

## The Limits of Indigeneity: Speculative Inspirations from Upendra Baxi

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In 2019, when some of us conceived the *Jindal Law and Humanities Review*, we reached out to Professor Baxi for a contribution. He had presented a paper on the controversial judgment in *Milirrpum v Nabalco* [(1971) 17 FLR 141] to the Australian Law Teacher's Conference in Hobart in 1972, and we wanted to publish it as a time capsule containing the early seeds of what today has become a complicated — and, at times cluttered — interface between indigenous thought and modern law. While the original piece was called “The Lost Dreamtime”, the 2020 issue finally carried it as “The Dreaming, Never to Be Lost.” The shift from *Dreamtime* to *Dreaming* underscored Indigenous epistemologies' untruncated, enduring character. Perhaps it signalled a greater willingness to embrace concepts that First Nation scholars had developed themselves instead of imposing our theories on them. By verbing the potpourri of creation stories, mythologies, and philosophies that construct Indigenous lifeworlds, we were attempting to put the law on reparative terms with the systems of thinking it had exterminated in the name of terra nullius.

This semantic gambit was also an invitation to think of indigenous politics as an active space of contestation: a discourse that was not trapped in 1972 and, by no means, in a primordial state of nature. Professor Baxi's comments in chapters 4 and 5 of the book, *Of Law and Life*, similarly highlight the ongoing nature of the struggle to find an aperture for indigeneity among the closures quilted by the state, market, and law. I have very little to add to these already incisive ideas, except to frame them as placeholders for the uneasy mismatch between contemporary indigenous politics and its legal offshoots.

The coming sections first grapple with the distorted production of a juristic personality in international law and then ponder the perils it holds for India. Not all avowals of indigeneity require the aid of law. This eclectic identity rests on situationally variegated arrangements of rights, legality, and social linkages, some of which may strive to bypass law altogether. Although such open-endedness may have been beneficial for Indigenous resistances in Australia and the Americas, I am not entirely sure about its appositeness in India.

### International Law and the Impossibility of Objectivity

Professor Baxi rightly notes that *Milirrpum* was not a wholesale rejection of indigenous legality. In Justice Blackburn's opinion, a sacred covenant with one's place of dwelling was law of a different kind. But modern property rights must constitute the ability to possess, use, and alienate. Indigenous land lacks the third element inasmuch as it is not merely a legal fiction but the source of law itself. Due to this inalienability, Justice Blackburn denied the litigants their claims over their homeland. Though *Milirrpum* has now been overturned by *Mabo (No 2)* [(1992) 175 CLR 1], its rationale reflects the continuing legal machination to offer recognition to the indigenous in the same breath that curtails it. The action in *Milirrpum* began when the government sold a part of the Arnhem Land reserve to a bauxite-mining corporation without consulting the Yolngu people who saw themselves as its traditional owners. In its verdict, the Supreme Court of the Northern Territory ruled that the doctrine of native title could not exist in the common law of a colony except via express statutory means.

Almost two decades later, in *Mabo (No 2)*, the High Court of Australia restored title to Aboriginal peoples by extracting it from their customs while also reiterating the sovereign power of the state to extinguish it. The 1992 decision agreed that terra nullius did not preclude indigenous ownership. But, as Richard Bartlett objects, “it had never been referred to in any case prior to *Mabo* as justifying a denial of native title.” From *Milirrpum* to *Mabo (No 2)*, each step forward paved a parallel regression towards the internment of the indigenous within a juridical complex. International law, too, is guilty of ensuring the impossibility of indigeneity under the guise of rendering it possible.

The UN broke its prolonged silence only in 1971 when it admitted in *ECOSOC Resolution 1589 (L)* that “indigenous populations often encounter racial prejudice and discrimination”. Special Rapporteur Jose Martinez Cobo was then tasked with compiling a detailed report on the status of indigenous groups around the world. The prevalent belief at that point in time favoured the integration of these disenfranchised communities within their parent states. Cobo's 24-part report, published over 12 years, advanced a definition of indigeneity that still remains the prevalent legal standard, maybe because it largely systematised our commonsense about who the Indigenous are and how they differ from the purported mainstream.

To put it succinctly, he concocted two objective determiners: pre-colonial continuity and territorial rootedness. The first seeks to carve “historical continuity with pre-invasion and pre-colonial societies”, and the second captures the intimate relationship that the indigenous share with their lands to differentiate them from “other sectors of the society.” No doubt many have denounced the abject othering that notions of continuity and difference enforce by relegating the indigenous to a pre-capitalist, pre-modern “waiting room of history,” to borrow Dipesh Chakraborty's term. But these two criteria have become an almost instinctive definition of indigeneity. I have written elsewhere about how deep the rot runs in law, both in international fora and Indian courts. Ramchandra Guha's book on Verrier Elwin, *Savaging the Civilised*, which Professor Baxi endorses as one of his best (p 142), also provides a robust critique of India's tendency to misconstrue its tribal population as a primitive remnant of the mainstream.

Thankfully, the International Labour Organization's 1989 *The Indigenous and Tribal People's Convention* added a subjective layer to Cobo's objective rosters, allowing groups to self-identify as indigenous. Even the 2007 United Nations Declaration on Indigenous Peoples (“UNDRIP”) exhorts this right. We now have an eccentric nomenclature where the capacity to call oneself Indigenous exists, but to translate the entitlement into concrete rights, communities must rely on courts and international institutions that still cherish the objective matrix.

Indeed, the indigenous is what Elizabeth Povinelli calls a “melancholic subject.” Their selfhood is often refracted through developmental promises and legal guarantees of the militant-managerial state, only to then be curtailed by the poignant impossibility of becoming a person on one's own terms without any high-handed ascription of traditionality. Professor Baxi's recollection of his association with the discords surrounding the Narmada Valley project (pp 162-164) is a potent reminder of India's own melancholic — in fact, exploitative — treatment of its tribal populations. In *Narmada*

*Bachao Andolan v Union of India* [(2000) 10 SCC 664], the Supreme Court ruled that “the displacement of the tribals ... would not per se result in the violation of their fundamental or other rights” insofar as “the living conditions of the oustees” in their new homes were thought to be “much better than what they had in their hamlets”. The judgment relied on Article 12 of the ILO’s *Indigenous and Tribal Populations Convention 1957*, which permits displacement as an “exceptional measure” that must be implemented “in accordance with national law”. My point is that the infliction of violence on the indigenous, the Adivasis, and the tribals is not external to law but integral to its repressive apparatus. While we have come a long way since the 1971 ECOSOC resolution to achieve the relatively empowering measures laid down in the UNDRIP, this arc is littered with pitfalls where the designation of indigeneity has granted citizenship at the cost of expropriation and subordination.

Does that mean it is hopeless to be indigenous? Not quite. The wanton negation of indigenous peoples is real and present, and so are the numerous marginalised struggles that continue to fight for the recognition of such an identity. But all these assertions do not necessarily depend on law. Not every profession of rights is legal in its outlook. [Andrew Canessa](#) shows how indigeneity in Bolivia is a multifarious category that draws on various analytic typologies — centred around territory, hegemony, demographics, and proximity to the state — to forge relationships and conflicts with other groups. Indigeneity has become a political comparative that shapes solidarities across time and space. Pronouncing its legitimacy is not the prerogative of law. Herein lies the strength of Professor Baxi’s method. If I read him correctly, neither does he discount the strategic upshots of legal tactics nor does he downplay their spectres of exclusion. Rather, he teaches us to pay attention to the pathologies of distance that separate indigenous struggles from their immediate legal contexts.

## The End of Indigeneity in India?

Chapter 5 of the book is titled “Learning from the Australian Experience”, and that is much easier said than done. Professor Baxi steers clear of charting any uncritical equivalence between settler-colonial societies and the postcolonial specificity of India. I would go a step further and contend that indigeneity simpliciter might be a [dangerous idiom in India](#). Consider how the recent troubles in Manipur emanate from rival proclamations of indigeneity by the Kuki and the Meitei. Caste-Hindu Assamese speakers have long accentuated their avowed status as “sons of the soil” to seek the eviction of Bangladeshi foreigners. And Hindutva nationalism’s fixation on an originary past continues to grow in virulence. While it is true that these xenophobic, ethno-nationalist assertions of indigeneity derive from the ambivalence of the phrase in India, the vast diversity of the country forecloses the sort of clarity that might otherwise be possible in Australia or the Americas. I do not imply that indigeneity in these places has not taken a violent turn before. [Lorenza Fontana](#)’s and [Shannon Speed](#)’s ethnographies, among others, shatter any such sublime fabrication. In India, however, the term has become a fungible resource available to all — or to the resourceful, as it happens.

[André Beteille](#) remarks that there is no definite anthropological or historical definition of Indian tribal formations. Although [Virginus Xaxa](#) reveals how certain tribal groups, especially the Adivasis, have espoused the claim of being original inhabitants, their politics germinate from a self-referential marker of resource ownership prior to the invasion of outsiders and not a categorical classification of indigeneity. Our best attempt to account for this open-textured signification of tribality without forsaking the distinctiveness of this identity might be the cultural vantage of viewing it as an assemblage of affinities and differences in relation to caste-Hindu groups. The legal scenario is equally ambiguous. Article 366(25) of the Constitution, read with Article 342, enables the President to specify a community as a Scheduled Tribe. Moreover, the 5th and the 6th Schedules confer administrative autonomy on stipulated tribal areas. But this only spells out how the Scheduled Tribes are created in law and what privileges the connotation entails; it tells us nothing about who they are. There are no qualifications in the Constitution, no prescribed sociological template whatsoever, that inhibit the recognition of a group as a Scheduled Tribe. While vulnerability, remoteness, and neglect are some social properties that might justify a special ST status, these are heuristic additions to the letter of the law and do not validate a default endowment of indigeneity. Besides, and Professor Baxi suggests so as well (pp 149-150), generational mobility towards a higher socio-economic stratum should not rob one of their tribal embodiments. The habitus of tribality is not necessarily effaced by a modern, globalised, moneyed way of life as long as people invest hope, aspirations, and entitlements in its cultural grammar.

What stops the Assamese from being indigenous? Numerous caste-Hindu families can trace their genealogies back to the 15th or 16th centuries in this region whereas several Northeastern hill tribes are known to have migrated here from the South-East Asian highlands within the last 300 years. Precolonial continuity and intimacy with territory — not just the Assamese, many caste-Hindu communities can satisfy Cobo’s criteria better than some tribal groups, especially those with histories of recent migrations or [without any documented history](#) at all to subsist among powerful text-based neighbours. I can stretch this argument to the edges of the legal anvil, and it only gets more and more bizarre. Even as a political comparative, the indigeneity or tribality of one group often dispossesses another of their felt superiority. Take, for instance, the oppression of the Chakma people by the Mizo majority in Mizoram — though both are considered Scheduled Tribes in the state — or the protracted violence that broke out in Manipur after the High Court accepted the Meitei’s longstanding insistence on an ST designation.

The situation in India is just an intense version of two global truths: that there is no objective definition of indigeneity and that the politicisation of this identity can easily become a technique of violence. If one were to ask me, the indigenous lexis nurtured in the West might be significant in Australia and the Americas to an extent, but in India, it fetches more harm than benefits. This is not a criticism of Professor Baxi. On the contrary, I have come to maintain this stance by working my way through the legal reticence about tribality and indigeneity that he perspicaciously underlines for us. Perhaps the prudent course is to politically and culturally charge the unique cosmologies of tribality while dissociating it from indigeneity. Otherwise, we would be stuck between ethnic clashes on one end and the derivation of indigeneity from the infantilising, stereotypical, and somewhat pejorative indices of vulnerability and depredations on the other.

## Of Enchantment and Self-Determination

I know that I am veering precariously close to paternalism here, more so since an increasing number of Adivasi and tribal groups today seek to couch their resistances in the language of indigeneity. All I am wondering, however, is whether it might be worthwhile to exercise a hiatus in the mobilisation of the term to curb the growing episodes of violence unfolding under its morphology. After all, the Adivasi resurgence in India, despite its imagery of original inhabitation, did not overlap with the global proliferation of indigeneity at its inception. The international discourse has made inroads into different Adivasi communities at different laces of time only in the last thirty years, and [with its advent](#) also heightened the dwindling importance of their rituals, performances, and religions—almost as if creating a new mythology out of a forgotten scripture.

Can we excavate vital Adivasi pasts from their indelible histories of colonialism under changing imperia without relying on the construct of indigeneity? Professor Baxi talks about the same as the re-enchantment of peripheral lifeworlds. I merely dislodge indigeneity from the equation. Adivasi or tribal politics mean much more than rephrasing a term of art borrowed from elsewhere. The Pathalgadi movement, the celebrated *Niyamgiri Hills* [(2013) 6 SCC 476] judgment, Ladakh’s current agitation for autonomy are all examples of harnessing municipal constitutionalism and negotiating the co-management of resources without losing sight of local dynamics. These struggles sabotage the state’s monopoly over legal enunciations by foregrounding their situated modes of knowing, feeling, and operationalising modern law. So I suppose the answer to that question is yes, though I do not have the space here to dig deeper than a superfluous affirmation. The furthest consequence of this imagination, of course, would be self-determination — a complete renunciation of the very states responsible for the subjugation of the indigenous. But international law, as Article 46.1 of the UDRIIP declares, once again resorts to its doublespeak to stifle radical change for the sake of state sovereignty.

At the end of the day, we must be cautious against letting our scholarship cut adrift from the ground realities of struggles whose marginalisation is mapped underneath our authority to theorise. When Professor Baxi says, “what matters is not being original, but being ab-original” (p 164), I read it as a prompt to understand indigeneity as a situated concept that is not marred by the sardonic demand for originariness or primitivity.

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**Feature Image:** [Niyangiri Hills](#) by [Souvik Lal Chakraborty](#).

This essay is part of a book round-table on *Of Law and Life: Upendra Baxi in Conversation with Arvind Narrain, Lawrence Liang, Sitharamam Kakarala, and Sruti Chaganti* (Orient BlackSwan 2024). Read the other posts [here](#).