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Jakub Babuśka
University of Warwick, United Kingdom
e-mail: Jakub.m.babuska@interia.eu
ORCID: 0000-0003-3529-2472

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.

Justice and law are like two sides of a Möbius strip. At the end of the day, after each full circuit, they always pass into each other. The tribal holism of justice and law lets both categories coexist but merely as separate, mute signifiers.

4. DIFFÉREND, THE RULE AND TOTALIZATION

In order to elucidate the perspective of possible difference, I would like to present a set of theoretical tools. As the first point of reference for portraying the precariousness caused by the discursive nature of injustice, I would like to refer to its Lyotardian understanding which combines crime with the perpetuation of silence that erases it. The following definition not only situates the very discourse as a precondition for any injustice to appear. The consequence of adopting this approach is the possibility to recognize what Jean-François Lyotard called *différend*.[15] It is a situation when a plaintiff is deprived of discursive means to convey or prove a wrong which, paradoxically, is possible to be identified as such by the very same discourse.

Another concept which will allow us to push the inquiry even further is Jean Baudrillard's concept of the Rule. As he says '[i]t is not the absence of the law that is opposed to the law but the Rule. The Rule plays on an immanent sequence of arbitrary signs, while the Law is based on a transcendent sequence of necessary signs.'[16] The Rule is based on the immanence of conventional procedures and body cycles, while the law is an instance of an unstoppable Kantian continuity. Models portraying the mode of the Rule's operation are both sets of Wittgensteinian language-game (*Sprachspiel*) and the course of a poker game. The Rule eradicates the possibility of transgression known from the law. It offers a different kind of totality than the ultimate incompleteness of discourse covered with a mirage of universality. It substitutes infinite but internally limited universalization with a finite set without a single exception. In the place of universality, it places what Lacan called *pas-toute* (not-all).

Now, let me move to a plane of what could be called Lévi-Straussian thirteen,[17] a model of double human totality. That number in the mythology of structuralist anthropology signifies a collective of two asymmetrical moieties, the failed union of six and seven or, in other words, phantasy of even wholeness and forever incomplete evenness. Not without reason, could it be argued that limiting indigeneity to the enclosed parameters of 'not-all' is a rash simplification. Nonetheless, in opposition to the herein outlined conception of 'limits of a tribal group as the

[15] J.-F. Lyotard, *Le Différend*, Paris 1983.

[16] J. Baudrillard, *Seduction*, Montreal 1990, pp. 131–132.

[17] C. Lévi-Strauss, 1966, *op. cit*., p. 145.

frontiers of humanity', I would advance the contrary proposition of the 'humanity without borders', simultaneously present even in the most 'savage minds'. In this pair, the latter counterpart cannot be anything other than a sole universalization in the guise of its totemistic agent.[18]

5. HOW DOES THE RULE GAME THE LAW?

The crown is not my right. It pleases me not. Mary is the rightful heir.[19]

The dialectics emerging from the confrontation of the Rule and normative law may be vividly exemplified by the situation in India. The country is a cradle for legal frictions as it serves as a home to both post-colonial British law and traditional, personal laws. At the same time, it is ethnically secularised to such a degree that the government refuses to acknowledge the legal existence of the Adivasi, indigenous peoples per se. Instead, a certain half-measure was introduced. Namely, a list of 705 ethnic groups, called Scheduled Tribes (STs), spread across 31 states, was created. Among them, 75 tribal communities were distinguished under the sub-category of Particularly Vulnerable Tribal Groups (PVTGs).[20] Generally, the strongest emphasis was put on providing a clear classification of all tribal societies according to strict and selective criteria of recognition. It is not without significance that it took place alongside the development of the list of Scheduled Castes (SCs) which paradoxically was intended to mark a radical departure from the prior caste system by permanently sanctioning a list of the most socially disadvantaged groups.

The same tribes seeking escape from foreign aggression 'concealed themselves in hills and jungles' and 'wherever the army marched, every inhabited spot was desolated'.[21] Exactly in consequence of that act of 'wanting to know nothing about' the dominant discourse, a regular Hindu 'peasant became a tribal'.[22] In the deserts, where there are no forests and no possibility to flee and hide, such escape was not possible.[23] Now, the dominant discourse reaches for the same population, this time by means of law, in the hope of deceitfully uncovering their vital concealment and maintaining their isolation by binding them to their lands. This time, again the only hope is to take refuge in the clump of legal regulations.

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[18] *Ibid*., p. 166.

[19] The ignored protest of the Nine-Day Queen, Lady Jane Grey, before her coronation.

[20] R. Sahani, Sh. K. Nandy, *Particularly Vulnerable Tribal Groups in India: An Overview*, 'Journal of the Anthropological Survey of India' 2013, 62(2), pp. 851–865.

[21] K. S. Lal, *The Legacy of Muslim Rule in India,* New Delhi 1993, Ch. 7.

[22] *Ibid.*

[23] *Ibid.*

I would risk a statement that the Lyotardian debate around différend is groundless in the context of indigenous laws since their dialectics stands in a direct opposition to the transgressional normativity. They are beyond it, situated at the intersection of the Rule and logic of not-all. However, even if the Rule is beyond the scope of différend, the heterogeneity of its encounters with litigation gives rise to its most radical cases.

Let me evoke a case of an Indian woman Rupa,[24] which will familiarise us with a morbid image of a woman not only maltreated but also abandoned by her husband. According to classical Hindu laws, their marriage was a unilaterally indissoluble sacrament, *samskara* (संस्कार). That norm that a woman cannot change her husband remains inviolable even if faced with the most extreme pathologies of conjugal life. On the other hand, a husband is entitled to any number of marriages. Such an unbridled polygamy had been permitted under Hindu law before enactment of the Hindu Marriage Act in 1955.[25] The tragedy of this particular situation was only aggravated by the society's blunt apathy in the face of a deserted wife's sorrow. After all, the same local and closely interconnected group which introduced her into her mature 'way of life',[26] averted their eyes from her in the hour of trial. Ironically, they directed their highly demanded attention towards nothing other than the second wedding of the culprit. Subsequently, Rupa arrived at the crossroad which should be a rite of passage for each enthusiast of phantasmatic integrity between society and law in indigenous groups. She was supposed to live on, follow the collective 'way of life'. However, to her detriment, Rupa supposedly 'knew something' about the artefact of European culture called tragedy. She also knew that, besides her integral place in the community, she is a Cartesian subject with the capability to suffer tragically. Knowing so much, she shifted from the role of an unfortunate group member straight into the role of Lady Jane Grey from Paul Delaroche's painting. Hence, she began to look for a discourse which could provide her with justice, but in search of a protective instance, she stumbled upon an ultimate fault of its structure.

The legal context in India imposes on its every subject a web of complex relations, as general statutory regulations overlap with traditional law.[27] One of the components in this vast category is Hindu Law, *Dharmasastra* (धर्मशास्त्र). It is certainly true that the Hindu Code Bill validated customary rituals and ceremonies, such as the Brahmanical procedure of the Hindu marriage, but without specifying any form of obligatory registration. Therefore, on the grounds of civil litigation the only way to prove the marriage was to convince the adverse commu-

[24] J. Krishnadas, *From East to West: Can Feminist Legal Strategies be Transformative? Post-disaster to Everyday Times of Crisis*, 'Jindal Global Law Review' 2019, Vol. 10(2), pp. 247–268.

[25] P. Lakshmi, *Personal Laws and the Rights of Women*, 'Christ University Law Journal' 2012, Vol. 1(1), p. 94.

[26] Resolution 12.5 Protection of Traditional Ways of Life, IUCN, GA 1975 RES 005.

[27] P. Lakshmi, 2012, *op. cit*.

nity to bear testimony in favour of Rupa. Needless to say, the husband's narrative denying any contract of marriage won in the court. The outcome for the abandoned wife is rather dire. She not only failed in her attempts to win the litigation, but she also had to face ostracism within her own social environment.

Besides being an evident example of unequal treatment of women resulting from the Indian personal laws, this case shows the impossibility of disturbing the status quo of the indigenous Rule by recourse to any set of legal norms. The dialectics of the game introduced by the Rule immediately ousts anyone who sets a goal different from the game itself. One can operate with an element of the game but only providing one is still in it. In this instance, we have to deal with a regime resembling a football game as practiced by the Gahuku-Gama of Papua New Guinea. Once this tribe learned how to play, its members started playing it continually for several days, just as many matches as necessary to achieve the same score by each team.[28] Thus, after entering into litigation with a goal of seeking justice, Rupa is immediately removed from the game as a 'cheater' and her marriage turns out to be legally invisible. Hence, as long as the husband is obedient to the Rule and stays indifferent to the stakes of the dispute, there is only one possible judgment. Similar persistence is totally incomprehensible in the statutory dimension. Even though the husband made false statements multiple times, every juridical attempt to formulate a just resolution inevitably failed. It is now sufficient to state the obvious; namely, the problem of incompatibility of both orders goes beyond a simple problem of translation into specific norms.

6. BETWEEN THE EFFECTIVENESS OF LEGAL SYSTEM AND THE CUSTOMARY RESIDUE

Which done, he crept under the elephant, and thrust him under, and slew him: whereupon the elephant fell down upon him, and there he died.
1 Maccabees 6:46, KJV

Judicial proceedings are absolutely helpless in the confrontation with the dialectics of indigenous rules. Moreover, every time law tries to overcome it by exerting alienating violence on human beings, it simultaneously exposes points of its very own discursive impotence. The fragile appearance of local systems can only be perceived as such due to a truly unfortunate mistaking of the acting-out of impotent discourse for the phantasies of universal omnipotence, which it is merely subordinated to.

[28] C. Lévi-Strauss, 1966, *op. cit*., pp. 30–31.

It is sufficient to identify this dialectical specificity to immediately realize that the historical fact of 'recognition of Indian and Inuit customary marriage law by Canadian courts is relatively little known by the Indian peoples and has had little effect upon their lives'[29] and the fact that 'rejection of the traditional law of Aboriginals by Australian courts has not caused its disappearance as many Aborigines and Torres Strait Islanders continue to adhere to its tenets, even if this causes conflict with state law'[30] are completely coherent and foreseeable. Another vivid demonstration is laid bare in the cases such as *Regina v Jack Congo Murrell* (1836)[31] and *William Cooper v The Honourable Alexander Stuart* (1889),[32] which illustrate that the previously legally unrecognized Aboriginal customary law came to the fore only after the Northern Territory Supreme Court refused to acknowledge tribal rights to their own land.[33] When Gopal Das Khosla makes the following remark about the Indian legal system 'I have no doubt that the judicial machinery imported from England and set up here with slight modifications can work efficiently if some of the dirt and grit can be eliminated' and it is followed by the transfer of responsibility to 'departures from the British way and the local modifications',[34] we should very carefully consider the form of the accusation.

Undoubtedly, the legal structure of British 'machinery' is always the most efficient and it is hard to argue otherwise, especially if we acknowledge that it sets its own rules and conditions, and therefore can compete almost only with itself. The comparison of the local context as 'dirt and grit' should not pass without recognizing the significance of its peculiarity. The comment is of astounding profundity as it bears witness to specificity of not-all represented by indigenous systems. It even makes the author hard to be blamed for any intentional pejorative connotations, because from the perspective of universalization, operating alongside totalization of not-all, the said dirt and grit, just as the six in the number thirteen, always stands in the way of a harmonious communion.

[29] B. W. Morse, G. R. Woodman, *Indigenous Law and State Legal Systems: Conflict and Compatibility*, (in:) B. W. Morse, G. R. Woodman (eds), *Indigenous Law and the State*, Dordrecht 1987, p. 107.

[30] *Ibid*.

[31] *R v Murrell* [1836] NSWSupC 35.

[32] *Cooper v Stuart* [1889] 14 App Cas 286.

[33] B. W. Morse, G. R. Woodman, 1987, *op. cit*., p. 108.

[34] G. D. Khosla, *Our Judicial System*, Allahabad 1949, pp. 70–71, 87.

7. LEGAL KNOWLEDGE AND WAY OF LIFE

What we need today in India as far as the judges are concerned is a scholastic living.[35]

There is a supposition that indigenous peoples have the clearest understanding of their own systems. However, Article 17(3) of the Indigenous and Tribal Peoples Convention stipulates clearly that 'Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members (…)'.[36] What at first glance seems contradictory in these two assertions is coherent at a certain level. Initially, it may seem patronizing to assume that indigenous peoples may be less versed with their own law than outsiders. Nonetheless, apart from the sole legislative intent, establishing such a protective umbrella against *Ignorantia iuris nocet* can be acceptable when set in the context of a different relation to knowledge. Tribes obviously are closer to their own tradition, but they are submerged in it, they play by the Rule and they succeed only by letting themselves be duped by it.[37] One should forget any knowledge of the previous compositions and instead, just like a first-time domino player, consider only the value of the adjacent halves in joining the pieces just for the sake of prolonging the game.[38]

Therefore, if there is any meaning behind esoterically transmitted 'way of life', it is just that it is a game. When we stumble upon a phenomenon that many inhabitants of rural areas have learned to 'astutely' use western courts for their own ends,[39] it is rather certain we are faced with a very particular kind of astuteness. We can only agree to the use of that term insofar as we extract from it the mode in which it has etymologically changed throughout the years. Starting from the Greek *asty* meaning 'town', in Latin it implied city sophistication. By merging together *astutus* ('crafty, wary, shrewd, sagacious, expert') and *astus* ('cunning, cleverness, adroitness'), the word departed from its origin and acquired its own distinct significance. The model of that etymological transformation itself can be instructive for understanding the indigenous handling of the normative law. In parallel, the use of that word underlines the quality of skilfulness at finding one's bearings in a legal situation. Indeed, indigenous peoples successfully identify their position in the legal context, however, in a rather unusual sense. They know

[35] S. H. Kapadia, *Human Rights and Social Justice*, speech given at Lucknow on 13 December 2008.

[36] Indigenous and Tribal Peoples Convention (No. 169), adopted by the International Labour Organization on 27 June 1989.

[37] J.-A. Miller, *The Unconscious and the Speaking Body*, Presentation of the theme for the X Congress of the WAP, Rio de Janeiro 2016.

[38] C. Lévi-Strauss, 1966, *op. cit*., p. 219.

[39] M. Galanter, 1972, *op. cit*., p. 64.

how to operate with their totality of not-all. Therefore, through demonstrating 'precise' indifference or inability,[40] they manage to let their logic flourish in that discursively hostile environment.

In opposition to that, knowledge as accumulation of fixed regulations, even if they are based on local customs, is aggressive in the same fashion as generality of law is. Hence, tribe members can actually be derailed by manoeuvring them into the discourse of litigation substantively disguised in normative translations of the Rule.

However, we should not take it as a proof for a dialectical impasse of indigenous laws. Rather, it should be discussed whether one can engage in such an integrationist 'dialogue' without undergoing a prior structural change of the mode of one's subjectivity. It is closely related to Marc Galanter's comparison of the dual modernization of medicine, where the western-style approach competes with the indigenous traditionalism. Even if he is right when stating that the revival of indigenous law is not actually its revival but 'its containment and absorption',[41] he misses the point that what he tries to tackle is actually a movement of 'dual universalization' or maybe it might be even called 'universalization's double'. It underlines the entirely imaginary nature of the distinction, where one option is the 'clean' original of an idealist and the other a phantasy of a sentimental universalist. As I explicitly stated, Rupa 'knew something about tragedy', she is an example of a new breed of 'bi-legal' beings, which at the end of the day boil down to perfect examples of 'uni-legal' or even simpler 'legal' beings.[42] Maybe 'they utilize both "indigenous" and official law in accordance with their own calculations of propriety and advantage', but precisely by introducing a policy of advantage they prove they are already alienated. This is the crux of the difference between the integrationist, Cartesian subject and 'astuteness' of indigenous peoples.

8. CONCLUSIONS

হাতি খাদে পড়লে ব্যাঙেও লাথি মারে[43]

In conclusion, the incompatibility of civil law with indigenous systems should effectively problematize any hybrid solutions. Working in the name of unifying the law or even empowering certain individuals in traditional communities, we risk much more than credibility and effectiveness of the judicial system. The pre-

[40] C. Lévi-Strauss, 1966, *op. cit.*, p. 219.
[41] M. Galanter, 1972, *op. cit*., p. 60.
[42] *Ibid*., p. 64.
[43] A Bengali proverb meaning: 'When an elephant is in a hole, even a frog will kick it.'

sented litigation of an Indian woman portrays how a civil litigation applied to indigenous peoples' disputes may lead not only to plaintiffs' exclusion from their group, but much worse, to creating *ex-nihilo* a situation of injustice. It shows us that no matter how strict asceticism and reluctance are exercised in formulating general legal self-criticism the discourse infallibly betrays its own premises. Therefore, we should consider the burden of our own phantasies in how we perceive indigenous peoples. Finally, before pursuing our dreams of comprehensive help, we should question in advance the degree to which its very form is based on the phantasms sustaining the fiction of the Cartesian subject in the law.

We must agree with James S. Fingleton's report that 'the exercise is one of recognition: the group has a natural membership, and the goal is to identify that, not create a new artificial body.'[44] The general law should neither create nor incorporate the indigenous 'state of fact'. One should strictly avoid constructing any 'new' or 'artificial' body. If Bradford W. Morse can say with confidence that given a chance, indigenous law has proved the adaptability and flexibility necessary to prevail in the face of future pressures, it is because of its totality of not-all. However, we should keep in mind that this unique quality cannot be viewed without the context of legal discourse as it bears a specific relation to the universal discourse's ultimate impasse. Indigeneity provides us with the real difference as it offers an alternative way of operating with what is inherent in but, all the same, absolutely inconceivable for any universal law, that is the body.

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