



Butas and Daivas as Justices in Tulu Nadu: Implications for the Philosophy of Law

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Legal Diversity in India

All over India there are peculiar examples of dispute resolution where the responsibility for justice is completely delegated to spirits such as butas or daivas, devtas or jinns. This paper will show that a spirit-based justice system such as this is not necessarily tied to romantic and orientalist ideas of ancient society. When the paper compares a spirit-based justice system with a modern state-based legal system, it treats both as coeval.¹

The paper is thereby able to explore the implications of such a comparison for modern Political and Legal Philosophy. One of these implications is that it puts a question mark on the modern claim to an ethical neutrality of a law-based justice system. Both, the law-based justice system and the justice system based on the belief in spirits, are relying on a particular ethical background consensus—one spiritual, one secular. For the spirit-based system this poses no problem as long as lifeworlds continue to be enchanted and communicative action is not cut loose from ties of sacred authorities, or released from the bonds of archaic institutions.

Moreover, the continued existence of spirit-based justice systems in much of the post-colonial world falsifies the modernist view that only small and relatively undifferentiated groups are able to integrate by regulating behaviour through archaic religious institutions like spirits. With the failure of modern law to make up for the legitimation crisis of liberal-democratic societies, postcolonial legality with its archaic institutions, "legal diversity"², and paradigms of "porous legalities" (Liang 2005: 15) may offer new avenues of participation which were not con-



ceivable within the blinds of the modern episteme. These may not be able to displace the normalised paradigms of modern, secular law-based regimes in practice, but they do shake up their resting position within liberal political theory.

The literature on India's alternative (legal) modernities (Kaviraj 2000) abounds with examples of how communities or corporate groups settle their disputes outside the purview of the state and its courts. Although known and often maligned for such extremes as death sentences or honour killings ordered by "Khap panchayats" (Kattumana 2015) or "Devil's courts" (Headley 2015), conflict resolution outside the paradigm of state-sponsored (positive, man-made) law relies on accepted ways of disciplining and punishing by 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's claim to a monopoly on the legitimate use of force.

I will set aside this disturbing question and instead look at Indian examples of a widespread phenomenon: the self-regulation of communities by way of a spirit-based justice system. Although such a system could in the legal pluralism approach be described as a system of law, there are good methodological reasons not to do so. However, the spirit-based system and the law-based system reconnect on the level of principles of justice. On this level, the spirit-based system appears as an alternative to systems based purely on law, whether customary or statutory.

After a few methodological considerations, I will argue that these spirits are efficacious institutions of justice. To argue thus, I claim that we can leave aside the question whether these spirits are 'real' in the objective sense. It suffices to show that their existence is an intersubjectively shared reality for the believers. Such beliefs, as part of the social imaginary, are 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 1985: 16).

The paper compares the two systems—one spirit-based; one based on statutory law—on the level of ideal-types. I thereby avoid the asymmetrical comparison of an ideal system on one hand with an operational system on the other (Baxi 1982: 346). When comparing both systems on the level of ideas, it is apparent that one of them suffers from a major paradox which the other does not have to grapple with.



The paradox afflicting the state-sponsored legal regime 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 a system based on state-sponsored law purports to be able to do without appeals to an integrated morality of its citizens, the spirit-based system is said to be less suited to modern conditions of plurality precisely because it rests on the assumption that everyone shares the same belief. One of the staple claims of modernist theories of law (such as Habermas' 1996 theory) is that modern society cannot be integrated or stabilised based on spiritual beliefs that not everyone shares.

While this may be true for Western societies, the claim seems less obvious in the case of societies like India where, in spite of their (different) modernity³, people continue to believe in the force of supernatural beings like spirits and deities. To the modernist, 'premodern' societies (with the supposedly more uniform religious beliefs of their members) serve as examples of the allegedly lost unity of ancient times in which a self-standing conception of justice—independent of any controversial religious or secular belief and only based on an "overlapping consensus" between conflicting religious and secular world views (Rawls 1999)—was not yet required. India was highly diverse even before modernity set in and thus it had developed mechanisms for interreligious conviviality even prior to any process of secularisation. Belief in spirits is one such mechanism. This paper will show that the belief in their efficaciousness as mediators of justice is shared by members of all religious denominations in spite of their internal differences.

Some remarks on methodology

Anthropologists have raised interesting methodological questions with regard to the study of spirits (Espirito Santo 2013; Goslinga 2013; Meyer 2016; Scott 2013). As Birgit Meyer remarks in the African context, with respect to the spirits populating the world of the Ewe in Ghana, "Spirits [...] are not just there, as signs of a traditional past, but reproduced under modern conditions" (Meyer 2011: 88). This paper will show that in the Indian context, spirits appear and are reproduced under modern conditions, especially in judicial settings.

Another methodological trap that has been exposed in much of postcolonial literature is 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 process of "rationalisation", graduate from tribal or lineage society to kingdom, empire, and 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 (Habermas 1996: 137-44). As in other domains, and likewise in the domain of law, this view denies "coevalness" (Fabian 1983) to 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. (Chatterjee 2004: 5)

This conception of modernity is a normative one, based on a mythical notion of "a time space of epic proportions" (Chatterjee 2011: 1), a fact which is in plain contradiction with the Enlightenment's claim to help us emerge from our "self-induced immaturity" (Kant 1784: 481). The mythical time-space of the pre-modern serves only as a narrative device to throw into sharp 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" (Chatterjee 2011: 1).

This paper seeks to avoid such modernist "nonsynchronism" (Un-gleichzeitigkeit, Bloch 1977) and neglects the obligation to its dialectics. And just as it refuses to relegate spirits and their believers to another age, it also refrains from relegating spirits to an ontological realm different from ours. Spirits, for their believers and for the purposes of this paper, do not inhabit a world other than ours, i.e. they are not relegated to a world of transcendence, but they share with us the very world we live in (Meyer 2011: 97). Some of the spirits, like our butas and daivas, even have a jurisdiction bound to a particular territory. The physical world and the spiritual world are on the same level. They are not perceived as belonging to two different ontological dimensions, one immanent, one transcendent. It is rather that their immanence is concealed and may only be brought to light by imper-



sonators through special ritual performances (kola, nema, jagar) where the body of a medium gets possessed by a particular spirit.

How does a spirit-based justice system work?

The belief in spirits as administering justice is found across India and amongst diverse religious communities—Animist, Jain, Buddhist, Hindu, Christian, and Muslim. The Animistic belief system of Tulu Naḍu⁴ includes the spirits of wild animals such as the wild boar buta Panjurli (Brückner 1995: 113-4), the tiger buta Pili (ibid.: 201), the Gaur buta Maisandaya (ibid.: 201), the snake buta Naga Bemmeru (ibid.: 181-97); ferocious, bloodsucking spirits like Guḷiga and Cauṇḍi (Upadhyaya 1996: 203); tragic human figures like Maindalu or 'Mayndala' (Claus 1979: 42-5), the two warriors Koti and Chennaya (Claus 1978a: 7-9; 1978b: 35-7), the two hunters Kari and Kabila (Gowda 1986: 267), the Siri sisters and Kumar (Claus 1975, 1978a, 1978b, 1979: 36-42), the stone mason Kalkuḍa and his sister Kallurṭi (Claus 1978b: 32-3), two shipwrecked Muslim traders Bobbariya (Brückner 1995: 32) and Ali buta (Hikosaka 1991: 566); royal figures or 'rajan daivas' like Jumadi (Brückner 1987), Dhumavati (Brückner & Poti 1992), Malaraya (Brückner & Rai 2015) and Balavaṇḍi (Ishii 2012; 2013; 2015); and devas like Ullalṭhi (Suzuki 2008).

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Some work has been done on the Himalayan gods of justice such as Bhairav, Golu Devta, and Poku Devta (Fanger 1990; Malik 2009; 2015; Sax 2009; Sax & Basu 2015; Baindur 2015). A dissertation on the petitioning of jinns at Feroz Shah Kotla in Delhi has recently been completed at Columbia University (Taneja 2012; 2013a&b).⁵ Additionally, some remarks on the judicial aspects of the butas and daivas of coastal Karnataka can be found in multiple works (Carrin 1999; Carrin & Tambs-Lyche 2003; Claus 1973; 1978a; 1978b; 1979; 1986, 1989; 1991; Brückner 1987; Ishii 2013; 2015; Someshwar 1986; Suzuki 2008). But no comprehensive work exists so far on the spirit-based justice system of Tulu Nadu (Karnataka), not to speak of the institution of the dharmadhikari of Dharmasthala, even though his pre-eminence was recognised even by the colonial state.

In this paper, I would like to create an ideal-typical picture of how a spirit-based justice system could work, based on the literature and on field work carried out in this region while I was a guest faculty at the Manipal Centre for Philosophy and Humanities (MCPH) between July 2014 and May 2016. This will allow me to compare on a theoretical level the law-based justice system proposed by western legal philo-



sophy with a spirit-based justice system abstracted from the available anthropological evidence. The latter need not qualify as a "system", much less a "legal system", as there is hardly any explicit reference to (unwritten) legal norms coming from the field.

The spirit-based justice system, of course, has to be seen in interaction with the state-sponsored legal system, which it sometimes mimics, sometimes shuns. Examples of the former are the written petitions, preferably on government stamp paper, used in Golu Devta's temple in Chitai (Uttarakhand) (Baindur 2015) or in addressing the jinns of Feroz Shah Kotla in Delhi (Taneja 2012, 2013a&b). An example of the latter kind has emerged from our field work. Other legal anthropologists have found many more examples of non-state legal practices protecting their autonomy from state interference by compelling their members to stay away from state courts (some of them mentioned in Baxi 1982).

There is reason to believe that in its present form the spirit-based justice system of Tulu Naḍu is a modern phenomenon. Its current importance may point to the dethronement of the landlords by the postcolonial state in the course of the land reforms of the 1970s (Carrin & Tambs-Lyche 2003: 5). Since the secular court system of the independent Indian state has taken over the judicial function of the landlords who formerly used to adjudicate borrowing their authority from the spirits (Claus 1973; 1975; 1978a&b; 1979; 1986; 1989; 1991), it is now the spirits themselves who adjudicate. Thus, in a way, the existence of the modern Indian state amplifies the significance of the spirit-based justice system of Tulu Naḍu.

Let us look at one particular case that was adjudicated by a daiva in Kasargod. This case is about the direct confrontation of the two justice systems, the spirit-based and the law-based. The paper uses evidence gathered on a field trip on the occasion of the spring fertility ritual (keddasa) of Kodlamogaru Village, Kasargod district, north Kerala, from 9-11 February 2016. The field trip was organised as part of a course in Legal Anthropology that I taught at MCPH in the Spring Term of 2016. Its participants included six MA students, two PhD students and one other colleague. Among them were several Kannada speakers, one Tulu speaker and one Malayalam speaker, the three principal languages spoken in the region. Interviews usually took place in groups consisting of several interviewees and several interviewers.

The interview from which I will quote below was taken on 10 February 2016. We were interviewing the brother and the cousins of the



pambada (impersonator) Lakshman Yane Kantha and the patri (oracle) Shekhar. Asked if they remembered any judicial cases that butas had solved in the past couple of years, they came up with the following account.

In May 2014, the Supreme Court of India had banned cockfighting under the Prevention of Cruelty to Animals Act. Traditionally cockfights take place at the occasion of kolas and nemas. In December 2014, the police raided the cock fight taking place at the occasion of the nema.

Once during a nema a police team arrived and tried to stop the cock-fight. Angered by the police intervention the villagers hit the police. Some policemen got injured. The police called for reinforcements and arrested around twenty five members of the village. A case was filed against each of them and the matter went to the court. Meanwhile the villagers invoked the spirit of their daiva and pleaded to him that their action was a kind of reaction to the police's unjust intervention into the realm of faith. The daiva promised the villagers to take care of the matter and to teach the police a lesson. Within some time one of the police officers who had arrested the villagers lost one of his arms and another lost one of his legs. Following this the police decided to settle the matter and withdraw the cases from court. As a mark of sin-cleansing the police department donated eight grams of gold to the shrine.

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Much can be inferred from this example regarding the legitimacy in the eyes of the people of the spirit-based justice regime as opposed to the state-sponsored juridical system. I have dealt with this elsewhere (Dusche 2016). Instead I would like to engage with the methodological question of how to make sense of the efficacy (Sax et al. 2010) of the spirit-based justice regime without having to subscribe to magical beliefs in the way of a "religious science" (Scott 2013). I would prefer to take an agnostic stance comparable to the one argued for by Birgit Meyer, i.e. one that suspends the belief in magic but does not foreclose the possibility of the "wow" (Meyer 2016).

Thus for methodological, and not for principled reasons, we rule out the possibility of magic done through supernatural beings, and therefore suspend our belief in the story that the daiva, at the instigation of the villagers, caused the two policemen to lose a hand and a leg respectively. The two policemen may have lost their limbs in accidents that were not in any way related to what they were doing to the villagers of Kodlamogaru. Nevertheless, this paper will argue that we can speak of the daiva's justice regime as efficacious.



The rituals associated with spirit worship in Tulu Naḍu are far from empty. They are not, as the scientific view would have it, lacking reason in regard to means-end relations (Habermas 1985: 15). The rites surrounding butas and daivas are also not merely "ends in themselves" (Quack 2010: 180), but follow a rationality of purpose, at least in the social dimension in which they are efficacious. I do not agree with Quack that "belief in causal consequences [...] is a secondary quality of ritualized actions" (2010: 184), but I do agree with him that ritual efficacy "does not depend on whether or not the action is ritualized" (2010: 183).

Of course, given our methodological scepticism, there cannot be any direct causal link between a spirit and a severed limb. Thus imploring the daiva to 'teach the police a lesson' is a meaningless act if taken at face value. But there 'is' a relation between the 'belief' of the villagers in the daiva's existence, the 'belief' of the policemen in the daiva as having caused the loss of their limbs, and the desired end result to 'teach them a lesson'. The 'lesson' was effectively delivered, not in the way it is depicted in the story if taken at face value, but due to the fact that the 'beliefs' shared by villagers and policemen alike effectuate the desired response from the policemen, i.e. prisoners are released and the cases against them withdrawn, and the likelihood of the same policemen raiding any cock fight in the near future is considerably reduced.

However, the success of the ritual activity of the villagers did not depend on the exact correspondence between their ritual actions and some ritual script. The success was already guaranteed in advance by the mere fact of the fear of the daiva shared by the villagers and the policemen. The performance of the ritual only helped participants to convince themselves again of his existence and power. If the policemen hadn't been staunch believers all along, they would not have causally attributed to the daiva the accidents that happened to them. Hence they would have had no reason to abide by the desire of the villagers to be left alone by the state, its law and its law enforcers. But since they *were* fellow believers, they accepted implication in what can only be described as a perversion of the course of justice (from the state legal perspective).

Arguably, the efficacy of the spirit-based justice regime is not any more wonderful than the belief in any other social institution whose existence rests on nothing but the shared beliefs of its participants. The state itself and its laws are such institutions. The state ultimately



exists only for those who share the belief in its ability or right to exist, and its legal regime is efficacious only to the extent that people share a belief in its legitimacy and efficacy. And just as nobody can be forced to believe in the existence of a daiva, nobody can be forced to believe in the legitimacy of the state and its legal regime. The villagers of Tulu Naḍu and their policemen may not deny the existence of the state and its laws, but they have proved that they do not believe in its legitimacy when it comes to their way of life, of which the cock fights are a prime example.

Perlocutionary efficacy of ritual performances

There have been attempts to explain the efficacy of rituals in general, and of rituals pertaining to justice in particular, in terms of "performativity", a notion that is tied to the concept of the "illocutionary" and "perlocutionary force" attributed to utterances and performances. Thus Peter J. Claus refers to John L. Austin (1962) for an understanding of "how to do things with words", i.e. for an understanding of how language (in the broadest sense, which includes ritual performances) can be used not only to refer to things and states of affairs in the objective world, or "represent" them (Asad 1993: 78-9) but to bring about states of affairs in the social world. Here I am drawing on Piaget's differentiation of three worlds that also underlies Habermas' three-tier ontology, i.e. the objective (physical) world, the intersubjective (social) world, and the subjective (psychological) world (Habermas 1985: 69-70).

In our case, the believer's illocutionary intention is directed at the daiva whereas the perlocutionary effects involve the police whom he is supposed 'to teach a lesson'. In the end the lesson is successfully delivered and the police bows to the spirit of justice. This perlocutionary effect was intended, but not as a direct consequence of the speech act (or ritual performance) addressed to the daiva. At most, it was intended as an indirect consequence of this communicative act, mediated by the spirit.

For the believer, this is a successful realisation of his illocutionary intention: he implored the daiva 'to teach them a lesson' and the daiva taught them a lesson. For us, however, with our suspended belief in the daiva, the consequences are to be analysed as unintended perlocutionary effects coming about due to the coincidence of the beliefs in, and fear of, the spirit of justice, shared by villagers and police alike.



Thus in our analysis, an intended illocutionary consequence turns into an unintended perlocutionary consequence.

Applied to our example this would yield the following analysis: When believers of the daiva call on him, or perform a ritual, with the illocutionary intention to petition him to do something about their plight, the illocutionary intention of the performance may come to nothing (for us, because we have suspended our belief in butas and daivas). But the unintended perlocutionary effect may be a consequence that is equivalent or even identical to the intended illocutionary result. I shall call this form of efficacy "perlocutionary efficacy". Within our three-tier ontology, however, perlocutionary efficacy is restricted only to the social world.

As perlocutionary efficacy is a common human experience, in all likelihood the very idea of magic is modelled on it. Just like the appropriate person can say 'hereby I declare you husband and wife' and thereby bring about the social fact of a marriage, the shaman wants to say 'hereby it rains' and it rains. By speaking the correct formula or by following a particular ritual in the right way, the performance is believed to be efficacious in a manner similar to a speech act's performative efficacy in the social world. The only difference with magic is that it attempts to be efficacious in the objective world. The idea of magic is incompatible with our methodological scepticism, but the concept of perlocutionary efficacy is not. There is nothing irrational therefore in attributing efficacious judicial powers to spirits in the social domain even when we ourselves may not believe in their existence in the physical domain. For them to really exist in the social domain it is sufficient that the members of that particular society 'believe' that they do.

Perlocutionary efficacy is not only sustaining the justice system but the entire social order of the village. At every kola or nema the whole village is engaged in the preparation and the execution of the ritual. Nobody is a mere spectator. The performance revolves around the spirit, but the work for its preparation and execution itself is a performance with its own ritual efficacy. By engaging every caste and religious group of the village, including the Brahmins and the Muslims, it naturalises the social order of the village by making it tangible. In Kodlamogaru, all fourteen communities of the village have a particular role to play. By embodying those roles in their ritual activities, the villagers make those roles appear to be natural and necessary, thereby reproducing and re-enacting the moral order that they represent in a



drama called keddasa. They are performers and at the same time co-authors of the great drama called keddasa. This would be irrational if this drama were fictitious. A fictitious character can't also be a real author. But this is a real drama.

Thus, the performance of a kola or nema can be called efficacious not only in the sense of maintaining justice. It is effective also in making tangible the moral and social order of the community and presenting again the collective memory of shared social and political history. In the case at hand this collective memory includes an account of how a Jain family that was ruling the area was ousted because they were not prepared to pay tribute to the daiva. Their sixteen children were blown into the Netravati River and killed, which led to the establishment of the present Bunt family in the Kodlamogaru House.⁶

Can the spirit-based justice system be called a 'legal system'?

Abstracting from this example and taking into account the several examples described in the literature, we are now in a position to generate an ideal-typical account of a society operating within a spirit-based justice system. In such a society, humans have delegated disciplinary powers to spirits. In the event of an offence, the plaintiff demands redress from the accused. If the accused does not respond, the plaintiff publicly warns him that he will take the matter to the spirit of justice. If the accused still does not respond, the plaintiff will file a petition with the spirit. Now the accused knows that if s/he is rightfully accused s/he will have to face the wrath of the spirit. If some misfortune happens to her/him or to one of her/his kin, s/he will attribute it to the spirit's doing. Eventually the rightfully accused will repay her/his debt to the plaintiff. Occasionally the perpetrator will have to publicly acknowledge her/his wrongdoing by sponsoring a ritual in which s/he apologises before the spirit and/or the whole community.⁷ In each case, the accused is brought to reason because s/he shares the belief in the spirit, which is known to be capable of inflicting great harm to her/him and to her/his family. In case the complaint proves to be false, the wrath of the spirit will be upon the plaintiff.

Looking at the swords (kaḍtale) of the butas of Tulu Nadu, one is 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 butas of Tuļu Naðu, matters stand slightly differently. Since spirits share time and space with mortals 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 can this be described as a legal system at all? I would argue that it could but, for methodological reasons, that it should not.

According to H. L. A. Hart (1961), 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 may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" (Hart 1961: 94-5). In other words, they circumscribe and institutionalise what Max Weber (1968: 34) had called the "staff" of people entrusted with the administration of justice.

Hart's secondary rules are of four types. We need evidence of at least one type of rules for our spirit-based justice system to count as a legal system.

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

In the case of our ideal-typical society with the spirit-based justice system, (1) is definitively missing, i.e. there is no code of law and no authority positively determining what should count as law. (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 1961: 92). Our society can be said to have a "legal order" only by virtue of (3) and (4), i.e. it authorises a specific social institution (a spirit embodied in a mortal) to determine whether (and which) law has been broken and to administer justice. It can therefore be affirmed that a system based on spirits as justices could be called a legal system.

For methodological reasons, I would still prefer not to call the spirit-based justice system a legal system. Agreeing with Fabian that "ethnography loses objectivity to the extent that it counteracts communicative exchange and permits 'analytical' formalizations to



prevail over a discursive, interpretive stance" (1979: 1), we should not allow a legal discourse to prevail over a justice discourse when it is not warranted by the communicative exchange with the research subjects. At least in our experience, references to law are not coming from the field, but would have to be superimposed. While I have no doubt that the intuitive sense of justice shared by spirit impersonator and villagers could be reconstructed in terms of a system of (legal) norms, I abstain from it since explicit reference to (legal) norms is hardly ever forthcoming from the participants of the ritual. While in the state-based system the idea is to achieve justice via the mediation of law, the spirit-based system attempts to achieve justice by incorporating principles of justice into the setup of the ritual. I prefer, therefore, to speak of a 'justice system' rather than a 'legal system'.

Theories of justice attempt to stimulate our sense of justice by way of thought experiments. Famous examples are the 'state of nature', the 'categorical imperative', the 'original position', or the 'ideal discourse situation'. The spirit-based justice system employs a similar strategy by incorporating principles of justice into the ritual practice itself. While philosophical thought experiments attempt to put the reflecting subject into the position of the least advantaged as a yardstick against which to measure one's intuitions about justice⁸, the practice of the kolas and nemas is to actually have those in the least favoured position adjudicate. After all, the Pambadas and Nalikes of Tulu Nadu represent communities at the bottom of the social scale. It is through their mouth that the spirit pronounces justice. While a lot of ink has been spilled to attempt to show that the impersonator's judgements could not possibly be independent of the powerful who hire them for their nemas, it remains true that their credibility within an entire community rests on the maintenance of a degree of independence so that a "veiled criticism" of those in power is possible, and even very likely: "[The impersonator] must speak like a 'bhuta', not like a partisan to human conflict" (Carrin & Tambs-Lyche 2003: 30, italics in the original). This was confirmed by our field work.

Implications for the Philosophy of Law

The 'court case' that emerged from our field work is an example of the resistance put up by traditional communities against the intrusion of the state-based legal system. One way to look at it is to take it as proof for a resilient lifeworld that resists attempts at colonisation by the modern state (Habermas 1989).⁹ It reveals how India's lifeworlds



still retain an astounding capacity for self-organisation outside the paradigm of state and state-administered law. Therefore, non-state practices should not be dismissed out of hand as things to be overcome by an uncritically idealised modernity, but something to be engaged with at a par with the practices of the modern state.

However, in this paper I am not comparing spirit-based and law-based practices at the operative level. Instead I am comparing the ideal-typical spirit-based model with the ideal-theoretical model of the constitutional democratic state as presented by theorists like John Rawls (1995, 1997, 1999) and Jürgen Habermas (1985, 1988, 1996). For both thinkers, the original reason for having a state-administered and democratically legitimised law is the historical fact of the breakdown of the sacral-moral background consensus that supported the social order prior to the age of reformation. This would also be their argument against the viability of the ideal-typical example of a spirit-based justice system in an allegedly secularising world. However, both these theses do not apply to much of the post-colonial world, especially India. For one, India never experienced a breakdown of its sacral-moral order comparable to the turmoil of the religious wars in early modern Europe. Secondly, the secularisation thesis as promulgated by the fathers of modern sociology has proved fallacious in most of the world outside Europe, which continues to be staunchly religious in spite of its (different) modernity (Casanova 1994).

In Europe, after the breakdown of the medieval Christian order in the religious wars of the sixteenth and seventeenth centuries and in the Enlightenment period that followed, the idea of Christian natural law was slowly replaced by so-called 'rational' natural law. 'Reason' allegedly took the place previously occupied by the sacral-moral order, which conversely comes to be seen as insufficiently reasonable. Liberal contract theories opened the space for a new idea of the social based on 'rational' state craft and individual liberty. In fact, the two levels, state law and individual liberty, unhinged the sacral-moral order on which the social life of traditional communities rested. Self-governing "moral communities" (Thompson 1991) had to give way to a state-sponsored "ethically neutralised domain" (Habermas 1996: 225) where individuals were encouraged to pursue their 'rational' advantage, limited only by the idea that the freedom of one should not impinge upon the freedom of another. Modern law thereby created a morally neutralised space where capitalism could flourish.



Thus goes the 'rationalisation'-thesis underlying the conception of modern law from Weber to Habermas. It obviously does not apply to India, but does it even apply to Europe? Or does it turn out to be a convenient self-mystification of a process that lures the individual out of his/her protective communitarian shelter with the promise of unlimited gains in material and goods and liberties? The confrontation with the ideal-typical example of a spirit-based justice system, widespread as it is in post-colonial countries like India, helps us to step out of the eschatological enthrallment of the liberal-democratic philosophy of law and gain a more sober perspective on what is going on.

According to the liberal-democratic lore, individuals are to be conceived as freed from moral concerns, only pursuing their rational advantage. On the other hand they are conceived as committing themselves to contractual obligations.¹⁰ However, the ethics of *pacta sunt servanda* (agreements must be kept), ironically a clause stemming from Roman canonical (Church) law, would be without moral base in the morally neutralised sphere of the capitalist market if it weren't for a moral background consensus off which the capitalist market constantly lives without being able to sustain it. And not only does the capitalist market fail to sustain the moral background consensus that is constitutive of its own modus operandi (contract law), it constantly undermines it with the false promise of unlimited gains, 'freed' of social and environmental burdens.

This paradox also applies to the ideology of the citizen in the liberal-democratic state, which is based on another kind of contract, the contract between citizens (social contract) and the contract between the citizen and the state (political contract) whose sovereignty, according to the liberal-democratic lore, rests on the citizenry taken together. On one hand, this state grants the greatest possible private autonomy to the individual citizen as is compatible with an equal degree of autonomy for all. Within this liberal space, individuals can choose their way of life, their religion and ethics. 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 civic ethos where they set aside their selfish interests and collectively work for the common good. This civic ethos is, however, constantly undermined by the very idea of the private person to which every other person becomes a hostile intruder into a self-referentially defined sphere of liberty. The rights-bearing private person, cut loose from all communal ties, therefore becomes all the more dependent on the state with which he coalesces against all others as a guarantor of his rights. The



idea that at the same time he should coalesce with all others in order to collectively set limits to that state and to determine its laws and policies creates a well-known tension in the liberal-democratic framework.

According to liberal-democratic legal philosophy, law can only take 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 (1996) 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 moral commitment of the citizen to the common good and to the moral community of all citizens in the state (ibid.: 29). While democratically legitimate law, according to Habermas, 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. (ibid.: 33)

With the increasing distance of the average citizen from any semblance of collective rule-making, norm-setting, or law-making, and with the increasing diffusion of democratic sovereignty in non-transparent global public-private networks of power, the hope that Habermas pins on popular sovereignty as a moral basis for the liberal-democratic state seems hopelessly misplaced. The idea of popular sovereignty no longer can, if it ever could, play the role of an anchor of a moral community of citizens since most of the laws and policies by which these citizens have to live today are generated in democratically not legitimised supranational institutions and elite networks. Thus, modern law lives off solidarity concentrated in the value orientations of citizens which again it cannot reproduce by itself. Not only does modern law fail to sustain the moral background consensus that is constitutive of its own modus operandi (civic ethos), it constantly undermines it with the unsustainable promise of unlimited gains in private 'autonomy'.

It seems thus that the stabilisation 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" (ibid.: 58). Even the modern legal discourse, therefore, remains embedded in a larger moral discourse from which it receives what it cannot engender. However, the solidarity issuing from a communitarian lifeworld that capitalism and the modern state constantly undermine through their emphasis on private autonomy remains unacknowledged by theories of rational choice. Instead, a "sense of justice" (Rawls 1999) must be presupposed to have developed, which carries the burden of stabilising a society of egoists. Thus the idea that modernity could do away with the morally integrated world of pre-modern times, where moral, spiritual and legal notions were amalgamated to the point of indistinguishability, turns out to be just another self-mystification. In reality, modernity undoes one moral world ("moral economy", Thompson 1991) of small scale communities, only to re-create another one on a national plain, and again only to undo this one too, without, however, this time helping to create another one on a global level.

Under these circumstances, the idea of popular sovereignty and co-authorship of legal norms upheld by Habermas (1988) only helps to obscure the continuing "legitimation crisis" of the modern state under conditions of a globalised neo-liberal economy which has reduced the scope of democratic politics to that of a 'market-compliant democracy'. And since the modern state in Europe by its very efficiency has erased any remnants of self-governing communities, there is no option outside the purview of the state to fall back upon. In much of the post-colonial world, however, such communities do exist, and in abundance.

We should not make the mistake of thinking that these are all 'pre-modern' village communities. In India for example up to seventy percent of urban populations live under conditions which would have to be termed 'illegal' if seen from the state-legal perspective. More than seventy percent of housing is constructed 'illegally', seventy percent of the software used in India is 'illegal', and around seventy percent of the labour market is organised outside the law (Liang 2005: 6).¹¹ The National Commission for Enterprises in the Unorganised Sector in their 2007 Report on the Conditions of Work and Promotion of Livelihoods in the Unorganised Sector states that the universe of informal workers constitutes 93 percent of the total workforce.¹²

It seems therefore that the greatest part of the Indian economy thrives outside the law. It is doubtful to what extent it benefits from the assistance of existing state-legal institutions or policies. More often than on inefficient state courts it seems to rest on the capacity of



partners to secure informal, but binding agreements based on communicative action alone, enforced, if need be, by 'illegal' means. This clearly falsifies Habermas' thesis that "modern economic societies" can only be integrated with the help of "positive law" (Habermas 1996: 25) but it reinforces his emphasis on the lifeworld as a guarantor of a moral background consensus without which, as we have seen, even the modern state and its law could not function.

India's traditional, and simultaneously modern, life-worlds are self-governed, of course, in a way that cannot always be called democratic. But "[e]very social interaction that comes about without the exercise of manifest violence can be understood as a solution to the problem of [coordinating human action]" as Habermas rightly says (1996: 17). The prima facie legitimacy of such interactions, provided they do not rest on manifest violence, cannot, therefore, 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 force like the state, and where this force has to be dealt with, it is engaged with, re-negotiated and rendered porous by what appears as illegality from a state-centric perspective. 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" (Mann 1986 vol. I: 7) the people.

Conclusion

We have seen how a spirit-based justice system ideal-typically works. We have ascertained that it could legitimately be called a legal system, but opted for calling it a justice system. We have compared it on the level of ideal-types with a system of state-sponsored law. And we have found that it is relying on a moral background consensus just like the state-sponsored legal system; the only difference is that the background consensus supporting the spirit-based system is spiritual, whereas the background consensus supporting the state-sponsored 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) put it. However, as we have seen, Habermas would be mistaken in assuming that those lifeworlds are therefore not coeval, that they would be less modern, or less internally differentiated or plural (ibid.). Our ideal-typical scenario does not "overtax the integrating capacity of communicative action", even if we look at India as a "modern economic society" (ibid.). In Habermas'



view, only "small and relatively undifferentiated groups" are able to integrate by regulating behaviour "through strong archaic institutions" (ibid.: 25). Our scenario clearly falsifies this view.

The spirit-based system may rely on archaic institutions like spirits, but it is therefore not small and undifferentiated. And as we have seen, even a state-based justice system presupposes a shared moral background understanding as a precondition for its citizens to be able to engage in contracts and to support the civic ethos that is required for its democratic laws to be more than the expression of a *modus vivendi* 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 civic ethos that is required for the state-based justice system to exist.

With the failure of liberal-democratic law to make up for the legitimization crisis of neo-liberal-democratic societies, we should consider dropping this paradigm altogether and instead look at "post-colonial legality" (Baxi 2000) with its legal diversity and paradigms of "porous law". They may offer "avenues of participation" (Liang 2005; Haritas 2015) previously not conceivable in Western contexts and within the blinds of the modern episteme. Even though legal diversity 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—is shaken under the impact of previously existing alternative legal modernities in most of the world.

Endnotes

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² 'Diversity' or 'plurality' is to be distinguished from 'pluralism'; "while Plurality is an ineliminable and elementary social fact, pluralism is a matter of belief and construct" (Baxi 2015: 1). In the



following paper, I will therefore avoid the term 'legal pluralism' and instead speak of 'legal diversity'.

³ I am following here the 'multiple modernities' approach developed by Eisenstadt (1998; 2000) and others in two special issues of *Daedalus*.

⁴ 'Tulu Nadu' refers to the Tulu-speaking areas of the region that stretches from the Arabian Sea in the West to the Western Ghats in the East and from Kundapur in the North to Kasargod in the South. My use of the term is not suggestive of any ethnic nationalism. Tulu speakers make up about half of the population of that region.

⁵ See also my own, as yet unpublished, material from a field visit undertaken on 11.06.2015.

⁶ Cf. the paḍḍana of Malaraya retold in Kannada by the patri Shekhar Shetty on 9 February 2016.

⁷ In Golu Devta's case this ritual is called jagar (Fanger 1990; Baidur 2015). In Tulu Nadu an expensive dharma nema is called for or at least a donation to the spirit's shrine. On the occasion of the keddasa that we attended some eighteen grams of gold had been donated. There is even a hierarchical ordering of courts in which the butas as justices divide up the labour amongst themselves (Someshwar 1986) and recognise Dharmasthala as ultimate court of appeal (Carrin & Tambs-Lyche 2003: 33). Interestingly, as we found out in Kodlamogaru, while the royal daivas are highest in feudal rank, it is the lower, autochthonous spirits to which people attribute greater supernatural powers: "If the prayers of the devotees are not answered by the royal daiva, they go to a more powerful buta like Pili-Chamunḍi or Kallurṭi. Usually disputes are also transferred to more powerful spirits in case the matter cannot be solved at the shrine of the daiva. This doesn't mean that the daiva has failed. All it means is that for a dispute to be solved or for the wish to be fulfilled, higher spiritual power is required" (interview with the cousins of Lakshman Yane Kanta conducted on 10 February 2016). Royal daivas like Malaraya or other forms of Jumadi have migrated into the region while spirits like Pili-Chamunḍi or Kallurṭi are native to it. We can thus observe here the same inversion of the social hierarchy as among humans where the highest spiritual power is attributed to the lowest in social rank such as the Nalike, Parava or Pambada communities who perform as spirit-impersonators. This fact points to a Dravidian religious system quite different from the Brahminical one of North India (Claus 1978a&b). Even the Dravidian notion of purity is quite different from the Brahminical notion (Ishii 2015).

⁸ Remember John Rawls' (1971) 'original position' which forces the reflecting subject behind the 'veil of ignorance' to recon with the possibility to find himself in the position of the worst of society.

⁹ Habermas' thesis is that in the course of modernisation the social subsystems of market and state, by way of their steering media, money, and power, develop '*irresistible inner dynamics* that bring about [...] the colonization of the lifeworld' (1989: 331; italics in the original).

¹⁰ For I am indebted to Akeel Bilgrami for a discussion on this point at the Seminar on Rethinking Svaraj held at MCPH on 15-17/01/2015.

¹¹ See also Chandrasekhar, C. P. 2014. India's informal economy. *The Hindu*, 3 Sept., <http://www.thehindu.com/opinion/columns/Chandrasekhar/indias-informal-economy/article6375902.ece> [retrieved 24.11.15].

¹² NCEUS. 2007. *Conditions of work and promotion of livelihoods in the unorganised sector*; http://nceuis.nic.in/condition_of_workers_sep_2007.pdf [retrieved 27.02.16].

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