Studia Iuridica 96
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-96.1

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THE INDIGENOUS SUBJECT IN LAW: AT THE INTERSECTION OF THE CARTESIAN SUBJECTIVITY AND THE RULE

Abstract

This paper addresses a key question raised by the tension between the subject of normative law and indigenous, collective systems. Within the framework of the Lacanian psychoanalysis, the author explores Cartesian specificity of a legal subject. He argues that structural nature of that legal construct not only affects an individual ontologically but also reorients the dialectics inherent in legal dogmatism. Following Baudrillardian thought, it is assumed in the paper that the total opposition to normative law is not the absence of law but rather the Rule. The Rule is a concept engaging the individual into dialectics of a game and at the same time ruling out any sense of inherently legal transgression. However, the context of indigenous systems based on the Rule, besides amplifying an alienating effect of the individualization of responsibility, also explains the incongruity of normative law in some cultural contexts. The failure to integrate indigenous, traditional and local legal systems into the post-colonial normative discourse is just one of many illustrations of this. As an exemplary case, the author evokes injustice (in the Lyotardian sense) resulting from litigation simultaneously based both on Brahmanical marriage rules and the Hindu Code Bill. In its final part, the text summarises the impasses of the legal dialogue with indigenous rules and the ways of emancipation for an individual imbedded in the Cartesian subjectivity, which are inspired by transcultural encounters.

KEYWORDS

indigenous law, the Rule, différend, Lacanian psychoanalysis, discourse, body

SŁOWA KLUCZOWE

prawo tubylcze, Reguła, différend, psychoanaliza lacanowska, dyskurs, ciało

With nothing more than the word elephant and the way in which men use it, propitious or unpropitious things, auspicious or inauspicious things, in any event catastrophic things have happened to elephants long before anyone raised a bow or a gun to them.[1]

1. INTRODUCTION

This paper is meant to address two basic matters. First of all, it focuses on the phantasmatic background of the most prevalent conceptions about indigenous systems. This issue is primarily presented in the context of its provenance, namely the place of Cartesian subject in the discourse of legal normativity. Then, an effort is made to accentuate features of indigenous systems which may be regarded as a source of real difference in legal discourse. Employing theoretical tools of psychoanalysis, the Lyotardian idea of injustice and the Baudrillardian Rule, the argumentation tries to stress the discursive place of the body and different modes of totalization. Finally, the above-mentioned points are exemplified by a legal case from India, representing an encounter between an indigenous system and the universal normativity.

The idea lying behind this inquiry is the hypothesis that there is 'the possibility of difference, of a mutation, of a revolution in the propriety of symbolic systems'.[2] The same difference normative law as a system, and above all as a discourse, tries to cover with the appearance of the sameness and completeness. However, it is beyond the scope of this paper to embark upon an analysis of any law from 'other reality'. Indigenous systems are not addressed as a source of external inspiration or distant roots of a familiar order. The underlying assumption is to let the indigenous systems speak in the legal domain with the most distinct voice possible, what is insurmountable in the discourse itself. Maybe it will 'isolate somewhere in the world (faraway) a certain number of features (…), and out of these fea-

[1] J. Lacan, *Les écrits techniques de Freud: La leçon de 12 mai 1954*, Paris 1975.

[2] R. Barthes, *Empire of Signs*, New York 1989, pp. 3–4.

tures deliberately form a system',[3] which system, to paraphrase Roland Barthes, I shall call indigenous. I hope that mediating such a speculative inquiry through jurisprudential materials may not only allow local systems of indigenous peoples become localizable within the discourse but also make law more tangible and closer to the living practice.

2. TRAVERSING THE PHANTASM OF INDIGENOUS SYSTEMS

Then the king went to the blind people and on arrival asked them, 'Blind people, have you seen the elephant?'
'Yes, your majesty. We have seen the elephant.'[4]

We eagerly enlist specific indigenous local systems under the common heading of the so-called Indigenous Justice Paradigm.[5] It designates social collectivism accompanied by holistic philosophy and the central role of vaguely defined 'ways of life'[6] as its main attributes. It somehow comes down to a picture of a tight-knit group proclaiming, in Chief Justice Tom Tso's words, 'We are so related to the earth and the sky that we cannot be separated without harm.'[7] That image does not appear to be foreign but rather missing from and inaccessible to any legal discourse. At the same time, it provides us with a simplicity possible only in the phantasmatic domain. One of the most significant documents in this respect is the Annex to the United Nations Declaration on the Rights of Indigenous Peoples, which recognizes them as contributing 'to sustainable and equitable development and proper management of the environment'.[8] The drafters are also 'convinced' that the cooperation with indigenous peoples will bring harmony to the international arena. Accordingly, nothing connected with the Indigenous Justice Paradigm seems to be competitive with the legal universalism. The remoteness of the idea that the empowerment of customary law can pose any threat to the western standards of human rights clearly illustrates this. The domestication of this law

[3] *Ibid*. p. 3.

[4] T. Bhikkhu, *Udana: Exclamations, Tittha Sutta: Sectarians*, Barre 2012, pp. 39–40.

[5] A. P. Melton, *Indigenous Justice Systems and Tribal Society*, 'Judicature' 1995, Vol. 79(3), p. 126.

[6] A. P. Melton, *Traditional and Contemporary Tribal Law Enforcement: A Comparative Analysis*, Western Social Science Association, 31st Annual Conference, Albuquerque, New Mexico 1989.

[7] T. Tso, *The Process of Decision-Making in Tribal Courts*, 'Arizona Law Review' 1989, Vol. 31, p. 234.

[8] United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, adopted on 13 September 2007, p. 4.

is prevalent to such an extent that the statements by the Australian Privy Council about 'social repugnance' of Aboriginal customs appear today a naïve overestimation rather than a gross discrimination. Every aspect of it seems to be both distant and legally familiar, but under no circumstances should we conflate this familiarity with the similarly paradoxical Freudian uncanny (*unheimlich*). It can be imaginarily far away or even exotic, but as in most cases of any exoticism, there is no trace of real otherness qua affecting internal alienation of our own discourse. The UN Declaration effectively coalesces with such an approach. While delimiting the indigenous peoples' rights, it does not refrain from specifying that they are entitled to have, create, protect and develop only their own 'sciences' and 'literatures',[9] as if singular forms of literature and science were already occupied. In fact, all of the above-listed descriptors represent nothing else than a projective plane for phantasies sustaining our own legalistic dogmatism.

3. CAN TRIBAL HOLISM PATCH CARTESIAN SUBJECT UP?

And forthwith calling Nicanor, who had been master of the elephants, and making him governor over Judea, he sent him forth (...)
2 Maccabees 14:12, KJV

And when he had cut out the tongue of that ungodly Nicanor, he commanded that they should give it by pieces unto the fowls, and hang up the reward of his madness before the temple.
2 Maccabees 15:33, KJV

The great Freudian contribution to legal studies is not only unmasking of subject's structural constitution as legal in nature but also the portrayal of law as entirely subjective. The only subject psychoanalysis can relate to is the Cartesian subject which, besides being shared with legal sciences, encapsulates all of the Western culture's discontents. Therefore, law compulsively covers the fundamental splitting (*Spaltung*) of discursive subjectivity by a mirage of obtainable wholeness of universality, while psychoanalysis is a practice which is orientated to persistently uncover the irreducible gap. One of the names of this irreducible gap in a divided subject is the Freudian castration. The subjectivity is simultaneously embedded in the discourse and mediated through it.

The unavoidable consequences of this inherent gap is a compulsion of discourse to camouflage it. The legal subject qua the Cartesian subject is a discursive fiction of unity and must be actively sustained to the same degree as any other

[9] *Ibid*., Article 31(1), p. 22.

fiction. This goal can be achieved by relegating a phantasy of obtainable fullness elsewhere, for example, to an exotic holism of indigenous peoples. The supposition of such an order outside our 'cultural universe' only sustains a naïve totalization of the world, harmoniously balanced when taken as a whole. We cannot use legal language without instantly falling into that dialectical trap. The symptomatic nature of that phenomenon can be easily illustrated with India, where after the era of colonialism, Gandhian and socialist factions within the ruling Congress Party supported a revival of traditional *Panchayat* (village assembly) justice and proposed it as a means of obtaining original 'harmony and conciliation' in place of legal 'faction and conflict'.[10] However, there is no way back; the fulfilment of fundamental phantasy each time turns out to be a bitter failure, and the search for the 'lost harmony' of a legal system is an endeavour without any clear conclusion.

To avoid recourse to any sort of legalistic normativism with idealistic undertones, we should evoke another psychoanalytical reference. It cannot be stressed enough that psychoanalysis always stays in touch with impasses of its own discourse. The above-mentioned impasses contain also the one identified by Claude Lévy-Strauss as seemingly 'insurmountable'. No matter how coherent and well-articulate a social system is, it is also a collectivity of living beings,[11] or psychoanalytically speaking 'living bodies'. Moreover, this is also an irreducible obstacle for any normative law and a reminiscence of the fundamental impossibility present in each discourse. However, for psychoanalysis it is above all a guarantee of the real. The indigenous systems testify to the same necessity by requiring of each new-born to be admitted to its structure[12] or, as in the case of the Yurok tribe, by categorising parents as dead in contrast with the life they have created.[13] The tribal system is always haunted by a living being, just as psychoanalytical subjectivity is haunted by the body and its enjoyment.

Enforcement of a universal regulation is always an instance of violence. Singular justice is not only excluded from generalization of normative law, but exclusion of singular justice is the very condition and foundation for establishing the universalizing legal discourse. Every sentence or, more generally, every application of norms involves a violent alienation of the judged subject. Nonetheless, we should not rush to conclusions and remember Pascale's dictum *La justice sans la force est impuissante*.[14] Justice emerges simultaneously with the legal discourse only to appear later as moments of auto-transgression, which in fact preserves the current order.

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[10] M. Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, 'Comparative Studies in Society and History' 1972, Vol. 14(1), p. 56.

[11] C. Lévi-Strauss, *The Savage Mind*, London 1966, pp. 154–155.

[12] *Ibid*. p. 197.

[13] *Ibid*. p. 198.

[14] In English: 'Justice without force is impotent', cf. B. Pascal, *Œuvres complètes*, Paris 1963, p. 103.