does not provide for an installment sales contract as conceived by the law of the asphalt, which would have protected Mr. SD's rights. This is probably due to the fact that though in the asphalt society (with its complex capitalist economy) installment sales have been promoted to expand the internal market, in Pasargada ("a primitive capitalist society") installment sales are, in most cases, the expression of mutual trust and solidarity in response to personal emergency situations.

force Mr. NT, who clearly owns the shack, to spend a significant proportion of the cash that he will realize from the sale in trying to bring Mr. SD to the RA. This is another example of how Pasargada law is strict on ethics and loose on formalism.

Case No. 6 illustrates surrogate parties reinforcing the presumed consent of a missing party. But surrogate parties can also be used to substitute for and counteract the will of a person who might refuse to consent.

Case No. 7

Mr. GM comes to the RA with Mr. MT and explains his problem to the *presidente*.

MR. GM: You know I own that *benfeitoria* on [location]. I want to sell it to Mr. MT but the problem is that I cannot obtain the consent of my wife. She left home nine months ago and never came back.

PRESIDENTE: Where is she now?

MR. GM: I don't know. Actually I don't think that her consent is very important in this case because, after all, the whole house was built by my efforts. Besides, there is no document of purchase of construction materials signed by her.

PRESIDENTE (silence, then): Well, I know you are an honest person and your wife has behaved very badly. (Silence.) How long has she been away?

MR. GM: Nine months

PRESIDENTE: That is really not very long. (Silence.) I think that your oldest son should agree to the sale of the *benfeitoria* and sign the document as a third witness.

MR. GM AND MR. BT: We agree.

MR. GM TO MR. BT: We could draft the document right now

The document is then drafted in the following way:

I, Mr. GM [full identification], being separated from my wife, who disappeared without notice, and living as a good father with my six children, declare that I sold a *benfeitoria* of my property located on [location] to Mr. BT [full identification]. He will pay immediately [amount] and the balance will be paid on a basis of [amount] per month. We declare that since there are no documents in my wife's name or in mine, I sell this *benfeitoria* without charges or encumbrances. Indeed it was built through my own efforts. I sign this declaration in the presence of two witnesses and in two copies, one of which will be kept in the Residents' Association in case any contingency arises.

Date:

Signatures:

Signatures of three witnesses:

(one of whom is Mr. GM's oldest son)

It is known in Pasargada that the law of the asphalt requires the consent of the legal spouse for the validity of contracts transferring immovable household property. In Pasargada, however, many couples are not legally married, and in any case the consent of the wife is presumed if she is living with her husband at the time of the transaction. But Mr. GM and Mr. BT are troubled because Mr. GM is legally married and yet, his wife is not living with him so her consent cannot be presumed. They are concerned that the

wife may try to upset the sale, especially since the house is a reasonably good one and Mr. BT is paying a substantial amount of money. They resort to the RA for two reasons. They want to make sure that if Mrs. GM elects to use the RA to upset the transaction her endeavors will be frustrated. But they also want to make sure that if she resorts to the legal institutions of the asphalt those institutions will respect the solution given by the RA.⁴⁹

The *presidente's* question concerning the whereabouts of Mrs. GM suggests that the best solution would be to try to obtain her consent. Mr. GM promptly answers that he does not know, though he probably does. But the *presidente* does not press the matter, for it is common knowledge that she left with another man and had been unfaithful to Mr. GM before leaving him. It would be humiliating for Mr. GM to contact her now, a course of action that should not be expected from a reasonable cuckold.

In any case Mr. GM seeks to eliminate this possibility by convincing the *presidente* that compliance with this formality is not very important in his case "because, after all, the whole house was built by my efforts." This argument embodies the *topos* of moral justification through which the formal norm requiring the wife's consent is reinterpreted in the context of the instant case. This is a convincing argument because in Pasargada law forms are not applied mechanically. The consent of the wife is recognized as a form that must be respected, but the substantive justification underlying that form is what gives it content. It is usually just to require the consent of the wife because she has actively participated in the creation of the wealth of the household. But if it is possible to demonstrate that such participation has not occurred the form becomes empty. Because the umbilical cord between the form and its moral justification has not yet been cut compliance with the form may admit gradations.

There are signs in Case No. 7 that the *topos* of moral justification may not be sufficient, by itself, to determine whether the

49. One may wonder why the parties should be concerned about an appeal by Mrs. GM to the law of the asphalt since it does not recognize rights and transactions established by Pasargada law. However, one should not forget that in this situation of legal pluralism the folk legal system is dominated by the official legal system and represents the legal behavior of dominated classes within a capitalist society. Pasargadians experience this discrimination every day, and thus know that the autonomous legality tolerated in Pasargada may easily be destroyed whenever the political power of the fascist State is interested in doing so, under the guise of any one of those slogans through which it reproduces class domination, e.g., "urban development," "the fight against crime," "law and order," "down with unhealthy slums." (John Steinbeck describes in *The Grapes of Wrath* (1939) how Hoovervilles were burned down in the Depression in the United States in the name of law, order, and human decency).

formal norm has been satisfied. This is because the participants are conscious that they are operating in a situation of legal pluralism and that the law of the asphalt grants considerable weight to the formality of consent (i.e., it is more legalistic or formalistic). Therefore Mr. GM feels the need to reinforce his moral discourse with a legal argument: his wife has no legal proof that she has contributed to the construction of the house because there are no receipts for the purchase of building materials signed by her. Unlike Case No. 4, legal and moral discourse are kept separate, and though they feed back upon one another the legal discourse remains subsidiary. The *presidente* recognizes the legal argument but does not consider it conclusive; after all, Mrs. GM might find other ways to prove her participation in the construction of the house.

The *presidente* considers the case a very complicated one and his silences are not only indexes of his perplexity but also a rhetorical device to communicate those complexities to the parties and convince them that they should not expect the contract to be perfectly secure. The *presidente* tries the only path left open: to dispense with consent. And so he asks for how long Mrs. GM has been away. Structurally, the legal reasoning implied here is very similar to that underlying the statute of limitations. If Mrs. GM had been away long enough, any subsequent claim against the contract would have little credibility. Had he been living without his wife for a long time, Mr. GM could probably contract as if he were not married. But they have been separated for only nine months and this is too short a period.

The *presidente* feels that Mr. GM deserves, and needs, to make the transaction as secure as possible. In the first place, the *presidente* knows that while Mr. GM has always been an honest man, respected in the community, his wife had acquired a bad reputation long before she left him. She has no moral grounds for insisting upon the formalities of consent. Secondly, the *presidente* knows that the main reason Mr. GM is so anxious to sell the house is that he is ashamed of all that has happened and wants to move out of Pasargada as soon as possible.

In light of this the *presidente* devised a solution that enables the parties to contract without Mrs. GM's consent and yet with some assurance that the transaction will not be upset. If the couple's oldest son (an adult) consents to the sale this will present an additional obstacle to interference by Mrs. GM. Should she attempt to do so, she will be acting against her children as well as against her husband. Thus her son's participation may discourage

her from proceeding and may contribute to a decision against her claim.

Consequently, the oldest son is not a mere witness. Indeed, in the document Mr. GM declares that he signs in the presence of two witnesses; the third witness, the son, is a surrogate party. Yet his consent does not really substitute for that of Mrs. GM, which is why the document emphasizes the immateriality of the latter rather than the presence of the former. An interesting inversion may be seen in this: while in the dialogue with the *presidente* the moral argument was dominant and the legal one subsidiary, in the document the inverse occurs. The *benfeitoria* is sold without charges and encumbrances because there are no documents signed in the wife's name. The moral argument ("it was constructed through my efforts") is merely a reinforcer. I suggest that the document, as a legal instrument, transforms the normative message and induces the legal argument to take the lead.

In this section I have tried to discern the internal structure of legal reasoning in Pasargada, focusing the discussion on the context of dispute prevention. Now I will turn to dispute settlement.

C. Dispute Settlement in Pasargada

1. Process

Whenever the RA is called upon to settle disputes, the typical procedure is as follows: The plaintiff comes to the Association and explains his grievances to the *presidente* or, in the *presidente's* absence, one of the directors. If he is not yet a member of the RA it is highly probable that he will become one on this occasion and will pay the membership fee and the first month's dues. The official will conduct a kind of preliminary hearing of the case. First he will ask about the exact location of the *benfeitoria* to make sure that it belongs to Pasargada and is therefore within the territorial jurisdiction of the RA. His questions will be then oriented toward establishing whether the dispute falls within the subject-matter jurisdiction of the RA (property and housing rights). Finally, depending on how well he knows the disputants and how much private knowledge of the dispute he already has, the official will engage in further questioning about the content of the dispute and the *prima facie* reasonableness of the claim. He may conclude that the plaintiff is acting out of spite, or that he is not serious about the dispute, or even that he is not involved in a dispute at all.⁵⁰

50. One day I was chatting with the *presidente* when a 16-year-old girl entered the Association carrying her four-month-old daughter in her

When the Association accepts the case, the official records the name and address of the resident against whom the claim has been brought and sends a written invitation asking him to come to the RA at the date and hour indicated "to treat matters of his interest." The plaintiff is also told to return then. In the meantime, the *presidente* or a director may inspect the locale. If the defendant replies that he cannot come on the specified date, another time will be arranged. If he says nothing and fails to show up and the claimant reaffirms his dissatisfaction with the present situation, a second invitation will be issued. If this too elicits no response then other devices may be used, such as personal intervention by the *presidente*, by a friend of the defendant, or even by the police. Sometimes the defendant will contact the *presidente* before the hearing in order to explain his version of the case and present his own grievances.

The parties may be accompanied to the hearing by friends, relatives, or neighbors, even though the latter may not intervene in the actual discussion. The *presidente* invites the parties to the back room or to one of the rooms upstairs, where the case will be heard *in camera*. Usually the plaintiff presents his case first, followed by the defendant. Then the *presidente* questions them and the parties may engage in a lively exchange. Finally the *presidente* will decide.

I want to argue that the procedural steps prior to the hearing create an ambience of interaction and an atmosphere of evaluation which will feed back upon the final stage of the process and contribute to its outcome. The process not only reflects the jurisdiction of the RA but also recreates and reinforces that jurisdiction, and in so doing strengthens the authority of the decision ultimately reached—the probability that it will be accepted by the parties.

Since the RA neither looks for cases nor possesses any official jurisdiction, a resident who invokes its help publicly acknowledges that jurisdiction. An exchange takes place between the resident who wants his problem solved and the RA which wants its jurisdiction recognized, but this does not engender the dependence of the RA upon the resident's claim for various reasons. First, the

arms. She explained that she had been living with her mother in her stepfather's shack, her stepfather had just forcibly raped her, she had fled, and now she had no place to live. The *presidente* then said: "Look, I don't know in what way I can be helpful. Do you want me to invite your mother and your stepfather for a discussion of the case? In fact, I think that your case with your stepfather is of a criminal nature. It cannot be resolved by the Residents' Association. It is a question for the police." The girl replied: "No. I don't want to denounce them. I don't even want to talk to them. I just thought that the Association might know of any shack or room for rent."

act of recognition can only be honored if the RA remains independent in the sense of being able "to make the balance" between the parties; otherwise its ability to function as third party, and thus to solve the problem, would be destroyed. Second, as already mentioned, the defendant may come to the RA before the hearing to present his own grievances; in so doing he performs an autonomous act of recognition. The RA's jurisdiction is thus strengthened and extended to all the rights and wrongs of the situation. Finally, as has also been discussed, the RA has managed to surround its jurisdiction with an ambience of officialdom which makes it appear that jurisdiction is not sought and thus that the act of recognition is not necessary; the resident who brings his case to the RA subjects himself to a preexisting jurisdiction.

Sometimes, when either the plaintiff or the defendant contacts the *presidente* about the case for the first time he asks if each knows that the RA has "legal quality" ("*qualidade juridica*"). The answer is usually affirmative. The purpose of the question, however, is not to obtain information about how well the legal status of the RA is known but to establish the unquestioned prerogative of the RA to solve cases that fall within its jurisdiction. Since the law of the asphalt has given the RA no official jurisdiction there is no other way to create it but by affirming it, in a ritualistic fashion, in contexts in which the assertion is persuasive and meaningful. This affirmation of "legal quality," which takes place so early in the processing of the dispute, is intimately related to the problem of implementing the ultimate decision. Given the weakness of the RA's sanctioning powers, implementation of the decision depends upon its acceptance by the parties without external coercion. But though power can develop suddenly and dramatically, the kind of authority that induces voluntary compliance is always created piecemeal and without drama. The *presidente* wants to point to it early in the dispute process so that its efficacy may unfold at the end.

The determination of territorial and subject-matter jurisdiction also reinforces the RA's authority. The message is not so much that if the shack is located outside Pasargada the RA has no jurisdiction, but rather that if it is located within it, jurisdiction is indisputable. The same analysis applies to the inquiry into subject-matter jurisdiction. By emphasizing the limits of its authority, the RA allays doubts about its authority within those limits.

The initial questions concerning the substance of the claim enable the *presidente* to get a preunderstanding (*Vorverständnis*) (Esser, 1970) of the case before the processing of the dispute reaches its final stage. This preunderstanding is also influenced by

whatever private knowledge the *presidente* may possess about the dispute, by the defendant's *ex parte* appearance to explain his version of the case and express his grievances, and also by the inspection *in loco* of the material basis of the dispute. The *topoi* of dispute settlement are applied in a very vague and inarticulate manner at this stage, but this is sufficient to give the *presidente* a first impression of the relevant features of the case and the norms that may apply to it.

When the *presidente* happens to meet the defendant while inspecting the locale he will invite him to the hearing orally; otherwise he will do so in writing. The choice of this latter medium announces the seriousness of the situation and the commitment of the RA to assert its jurisdiction over the case. The message contains an invitation to come to the association "to treat matters of his interest." This epitomizes the ambiguity of the invitation process. Because the command emanates from a weak center of power, it can only be asserted through self-denial, and thus is framed as an invitation. The unity of the explicit message is split into two implied ones: the veiled promise that the resident's interests will be advanced if he accepts the invitation and the veiled threat that they will be sacrificed if he refuses.⁵¹ If this strategy fails the RA will intensify its pressure upon the defendant only when the plaintiff reaffirms his interest in the case by renewing his claim. Persuasive messengers—such as a friend of the defendant, the *presidente*, or a director—may hint that the police will intervene, either to bring him to the RA or to enforce whatever decision the RA takes in his absence. I have not personally observed such police action, though I have seen them deliver invitations in cases in which the RA wants to embargo the construction of a house or shack. The *presidente* recognizes that absolute noncooperation would constitute a very serious problem, but he also says that such a situation hardly ever occurs. How true this is I could not ascertain.

In most cases observed the final stage of the dispute settlement process took place *in camera*, ensuring an atmosphere of privacy and intimacy that serves several functions. First, the parties may vent their anxieties without being disturbed by the pres-

51. The use of the invitation as an ersatz-summons is not limited to Pasargada law. The lawyers at the offices of the Free Justice, who also lack the power to summon, invite the defendant to meet with them to try to reach an out-of-court settlement. They believe that because the invitation is printed on the official paper of the State prosecutor and sometimes served by a court clerk, it will be interpreted by the addressee as a summons. I have no evidence that the Pasargada law has borrowed this strategy from the law of the asphalt. It seems more likely that these are independent responses to similar conditions.

ence of strangers. Second, since it is much more difficult for other residents to gain access to the *presidente* while he is in the back room, the legal-rhetorical discourse in which he participates will not be interrupted. If this discourse is to be persuasive, the parties must engage in a continuous exchange of views through which a normative orientation gradually and precariously unfolds. So precarious is this process that a break may mean a return to zero; the accumulation of persuasion in legal rhetoric is never irreversible.

Finally the movement of the parties from the open front room to the closed back room is accompanied by the removal of the dispute from the natural setting in which it occurred into the legal setting in which it is going to be discussed and eventually settled.⁵² The myriad circumstances and implications that comprise the former setting are transformed into the relevant issues of the latter. The dispute does not lose all contact with the natural setting. For, like the parties in the back room, it continues to be located in Pasargada and socialized in Pasargada ways. But much as the closed room offers the participants a privileged forum in which to discuss the dispute, so the legal setting gives the dispute a foreshortened perspective.

Once the parties appear at the RA and the hearing begins, we are in the final stage of dispute processing.

2. Topoi of Dispute Settlement

a. *The topos of fairness.* In disputes arising out of the conflict of individual interests this *topos* urges a real or fictitious balance of rights and duties, an outcome that approximates the model of mediation. It has been suggested that we never find either pure adjudication or pure mediation in practice, and that it might be more profitable to work with the categories of mixed adjudication and mixed mediation. I will argue that a third category should also be considered: false mediation. For the rhetorical needs of the argument may lead the dispute settler to present a decision as a compromise when it actually grants the claims of only one party.

I will initiate the discussion with the analysis of a case.

52. This movement assumes different forms in different societies. In modern industrial societies the publicity of court proceedings is never absolute. But in some countries the public may be totally excluded in political or sexual crimes. The superficial surface justification for this is usually the preservation of orderly legal procedures, or a concern for public morality, or even the interests of the parties. A more profound reason may be that in such cases the natural setting of the dispute asserts itself so irresistibly that the increase in secrecy is needed to create the legal setting.

Case No. 8

Mr. SB sold his shack to Mr. JQ for Cr\$1,000.⁵³ The purchaser paid half of the price immediately and promised to pay the rest in installments. On the date agreed upon he paid the first installment (Cr\$50). The second installment of Cr\$200 was also paid on time. However, instead of giving the money to the seller himself, Mr. JQ gave it to the seller's wife. She kept the money for herself and spent it at her pleasure. Besides, she was unfaithful to her husband and had gone to bed with the purchaser's brother. Having learned this, Mr. SB, the seller, killed his wife and demanded repossession of the shack. The purchaser complained that he had duly paid the installments and intended to pay the balance. He had given the second installment to the woman in the belief that she would take it to her husband.

The seller's sister was called to the Association to represent her brother who could not come since he was being sought by the police. The *presidente* said that it would not be fair to revoke the sale since the purchaser had acted in good faith throughout. On the other hand, the seller should not be injured by the purchaser's failure to tender the money directly to him; therefore the installment in question should not be credited to the balance of the price. The *presidente* finally decided, and the parties agreed, that the purchaser would pay the balance in six installments, three of Cr\$100 and three of Cr\$50.

Because the *presidente* knew the dramatic circumstances of this case before Mr. JQ brought his complaint to the RA, he had a preunderstanding of the facts and norms involved in the dispute. In demanding repossession of the shack Mr. SB was using Mr. JQ as a scapegoat for his anger at Mr. JQ's brother. But it was clear that Mr. JQ had not been involved in his brother's affairs and had always acted in good faith.

After the parties presented their cases the *presidente* invoked the norm that demands good faith in contractual relations (*pacta servanda sunt*). He also used the *topos* of fairness to eliminate some extreme solutions, thus creating the normative ground upon which a middle-of-the-road decision could gradually be shaped.

Mr. JQ had always conducted himself as a reasonable purchaser. He paid all the installments on time. The fact that he made one of the payments to Mrs. SB cannot be conceived of as a violation of the contract. Since Mr. and Mrs. SB are legally married the shack is property of both; therefore, Mr. JQ made the payment to one of the sellers, reasonably assuming that Mrs. SB would give the money to her husband. After all the use of surrogate parties is well recognized in the Pasargada law—for instance, Mr. SB's sister is allowed to represent her brother in the hearing to avoid delay. Consequently, it would be unfair to give no consideration to the legitimate interests of Mr. JQ by revoking the sale. On the other hand, Mr. SB contracted with Mr. JQ on the

53. All amounts are given in Brazilian *cruzeiros*, which at the time were worth approximately \$0.26.

assumption that the installments would always be paid to him since he did not trust his wife, with good reason. He got none of the installment to which he was legitimately entitled, and can no longer get it from Mrs. SB. It would be unfair to give no consideration to Mr. SB's legitimate interest in obtaining full payment for the shack. By excluding two alternatives that totally sacrifice the interests of one party, the *presidente* legitimated, indeed necessitated, a decision that would "make the balance" (cf. Nader, 1969): Mr. JQ could retain the shack but the payment of the second installment should be repeated; Mr. SB could not repossess the shack but would receive the money from the installment originally paid to his wife.

It is interesting to notice that the *presidente* avoids any involvement in the criminal issues that gave rise to the dispute. The object of the dispute is strictly maintained within the boundaries of the law of contracts even though the *presidente* knew that Mr. SB was using Mr. JQ as a scapegoat for his brother. I would speculate that the conciliatory decision which, on the surface of the legal discourse, appeared as the normative result of the exclusion of extreme alternatives was motivated by the *presidente's* policy of avoiding any involvement with the criminal behavior. The *presidente* may have been particularly anxious to persuade the parties to accept the mediation as a fair settlement of the processed dispute because this might settle the real dispute without explicit argumentation. If this is true, the processed and the real dispute were kept separate in order to allow an "economical" settlement of both.⁵⁴

In Case No. 9 the problem of the limits of the object of the dispute is raised again, but the *topos* of fairness is used in a somewhat different fashion.

Case No. 9

The plaintiff, Mrs. BW, came to the RA with her sister and the latter's three children. The defendant, Miss AM, came with her oldest daughter (about five years of age). All of them went to the room upstairs where the case was heard by the *presidente*.

Mrs. BW: The land belongs to Mrs. OL. She gave me permission to build my shack there. I did it myself, I furnished it and I lived there

54. One night, some time after the decision of this case, I managed to talk to Mr. SB. He always carried a loaded gun, wrapped in an old newspaper, and intended to use it not to resist arrest but rather to kill Mr. JQ's brother. (The latter had fled from Pasargada and gone into hiding in the interior of Rio State. His wife, who had always been mistreated by him, was hesitant about saying to Mr. SB the whereabouts of her husband but she never did.) We talked about the case. He manifested his agreement with the decision "because, after all, Mr. JQ should not pay for what his brother did." He was only annoyed that he could not sell the shack again because he needed money desperately. This shows clearly the discrepancy between the processed and the real dispute and how, in fact, the settlement of the former might have reached the latter.

for a while. In the meantime I got another shack close to the first one and I moved into it. At the same time, Miss AM (the defendant) came to me with her two children saying she had no place to live and that she was sleeping on the street with her children. She knew that the first shack was vacant and asked me to let her move in there.

Compassionately, I agreed and I even lent her all the furniture in the shack. I never requested any rent from her. Now I want the shack for this sister of mine and her children who just arrived from the hinterland and have no place to live. But Miss AM refuses to leave.

PRESIDENTE: Now Miss AM, what do you have to say?

MISS AM: I do know that the shack belongs to Mrs. BW. But I know that I cannot leave the shack because I don't have any place else to go. I don't have money to pay any rent. And besides I have three children. Nobody will rent a room to me.

Mrs. BW (interrupting): She can pay the rent. The truth of the matter is that she is a prostitute and is full of *cachaca* (alcoholic drink) and of *maconha* (marijuana) all the time. And the shack is always full of *marginais* (criminals).

MISS AM: This is not true. And what about you? You lived for eleven years with a guy who was crazy and beat you all the time. He committed all kinds of larcenies and finally was caught by the police. Now he is in the mental hospital. But you said that you would receive him when he comes.

Mrs. BW: That's nonsense. I am very happy with the man I am living with now. I work in a lawyer's home and he said that I had the right to repossess the shack.

MISS AM: I don't care. More important than all is that you . . .

PRESIDENTE (interrupting): No. All this argument is not relevant to our problem. If the shack is not Mrs. BW's, neither is it yours, Miss AM. And, after all, Mrs. BW was very kind to have let you move into the shack and even use her furniture.

MISS AM (in conciliatory mood): I don't deny that. And as a matter of fact she was very nice when I first met her. But the problem is that I can't find a place to live. I would leave the shack willingly if I found a room. But even if I find it I cannot pay the rent.

PRESIDENTE: Look, I don't think that it is impossible to find a room at a very low rent. After all you have not tried yet. You have to. Your lack of cooperation is not fair. Mrs. BW's sister is here with her children. They also have no place to live. They just came from the Northeast. They don't have money. It is reasonable that Mrs. BW wants to help her sister and her children. She has a greater duty to help them than to help you.

MISS AM: I know. I know. But how can I find a room?

PRESIDENTE: Look, you have not tried yet. I will give you thirty days to find a room and to leave Mrs. BW's shack. Do you agree Mrs. BW?

Mrs. BW: Yes, I agree. I wouldn't like to see her on the street.

PRESIDENTE: Do you agree Miss AM?

MISS AM: I agree. But I don't know if I will be able to find a room. I will try.

PRESIDENTE: You will try. You will find something.

This case is characterized by normative consensus between the parties concerning the application of the laws of property. Mrs. BW was allowed to build on Mrs. OL's land and thus became the legitimate owner of the shack. She then granted Miss AM a precarious tenancy. Mrs. BW has the legal right to repossess the

shack. None of these legal conclusions is questioned by Miss AM. This explains why the argumentation lacks the legal tone that can be detected in other cases. The discourse is predominantly moral: the parties accept the same normative principle, need for shelter, but use it to support contradictory claims. The supporters that each disputant brings to the hearing (Mrs. BW's sister and her children, Miss AM's daughter) are used as nonverbal arguments, as symbolic reinforcers of the parties' claims.

Each disputant tries to describe the facts in such a way that her claim appears morally superior to her opponent's. Mrs. BW emphasizes the moral uprightness of her conduct: how *compassionate* she was in lending the shack to Miss AM with *all* its furniture and without asking for *any* rent; only compelling circumstances force her to ask for it back; she does not like "to see Miss AM on the street" but her sister and the latter's three children, who fled from the hopelessness and hunger of the hinterland, have no place to live and need her help.

On her part, Miss AM tries to demonstrate that she does not refuse to leave out of a selfish motive but solely because her situation is desperate: she has *no* place else to go; she cannot pay *any* rent; and because she has three children, *nobody* would rent her a room. She pushes the argument of necessity to the extreme, so much so that Mrs. BW, afraid of its persuasiveness, interrupts abruptly and tries to neutralize it. She does so by presenting facts that are so loaded with moral opprobrium that they not only eliminate the factual basis of Miss AM's claim but also cast serious doubt on her motives and her general moral character. If Miss AM is a prostitute, she has money and can pay the rent. She is also a deviant, a characterization reinforced by her alcoholism, drug abuse, and contacts with criminals. Mrs. BW's argument, in sum, is that the claim of an unworthy person is an unworthy claim.

Miss AM responds by trying to knock Mrs. BW off her moral pedestal. Although she denies Mrs. BW's accusations, she does not press this point, probably because she recognizes that the facts are so well known that to deny them will further damage her credibility. Actually her rhetorical question—"And what about you?"—is a confession: "Yes I am bad, but you aren't any good either." Miss AM tries to stigmatize Mrs. BW as deeply as she has been stigmatized herself: even if Miss AM does have contacts with criminals, Mrs. BW had lived eleven years with a man who is not only a criminal but also crazy (double stigmatization). Therefore, she cannot be the moral person she alleges and her claim is not worthier than Miss AM's. Mrs. BW tries to defend herself but perceives that she cannot win on moral grounds and swiftly moves from a

moral to a legal argument. She invokes the official law and the lawyer of the asphalt in order to intimidate both Miss AM and the *presidente*. It is at this point that the *presidente* breaks his silence and takes control of the discussion.

The emotional dialogue between Mrs. BW and Miss AM has shown the *presidente* that the dispute over the shack is only part of the conflict between them. For reasons that I will analyze below, he does not want to extend the settlement context beyond the issue of the shack, and therefore organizes his argumentative strategy around this issue. At the level of moral argument the claims of the disputants seem to lead to a tie score: the principle of need of shelter applies equally to both. At the level of legal argument, Mrs. BW has an edge, since Miss AM recognizes that Mrs. BW owns the shack.

It is clear that the *presidente* decides this case for himself on legal grounds. But he cannot present his decision in those terms because the fact that the parties have chosen a moral argumentation makes such a presentation unpersuasive. Accordingly, the *presidente* inverts his legal reasoning. He converts the legal advantage into a tie score—"If the shack is not Mrs. BW's neither is it yours"—and then proceeds to create a moral advantage for Mrs. BW. He begins by emphasizing Mrs. BW's kindness in having let Miss AM move into the shack "and even use her furniture." The purpose of this moral rhetoric is to induce Miss AM to relinquish her inflexible position by making her feel grateful toward Mrs. BW and conciliatory. He is only partially successful, for though she admits that Mrs. BW "was very nice when I first met her," she repeats the argument of necessity. It is here that the *presidente* invokes the *topoi* of fairness and of cooperation. As in Case No. 8, the *presidente* uses the *topos* of fairness to exclude an obviously unfair alternative solution. But while in Case No. 8 the predominant feature of the *topos* is the balance of interests, in this case it is the conflict of moral duties.

The *presidente* argues that, though Mrs. BW was performing her moral duty to help the needy when she let Miss AM live in the shack, she had an even greater moral duty to help her own family. It would be unfair for her to leave her sister and nieces on the street to help Miss AM. Miss AM is touched by the argument and shows some change in her position when she converts her previous assertion into a rhetorical question: "But how can I find a room?" Promptly, the *presidente* undercuts the rhetorical value of the question by answering that she will find a room if she really tries, and gives her a month to do so. Even though he knows that Mrs.

BW will agree with this, he asks her consent in order to intensify the conciliation of the parties, since Miss AM is still reluctant.

In the first part of the discussion the *presidente* kept silent. He wanted to know as much about the case as possible. The parties were free to expand the object of the dispute and to raise any issues they deemed relevant. They could also vent their anxieties and release emotional tensions that would stand in the way of a conciliation. But this does not mean that the parties exercised absolute control over the object of the dispute. On the contrary, the *presidente* interrupted Miss AM when she was about to say something that she considered "very important." At this point, he had a sufficient understanding of the case and felt that no new issues should be raised.

In his argumentation he was careful to concentrate on the issue of the shack, omitting the other facts that the parties had asserted. Why did he proceed in this way? In the first place, he sensed that the dispute over the shack was secondary and had been triggered by another *real* dispute between Mrs. BW and Miss AM. They were probably fighting over a man. He did not know what the real dispute was because the parties never disclosed it, but the emotional character of the discussion between the two women and their use of stigma and counter-stigma could not otherwise be understood. However, the *presidente* did not show any interest in reaching the real dispute. This case had a "bad smell." He knew that both parties were prostitutes, deeply involved with career criminals and the police. The role of the RA in such a case should be kept at a minimum. Besides he was not sure that the plot of land upon which the shack was built was still under the territorial jurisdiction of the RA. And he knew that the feelings of the prostitutes were highly changeable: they were enemies today, but could be friends tomorrow. The fate of the agreement was less dependent on what happened in the RA than on what would happen outside, where the real dispute was being fought. The *presidente* was aware of the limits upon his functions in a case like this.⁵⁵

In Case No. 8 the *topos* of fairness was used to reach a mediated outcome. In Case No. 9 there was no mediation: Miss AM lost her case even though she was allowed to stay in the shack for another month. In Case No. 10, we will see how the *topos* of

55. The accuracy of his doubts was confirmed in a conversation I had later the same day with the defendant. She was completely drunk, but still she could articulate her ideas fairly well: "I won't leave the shack. I just talked to a friend of mine who is a sergeant in the military police and he told me that nobody can force me out. Besides, the Residents' Association of Pasargada has nothing to do with my case because the land where the shack is does not belong to Pasargada."

fairness can be used to reach an outcome of false mediation: that is, a decision that is presented as mediation but is really adjudication.

Case No. 10

Mrs. CT, the plaintiff, and Mrs. SN, the defendant, were invited to come to the Association to settle the dispute in which they are involved. Mrs. SN is very old, a sick person. Her son, Mr. CN, came in her place. The parties were taken to the back room and the case was heard by the *presidente*.

Mrs. CT: My sister came from the hinterland and she had no place to live. I bought for her the backroom of Mrs. SN's shack. I paid Cr\$100. My sister lived there for nineteen months. She left a while ago but the man who lived with her is still living there. Now Mrs. SN wants to sell the whole shack but she cannot because the backroom belongs to me and I am going to sell it myself.

Mr. CN: This is not true. There was no sale. No Cr\$100 were paid. My mother accepted Mrs. CT's sister in our house because her sister had no place to live.

Mrs. CT: But I have witnesses of the sale of the backroom.

PRESIDENTE: Let's see. Mrs. CT, do you have a document of sale?

Mrs. CT: No, I don't because she refused to give me the receipt. But I bought the room and I have witnesses.

PRESIDENTE: I'm afraid that is not enough. The Association only recognizes sales for which there are written documents with the Association's rubber stamp printed on them. Witnesses are not enough. The Association is a juridical institution.

Mrs. CT: But I have witnesses.

PRESIDENTE: It is not enough, Mrs. CT. We need a document. But let's discuss the case according to the logic. I am not saying that you, Mrs. CT, are not right in your contention. I know neither you nor Mrs. SN. I only want to find a fair solution. Let's suppose that you paid Cr\$100. Let's further suppose that Mrs. SN gives you the money back. In that case you have to pay the rent for the period in which your sister occupied the room. Let's suppose that the rent is Cr\$10 per month. Nineteen months of tenancy amounts to Cr\$190. You paid only Cr\$100. This means that you still owe Mrs. SN the amount of Cr\$90. Wouldn't it be better if you forget the Cr\$100 you paid? In that case, Mrs. SN will also forget the Cr\$90 that you owe her. As a matter of fact, you may have paid the Cr\$100 but your sister also occupied the room for nineteen months. I would suggest that you forget the whole thing.

Mrs. CT: I don't agree. The room is mine. I bought it. I am going to sell it.

PRESIDENTE: Look, in your case I would be cautious. Your case is a lost case. If you want to fight then you should consult a lawyer. I may even refer you to the Free Justice agency.

Mr. CN: I don't care if she wants to go to a lawyer. We will go too.

PRESIDENTE: That's the problem. You may go to the lawyer. But your case, Mrs. CT, is a lost one. You don't have a document of purchase. In my opinion you should give the key of the backroom to the owner of the house.

Mrs. CT: All right, I agree.

The legal norms involved in this case are the formal rule requiring a written document to certify the sale of the shack and the substantive rules of property. The basic dispute is about legal title to the shack. Mr. CN contends that his mother owns the whole

shack and has the right to sell it because Mrs. CT's sister and her lover have been occupying the backroom as precarious possessors. Mrs. CT contends that she bought the backroom from Mrs. SN. Both parties use the same moral argument—the principle of need of shelter—to substantiate their legal contentions. Mrs. CT's sister came from the hinterland and had no place to live and no way to support herself. Since Mrs. CT could not accommodate her in her own house, the only reasonable and morally commendable way of helping her sister was to find her a room. On the other hand, Mr. CN contends that his mother was so deeply moved by the helpless plight of Mrs. CT's sister that she compassionately allowed her to stay in the backroom of the shack in these circumstances; i.e., she would not possibly accept money.

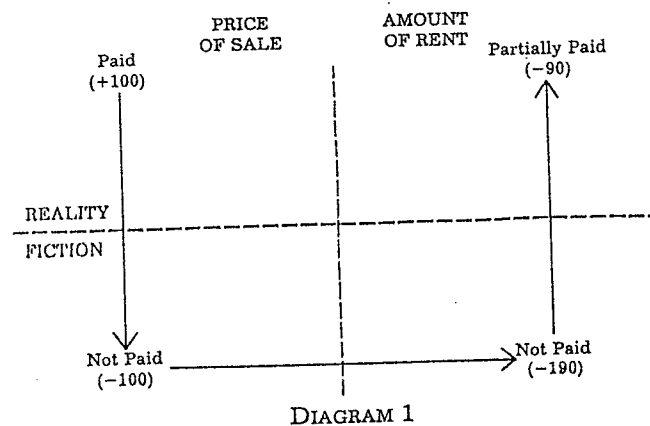
Mrs. CT tries to strengthen her position through a formal argument: she has witnesses who will testify that the sale took place. It is at this point that the *presidente* decides to intervene. He responds to Mrs. CT's argument by dealing with the question of formalism. Mrs. CT has said that she does not have a document of sale because Mrs. SN refused to give it to her but she does have witnesses, implying that they are just as good evidence as a written document. The *presidente* perceives the implication and disagrees with it as strongly as possible. The RA is a juridical institution and therefore has to maintain a high standard of formalism: witnesses are not enough, nor even just any kind of document—only a document with the Association's stamp. The rhetorical device used by the *presidente* to render this formal norm persuasive consists in elevating the standards of formalism by elevating the legal status of the RA.

But Mrs. CT does not seem persuaded and the *presidente* recognizes that the formalistic argument is indeed rhetorically weak. He thus turns to argue the substantive issues; he will discuss the case "according to the logic," which is the logic of fairness. However, before doing so he has to solve two threshold problems. While arguing on formal legal grounds the *presidente* had indicated to Mrs. CT that the case would be decided against her; now he has to retreat from this conclusion or suspend it rhetorically because otherwise his argumentation on fairness grounds will lack credibility and persuasive power. Mrs. CT will not even listen to him if she knows that the case has already been decided against her. Her resistance has to be overcome and an atmosphere of open-minded evaluation and cooperation has to be created. The *presidente* feels that his formalistic argument may have caused so much damage that he almost implies that Mrs. CT may win the

case after all: "I am not saying that you, Mrs. CT, are not right in your contention."

The second problem is this. The argumentative needs of the formal-legal discourse required an institutional rhetoric that emphasized the legal authority of the RA. But this tone is highly inappropriate to an argumentation based on fairness and cooperation rather than intimidation. Here it is essential to stress the moral authority of someone who stands above the dispute and thus can evaluate impartially the rights and wrongs of the situation: "I know neither you nor Mrs. SN. I only want to find a fair solution."

Having decided the threshold questions, the *presidente* embarks upon an ingenious argument in which he wants to present a decision against one of the parties as a compromise between them. To achieve this, the *presidente* begins by changing the object of the dispute through imaginary manipulations of reality ("Let's suppose . . ."). He transmutes a dispute over the transfer of property (sale) into a dispute over the amount of rent (tenancy). Diagram 1 represents the structure of the argument.



Through this argument the *presidente* transforms the plaintiff (Mrs. CT) into the defendant. Reality is reconstructed so as to make it appear that her best legal position is to owe Mrs. SN a mere Cr\$90, and even this is possible only because he is willing to grant, without further evidence, that Mrs. CT actually made the payment of Cr\$100. The *presidente*'s reasoning employs an ingenious device: in the course of the argument he manages to separate

the payment of Cr\$100 from the legal situation that required it. He transforms it from a total payment of the purchase price into a partial payment of rent, and on this basis concludes: "You may have paid the 100 *cruzeiros* but your sister also occupied the room for nineteen months." This would not make sense if the 100 *cruzeiros* had been paid as the sale price. But after the manipulation performed by the *presidente* the stage is set for his proposed compromise: Mrs. CT will forget the payment she made and Mrs. SN will forget the rest of the rent.

The overall purpose of the *presidente's* strategy was to show Mrs. CT that the amount of money she claimed to have paid was so small that it could not reasonably be considered the sale price for the backroom: nineteen months of a low rent would constitute almost double that sum. This strategy allowed the *presidente* to propose a decision that he considered fair without having to ascertain the facts of the case.

The argumentation was probably too artificial to convince Mrs. CT and she reaffirmed her view of the case: "The room is mine. I bought it." At this point the *presidente* concluded that it was not possible to obtain spontaneous cooperation and abandoned the *topos* of fairness to return to a formal-legal argument. He sought to intimidate Mrs. CT by warning that if she does not accept the decision of the RA she will have no alternative but to hire a lawyer and try to fight the case in the asphalt. But he admonishes: "In your case I would be cautious." And though he offers to refer her to the offices of the Free Justice this is less an offer of services than a threat.

The folk image of the official legal system is immediately reconstructed in the implicit discourse of the participants: financial costs (even in the case of the Free Justice), delays, and general inefficiency. Moreover, the *presidente* predicts the decision of the law of the asphalt: "Your case is a lost case" ("*o seu caso não dá pé*"). The formal legal argument, which he recognized as weak within Pasargada law, acquires new strength through its direct connection with the official law: since Mrs. CT has no document of purchase her claim will be rejected by the official law.

It is interesting to notice that the written document, as a legal form, constitutes the common ground of Pasargada law and the law of the asphalt. In contrast the argument of fairness is kept within Pasargada law (see Diagram 2).

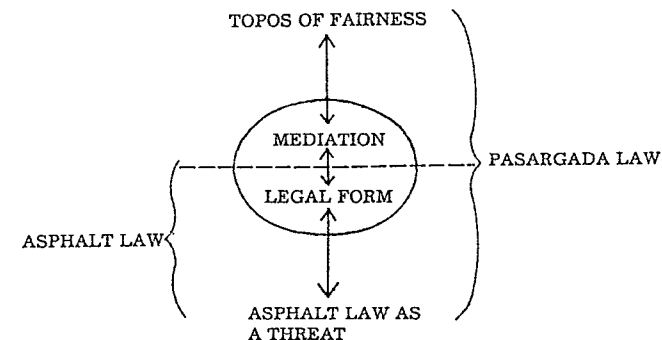


DIAGRAM 2

The official legal system is presented not as a forum to which a litigant may appeal from an adverse decision under Pasargada law but as a threat aimed at reinforcing the decision of the RA under that law.

The dominance of official law only partly explains the recurrent reference to the legal form of the written document in this case, for it fails to account for its invocation in the initial stage, when the discussion is kept within the boundaries of the Pasargada law. Throughout Section III.B, I demonstrated the flexibility of Pasargada law in matters of formalism. Indeed in Case No. 6 witnesses were allowed to certify the existence of the contract. The present case thus seems to contradict my theoretical prediction that because Pasargada law is loose on formalism and strict on ethics, nobody would lose a dispute because of a technicality.

I want to argue that these inconsistencies are superficial and disappear once the structure of the legal reasoning in this case is analyzed in depth. After the parties presented their claims the *presidente* realized that it would be very difficult to learn what actually had happened. It was the word of one against that of another: if Mrs. CT brought her witnesses, Mr. CN would bring his. He therefore sought a solution on the basis of the data spontaneously offered by the parties. In the first place it looked highly suspicious that Mrs. SN had refused to give a receipt of payment. Since the whole purchase price had been paid at the time of the sale there was no reasonable motive for Mrs. SN's refusal. Besides, it did not seem plausible that Mrs. CT, who seemed so articulate

and so zealous in defense of her interests, would accept this refusal without doing anything about it. Then, too, the *presidente* questioned whether Mrs. SN would have sold the backroom for the 100 *cruzeiros* that Mrs. CT claimed to have paid.

This was a very low price considering the location of the shack and the fact that its value would diminish as a result of the sale of one of its rooms. Mrs. SN would only have agreed to such a sale out of ignorance or because of fraud, and since the evidence of the sale was not unequivocal her interests should prevail. Finally, Mrs. CT does not really need the room, either for herself or her sister. She wants to sell it and make a profit at the expense of Mrs. SN. Accordingly she must lose the case.

All of this shows that the *presidente* decides against Mrs. CT on substantive grounds, with the help of assumptions about reasonable behavior and reasonable prices. The presentation of his arguments reflects, in an inverted form, the process through which he reached his decision. He uses the legal form of a written document (rhetorically buttressed by such details as the requirement of an official stamp) as persuasion for a decision ultimately grounded on principles of fairness.

b. The topos of the reasonable resident. This *topos* is invoked when a resident has asserted his individual interest in opposition to the primacy of community (or neighborhood) interests. It is far more difficult to apply than norms regulating conflict among individual interests (as in landlord-tenant controversies) and its currency in Pasargada is open to question. A resident who easily defines his individual interest in a given building may not recognize a collective interest in his undertaking and, even if he does, may find it difficult to determine how the two collide.

In all the cases collected under the *topos* of the reasonable resident there are two or more residents who present the same grievance against the same person. In some the RA represents the interests of the community or the neighborhood in a kind of administrative proceeding.

Case No. 11

When repairing his house Mr. KS extended one of the walls so much that the street, already very narrow, was almost completely obstructed. Some neighbors complained before the Residents' Association. The *presidente* and one director inspected the locale and concluded that the street had been virtually closed by the construction. They went to see Mr. KS and explained the situation to him. He was reluctant to do anything about it but the officials pushed the matter very hard. The argument was: "Look, if someone dies, the coffin cannot pass down the street. Not even the street cleaner's wheelbarrow."

Faced with the refusal of Mr. KS to cooperate, the *presidente* said: "Look, I think that's unreasonable. But in any event you know that the Association has powers to demolish unlawful buildings in Pasargada. I have the laws here and I can show them to you. And the police are anxious to help the Association enforce its powers." The *presidente* and the director left without Mr. KS making any commitment. Shortly after the discussion Mr. KS decided to demolish the wall himself and to rebuild it according to its original dimensions.

Leaders of Pasargada, the *presidente* and directors included, share the view that Pasargadians are individualists. As one leader puts it: "They may watch someone doing something harmful to the interests of the community but if they are not directly affected they won't move a straw." Whether or not this is true, it constitutes an assumption for evaluating behavior. When some residents came to the Association to complain about Mr. KS's construction, the *presidente* immediately concluded that they must have been significantly affected because otherwise they would not have acted. The stereotype of selfish individualism furnished the *presidente* with expectations about the facts and issues involved.

Suspecting that construction was already under way, if not yet completed, the *presidente* anticipated that the defendant might be obstructive, since Pasargadians are very serious about protecting their interests and property values.⁵⁶ He may have asked a director to accompany him in the inspection of the locale because he was concerned about Mr. KS's reaction and thought that the presence of two officials would have greater impact and deter any violence.

The *presidente* and the director quickly concluded that they faced a flagrant violation of the Pasargada norm that forbids private construction to the detriment of collective interests. The street was virtually closed by Mr. KS's construction, and its residents thereby denied access to the main street. The normative needs of the factual situation were so evident that the *presidente* thought that a discussion between the complainants and the defendant in the RA would be unnecessary. The RA took upon itself the task of representing the interests of the neighborhood against an unreasonable resident. Like the *Lozi kuta*, the RA is a flexible institution which may function as either a judicial body or an administrative agency, as circumstances require.

Mr. KS offered a defense at each of the two levels of discourse we have distinguished: the street had always been narrow and he had not exceeded the original dimensions of the house (legal discourse); he had invested money in the construction of the wall and

56. Not surprisingly, in the capitalist culture in which Pasargadians live, private property becomes more valuable the scarcer it is.

had neither money nor time to demolish it and construct it again (moral discourse or discourse of necessity.) Since Mr. KS showed no respect for the Pasargada norm he had violated, the *presidente* turned to the *topos* of the reasonable resident. By disregarding the interests of his neighbors he was behaving unreasonably because if all residents behaved like him Pasargada would very soon be impossible to live in. His cooperation was requested, and in these circumstances the emphasis on cooperation was transformed into a rhetorical *topos* put at the service of (and reinforcing) the *topos* of the reasonable resident, because a reasonable resident not only does not violate collective interests but cooperates to restore them when they have been violated. In the course of the argumentation the *presidente* managed to magnify the unreasonableness of Mr. KS's behavior by rhetorically expanding the object of the dispute. His conflict is not only with those who live on his street but also with those who die in Pasargada and whose coffins have to pass through the street on their way to the cemetery. Mr. KS is violating the interests of the living *and* the dead, and to be disrespectful to the dead is an especially heinous moral offense in Pasargada. His transgression extends beyond the neighborhood in another sense: it damages the community interest in cleanliness because it prevents the street cleaner, hired by the RA, from carrying the rubbish in a wheelbarrow to the entrance of Pasargada.

Mr. KS had invested too much in his wall to be persuaded by the *topos* of cooperation. When this became clear the *presidente* shifted to the *topos* of intimidation. Pasargada law has developed a characteristic dialectic between these two *topoi*. Intimidation by the *presidente* becomes reasonable only after the unreasonable refusal of the resident to cooperate has been established (even if not explicitly admitted). Once this *topos* was introduced the legal discourse changed direction.

Mr. KS's conduct violated both the Pasargada norm of community interest and the law of the asphalt that forbids (and orders the demolition of) unauthorized construction in squatter settlements. As long as the *topos* of cooperation dominated the legal argumentation, the *presidente* emphasized the Pasargada norm. But when he turned to the *topos* of intimidation he also invoked the laws of the asphalt. Because these are produced by the State they are more effective in evoking the sanctioning powers which the *topos* of intimidation manipulates in order to elicit what I would call imperfect cooperation, compliance in which the act of cooperating is denied by the resident who was persuaded to conform *through* intimidation.

But the laws of the asphalt do not completely dominate this second phase of the legal argumentation. The *presidente* asserts the power of the association to demolish unlawful buildings. Since this power is given by the official law it may appear that the criteria that determine which buildings are unlawful are also contained in that law. Yet this is not so, as evidenced by the many buildings in Pasargada which are not lawful from the point of view of the official law (since their construction was never authorized) but which the RA has no intention of ordering demolished. Mr. KS's construction is unlawful not because it violates the interest of the State in stopping or controlling the growth of squatter settlements, but because it violates the community interest in free passage through the streets. Thus, as mentioned in the previous section, the official laws are selectively invoked to protect a recognized interest of the community. The threat of State sanctions and of the police is put at the service of substantive norms that belong to Pasargada law. This case also illustrates how the threat of police intervention is invoked in tandem with the official laws.

Case No. 12

In this neighborhood, as in every other in Pasargada, there is a water supply network with pipes and pumps installed by the residents. Mr. TH, one of the residents living in this neighborhood, constructed a device to pump the water into his house. However, he installed it on the street and over the pipes of the water network. Some neighbors complained to the Residents' Association, arguing that this would ruin the pipes and would make repairs very difficult and costly. The *presidente* inspected the locale on the next day. He came to the conclusion that the neighbors' complaint was reasonable. The defendant was not at home at that moment, so the Association sent him an "invitation." He came before the date set for the joint discussion and was given a hearing in the back room.

PRESIDENTE: You know why the Residents' Association invited you to come here, don't you?

Mr. TH: Yes, I know but I don't see why the Residents' Association has anything to do with my case.

PRESIDENTE: Well, one moment, please. [The *presidente* went to the desk in the front room and brought back with him the folder with copies of the official laws on construction in squatter settlements.] I am going to read to you the laws that give power to the Residents' Association to order the demolition of unauthorized constructions. [He read the specific provision.]

Mr. TH: My problem is that the pumping machine cost me a lot of money and I don't have any other place to install it. Besides, the way I installed it I don't think that any damage can be done to the network.

PRESIDENTE: I have already inspected the place (*a obra*, lit. "the work") and the situation is not so clear to me. I will set a date for you and your neighbors to come to the Residents' Association to discuss the case.

After Mr. TH left the *presidente* commented to me: "I am sure that he will be forced to remove the construction. The neighbors

will exert too much pressure." Although I could not observe the conclusion of this case, I present it here to illustrate several things: the circumstances under which a defendant comes to the Association prior to the hearing in order to present his own version of the case, the flexibility of Pasargada procedures (the *presidente* first inspected the locale and attempted to meet the defendant on the spot and only subsequently invited him to a hearing), and the extent of legal argumentation before the dispute even reaches its final stage.

In this case—as in the preceding one—the crucial phase of the process is the inspection of the locale. Since the factual basis of the dispute is visible, the *presidente* becomes an eye witness; the knowledge and authority he acquires in that capacity are a resource in the subsequent processing. Moreover, the issues and the governing norms sometimes appear so unequivocal in this phase that the *presidente* not only acquires a preunderstanding of the case but in fact, by a kind of short cut, reaches a decision about it.

The demands of legal argumentation, however, may lead the *presidente* to suspend his decision in order to create the rhetorical space within which the legal discourse can be persuasively articulated. This is why the *presidente* ambiguously says to the defendant "I have already inspected the work and the situation is not so clear to me," even though he is convinced that the neighbors have a reasonable claim and that Mr. TH, by his lack of cooperation, has revealed himself to be an unreasonable resident. The ambiguity is generated by the tension between the contradictory elements in the *presidente's* utterance. The first—"I have already inspected the work"—informs Mr. TH that the *presidente* possesses first-hand, precise knowledge of the case. The linguistic signs of this phrase reflect and create certainty and precision in each semantic element: the agent ("I"), the temporal dimension ("already"), the activity ("have inspected"), and the object ("work"). In the second phrase, by contrast, the *presidente* confesses his doubts, and accordingly adopts the passive voice, employs a vague referent, and describes it only by its lack of a quality ("not so clear").

Water networks are a recurrent source of disputes among neighbors in Pasargada. They involve an initial investment of money and demand daily management and constant maintenance, both of which may require technical skills that are not always available. The situation is even more complex in the neighborhoods on the top of the hill, where the lack of cooperation by one resident may create significant hardships for the others because of

the increased difficulty of pumping the water up and into the houses.

Mr. TH's neighbors were alarmed about the potential adverse effects of his construction upon their network. By acquiring a pumping machine, Mr. TH was becoming independent from the network. Moreover, he showed his lack of concern about their welfare by failing to build a base of reinforced concrete that would have protected their network from possible damage. Because the neighbors' complaint was expressed in strong terms the *presidente* inspected the locale the next day. When Mr. TH heard this he became concerned about the security of his investment in a water supply and decided to come to the Association in order to forestall further proceedings without his participation. He began by making a legal challenge to the RA's jurisdiction. But by raising this procedural objection Mr. TH became doubly unreasonable in the eyes of the *presidente*: at the substantive level (by constructing on top of the water network) and at the procedural level (by refusing to recognize the RA's jurisdiction in construction cases).

The *presidente's* first step, therefore, was to assert his jurisdiction, which could only be done through the *topos* of intimidation. The use of that *topos* in this case is very complex and requires detailed analysis. It is generally characterized by strict legality, precision, and impersonality. When the *presidente* left the back room to get the documents he suspended the action, freezing Mr. TH in his own argument, uncertain whether his arrow had struck its target or was ricocheting and would strike him instead. By leaving the room to get the folder, the *presidente* showed Mr. TH that he not only had the power to control time and impose silence but also had access to resources unavailable to Mr. TH. Thus the *presidente* created distance between himself and Mr. TH.

This ritual creation of distance was prolonged when the *presidente* returned. The folder and the copies of the laws were used as nonverbal clichés or legal fetishes whose infrequent appearance among the paraphernalia of everyday life communicated a distinct note of impersonality. The silent opening of the folder was like the unveiling of a secret treasure. Then the *presidente* announced that he was going to read the laws in much the same way as the trumpets of the King's heralds aroused the burghers to the news that royal decrees were going to be proclaimed.

Instead of explaining the law in his own words, the *presidente* preferred to read the official text, another rhetorical device aimed at intensifying the impersonality of the legal argumentation. The State was speaking through the *presidente's* mouth. Thus, the reading as ritual evoked the myth of the all-powerful State. The

laws as fetishes summoned the State, as founding fetish. As with an oracle, it was unimportant whether Mr. TH really understood the meaning of the law—it was significant as an official formula incanted against Mr. TH by an impersonal State.

Mr. TH did not accept or reject the argument. Indeed, it was not a question of either but of whether he was sufficiently overwhelmed. This lack of reaction was interpreted by the *presidente* as indicating the success of the *topos* of intimidation. And he might be right, in view of the fact that Mr. TH did not interrupt the legal discourse and adopted a different line of argumentation that presupposed his recognition of the RA's jurisdiction over the case: the moral argument and the defense of necessity. The *presidente* concluded that the *topos* of the reasonable resident and the *topos* of cooperation now could work in tandem, which is why he decided to create the space for argumentative maneuvering I mentioned earlier. Even then he was not convinced that the *topos* of cooperation would be persuasive by itself, and was relying on informal sanctions imposed by the neighbors, who had shown their deep concern by raising the matter in the first place. Given the weakness of the RA's own authority and its reluctance to call for police coercion, such self-performance of law jobs is an accepted practice in Pasargada.

From the point of view of the law of the asphalt legal title to all houses and shacks in Pasargada is precarious: land tenure is illegal; construction does not comply with the housing code; titles are not officially registered; and many buildings violate special official laws on construction in squatter settlements. These sources of legal precariousness are irrelevant to the status of titles under Pasargada law. Yet there are situations in which that law refuses to recognize a given legal title because the collective interest is at stake.

In such cases the neighbors' complaint may not even be necessary; the RA takes upon itself the task of representing the collective interest and proceeds like an administrative agency. (This distinction between judicial and administrative proceedings is extremely elusive in Pasargada, since in both the RA assumes the support of the neighborhood, and follows the same dialectical relationship between the *topoi* of cooperation and intimidation.)

Case No. 13 illustrates the collective interest overriding a claim of individual title.

Case No. 13

I, Mr. ZA, [full identification] declare: The area, which is occupied with pipes, in the address where I live, will be delivered to the

Residents' Association, spontaneously and free of expenses, at any time that the Residents' Association needs the said area. The board of directors of the Residents' Association declares: The shack in the address [location] cannot be sold without the receipt being made in the Residents' Association. If the shack is disrespectfully sold without this receipt, the buyer will lose all its rights to the shack or area. Mr. ZA is in agreement with all these declarations and signs.

Date:
Signature:

Mr. ZA built a shack in an area which the RA had reserved for storing pipes before they were used for the improvement of the community. Mr. ZA did not damage the pipes but simply moved them to create a small space where he could build his shelter. The RA found this an infringement of its rights, but since the pipes had not been injured the principle of the need of shelter prevailed and Mr. ZA was allowed to stay. In the future, however, this principle may collide with the collective interest (for instance, the need to store more pipes) and the RA wants to avoid possible conflict. The solution does not balance the interests of the community and Mr. ZA but is based on the illegality of his initial occupation. Accordingly, the legal status of Mr. ZA's title over the shack is declared precarious: he will leave when asked and cannot sell the shack without permission of the RA.

These restrictions reveal some interesting aspects of Pasargada law-ways. The RA recognizes that in general people may transfer their property without consulting it. But because Mr. ZA has constructed illegally upon an area dedicated to community purposes he is a squatter under Pasargada law. Mr. ZA's right is dependent upon his need for shelter; if he decides to sell the shack he must no longer have such a need, and the RA determines the fate of the shack. The Association may decide that it needs the area, in which case the shack will be demolished. Or it may allow the sale because it has no immediate use for the land, but in this case the precariousness of the legal title will pass to the next occupant. That is why the RA not only forbids a sale without its approval but also declares that any such contract will be void, so that even a good faith purchaser will obtain no rights.

Pasargada law deals with squatter settlements inside the *favela* in much the same way as the official law deals with Pasargada itself. This similarity occurs through the inversion of the basic norm concerning rights to land, which I discussed earlier. Once this inversion takes place it is possible to apply the same legal categories and remedies inside and outside the *favelas* (see Diagram 3).

ASPHALT LAW		PASARGADA LAW	
With land tenure	Without land tenure	With land tenure	Without land tenure

a. Viewed in isolation

With land tenure		Without land tenure	
		PASARGADA LAW	
		With land tenure	Without land tenure

b. Viewed in a relationship of legal pluralism (inverted basic norm)

DIAGRAM 3: The relationship between the normative structures of Pasargada law and asphalt law.

Since it is the inversion of basic norm that allows Pasargada law and the asphalt law to provide similar normative solutions to similar problems, a reasonable Pasargadian accepts both this inversion and its consequences—that the Pasargada law “is like the law of the asphalt.” In the course of a chat with some residents the *presidente* said: “If a resident rents his shack to someone and this tenant fails to pay the rent, then the landlord shall have the right to repossess his shack. Either the tenant leaves or he will be forcibly evicted. It is like the law of the asphalt.”

I have been arguing that this similarity does not descend to technical details but remains at the level of broad normative outlook. Moreover, even at this level, Pasargada law may have some normative autonomy. For instance, I have discussed how the basic norm governing landlord-tenant relationships is modified by the principle of the need of shelter. In his relations with other residents the reasonable resident is expected to disregard whatever the law of the asphalt or its officials say about the legal status of

such relations *because* they take place in squatter settlements, and to accept the normative solutions proposed by the Pasargada law, which are structurally similar to those proposed by the asphalt law for asphalt cases. If a resident tries to take advantage of official law, and to live in Pasargada according to the normative judgments that asphalt law makes about squatter settlements and social relations within them, he is an unreasonable, even a deviant resident because he places his individual interest above the community interest under the pretext of its coincidence with the State interest. For it is the community that permits the possibility of peaceful, decent, upright social life in the face of a State that labels it illegal.

IV. CONCLUSIONS

A. The Structure of Legal Pluralism

Pasargada law is an example of an informal and unofficial legal system developed by urban oppressed classes living in ghettos and squatter settlements, which seeks to maintain community survival and social stability in a capitalist society based on speculation in land and housing. Starting from the assumption (unquestionable in the case of Brazil) that the State legal system represents (in general and in the last instance) the interests of the bourgeoisie as a whole or some of its factions, I wish to argue that this situation of legal pluralism is structured by an unequal relationship of exchange in which Pasargada law is the dominated part.

We are thus in the presence of interclass legal pluralism, one of the several forms through which the class struggle is fought in Brazil. In this instance class conflict is characterized by mutual avoidance (latent confrontation) and adaptation. Pasargada law does not claim to regulate social life outside Pasargada, nor does it question the criteria of legality prevailing in the larger society. Both legal systems are based on respect for the substantive principle of private property. Pasargada law achieves its informality, subtlety, and flexibility through selective borrowing from the official legal system. Thus, although they occupy different positions along a continuum of formalism, they can be said to share the same legal ideology and to be culturally homogeneous. Using the concept loosely, Pasargada may be thought of as a primitive capitalist society whose social and economic structure is reflected in law, thus accounting for its ideological integration with the State legal system. Although Pasargada is not riven by antagonistic classes, the existence of social stratification is undeniable—

there are good and bad neighborhoods, as shown earlier. The RA has been controlled by the middle or upper strata who are most familiar with the official society and most eager for integration with it. The RA does consider the interests of the lower strata, but in a paternalistic fashion. Speaking even less rigorously, one could say that Pasargada is a primitive social democracy.

The State strategy of mutual avoidance and adaptation may be illustrated by its relative passivity toward Pasargada. Despite its repressive policy of community control, the State has tolerated a settlement it defines as illegal, and through that continuing tolerance allowed the settlement to acquire a status we may call alegal or extralegal. We may explain this by the fact that Pasargada and its law, as they presently exist, are probably functional to the interests of the power structure in Brazilian society. By disposing of secondary conflicts among the oppressed classes, Pasargada law not only relieves the official courts and the offices of Free Justice of the burden of hearing *favela* cases (which would otherwise direct considerable resentment and frustration toward the inefficient judicial system), but also reinforces the socialization of Pasargadians in a legal ideology that legitimates and consolidates class domination. By providing Pasargadians with peaceful means of dispute prevention and settlement Pasargada law neutralizes potential violence, enhances the possibility of orderly life, and thus instills a respect for law and order that may carry over when Pasargadians go into town and interact with official society. The State coopted the RA through both carrot and stick: first it granted the RA a privileged position as representative of the *favela* in its relations with all State agencies; later it issued repressive threats against any attempt by the RA to assert its autonomy. Finally, the political machines of the two legal parties may find that the preservation of law and order in the *favela* facilitates the reproduction of patron/client relationships that have always characterized bourgeois democratic rule in Brazil.

It would be wrong, however, to overemphasize integration and adaptation between the two legal systems. And overemphasis will always be the bias of an analysis that views these phenomena in isolation from the social conditions of their production and reproduction. Integration and adaptation are both strategies followed by the antagonistic classes at a given historical moment in a capitalist society. But this situation of legal pluralism remains a reflection of class conflict, and thus a structure of domination and unequal exchange. That the State has tolerated Pasargada thus far is no guarantee against future intervention. There are many recent examples of large *favelas* in the center of Rio being totally re-

moved, often with only a few hours' notice. The same political criteria that have dictated tolerance may dictate intervention if there is a significant change in the relationship between the two antagonistic classes or between the different factions of the dominant class, all of which are involved in a permanent struggle for the control of the State apparatus. This harsh fact is never forgotten by Pasargadians or any other *favelado* and accounts for the basic insecurity that characterizes the squatter settlements.

In a nonrevolutionary situation, unofficial legality is one of the few instruments that can be used by the urban oppressed classes to organize community life, enhance the stability of the settlement, and thus maximize the possibility of resistance against intervention by the dominant classes, thereby increasing the political cost of any such action. The political evaluation of unofficial legality depends upon the class in whose name it operates and the social goals at which it aims. Under a capitalist mode of production (hereafter CMP), any attempt to offer a normative alternative to the existing system of land tenure in squatter settlements must be a progressive task. What appears on the surface to be ideological conformism is probably nothing more than a realistic assessment of the constellation of forces and the concrete needs of the class struggle in contemporary urban Brazil. Pasargadians, some of whom were politically very active and radical prior to the military coup, know that now is a time of fascist repression highly unfavorable to the class struggle. The present task is to minimize losses. It is not today nor tomorrow that *favelas* will see the realization of the fears of the reactionary bourgeoisie that "the *favelas* will come down the hill."⁵⁷

That this unofficial legality may, under the conditions described above, be considered a strategy of class struggle is illustrated by the ways in which Pasargada law "deviates" from the official legal system. Although the two systems share the same legal ideology they put it to very different uses. On the substantive level, I have discussed what I call the inversion of the basic norm of real property by means of which Pasargada law established the legality of land tenure using the very norm through which the official legal system makes that tenure illegal. This is reminiscent of Renner's (1949) historical analysis of the law of property which retained its verbal content unchanged while its social function was

57. See, for instance, Walter Meuren (1959:463): "[*Favelas*] are the cancer which may come to destroy the whole sociopolitical organization of the country. In the capital of the Republic, a political center of the greatest national relevance, they may become the direct cause of a revolutionary turmoil, the ideology behind which is well-known but which may lead to incalculable results."

transformed from a guarantee of personal autonomy in precapitalist European societies to the legitimation of class domination and exploitation in the CMP. What Renner observed diachronically I have observed synchronically in a situation of interclass legal pluralism. However, in order to sharpen the parallel, it would be necessary to analyze in depth the dominant mode of production in Pasargada. This is not the place to discuss the question of precapitalist clusters within capitalist economies. Obviously Pasargada is integrated in the CMP. The bulk of its active population works outside Pasargada. It has a flourishing commercial sector as well as some industry (Santos, 1974:74 ff.). The latter (mainly shoe shops, bakeries, and ice cream shops) has precapitalist features though it produces for the market (which sometimes extends outside Pasargada) and is thus integrated in the CMP. The totality is a very complex hybrid structure which I have called, rather loosely, primitive capitalism. One of its features is a persistent and probably increasing social stratification.

But it is important to emphasize that the significance of Pasargada lies not in its productive sector but in its function as a residential settlement for the working class. By providing housing Pasargada contributes to the conditions of reproduction of labor power, and it is here that Pasargada law plays its role. Although its official (external) legal structure as a *squatter* settlement is a mere reflection of Brazilian capitalism (the mode of production), the internal legal structure of Pasargada as a *settlement* is an attempt to ameliorate the living conditions of the working class (the mode of reproduction of labor power) and obtain some freedom for autonomous action—a progressive task in a situation in which the existence of an immense industrial reserve army makes capitalism unconcerned with the intensive reproduction of labor power. If it is true that the verbal content of Pasargada law reflects the CMP and capitalist legal ideology but actually operates to organize autonomous social action by the working class against the conditions of reproduction imposed by capitalism, then this is precisely the inverse of the situation found by Renner, where the liberating content of the legal ideology served as a disguise for the oppressive functioning of the State legal system. This hypothesis may open some new paths in the analysis of law in society.

The inversion of the basic norm of real property is not the only "deviation" of Pasargada law vis-à-vis the State legal system. Another is what I have called the selective borrowing of legal formalism through which a folk system of formalism evolves. Though informality in general is a function of the absence of professionalization, low role differentiation, and little specializa-

tion, the specific operation of those informal rules—the ways in which they are created, affirmed, refused, changed, adulterated, neglected or forgotten—is a function of social objectives, general cultural postulates, and ideas of justice and legality. However, unlike the inversion of the basic norm, the folk system of formalism does not itself reflect class conflict and class struggle.⁵⁸ Its social meaning is a corollary of the function of the dominant element in the deviation from the official legal system—the inversion of the basic norm. In Pasargada law, the main function of formalism is to guarantee the security and certainty of legal relationships without violating the overriding interest in justice that is accessible, cheap, quick, intelligible and reasonable, a justice that negates the official justice.

Finally, it is important to bear in mind that the structure of deviation is not absolutely rigid. Within limits it is open to manipulation by both of the classes involved in this relationship of legal pluralism, each operating within its own system. Among others, Cases 11, 12, and 13, show how the official legal system is excluded from or incorporated within Pasargada law through rhetorical argumentation according to the settlement strategy of specific disputes. Rhetoric and structure represent the dynamics and the statics of the social process, neither of which exists without the other.⁵⁹

B. The Inside View

A deep understanding of Pasargada law requires the analysis not only of its legal pluralistic relations with the official legal system but also of its internal structure, the inside view. In fact, the main goal of the present study has been to capture Pasargada law in action, and both the research method (participant observation) and the analytical perspective (legal rhetoric, legal reasoning) have proved adequate for that purpose.

Though Pasargada law reflects the social stratification of the community and does not transcend, in its ideology, the liberal tradition of capitalism (probably in its social-democratic version) it seems to me that as a *functioning legal apparatus* it possesses some characteristics that would, under different social conditions, be desirable in an alternative to the professionalized, expensive,

58. This explains why a theory of law in society must distinguish between legal formalism and substantive legality if it wants to go beyond the simplistic and dogmatic views that have characterized the field so far.

59. It is regrettable that sociology has devoted so much attention to structure and so little to rhetoric. This probably accounts for the rigidity (I was going to say frigidity) of much social analysis of legal life. More recently the so-called interactionist approach has committed the opposite mistake, thus engaging in onanistic social analysis.

inaccessible, slow, esoteric, and discriminatory State legal system in capitalist societies.

I am very concerned that I should not appear to be romanticizing community life in capitalist societies in general, much less Pasargada life. Such romanticism has been a recurrent element of liberal capitalist ideology, most recently in the sixties, and has been felt in such different realms of social life as psychiatric treatment, police control, deviance control, medicine, legal services, schooling, etc.⁶⁰ Pasargada is not an idyllic community. Like any other urban squatter settlement, it is the product of expropriation of peasants, savage industrialization, and uncontrolled urban growth. Because it is an open residential community significantly integrated into the asphalt society, it is not surprising that it reproduces the basic features of the dominant ideology and of the dominant social, economic, and political structures. Its relative autonomy (as expressed in its law) derives both from its specific class composition and from its collective response to the brutalizing housing conditions imposed by capitalist development and translated into State policies like the illegality of land tenure, social control of the community through the police and social work agencies, and refusal to provide basic public facilities.

The characteristics of Pasargada law that I identify below could never be fully developed within a *favela* nor do they, in Pasargada, provide nor can they be thought a sufficient guarantee against injustice, manipulation, or even abuse. As discussed elsewhere (Santos, 1973:75 ff.) my contention is simply that some of these characteristics should be constituents of a popular legal system in a self-managed socialist society, or as Ivan Illich (1973) would prefer to say, "a convivial society."

1. *Nonprofessional.* The *presidente* of the RA is a storekeeper who learned to read and write as an adult and has no formal legal training. His daily work includes many other activities besides preventing and settling disputes. Consequently, he performs law jobs in a nonprofessional manner.

Professionalization of social reality and of knowledge has been closely associated with the development of capitalist societies, though today it is equally pervasive in bureaucratic socialist societies. Accordingly the techno-industrial society has provided the prevalent frame of reference for the most recent discussion on professions (Gorz, 1976; T. Johnson, 1972; Illich, 1977). Because of this, the radical critique of professions has so far

60. The mixed results of the "back to the community" initiatives are now beginning to be analyzed and exposed (Scull, 1977; S. Cohen, 1977).

failed to provide a theoretical understanding of the conditions under which deprofessionalization will contribute to socialism.⁶¹ In order to achieve such an understanding we must scrutinize the concrete conditions of the country or area concerned to determine how the struggle for deprofessionalization is related to the struggle for the transformation of power. It is true that, in general, professionalization has been associated with the monopolization of both knowledge and political power. But it is also true that the material and cultural conditions of monopolization of power transcend professionalization. This explains why some State institutions have knowledge and *thus* power while others have power and *thus* knowledge—which is what, in the last instance, distinguishes the education system from the army or police force. These two processes of power production and reproduction, though dialectically related, have specific rhythms of development.

Legal skills in Pasargada are widely distributed. The fact that law jobs are not professionalized is associated with the structural weakness of the RA as a center of power and with the general pattern of atomized power prevalent in the community. However, we have observed that the rhetorical strategy of the settlement process may include an emphasis upon the nature and the quality of the legal knowledge possessed by the *presidente* and the RA about both asphalt law and Pasargada law. Moreover this emphasis is reinforced by occasional references to the "official quality" of the RA. The cumulative effect of this dramatization of the RA's position is to create the idea that it is endowed with quasi-professional or quasi-official knowledge. And this process is particularly visible in those situations in which the RA adopts a strategy of power restoration to counteract a perceived threat to its normal power position. This suggests that legal knowledge in Pasargada is given professional and official attributes by analogy when extra power is deemed necessary.

In Pasargada, as in any loosely structured society, the relation between power and knowledge is strikingly transparent. Moreover, the two processes of power production and reproduction are combined in the same institution: the *presidente* stresses both the official character of the RA (power, hence knowledge) and its quasi-professional legal knowledge (knowledge, hence power).

61. Gorz is exclusively concerned with professionalization in advanced "neocapitalist" societies. Illich, though broader in his approach and more radical in his critique, tends to neglect the differences in patterns of professionalization between central (capitalist) countries and those of the periphery. Such differences, particularly in patterns of patronage and relations with the State apparatus (T. Johnson, 1973), may be quite crucial in the organization of the anticapitalist struggle in specific countries.

What people know *about* the RA feeds upon what they know *through* the RA. The knowledge of its official quality is converted into the official quality of its knowledge.

The dialectic of power and knowledge is thus present in Pasargada and is made concrete through legal rhetoric. But because professionalization has not been institutionalized, and occurs by analogy and only occasionally, legal skills are still widely distributed.

2. *Accessible.* Pasargada law is accessible both in terms of its cost in money and time and in terms of the general pattern of social interaction. Pasargada residents do not pay lawyers' fees or court costs, though they may be asked to join the RA if they are not already members, and pay the membership fee. They do not have to pay for transportation or lose a day's salary as they would if they had to consult a lawyer or attend the court in Rio.

Furthermore, cases are disposed of very quickly. The *presidente* is proud of this contrast with the official courts: "We decided the case right on the spot. If the resident had gone to the courts he would never get a decision on his case. It takes two or three years to get a decision on a simple case."

Delays are incompatible with the emergencies that usually are the stimulus for an appeal to the RA, and it in turn tries to respond to these emergency conditions, although the rhetorical argumentation necessary to achieve a compromise presupposes a tempo that cannot be hastened. But the time spent talking cannot be compared with the magnitude of the delays in the official court, which has nothing to do with the effort expended by the judicial bureaucracy upon the analysis of the case.

Finally, the mode of social interaction within the RA is close to that of everyday life. People do not change clothes to go to the RA, or engage in ritualistic self-presentation, and they use ordinary language to convey the facts, values, and arguments of the case.

In these respects Pasargada law offers a strong contrast with the Brazilian State legal system, or indeed with the State legal system of any other capitalist society (central or peripheral), the inaccessibility of which has been widely analyzed and exposed.⁶² However, the contrast, though striking, must not be taken to mean that Pasargada law is equally accessible to all. Not all Pasarga-

62. Inaccessibility has different aspects, some of which directly reflect the class nature of the judicial apparatus (e.g., costs) while others reflect class conflict in a much more mediated form (e.g., the professionalization and ritualization of social interaction).

dians are well informed about the dispute processing conducted by the RA. Not all feel the need to resort to the RA since some may find alternative ways of solving conflicts within the community (friends, neighbors, religious leaders, etc.). Moreover, in some "bad neighborhoods" of Pasargada a "rough justice" is still practiced (is there legal pluralism inside Pasargada?). And though Pasargada law is not political justice in the same sense that asphalt law is, the fact that the *presidente* and directors of the RA are elected within the community means that residents will have differential incentives to use it depending on their ties of friendship or politics. Finally, the legal process in Pasargada has developed what I have called a folk technical language. The barrier thus created may vary according to the rhetorical strategy of the case but in any event it is not so high that it requires the help of professional legal knowledge.

The seeds for differential accessibility do exist in Pasargada law and they will germinate as social stratification and inequalities of power increase in the community.

3. *Participatory.* Though closely related to accessibility (particularly as measured by the degree of homology between legal and social interaction), participation deals specifically with the roles played by the different interveners in the dispute process. The level of participation and the informality of the legal process are closely correlated, and in both Pasargada scores high. The parties present their own cases, sometimes helped by kin or neighbors. They are never represented by professional legal specialists. They are not confined in the strait jacket of formal rules and can express whatever troubles them since the criteria of relevance are broad. Again this represents a clear-cut contrast with the State legal systems of modern capitalist societies where the professionalization of knowledge and the consequent monopolization of the criteria of relevance have alienated the parties by denying them the autonomous satisfaction of their "legal needs," an alienation that is magnified in the case of the dominated classes.

This does not mean that in Pasargada law the parties have full control of the process as they do in negotiation, where the third party is reduced to an errand boy or go-between. The *presidente* may interrupt the parties when this is required by either a judicial protopolicy or the strategy of argumentation he adopts. These factors may also occasionally increase the formality of the process. Indeed informality, by its very nature, allows for flexibility and gradation—it is the rhetoric that activates the legal process in different directions. Moreover, the ratification process is per-

meated by formalism and by rituals of alienation through which the parties are confronted with (and warned not to trespass upon) a legal space (however precarious) that has meanwhile been created.

It is as though legality, in the last instance, must mean the construction of alienation, the transformation of the familiar into the foreign, the horizontal into the vertical, the gift into the burden. This process is thus visible in Pasargada but it does not begin to approach the extremes that characterize the official legal system of the modern State.

4. *Consensual.* Mediation is the dominant model for dispute settlement in Pasargada law, so much so that adjudication may be disguised as mediation, a situation I have called false mediation. The attempt is always made to reach a compromise in which each party will give a little and get a little. In this respect Pasargada law differs from the official legal systems in most modern States in which the model of adjudication (all-or-nothing decisions) prevails, although the extent of the difference is often exaggerated.

The predominance of mediation in a given setting may be due to several factors. It may be a reflection, in a legal context, of much broader cultural postulates; Japan is often offered as an illustration. It may be related to the type of social relations between the parties involved in the dispute; if they are bound by "multiplex relationships" (as Gluckman called them) involving different sectors of life, mediation is aimed at preserving the relationship. Finally, mediation may result from the fact that the dispute settler lacks the power to impose his decision, a situation which seems to prevail in loosely structured societies based on a plurality of groups, quasi-groups, and networks, where a center of power is either missing or very weak.

The first factor seems to be irrelevant to Pasargada, which is strongly imbued with the legal ideology of the West. But the others are important. Given the high density of population in Pasargada and the style of community life (street orientation, face-to-face relationships, gossiping, mutual gifts of use-values in knowledge and skills), neighbors are frequently involved in housing disputes. The last factor is the most significant. The RA has no formal sanctioning power and the power to demolish illegal repairs is not exercised since it collides with the overall interests of the community. For the same reason the RA does not seek the informal support of the police. Threats are often used as intimidation arguments, but then the sanction is limited to the message.

These factors, however, are mere preconditions. Mediation occurs through rhetoric which creates the orientation toward consensus upon which the mediator builds.

What is the political meaning of rhetoric? Throughout history rhetoric has flourished (both as a style of legal process and as an academic subject) in periods when social and political power were relatively widely distributed among the members of the relevant community. The repressive component of law, by contrast, first came to dominate in situations where the legal system was used to pacify occupied countries defeated in war. The consolidation of repression as the paramount feature of the law was achieved only with the birth of modern capitalist societies when the law of the State became an instrument of political unification and social integration in societies divided into antagonistic classes.

Concentration of power brings with it control over language and silence, which undermines the collectivization of language and silence upon which the free flow of rhetorical argumentation is based.⁶³ Rhetoric is inherently anarchic for it tends to subvert preconceived formal schemes of interaction (including language and silence) allowing free reign to fantasy and imagination.

It would be both scientifically and politically naïve to evaluate the social meaning of rhetoric and orientation toward consensus in a social vacuum. The key concept in rhetoric is the "relevant community" or "relevant audience." Both the limitation—*relevant* community or audience—and the criterion of relevance reflect and reproduce unequal power relations. However widely shared, the power is exercised against someone: the irrelevant community. In the Athens of ancient Greece slaves were not part of the relevant community. Consequently the law of the City-State, dominated by legal rhetoric, did not apply to them. They were merely objects of property relations among the free citizens. This means that a truly democratic legal order inside the relevant community may coexist with (and indeed be based on) the tyrannical oppression of the irrelevant community.

Although law has historically reflected and reproduced social processes of exclusion upon which social integration develops, the focus on legal rhetoric—and here lies its importance for the sociohistorical analysis of the law—leads us to distinguish among different forms of social exclusion and mainly between external and internal exclusion. External exclusion is a social process by

63. Extreme concentration of power leads to ritualization of social interaction and consequently of language and silence, though rituals may survive after the change of power relations.

means of which a group or class is excluded from power *because it is outside* the relevant community, as illustrated by the law of Athens. Internal exclusion is a social process by means of which a group or class is excluded from power *because it is inside* the relevant community, as illustrated by the State law of modern capitalist societies. There may also be mixed social processes in which elements of both external and internal exclusion are to be found in different degrees. There is a need to theorize about the impact of these different social processes on the operation of the legal system and I have been suggesting that the sociology of legal rhetoric will play an important role in the construction of such theory.

In Pasargada the use of legal rhetoric by the relevant community reflects a process of external exclusion, but one which is the reverse of the Athenian example above. The irrelevant community in this case is the asphalt society with respect to which Pasargada is powerless. Pasargada law is an underground law, the result of a process of social exclusion. But because the law of the excluded community stands in a relation of legal pluralism with the law of the excluding community we have a mixed social process of the type described above. Because they belong to the oppressed classes in a capitalist society, Pasargadians are internally excluded as reflected, for instance, in the declaration by State law that their land tenure is illegal. However, the specific form of marginality to which they have been consigned through this process of internal exclusion has made possible alternative social action—Pasargada law—which reflects a social process of external exclusion. Nevertheless, as already suggested, the irrelevant community of Pasargada law is, probably not only the asphalt society but also some areas or groups of residents inside Pasargada. And since Pasargada law is powerless with respect to both of these communities it may be concluded that the rhetoric of Pasargada law is less the result of widely shared power than of widely shared powerlessness. The exercise of legal rhetoric directed by the relevant community is subject to certain constraints, illustrated in those cases in which the *presidente's* argumentation is imposed on the parties rather than accepted by them, a pattern I call nonrepressive imposition. These limitations of legal rhetoric in Pasargada law are probably the reflection of social stratification in the community.

Pasargada is not an idyllic community. But this does not prevent its internal legality from sharing some of the characteristics of the legal process in a self-managed socialist society. Despite the fact that we could everywhere observe the seeds of perversion,

the legal tools in Pasargada remain amenable to use in a socialist "convivial" manner: wide distribution (nonmonopolization) of legal skills as expressed in the absence of professionalism; manageable and autonomous institutions as expressed in accessibility and participation; noncoercive justice as expressed in both the absence of professionalism and the orientation toward consensus.

C. Law and Revolution

I have discussed the role played by Pasargada law in the overall struggle of the urban working classes for decent housing and a better life, and have argued that it is progressive (Part IV. A, *supra*).

To be progressive does not necessarily mean to be revolutionary. What is the contribution of Pasargada law (and of other "Pasargada laws" in the other countries of the capitalist periphery) to the socialist revolution? This question involves a more general inquiry, which I cannot pursue here, into the relations between law and revolution. For purposes of the present discussion I postulate the following:

1. A strategy is progressive if it aims both subjectively and objectively at improving the lot of the working class, as a *class*, in the capitalist society. It is revolutionary if it links the struggle of the working class to the supersession of the CMP, that is, to socialist revolution.⁶⁴
2. A progressive strategy is restricted to the use of legal means; the use of violence for progressive purposes is always reactionary. A revolutionary strategy, on the contrary, may use both legal and extralegal means including violence, provided that violence is used against reactionary minorities in power. Nevertheless, the revolutionary use of legality is not only possible—it must be preferred whenever possible.
3. A progressive strategy, whatever its ideology, never raises the question of power in practical terms. This question is central in a revolutionary strategy but the attempt to answer it must always be guided by the basic principle that the seizure of power is the last *and not the first* stage of the transformation of power. Because of their contribution to the transformation of power many struggles of bourgeois origin (ecology; anti-nuclear weapons and energy; consumer rights; antipsychiatry;

64. Though clear-cut in the abstract and after the fact, the distinction between progressive and revolutionary strategies is very difficult to make while a given political process lasts. This accounts both for the political opportunism which all too often betrays the revolution and for the constantly renewed hope of the revolutionaries in the next opportunity. If the revolution were easy, revolutionaries would be the conservatives of our societies.

deschooling of education; demedicalization of health, etc.) as well as struggles by oppressed groups that are not in the mainstream of the labor movement (women, ethnic minorities, prisoners, squatters) may be channeled toward a socialist end. The revolutionary use of legality (and not only official legality) in all these struggles is potentially of great importance because they may raise the question of power in its broadest sense, not only as exercised by the political apparatus of the State but also in the family and in everyday life. But because all these struggles are directed against specific forms of oppression and dispossession their contribution to the socialist revolution can only be guaranteed by their integration in the struggle against general oppression and dispossession, namely the labor movement (not necessarily the "established" or "legalized" one).

4. In any complex industrial society pockets of alternative legality coexist with State (official) law, whether they are revolutionary, traditional or precapitalistic, or the informal legality of marginalized groups inside the ruling coalition. Legal pluralism is far more common than generally assumed—perhaps universal. The theory of law in society, and thus the question of the relations between law and revolution must account for the different types of legality (both as legal subcultures and as functioning institutions), their respective ideological power, and the constellation of forces among the groups or classes championing each.

Judged by these criteria it is apparent that Pasargada law is not part of a revolutionary strategy, though its objective conditions raise more problems of classification than its subjective conditions. With respect to the former, it is probably true that the distinction between Pasargada law and the official legal system is grounded, in last instance, in the different development of the forces of production and not in the different relations of production. Pasargada law is determined by the CMP, which assumes a more "primitive" or a less developed version inside Pasargada, taken as an economic unity, as well as by the relations of production which the CMP reproduces. The fact that the inversion of the basic norm does not affect its normative content but simply its application can be advanced in favor of this interpretation.

Though correct in its main features, this interpretation fails to give a complete picture of the social context of Pasargada law, a typical shortcoming of analysis based on the simplistic use of the two categories, forces of production and relations of production. For though Pasargada law may be functional to continued domination by the ruling classes, the determination of that law by the

CMP is relative and open. If Pasargada law has an impact on the internal CMP, for instance, by contributing to the development of the housing market, its principal significance is at the level of the conditions of the reproduction of labor power, where it confers upon Pasargadians, as a class, a margin of autonomous action, however reformist the process may be.⁶⁵

This analysis leads us to the two main objective features of Pasargada law as a relatively autonomous system of community action. First, its real operation is less determined by the CMP than is its normative ideology.⁶⁶ By producing an alternative legality, Pasargada law attempts to neutralize or to counteract the fact that in capitalist societies (at least in the peripheral ones) the oppressed classes have no access, as proprietors, to social relations based on property in land because their rights are declared to be illegal by the official legal system. Second, Pasargada law centers around a community-based *elected* organization, the Residents' Association. Despite the limitations of the electoral process (due mainly to external pressure), Pasargada law thus offers an alternative democratic administration of justice, all the more remarkable because it takes place at the fringes of a fascist State.

These two objective features of Pasargada law offer great potential for the revolutionary use of legality. They could be used to extend the practice of alternative legality to other realms of social life in which class exploitation is even more ruthless; to expound the idea of democratic participation through elections in all spheres of social life, exercising it to the fullest possible extent inside Pasargada; and to practice a pedagogy of liberation, exposing the roots of social deprivation and thereby raising the class consciousness of Pasargadians. However, the conversion of this potential into social action presupposes the existence of adequate subjective conditions. These do not exist in Pasargada today.

However careful we must be about the concept of "*favela bourgeoisie*" the fact remains that the upper and middle strata of Pasargada, the so-called commercial class in particular, have thus far controlled the RA. This has two kinds of consequences. First, since these strata also contain the community leaders who have close contacts with the asphalt society and its politicians there is a real danger of political manipulation of the RA and of Pasargada law. This does not mean that the administration of justice in

65. This is not falsified by the paternalistic attitude of Pasargada law toward the lower strata of Pasargadians because the latter do not constitute a different class.

66. Although this conclusion is the inverse of Renner's, the two are not contradictory, since they apply to different social phenomena. A theory of law in society should be able to account for these differences and their implications.

Pasargada depends upon the political affiliation of the parties. On the contrary, the *presidente* makes an honest effort to abstract from both his political and religious affiliations (and leadership) while acting as a third party in dispute processing. However, one might say that the political rewards derived from the control of the RA increase as Pasargada law in action becomes more "neutral" and "apolitical" (in which respect Pasargada law does not differ much from the official law). Nevertheless, as autonomous community development is progressively replaced by State action, the RA becomes an increasingly weak center of power and, in consequence, the capacity of community leaders to manipulate the residents decreases. Second, a much more immediate danger lies in the socialization process conducted by the RA. Because the upper and middle strata of Pasargada are most strongly imbued with bourgeois values and aspire to full integration into Brazilian society, Pasargada law may be used to transmit and reinforce those values (which extend far beyond what we call legal ideology), and this will tend to legitimate the social structure of Brazilian society. If this occurs, a survival strategy for hard times will gradually be transformed into a strategy of apologetic integration. The danger is all the greater because within the bourgeois liberal tradition the struggle for legality, conceived as a strategy to reach specific social objectives (the legality of land tenure in the present case), has an inherent "perverse" tendency to absolutize itself and to reduce its social objective to the legality of the struggle itself. In other words, the strategy of legality tends to transform itself in the legality of the strategy.

I conclude that the revolutionary potential that objectively exists cannot be realized because the subjective conditions are lacking. An infantilé radical response would be to dismiss Pasargada law as no more than a transmission belt of bourgeois interests inside Pasargada. As a political strategy, nothing could be more incorrect. I have repeatedly stressed that the progressive nature of Pasargada law lies in its continuing operation as a form of community action in the social and political conditions of contemporary Brazilian society. Several radical leaders told me that, had they been elected to the RA, they would not have gone much further in the direction of political and social activism than did its current leaders. Given the constant supervision of the RA's activities by State agencies operating in Pasargada (despite all the dilatory tactics employed by the RA) any less cautious program might lead to the banning of the RA. This shows that the sociopolitical evaluation of Pasargada law can only take place in the context of the constellation of forces among the different

classes in Brazilian society, and its future must necessarily be a contingency of a much broader class struggle. Though acknowledging the limitations and ambiguities, I end by taking a stand in favor of Pasargada and its law.⁶⁷

67. This may be labeled negative ethnocentrism by the partisans of nonpartisan social science. I think, however, that the equation between (traditional) positive ethnocentrism and negative ethnocentrism is a false equation in the present case, one that shows the liberal ideological bias of established social science. Indeed, from a political point of view, positive and negative ethnocentrism mean quite different things. And though science is not politics, it is probably true, to paraphrase Clausewitz, that science is the continuation of politics by other means.

APPENDIX

Sociological Note on *Favelas*, Pasargada, and Residents' Associations¹

I. Socioeconomic Structure

It has often been emphasized that neither *favelas* nor *favelados* are socioeconomically homogeneous (SAGMACS, 1960, Part I: 3 ff.; Goulart, 1957:32; Valladares, 1968; Silva, 1967; Queiroz, 1969:90 ff.; Medina, 1969: 119 ff.; Leeds, 1969; Silva and Santos, 1969:57). But though there is no reason to expect homogeneity in settlements located within a stratified and differentiated society, least of all in the larger ones, this statement has to be repeated because *favelas* are often stereotyped as the last resort for the poorest of the poor, those at the bottom of the social scale without any hope for upward mobility (e.g., Medina, 1969). Recently, social scientists have described the intensive economic life within the *favelas*, and the high levels of internal investment in housing and consumer goods. They have spoken of the "mildly affluent" *favelados*, and of a "*favela bourgeoisie*" ("*burguesia favelada*"). But statements like these, taken out of context, may lead to the opposite stereotype, an exaggeration of the upper levels of *favela* family incomes. The fact remains that the bulk of the *favela* population belongs to the working class (employed and unemployed) and to the so-called lumpenproletariat. The concept of *favela bourgeoisie*, in particular, is a misleading one. That the upper strata of the *favela* population may develop behavioral and attitudinal patterns typical of the petty bourgeoisie in the larger society² simply demonstrates that the dominant ideology penetrates certain sectors of the *favela* population more easily than others, and not that the bourgeoisie, as the dominant class in a capitalist society, has chosen *favelas* as its residential area (irrespective of the individual choices by members of this class). The small, community based industry is usually a family enterprise with little hired labor. On the other hand, the flourishing commercial activity is characterized by its heterogeneity in size, income, and economic autonomy. Semiproletarian families are common: the man works in the city (when not unemployed), while the wife

runs the store. It is doubtful that the self-employed petty bourgeoisie has different class interests from those of the *favela* population as a whole.

The only way to go beyond broad generalizations is to describe and explain patterns of differentiation in each *favela*. There are *favelas* in which the income of most residents tends to cluster at the highest or the lowest levels of the Brazilian "lower classes"; in others, all income gradients may be present. The latter tends to be the case of the larger *favelas* where engineers, white collar workers, and highly skilled workers, as well as the underemployed (odd jobbers) and unemployed are all represented, if unequally (Leeds, 1969:78). According to the SAGMACS study one can find five different strata in many *favelas* (1960, Part II: 3). This schematization takes the family as the unit of analysis and employs economic, sociological, and psychological criteria. The following are the strata in descending order.

5. Families that enjoy an economic situation good enough to allow them to live outside the *favela* lead an integrated family life, manage to balance their budget and fulfill far more than their primary needs, and display the attitudes of petty bourgeoisie.
4. Families that succeed in meeting their basic needs and even a certain supplementary consumption, which shows in the improvements of their shack, in their extra leisure time, in their domestic equipment; such families, however, cannot hope to leave the *favela*; in a way, they resign themselves to their present housing conditions and even value them.
3. Families that are still able to satisfy their basic needs but are unable to maintain a certain level of security without resorting to extraordinary services.
2. Families that hardly meet their basic needs and live permanently on the edge of disintegration.
1. Families that have no possibility of satisfying their elementary needs and live in a process of constant disintegration.

The authors of the SAGMACS study acknowledge that in all *favelas* they studied, families in the lower strata predominate. The mode of stratification shows that housing conditions closely reflect the socioeconomic condition of the family.

Medina (1969) advances a different theory, focusing upon status differentiation. He argues that because most *favela* residents belong to the lower classes, and because *favelas* have an

1. This is a summary, with some revisions, of Chapters 1 and 2 of Santos (1974).
2. For example people in these upper strata refuse to identify with the lower strata: they call the other residents "*favelados*" ("ignorant people"); they tend to prevent their children from playing with lower strata children, they tend to have increasing social ties outside the *favela* and loyalties to outside (private or public) organizations working in the *favela*. This phenomena is analyzed in detail by Medina (1969) and Silva (1967).

atomistic structure (partly explained by a rural past of slavery that destroyed solidary relationships), the *favela* residents can satisfy their striving for higher status only by pledging their allegiance to persons already in possession of those higher statuses. This personal bondage leads those residents to perceive themselves, and be perceived by others, as no longer identified with the other residents, and consequently as having a higher status. Therefore, social stratification in the *favela* is directly dependent upon linkages with outsiders. Medina's analytical strategy is adequate to a case study in which the question is the impact of outside forces (public and private agencies) upon the residents, mainly those who were recruited (or self-recruited) to collaborate with those forces. The results show that the organizational efforts inside the *favelas* usually derive from external initiative, are very heavily dependent on outside forces, and are used not to achieve their manifest goals but rather to obtain higher status for the *favela* residents who participate.

There is no doubt that the linkages to outside forces often lead to economic advantage for the *favela* resident but there are also other sources of economic stratification, as the analysis of the internal economic life illustrates. On the other hand, the atomistic social structure should not be overemphasized because many *favelas* display patterns of associational life with significant permanence and relative autonomy from outside forces. Obviously, these forces are always present, whether they are imposed, offered, or sought for by the residents, but their impact upon the life and the operations of associational activities varies.

The socioeconomic stratification of the *favelas* correlates positively with their physical and economic development. As early as 1960 the SAGMACS study called attention to the intensity of commercial life in *favelas* (Part I: 22) and Silva also speaks of their capitalist organization and economic vitality (1967). Traditionally, commercial life has centered around the *biroscas*, small commercial houses where one can buy beverages (alcoholic and nonalcoholic), candies, groceries, and other domestic items (Silva, 1969). The initial investment is very small, but it increases with the expansion of commerce, and the enterprise can often be highly profitable. The commercial structure of the *biroscas* is well adapted to the economic situation of most *favela* residents. On the one hand, the *biroscas* may sell the smallest possible unit of a given product, the quantity that is strictly needed for a given occasion. On the other hand, credit systems are organized so that payments can be met with the least stress to the domestic budget. Recently, however, the commercial life of many *favelas* has become increas-

ingly differentiated and the more primitive and simple *biroscas* have been partially replaced by grocery stores, fruit and vegetable shops, drugstores, bakeries, butchers, bars and restaurants, and even supermarkets. In such *favelas* we can even find small-scale industrial activity in the form of shoe factories and ice-cream factories, which may even "export" part of their production to the city.

Finally, one should mention the housing market as an important feature of *favela* economic life. People build their shacks and houses and, for very different reasons (economic stress, profit expectation, etc.), may sell them, or parts of them, later on.

All this shows that some *favelas* permit the accumulation of capital and considerable investment. In some *favelas* an internal labor market may even develop. However, investment in *favelas* does not necessarily mean investment by *favelados*. There are outsiders investing in the most stable and developed *favelas* and taking out considerable profits. These investors are part of the bourgeoisie, and not of the so-called "*favela* bourgeoisie." The economic exploitation of *favela* residents may begin before they leave for the city.

Pasargada's socioeconomic life fits the above analysis so far. As a large *favela*, it contains intensive economic activity. It was estimated in 1960 that there were 458 *biroscas* (commercial houses) in Pasargada and since then this number has continued to grow. More impressive than mere quantity, however, is the increasing diversification of commercial activities. Traditional and primitive *biroscas* continue to operate side by side with modernized grocery stores and bars (*botequim*). And in Pasargada's "commercial street" the compound of stores and shops includes: drugstores, a funeral home, a photo studio, a furniture shop, a store selling construction materials, a religious articles shop, a clothing and fabric shop, a hardware and domestic appliances store, a butcher shop, grocery stores, bars, vegetable stands, restaurants, and shoe shops. In most cases the owner or owners operate the store themselves; only exceptionally do they have more than one employee. The service sector is also diversified, including barbers, hairdressers, laundresses, and shoe, watch, radio and television repair technicians. Most of these people are self-employed and (with the exception of laundresses) tend to make more money than industrial workers. The odd-jobber (*biscateiro*) who is underemployed, tends to find his irregular and low-paid work outside Pasargada, but the constant development of Pasargada's economic life is providing some work opportunities inside the *favela*.

In the sphere of production, several small handcraft shoe plants must be mentioned, some operated by the owner and members of his family, others employing some hired labor. There are also two bakeries and an ice-cream factory. Raising chickens and pigs is not prominent. House construction is constantly expanding, but the labor market thus created is very irregular because much of the house improvement is still carried through self-help and mutual help.

The economy of Pasargada (like the Brazilian economy as a whole) cannot fully be described without mentioning two other segments of economic activity. First, there is the production of religious and supernatural goods and services by the churches, sects, and spiritist clubs. The "rites of passage" are paid whenever the recipient or his relatives can afford it. In *macumba* and spiritist clubs specific "consultations" and services may also be purchased, aimed at curing a physical or mental disease, obtaining employment or success in an examination, finding a lost article, getting a wife (or husband) back, being lucky and safe in a risky enterprise, or causing some (specified or unspecified) evil to an enemy. The price of the service depends on several factors: the financial situation of the client, the time spent in preparing it, the supernatural dangers involved, the cost of the necessary substances, and the degree of certainty that the service will fulfill its aim.

Popular medicine should be treated separately. Although it is often intimately related to religious and supernatural services, it may also be almost completely free from those associations. Two main factors distinguish popular medicine from religion and magic. On the one hand, it tends to rely more heavily on natural products (leaves, flowers, oils, roots, grains, etc.) which are used in preparing teas (*chás*) or more complex beverages (*garrafadas*). On the other hand, it is invoked where the client and his primary group perceive the problem as one of health. Medical services may be aimed at curing mental or physical diseases, becoming fertile, inducing an abortion, regularizing menstrual periods, etc. These services may not be paid for as such; rather money or some other good may be given as a gift or a sign of gratitude.

The second type of economic activity to be considered includes gambling, prostitution, and marijuana smoking (*maconha*), activities that are widespread throughout the city. To the extent that the first and last exist in Pasargada, they are controlled from the outside. As elsewhere in the world, the ultimate owners and profiteers are, thus, respectable people occupying honorable and comfortable positions in Brazilian society.

Internally, Pasargada is highly stratified, with most of the population falling in the second, third, and fourth of the SAG-MACS strata. But community leaders in Pasargada employ a more useful concept of social class based upon a complex mixture of social, economic, and educational factors. Four classes are distinguished: the cultural class, the middle class, the low class, and the commercial class. The cultural class is composed of individuals with at least a high school education, who hold jobs with a corresponding educational requirement. These white collar workers, highly skilled workers, and engineers constitute a tiny minority, and are the upper class par excellence. The middle class, by far the majority, consists of industrial workers, people with regular jobs, earning the minimum salary or somewhat more. The low class is composed of people earning less than the minimum salary or no salary at all, including odd-jobbers, domestic servants, the unemployed, people getting retirement and illness payments (*encostados no Instituto*), and also people who, though they earn the minimum wage, are heads of families in which crises have been recurrent and serious. This, too, is a minority, but is still much larger than the cultural class. The commercial class is very heterogeneous, including self-employed skilled craftsmen and the owners of *biroscas*, bars, grocery stores, and other shops operating in Pasargada. Its members are united only by their regular self-employment inside Pasargada. In terms of income they are distributed among the other classes. The owner of a traditional primitive *birosca* may earn less than the minimum wage. However, the owner of a modern grocery store or ice-cream shop may earn an income comparable to, or even higher than an upper class salary. This class is identified not so much by a specific economic situation as by a set of political attitudes, as will be seen below.

... Even though there is no rigid segregation, the different groups are not randomly distributed throughout Pasargada; one can identify neighborhoods that differ in socioeconomic situation in terms of housing patterns, domestic furniture and appliances, dress, etc. The best neighborhood seems to be the one that extends half-way up the hill, where the social center of the *favela* is located. The lowest strata, on the other hand, tend to live along the river or at the top of the hill, an area of ill-repute.

II. Political Structure

Two stereotypes about political life in *favelas* are widespread. According to one, *favelas* present a serious threat to the political status quo. They are full of communists and have an enormous revolutionary potential. Some of the activities of State agencies

and the Catholic Church are in part a response to this stereotype, an expression of the belief that these agencies should go up the hills to the *favelas* before the communists come down the hills to the city. According to the other stereotype, the *favela* is a politically amorphous mass, readily manipulable by external actors. Since "politics does not feed people" ("*politica não dá comida*") *favelados* have no substantial interest in it.

In recent years good analyses of political processes in *favelas* have been produced. The first, and by far the most important, is the one done by SAGMACS (1960, Part II: 27 ff.). Its conclusions have been further expounded, as well as reinterpreted, in subsequent articles by A. Rios, who was the general scientific director of the study (1960:12 ff.), and by Medina, who was general director of the field research (1964). More recently, Silva (1967) and E. Leeds (1970) have also presented sophisticated analyses of *favela* political life.

In order to understand the political patterns in *favelas* two preliminary observations must be made: one that locates *favelas* in a broader social context, and another that treats *favelas* as a universe. After the departure of the external colonizer, new forms of internal colonialism developed. In rural areas, where most of the population lived, the landed elites maintained their dominance and political leadership through "coronelism," a political strategy based on the personal dependence of the masses and on the dispensation of personal favors by the elites (a patron-client system). The rural migration to the cities carried with it this heavy past. The freed slaves were probably the first migrants to arrive in Rio at the end of the nineteenth century. They brought a past of dependence, conformity, and alienation that could hardly be erased by legal emancipation. Free action was itself a rupture with the traditional social patterns that demanded total alienation of the masses from public life (Medina, 1964:93). "From coronelism to urban political demagogy," says A. Rios (1960:35), "there is only a change in the means of political control, not a substantial structural alteration."

The other preliminary observation concerns *favelas* as a universe. They are marginal and illegal settlements, and therefore are beyond the jurisdiction of the general administrative structures of the State. Since they are perceived by the State as a problem, special laws and administrative agencies have been created to deal with them. However, most of these measures have been directed at control and prohibition rather than at facilitative regulation. The net result is that the State administration has remained unresponsive to the needs of *favela* residents. This puts *favelas* in a very precarious position, rendering it difficult for them to satisfy their needs as communities and those of their residents.

These preliminary observations help us to understand the two main features of politics in *favelas*: the personalism of political interaction, and the exchange of short-range and immediately identifiable favors or rewards. *Favelas* depend heavily on politicians. Sometimes the foundation or continued existence of the whole settlement is owed to the initiative of a politician. Since *favelas* are deprived of basic public facilities, the politician is seen as a potential "benefactor," an individual powerful enough to provide the community with an improvement such as a water tap or water network, paved streets, schools, or a license for communal activities. The politician confers those favors from his own financial resources or through his ability to mobilize the State administration. The *favela* electorate, if united, could be a powerful political instrument and could eventually dominate the city government. But such unity does not now exist and is not likely to develop in the foreseeable future. The electorates of the *favelas* are almost totally insulated from one another. Moreover, within a single *favela* there is no unanimity about community priorities. Shopkeepers may want another police station while the Residents' Association might prefer a school. However, these divergencies are discussed by the *favela* leaders, who sometimes try to combine community priorities with personal priorities.

The common *favela* resident tends to see his vote as a commodity he can exchange for some personal advantage. It is in this sense that A. Rios speaks of the "market of guarantee and favors," (1960:35), E. Leeds of "exchange of rewards," (1970:1), and Medina of the traditional conception of the politician as "an intermediary of bonuses" (1964:79). The individual voter asks everything of the politician: water, light, employment for himself or for a member of his family, housing, medical treatment, retirement, legal aid, etc. In return he will give the politician his vote and those of his friends and relatives. Many voters see their votes as a commodity in a different sense: a political commodity which they exchange for a bureaucratic commodity (a legal document), whenever the latter can only be obtained by showing that one is registered to vote. For those persons, the voting of substance is reduced to the substance of voting. The *favela* resident's knowledge of and familiarity with urban political processes is the direct cause of his "uncivic" political behavior. In an oligarchic society politics has an exploitative basis and purpose whatever the model may be—even if it is formally democratic; the oppressed classes know this from sheer experience. Over the years, *favela* residents have been pursued by politicians who promised everything and delivered little or nothing. Periodically, however, the vote comes

to them as an unsown harvest. It is a commodity of immediate consumption, and it may be also an investment. There is no reason not to reenact the old process of bargaining. They have nothing to lose and something to gain. Rather than revealing their ignorance this behavior shows that *favela* residents are skeptical about politics and gamble with the odds. And this is why there is little ideological commitment on their part.

At the basis of this attitude of conscious simulation there is a profound skepticism towards politicians, the skepticism of all the oppressed who know that, in spite of the paternalistic efforts of the rulers, they can only count on themselves. [SAGMACS, 1960, Part II:28]

The *cabo eleitoral*, a kind of ward-heeler campaigning for the political candidate, is the necessary link between the politician and the electorate. According to the SAGMACS study, the lower the socioeconomic level of the electorate the greater the importance of this middleman (1960, Part II:29; see also Rios, 1960:20). Because *favelas* are unknown and dangerous land for most politicians they must recruit official campaigners from among *favela* residents. Often paid, but always promised at least some personal reward, the *cabo eleitoral* serves to channel as many votes as he can to his candidate. He also transmits the demands, promises, and rewards between the politician and the voter. To this end he performs a complex set of subsidiary functions: getting out the vote, gathering and legalizing electoral titles, visiting voters in their houses and convincing them of the generosity of his candidate, distributing propaganda, demonstrating that voting pays, organizing rallies, orienting and controlling voters prior to and during the election. To accomplish so many diverse tasks the *cabo eleitoral* has to be endowed with special gifts and qualifications; he must have personal knowledge of the voters, have bestowed favors on them in the past, be esteemed by the residents, be a good, clever, nice, talkative person, possess prestige within the community, be an old resident, and be above average intellectually and in education, so that he may explain the political process to the residents (SAGMACS, 1960, Part II:29).

Most *cabos eleitorais* take their functions seriously though this may depend on the personal interests at stake. They know that their position is unstable, and that therefore they can and must gamble. They do so with both the elector and the politician. They may work for more than one politician. They may make false reports to the candidate in order to obtain some additional reward. And they are often victimized by the politician, who may fail to deliver their personal rewards or those of "their" voters.

Cabos eleitorais tend to belong to the upper strata of the internal stratification of the *favela* (the "*favela* bourgeoisie"), and thus their immediate political interests may conflict with those of the lower strata. However, the "*favela* bourgeoisie" is in a dependent position with respect to external politics. Without minimizing internal conflict, it seems evident that the major conflict lies between *favelas* as a universe and the global system of which they are a structural result.

Because Pasargada is one of the largest and most developed *favelas* in Rio, the preceding analysis assumes greater cogency. Outside politicians have always shown a special interest in Pasargada, for both they and the community leaders are aware of its political potential. According to some of these leaders, Pasargada may "produce" as many as 20,000 votes, a number sufficient to elect more than one representative to the State of Guanabara legislature.³ Why, then, has Pasargada never been able to elect someone who could be called the "Pasargada representative"? In the *favela*, as anywhere else, the game of politics is played by the exchange of rewards. Because outside politicians have vested interests in the maintenance of the traditional reward system, they have never supported the pursuit of such long-range goals as the election of an insider, a Pasargada resident, to the State congress. Some community leaders—probably those who perceive themselves as having a better chance to be elected—have made motions in that direction, but nothing has been accomplished so far. The main reasons for such failure are fourfold. First, all of the community leaders are also *cabos eleitorais* for outside politicians; no one is willing to give away his power position and its consequent rewards. Given the political atomization to which this reward system leads, each tries to undermine any strategy that will give one of them disproportionate prominence, and therefore an "unequal" and "unjust" allocation of power and its rewards. Second, outside politicians, who depend on *favela* votes to be elected, support and even instigate the splits and rivalries between the leaders, since the concentration of Pasargada electoral power on an insider would damage their political careers. Third, even the community leaders who support such a long-run strategy concede that under present political conditions any attempt would be both risky and bound to fail. They know that particularly within the boundaries of a military dictatorship the formal democratic process is maintained only as long as its inefficiency is guaranteed. Fourth, because Pasargada residents have consistently been

3. Prior to 1975 the city of Rio de Janeiro itself constituted a state, Guanabara State. Now it is only a part of the much larger Rio de Janeiro State.

cheated and deceived by both outside politicians and community leaders they have been fully socialized in the interest exchange system. Consequently, they would be very reluctant to support the election of an insider, not only because they would visualize him as climbing to personal success on their shoulders, but also because he, being a *favelado*, would be in a much worse position than Dr. So-and-So to deliver the material rewards they expect from a politician. The limited movement in the early 1960s toward dissolving the traditional reward system was halted after 1964. Since then, as the regime has become increasingly fascist, formal democratic rule has been reduced to meaninglessness. With a political situation in which the single opposition party (MDB) is capable of very limited action, the rewards of the old system have been "devalued" and nothing has taken their place. The capacity of the *favela* to participate in national politics has been severely curtailed.

A closer analysis of political activity in Pasargada before the 1970 national elections suggests that among the reasons described in the preceding paragraph, the influence of outside politicians possesses the greatest explanatory power. From the time when community leaders began to talk about the coming elections, there was a continuing escalation of political activity. The first phase lasted until outside politicians began to invade Pasargada, and was one in which community interests tended to prevail over individual interests, within the limitations posed by the overall structure of Brazilian political life. A sizeable number of community leaders held meetings to discuss the possibility of a unified strategy. This was justified by the history of frustrating experiences with outside politicians in prior elections: promises made to residents who voted for them and to leaders who campaigned for them were not fulfilled, excused by the demagogic argument that, given the pulverization of Pasargada voting power, the politician had not been elected with Pasargada votes and, consequently, that favors should be asked from those *really* elected by Pasargada (that is, nobody).

The possibility of a Pasargadian as Pasargada candidate was discussed initially, but soon abandoned in preference for a choice of an outside politician who could be considered most reliable, most honest, and most capable of delivering communal rewards. Some names were advanced and divergences among leaders quickly began to appear. But a choice was felt to be premature, and the local leaders decided to identify community priorities first, and then try to find out the relative capabilities of different politicians to deliver those improvements. A public water network and paving

one of the main streets were high priorities. Leaders representing religious interests wanted a high school in the community. The "commercial class," to which most community leaders belong, and which has the largest property interests at stake, favored the opening of another police station, arguing that under present political conditions any measure related to law and order (*segurança*) would be promptly taken.

Soon, however, outside politicians began to invade Pasargada and the second phase began. Since their survival depended on the atomization of the community's political power, they always interacted with community leaders in terms of rewards and exchange. The traditional offers were made and community interests were gradually replaced by personal interests. If some leaders made counterproposals in terms of community interests they were either subjected to hidden political pressures or seduced with greater personal rewards. Soon the atomization of Pasargada became evident.

My observations have led me to two major conclusions, although I acknowledge the risk of overgeneralization. First, the conservative and short-range politics of *favela* leaders (Silva, 1967) is less a cause than an effect. True, the reward exchange system benefits them, but only within the larger political system that constrains them and which they have done little to shape. It is the outside politicians who profit most from the *status quo*, which is why they play a leading role in turning *favelas* away from community interests and problems. This has been even more true since 1964, when the politicians who favored reforming democratic life through elimination of the reward exchange system were silenced. Second, we must qualify the idea that community leaders relentlessly exploit *favela* residents (Silva, 1967). No one can deny that exploitation occurs under the disguise of personal ties. But community leaders are themselves equally exploited by outside politicians. The *cabo eleitoral* is used by the outside politician as a buffer against the demands by the *favela* residents for the promised rewards. In absorbing these pressures, the leader is victimized by the politician and discredited before the people. One is led to conclude that the exploitative relations found inside *favelas* are a consequence of the even more exploitative relations between these communities as a whole and the Brazilian ruling classes.

Throughout this section, community leaders have often been mentioned. Although the roles they perform are too numerous to permit an exhaustive description, we can define the categories of people who look to community leaders for particular functions. Two major groupings can be identified. For outsiders—State offi-

cials, politicians, social workers, social scientists, and religious proselytizers—community leaders are people who can interpret community ways and transmit the outsider's message to the residents in terms they understand. Described in this fashion, the leaders' know-how is as complex as the group of outsiders is heterogeneous: the politician wants to be known and to collect votes, the social scientist wants information, the social worker and the State official want to penetrate the community, the religious proselytizer wants followers. All can be helped or obstructed, instructed or deceived, by community leaders.

For the ordinary *favela* resident, the community leader is a person who knows the ways of the city, or has the power to harm or benefit the resident, or possesses some specific know-how. The leader may explain the most efficient way of getting something from a State agency (official document, payment, license, etc.). He may know an influential person in the city who can circumvent the formal bureaucracy (*pistolão*).⁴ He may ask the politician to do a favor in return for the resident's vote. He is often a storekeeper who will extend credit in exchange for services or votes. If he is a priest or minister he may help in settling one's disputes with God. He may also be asked to settle disputes within the family. He may assist one in drafting a document, choosing construction materials, or buying an expensive item. Community leaders differ widely in power and prestige. Most tend to overestimate both the efficacy of their relations with outsiders and their capacity to mobilize the residents of the *favela*.

It is not surprising that community leaders greatly covet control of community organizations, particularly those with a community-wide scope, such as the Residents' Association and the electricity commission in Pasagarda. The leading position in these associations carries with it not only structural contact with influential outsiders and institutions but also control over resources. Because the Residents' Association highlights the complex articulation of supralocal and community power, it will be described in greater detail.

III. The Residents' Associations

In 1956, when Rio de Janeiro constituted the Federal District, a new official agency (SERFHA) was created to deal with the "rehabilitation" of *favelas* and other types of slum housing. Although this agency retained elements of control and repression, it

4. Anthony Leeds describes *pistolão* as a personal contact with someone in an important position who gets things done as a personal favor (1964).

embodied a new philosophy about the relations between the State and the *favelas*: community development projects would require the active participation of *favela* residents. In practice this new agency started to function only four years later when the Federal District became the Guanabara State. The agency's new leadership based its action upon two premises. First, in order to help *favela* residents and secure their cooperation the State had to learn from the *favela* residents how they wanted to be helped. Second, enduring and systematic cooperation would not be possible unless *favela* residents were formally organized (A. Rios, 1961). Accordingly, SERFHA initiated *Operação Mutirão* (Operation Mutual Help) in June 1961—a broad appeal to *favelas* to organize residents' associations. Directors were to be elected by the community. The association would then sign a kind of contract with SERFHA in which both parties agreed to work together in *mutirão*.⁵ A standard agreement was promulgated setting forth the mutual obligations.

Within a couple of months some seventy-five associations were in operation. Statutes and internal regulations were drafted and approved, containing a statement of purpose similar to the following:

1. To solicit from the competent State and federal agencies the improvement of public services.
2. To assist its members in using the resources available.
3. To act as a link between the official agencies and the local community, helping the latter in resolving its problems as a community.
4. To promote social activities, such as recreation and sports.
5. To maintain the order, the security, and the tranquility of the families.
6. To promote, whenever possible, cultural activities such as lectures and colloquies.

At first, the association derived most of its prestige and community support from its collaboration with SERFHA, which provided the association with building materials to be used in improving shacks and enhancing public services such as paved streets, the sewage system, reservoirs, and public buildings (the

5. *Mutirão* or *ajutorio* is a system of neighborhood mutual help, very common in rural Brazil, in which a person requests the help of his neighbors to build a house, open a road, or execute some agricultural tasks (seeding, planting, harvesting). At the end of the work, the neighbors are offered a big meal and drinks (see SAGMACS, 1960: I, 33).

association headquarters, the health center, etc.). The association would recruit the workers from the community and organize the working schedules. Construction would be supervised by an engineer hired by SERFHA. Once a week, the president of the association would meet with SERFHA staff members to design cooperative programs, hear complaints, solve financial and technical problems, and settle disputes (A. Rios, 1961).

This experiment did not last long. Political struggle within the ruling urban elite brought it to an end two years later. Abandoned to themselves, the residents' associations had different fates. Some disappeared, some maintained a merely symbolic existence, still others managed to remain powerful and representative of the community interests. It is obvious that without the financial and political support of the State the associations could not continue their former activities at the same level. Three main factors conditioned their existence thereafter. First, they could only finance public works from the meager contributions of their members. Membership was not very high, and even members did not always pay their fees. Second, deprived of a cooperative relationship with State agencies, the associations were relegated to the traditional political process, with its rarely effective and always humiliating system of rewards and favors. Third, a growing volume of legislation sought to control the residents' associations, particularly after 1967. The autonomy of the associations, once praised, has been constantly restricted, forcing them to make degrading concessions, and to engage in subtle avoidance or discreet boycotts. Perhaps because the residents' associations experienced such different fates after 1962, social scientists have offered the most divergent evaluations of the institution (Valladares, 1968:27; Cordovil, 1965; Medina, 1969:126). Although each may be correct as a description of a specific instance, they tend to indulge in overgeneralization. Today there is no typical residents' association. I therefore prefer to concentrate on Pasargada's Residents' Association.

The present Residents' Association of Pasargada was founded in 1966 and incorporated in 1968, at the onset of the new wave of repressive legislation against autonomous community action. The elections for directors were held, and they elicited a high level of community participation. Symptomatic of the relationship between internal and national politics, four slates were presented whose programs, though related to community issues, reflected the supralocal political options. Outside politicians campaigned for candidates who had worked for them as *cabos eleitorais*. On the one hand, candidates pursued the community interest in seizing

this opportunity to solidify and make irreversible the State's move toward recognizing Pasargada as a legal entity—a status that was thought to be long overdue. On the other hand, they saw the Association as a source of personal power, prestige, and influence. Because it was charged with representing the interests of Pasargada before many State agencies, the Association not only commanded a privileged position in the community, but also opened a structure of contacts with outside power holders, which might provide springboards for higher ambitions. Finally, the commercial class, which furnished many of the candidates, saw a direct correlation between the improvement, development, and security of the community and the market-value of their investment.

It is now clear that when the State initially conferred symbolic legitimation upon the Association—for instance by housing it provisionally in the social center run by the Fundação Leão XIII, an agency later integrated in the State system of social work—it was primarily interested in cooptation and control. For this was not followed by any major State subvention of public improvements to be carried out through the Association. Under these circumstances the Association was forced to disappoint the expectations of its members and of the residents in general. What little has been accomplished is owed to the small contribution of members.⁶ The Association, by itself, has been unable to initiate major projects, such as a general water network, for which there is no alternative but to try to mobilize the responsible State agency through the mediation of politicians.⁷ The State controls the Residents' Association in Pasargada at two levels, the legislative and the institutional, which are best illustrated by the laws concerning construction in *favelas*, and their implementation by the Fundação Leão XIII. At the time of its creation the Residents' Association was granted the power to authorize and supervise any shack or house

6. The members of the Association are Pasargada residents (or people otherwise integrated in the community) who pay a monthly fee. There are approximately 1,500 members (heads of family), but not all of them pay their fees regularly. While the first board of directors was in office there was a single fee for all members. The second board of directors—who held office at the time of the field research—stratified the fees structure, decreasing the fee for ordinary residents and increasing it for storekeepers.
7. Just before the national elections, while I was doing this fieldwork, public workers began to dig ditches for the water network. The Association was anxious to convince the residents that it had played a decisive role in obtaining such an important improvement. The social workers of the Fundação Leão XIII felt that the Association was using the project for political purposes. The president of the Fundação Leão XIII had just stepped down to become a candidate for State deputy and was campaigning in *favelas* where the Fundação operates (Pasargada being one). Obviously, he was not supported by the leaders of the Association.

repair in Pasargada. This was a very significant concession, in view of the traditional State policy of opposing the spread of *favelas* and discouraging the improvement of housing within them. The situation changed with the Decree "N" 870 of July 15, 1967, which initiated the new wave of repressive legislation. This Decree gave the power to authorize house repair to the State social work agency (the Fundação Leão XIII in *favelas* under its jurisdiction, like Pasargada), while the Residents' Association was restricted to channeling the petition to the State agency and relaying the agency's decision to the petitioner. It took some time before this decree could be enforced in Pasargada. As soon as its internal regulations were approved, in June 1967, the Residents' Association began to authorize house repairs on its own. Pressure to relinquish this power only became severe with the publication of the Portaria "E" - CFL - No. 8 of July 28, 1969, which implemented the earlier decree. The present process of authorizing construction and repair is worth describing because it illustrates the State's strategy toward the Residents' Associations. The resident who needs to repair his house will seek authorization from the Residents' Association, which will forward the request to the State social work agency. The agency may decide to send an engineer to inspect the house and the surrounding area, and advise on the need for the repair. If the agency then gives its approval ("*de acordo*") to the Residents' Association, *the authorization will be issued by the Association*. Thus the Association is a mere functionary in issuing the authorization. But once authorization is given, the Association retains some power: it will supervise the repair to see that it abides by the terms and restrictions of the authorization; it will prohibit work that violates the terms of the authorization and demolish it if the resident does not do so himself. The State's strategy is thus to retain the power to authorize building repairs while allowing the Association to appear to hold that power. The function of the Residents' Association is to absorb the impact of dissatisfaction. The State reserves to itself the power to authorize—what we may call positive sanctions—leaving to the Residents' Association the "dirty work" of supervising, prohibiting and demolishing illegal repair—negative sanctions. The visibility of State control over the community is thus reduced, and the Residents' Association is allowed to appear to be participating in the decision-making process, thereby solidifying its position in the community.

So far, however, this "division of labor" has not been implemented because the Residents' Association has kept its cooperation with the Fundação Leão XIII to a minimum. The Association

has very rarely used the sanctioning power, not only because its overriding loyalty to the community conflicts with the principle upon which the power is based, but also because the Association's power is very precarious and may wither away if it embarks upon actions repudiated by the community.⁸ In fact many residents do not bother to request authorization for building repairs. If they do, the Association may face the following hypothetical conflict. The resident, a worker in a nearby factory, got some time off, bought the materials in one of the *favela* stores, and requested the authorization for the repair from the Association. Obviously, he cannot wait long because the repair has to be done while he is on vacation and the materials may deteriorate or else be stolen.⁹ But the Association knows by experience that the State agency is in no hurry to send the technician or issue the approval; authorization has been delayed two or three months. In view of this, the Association may not hesitate to authorize the repair informally and provisionally, after one of its directors has inspected the locale, if it is felt that the petition is reasonable and does not violate community interest.

Furthermore, the Association has no means to supervise the execution of repairs or to secure compliance with the terms of the authorization. If it did, it is doubtful it would use them. Indeed, there has never been any attempt to enforce the general legal constraints upon construction in the *favelas*: that the repair cannot enlarge the building either vertically or horizontally and that the materials used cannot differ from the original materials. The State agencies themselves have often authorized repairs and new construction in open violation of these restrictions. The community would hardly understand and would harshly condemn any attempt by the Association to be more zealous than the State authorities in whose interest the restrictions were established. Moreover, the bigger, the more permanent, the more numerous the structures, the more developed the community will become and the more difficult will it be for the State to remove the *favela*—or so it is believed by both leaders and residents.

8. The failure of an association to exercise its powers subjects it to administrative sanctions. (Portaria "E" - CFL - No. 8 of July 28, 1969, Art. 16; Portaria "E" - SSS - No. 12 of November 13, 1969, Art. 42) Pasargada's Association has often been threatened with these sanctions but so far they have not been applied.

9. Many residents use the strategy of buying the materials before asking for authorization not only in order to press the Association for a quick decision, but also to put the Association in the dilemma that if the authorization is refused they will probably go ahead with the construction anyway since it is not fair for them to lose the money invested in the materials.

Under these circumstances the use of the sanctioning power by the Association would be a radical contradiction of what the community stands for. In the rare cases in which the Association has used this power, it has done so not in the name of an abstract State interest, but to protect a recognized interest of the community as a whole, thus securing the support of the community for its intervention.

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