The Spirits of the Laws and the Laws of the Spirits

Legal Pluralism, Porous Legalities and India's Alternative Legal Modernity

The literature on legal pluralism in India abounds with examples of how communities or corporate groups settle their disputes without necessarily resorting to brute violence. Well within this side of extremes such as death verdicts or honour killings ordered by 'Khap panchayats' (Yadav) or 'Devil's courts' (Headley), conflict resolution outside of the paradigm of state-sponsored positive (man-made) law relies on accepted ways of disciplining and punishing, which may involve fines or social boycott. These are the stories we hear from village panchayats and slum dwellers associations, tribal assemblies and caste councils. All of these use force to a certain extent (not necessarily physical violence) and the debate is whether this is legitimate given the state monopoly on the legitimate use of force.

I will set aside this question, which mars the debates on legal pluralism, and instead look at a phenomenon that on first sight seems outside the purview of legal discourse altogether, but on closer inspection turns out as a rather harmless but all the more interesting example of legal practice.

All over India there are examples of legal practice which completely refrain from using force. The "enforcement" of laws is completely delegated to spirits such as *daivas* or *bhutas*, *devtas* or *jinns*. In the first part of this paper, I will argue that these spirits are efficacious legal institutions. To argue thus, I claim

that we can leave aside the question whether these sprits are “real” in the scientifically “objective” sense. It suffices to show that their existence is an “intersubjectively” shared belief. Such a belief, as part of the ‘social imaginary’ (Castoriadis), is efficacious just like any other social institution whose reality is grounded in the intersubjective ‘social world’ rather than in the ‘objective world’ of science or the ‘subjective world’ of experience (Habermas).

I am comparing two legal systems, one spirit-based, one positive, on the level of ideal types (Weber). Thereby I am avoiding the asymmetrical comparison of an ideal system on one hand with an operational system on the other. When comparing both systems on the level of ideas, it will turn out that one suffers from two major paradoxes which the other does not have to grapple with. It will turn out that two paradoxes that a system based on positive law faces can only be resolved by resorting to the stipulation of a moral consensus, which is precisely what is said to be lacking under ‘modern’ conditions. While the system based on positive law purports to be able to do without appeals to an integrated morality of its citizens, the primordial spirit-based system is said to be less suited to ‘modern’ conditions of plurality because it rests on the assumption that everyone share the belief in those spirits.

It belongs to the staple claims of modernist theories of law that modern society could not be integrated or stabilised based on spiritual beliefs which not everyone can share. This may be true for Western societies. The claim seems

less obvious however in the case of postcolonial societies where, in spite of their modernity, people continue to believe in spirits. To the modernist, 'premodern' societies, with the supposedly more uniform religious beliefs of their members, serve as examples for the allegedly lost unity of primordial times in which a 'self-standing' conception of justice was not 'yet' necessary, which would be independent of any controversial religious or secular beliefs and only based on an 'overlapping consensus' between conflicting religious and secular world views (Rawls). This paper will show that a sprit-based legal system is not necessarily tied to such romantic and orientalising ideas of primordial society. In the contrary, it will show that the belief in the efficaciousness of spirits is shared by members of all denominations in spite of their internal differences in a society like India which has not only recently become highly plural.

I. Anthropologists have raised interesting methodological questions with the study of spirits. As Brigit Meyer remarks in the African context with respect to the spirits populating the world of the *Ewe* in Ghana: 'Spirits … elude confinement to the category of religion and appear in all kinds of settings, including politics, economics, and entertainment. Spirits, in other words, are not just there, as signs of a traditional past, but reproduced under modern conditions." This paper (and other contributions to this conference) will show that in the Indian context spirits appear – and are reproduced under modern conditions – especially in legal settings.

One methodological trap that has been exposed in much of the postcolonial literature is that of a stage theory of legal development. A prominent representative of this approach is Habermas who in his *Between Facts and Norms* (1996) presumes that societies, in a learning process, graduate from tribal or lineage society to kingdom, to empire, to early modern state, until they finally reach the level of the fully modern constitutional and democratic state. In terms of legal practices this entails a 'learning process' beginning with a pre-modern magical or sacral understanding of social order and culminating in the realisation of positive, fully democratic constitutional law.

As in other domains, so in the domain of law, this view denies 'coevalness' (Fabian) to our contemporaries who take spirits to exist in and behind the world of physical appearance. It is as with modernity in Partha Chatterjee's account: 'When it encounters an impediment [i.e. people believing in spirits], it thinks it has encountered another time … something that belongs to the pre-modern. Such resistances to … modernity are therefore understood as coming out of humanity's past, something people should have left behind but somehow haven't." This conception of modernity is a normative one, based on a mythical conception of 'a time-space of epic proportions', a fact which is in plain contradiction with the enlightenment's claim to help us emerge from our 'self-induced immaturity' (Kant). The mythical time-space of the pre-modern serves only as a narrative device to through into relief the achievements of the moderns. 'The curious fact is that the negatively designated historical past could even be

found to coexist with the normatively constituted order of modern political life in a synchronous, if anomalous, time of the present.'

We want to avoid such modernist conceptions of 'nonsynchronism' (Bloch) and neglect the obligation to its dialectics. And just as we avoid relegating spirits and their believers to another age, we must also refrain from referring them to an ontological realm different from ours. Spirits for us, and for their believers, do not inhabit a world other than ours (*aloka*), i.e. they are not relegated to a world of transcendence, but they share with us the very world we live in (*manushya-loka*). Some of the spirits even have a jurisdiction bound to a particular territory.

As in the case of the Ewe, '"the physical" and "the spiritual" are completely entangled … in a sense, spirits and the spiritual are within, in the midst of, "the physical." In many respects, the spiritual and spirits are the powers that shape the course of things and make people act and think in the way they do.' The physical world and the spiritual world are on the same level. They are not perceived as belonging to two different spheres of reality, one immanent, one transcendent. Spirits administering justice are found across India and amongst diverse communities such as pre-Hindu, Jain, Buddhist, Hindu, Christian and Muslim. The pre-Hindu belief system of Dakshina Kanara includes the spirits of totem animals (wild boar, leopard), tragic human figures (one of them, *Ali bhuta*, a Muslim trader), royal figures (*rajya bhutas*), semi-gods (*daivas*) and gods (Manjunath).

Now, how does a spirit-based legal system work? A farmer who was accused of felling trees from the village commons fell from his tractor and broke his hip. He had to plant new trees to appease the daivas after which he recovered. A maid had stolen a golden necklace following which her little son fell ill. He recovered as soon as she had returned the necklace thereby appeasing the spirit with which all those were cursed who kept the necklace illegitimately.

Now, I will give an ideal-typical account of a society where humans have delegated all disciplinary powers to spirits:

In the event of an offence, the plaintiff goes to the accused and demands redress. If the accused does not respond, the plaintiff publicly warns her that she will take the matter to the spirit or deva. In the case of Golu Devta she utters the phrase ‘maat lagana’ (I will put a complaint on you). In the case of the Dharmadhikari of Dharmasthala she will call upon lord Manjunatha and utter the words ‘maatubida Manjunatha’ (Manjunath will judge the case). If the accused still does not respond, the plaintiff will file a petition with the spirit. At Golu Devta’s temple and in the caverns of Feroz Shah Kotla, believers put up written petitions, sometimes on government stamp paper. On the occasion of a *bhuta kola*, a night long séance where a spirit is impersonated by a medium, the petition is offered orally. In Dharmasthala the petitioner submits a complete file to the *dharmadhikari*.

Now, the accused knows that if she is rightfully accused she will have to face the wrath of the spirit. If some misfortune happens to her or to one of her near and dear one, she will attribute it as an action to the spirit. Eventually the rightfully accused will repay her debt to the plaintiff. In the case of Golu Devta this takes no more than twenty-one days. Veerendra Hegade of Dharmasthala told me that his cases may take several generations to get resolved as there is no prescription, but resolved they will be. Occasionally the perpetrator will have to publicly acknowledge her wrongdoing by sponsoring a ritual in which she apologises before the spirit, the plaintiff or the whole community. In Golu Devta's case this ritual is called *jāgar* . In case the complaint was false, the wrath of the spirit will be upon the plaintiff for contempt of court. In the case of Dharmasthala and the *bhuta kolas*, there is even a hierarchy of courts in which the *bhutas* of Dakshina Kanara recognise Manjunatha and the caretaker of his temple at Dharmasthala as court of appeal. In each case, the accused is brought to reason because she shares the belief in these sprits, which are known to be capable of inflicting great harm to herself and to her family.

Looking at the arms of the *bhutas* of Dakshina Kanara, we are reminded of the Christian doctrine of the two swords of justice. In the case of a transcendental religion like Christianity, the divine sword will be applied only in a time transcending our times. In the meantime, only the "temporal" sword is used by the "secular" authorities. In the case of the *bhutas*, matters are slightly different. Since the spirits share the same space and time with us, divine justice does not

have to wait for a time after times. It can be executed in this very day and age. Hence there is no need for worldly powers to wield the temporal sword *in lieu* of the heavenly sword of eternal justice. They can completely leave matters to the spirits. But is this a legal system at all?

According to H. L. A. Hart, a "legal system" arises the moment a system based on "primary rules of obligation" is supplemented by "secondary rules". The secondary rules "specify the ways in which the primary rules maybe conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." In other words, they circumscribe and institutionalise what Max Weber had called the 'staff' of people entrusted with the administration of justice.

Hart's secondary rules are:

(1) rules of recognition,
(2) rules of change,
(3) rules of adjudication, and
(4) rules empowering individuals or institutions to carry out tasks (1)-(4).

In the case of our ideal typical society with the spirit-based legal system, (1) is definitively missing, i.e. there is no code of law and no authority positively determining what should count as law. The laws are known to the members of this society as part of their "being in the world" (Heidegger). They inform their "lifeworld" (Habermas) and as such form the largely unconscious "background" (Wittgenstein) of all their actions. The rules are transmitted in the process of socialisation in which they are internalised as part of the process of forming a

"personality system" (Parsons). Personality system and cultural system correspond to each other like mirror images.

(2) is also missing. Nevertheless this society is not "static", but subject to the kind of change that Hart described as "slow process of growth." (Hart)

Our society can be said to have a legal order only in virtue of (3) and (4), i.e. it authorises a specific social institution (a spirit) or its representative (*dharmadhikari*) or its medium (in the case of *bhuta kolas* or *jāgars*) to determine, whether (and which) law has been broken and to administer justice.

The force exercised on the victim could be interpreted as psychological pressure with Max Weber, who categorically denies '… that *law* exists only where legal coercion is guaranteed by the political authority … A *legal order* [according Weber] exist[s] wherever coercive means, of a physical or psychological kind, are available; i.e., … wherever we find a consociation specifically dedicated to the purpose of *legal coercion*. The possession of such an apparatus for the exercise of physical coercion has not always been the monopoly of the political community. As far as psychological coercion is concerned, there is no such monopoly even today, as demonstrated by the importance of law guaranteed only by the church.' (Weber)

But for the believer, the psychological pressure is grounded in a real threat of physical sanctions, i.e. a disease or misfortune befalling the perpetrator or his

family. Depending on whether you believe in spirits or not, you would describe as real the threat itself or only the fear that it induces in the psyche of the believer. In any case you would have to acknowledge that the shared belief among the members of the stipulated society gives rise to the spirit as an efficacious social institution of justice. We therefore affirm that, although it lacks physical force (for the non-believer), a system based on spirits as justices can properly be called a legal system. But what is its significance for India and for the world at large?

While in India (and Africa) belief in spirits may be widespread, it is said that the world at large could not rely on something like a shared sacral or moral order backing the social world. The breakdown of the shared sacral-moral order in the time of reformation and religious war in Europe was precisely the reason why Christian natural law had to give way to rational natural and positive, man-made law. This process could not be reversed in the West. In India and many a postcolonial country, however, where belief in a sacral order has not broken down, there is no need to move blindly along the same path as Europe. In postcolonial contexts it may be worth appraising the merits and demerits of both legal traditions, positive and spiritual. There is no reason to presume that one is necessarily more rational that the other. For what could be more rational than refraining from physical force in the administration of justice?

II. In the second part of my paper, I will try to create a level playing field between spiritual and positive law so as to avoid the usual skew, which according to Upendra Baxi has us compare ‘normative models’ of the state legal system with ‘operative models’ of the non-state legal system. Comparing both systems at the operative level, one would have to say that there are merits and demerits to both, state and non-state law. Thus I will not compare spiritual and positive legal practices at the operative level, but I am going to compare the ideal typical conception of spiritual law as laid out in the previous pages with the idealising account of the modern constitutional and democratic state as set forth by theorists like John Rawls and Jürgen Habermas.

For both thinkers, the original reason for having a state administered and democratically legitimised law is the fact of the breakdown of the sacral-moral background consensus allegedly supporting social order prior to the age of reformation. This would also be their argument against the ideal typical example of our stipulated society which is based on spiritual law. As I will try to show in the following, both Rawls and Habermas admittedly have to presuppose a shared moral background consensus regarding equal citizenship, which however cannot itself be grounded in law. I show this by pointing to two paradoxes of the liberal democratic state.

1st paradox: Positive law therefore is the source of our first paradox, the *paradox of the “free market” society*. On the one hand, individuals are conceived of as

freed from moral obligations vis-à-vis each other. They are free to pursue their rational advantage. On the other hand they are conceived as committing themselves to contractual obligations. The ethics of *pacta sunt servanda* (agreements must be kept), a clause stemming from Roman canonical (Church) law, however, seems without moral base in the ethically neutralised space of the market. *Thus the market thus lives off a moral consensus that it cannot sustain by itself.*

2nd paradox: The *paradox of the liberal democratic state*. On the one hand, this state grants the greatest possible private autonomy to the individual as is compatible with an equal degree of autonomy for all. Within this liberal space individuals can chose their own way of life, religion and ethics. The state has to be neutral with respect to questions of the good life. On the other hand the same state, because it is democratic, is not sustainable if every individual retires into private life. It depends on individuals embracing a *republican ethos* where they set aside their selfish interests and collectively work for the common good. Its conception of justice has to be 'self-standing' and based on an 'overlapping consensus,' achieved only through 'public reason' (Rawls).

This paradox follows straight from the definition of law as a system of coercible norms. Since law only takes care of coercible behaviour, it cannot demand or enforce a moral attitude. This moral attitude is necessary, however, for law to perform its integrative function as an expression of democratic self-rule of and

by a people. Habermas tries to mend this problem by attributing a dual character to democratically engendered legal norms. They are legal norms to the extent that they are enforceable; they are attributed a moral character by Habermas to the extent that the process that engenders them requires the ethical commitment of the citizen to the common good and to the moral community of all citizens in the state: 'legal norms are at the same time but in different respects enforceable laws based on coercion and laws of freedom.' While democratically legitimate law is not based on moral principles; it does depend on morally justified procedures guaranteeing a fair outcome, 'For without religious or metaphysical support, the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational authors of those norms.' These moral principles have to be anchored in a moral community of citizens. Thus 'modern law lives off a solidarity concentrated in the value orientations of citizens' (ibid.), *which again it cannot produce out of and by itself*!

This solidarity issues from a communitarian lifeworld that capitalism and the modern state constantly undermine through their emphasis on private autonomy. Unacknowledged by theories of rational choice, a 'sense of justice' (Rawls) must be presupposed to have developed, which carries the burden of stabilising a society of egoists. It seems thus that the stabilization of a liberal democratic society is 'based not on the coercive force of law but on the socializing force of

a life under [sufficiently] just institutions.' (Habermas) Even the modern legal discourse, therefore, remains embedded in a larger ethical discourse from which it receives what it by itself cannot engender.

Thus the idea that modernity could do away with the ethical world of pre-modern times where moral, metaphysical and legal notions were amalgamated to the point of indistinguishability turns out to be just another self-mystification. In reality, modernity undoes one ethical world only to re-create another one on a different plain. In this respect, modern positive law is not very different from the spiritual law of our stipulated ideal typical society where the two paradoxes, that of capitalist society and the one of the liberal democratic state, do not arise in the first place.

In much of the postcolonial world; self-governing communities still exist outside the purview of the state and the law. We should not make the mistake in believing that these are all 'pre-modern' village communities. In India up to seventy percent of the urban populations live under illegal conditions, more that seventy percent of housing is constructed illegally, seventy percent of software used in India is illegal, around seventy percent of the labour market is organised outside the law.

It seems that the greatest part of the Indian economy thrives outside the law and does not require the assistance of modern state and positive law. Instead it rests on the capacity of business partners to secure informal but binding agreements

based on communicative action alone. This clearly falsifies Habermas' thesis that 'modern economic societies' can only be integrated with the help of positive law (Habermas) but it reinforces his emphasis on the life-world as a guarantor of a moral background consensus without which even the modern state and its law could not function. India's traditional and modern life-worlds are self-governed, of course, in a way that cannot be called democratic. But, as Habermas says, 'Every social interaction that comes about without the exercise of manifest violence can be understood as a solution to the problem of [coordinating human action].' (Habermas)

The *prima facie* legitimacy of such interactions, provided they do not rest on manifest violence, can therefore not be dismissed out of hand. They are self-determining at least in the sense that they have not been tempered with by an extraneous authoritarian power like the state, and where this power has to be dealt with, it is engaged with, re-negotiated and rendered porous by what appears as illegality from a state-centric perspective; 'porous legalities are often the only modes through which people can access and create avenues of participation in the new economy.' (Liang) They offer ways for 'people ordinarily left out of the imagination of modernity, technology and the global economy … of inserting themselves into these networks (ibid.). The state and its law is thereby re-liquefied and re-absorbed into the lava of the lifeworld from which it once emerged to 'organisationally outflank' the individual people (Mann).

Conclusion: We have seen how a spirit-based legal system ideal typically works, we have ascertained that it can legitimately be called a legal system, we have compared it on the level of ideal types with a system of positive law and we found that it is relying on a moral background consensus like the positive legal system, the only difference being that the background consensus supporting the spirit-based system is spiritual whereas the background consensus supporting the positive legal system is secular. This poses no problem as long as lifeworlds continue to be 'enchanted' and 'communicative action' is not 'cut loose from ties of sacred authorities and released from the bonds of archaic institutions,' as Habermas (1996: 26) would put it. However, as we have seen, Habermas would be mistaken in assuming that those lifeworlds are therefore not coeval, less 'modern', less 'internally differentiated or pluralised' (ibid.). Our ideal-typical scenario does not 'overtax the integrating capacity of communicative action', even if we look at it as a 'modern economic society' (ibid.). In Habermas' view, only 'small and relatively undifferentiated groups' are able to integrate by regulating behavior 'through strong archaic institutions.' (Habermas 1996: 25)

Our scenario clearly falsifies this view. It may rely on archaic institutions like spirits, but it is therefore not necessarily small and undifferentiated. And as we have seen, even a system based on positive law necessarily presupposes a shared moral background understanding as a precondition for its citizens to be able to engage in contracts (to eliminate the first paradox) and (to eliminate the second paradox) to support the republican ethos that is required for its democratic laws

to be more than the expression of a ‘modus vivendi’ (Rawls 1999) between differently powerful private interests. How ‘modern’ society is achieving this when it cannot rely on an overtaxed communicative action system is at least as mysterious as the juridical efficacy of spirits. Thus we can reply to the objection that spirits do not exist by questioning the existence of the republican ethos that is required for positive law to be legitimate, and whether democratic positive law is suited to overcome the persistent ‘legitimation crisis’ in late capitalism (Habermas). With the failure of ‘democratic’ positive law to make up for the legitimation crisis of neo-liberal-democratic society, we should consider dropping this paradigm altogether and instead take ‘postcolonial legality’ (Baxi) with its legal pluralism and paradigms of ‘porous law’ seriously; they offer ‘avenues of participation’ (Liang, Haritas) not previously conceivable in Western contexts and within the blinds of the modern ‘episteme’ (Foucault). Even though legal pluralism and porous legalities may be the paradigms followed in much of the postcolonial world, they may not be able to displace the normalised paradigms of western legal regimes in practice. But as far as the philosophy of law is concerned, the stable location of positive law as part of modern political theory stands shaken under the impact of really existing alternative legal modernities in most of the world.