Tribal Law in India:

How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better

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India's population includes almost one hundred million "tribal people." The two main regions of tribal settlement are the country's northeastern states bordering China and Burma, and the highlands and plains of peninsular India. In this paper, I focus on the latter. An overwhelming majority of India's tribal people inhabit this region and were only recently introduced to self-government when the Indian Parliament legislated the Panchayat (Extension to Scheduled Areas) Act*, 1996 (PESA).*

PESA mandated the states in peninsular India to devolve certain political, administrative and fiscal powers to local governments elected by the tribal communities in their jurisdiction. The Act was hailed as one of the most progressive laws passed since independence, granting tribal communities 'radical' powers to preserve their traditions and entrusting them with the authority to manage their community resources. But, after a decade, it is apparent that PESA is clearly not achieving those objectives. Blatant violation of tribal interests and the reluctance (in some cases, sheer procrastination) of the state administrations to cede authority have compelled the tribes to reassert their identity and rights. Tribal unrest has spawned violent movements across these regions, and renegade groups known as the "Naxals" have become a significant threat to India's national security.

Despite the surge in tribal violence, there has never been a serious debate about alternative schemes for governing the tribal regions in peninsular India. Almost everybody presumes that the fault lies not with the substantive content of the law, but with its implementation. However, as I show, a major cause for the failure of governance in the tribal areas is the top-down approach of decentralization adopted in the Indian Constitution and

PESA. I therefore advocate a range of constitutional and statutory reforms that would institutionalize "tribal autonomy" (the term that I employ to refer to a bottom-up approach) and permit the tribes to maintain their individual identity while participating in national development.

I INTRODUCTION

India's population includes nearly one hundred million tribal people.[1] These numbers are matched only by the remarkable diversity of India's tribes.[2] The two main regions of tribal settlement are the country's northeastern states bordering China and Burma, and the highlands and plains of its central and southern regions.[3] The latter is home to more than 80 per cent of the tribes, which differ from the northeastern tribes in ethnicity and in having experienced greater "intrusion of the Indian mainstream and of the pan-Indian model of the state, society, economy and culture."[4] There are also differences in the extent to which the tribes interact with non-tribal communities. While the northeastern tribes are usually isolated communities, the tribes in peninsular India may at times coexist with non-tribal people.

Despite some regional variation, the tribes share many traits, including living "in relative geographical isolation," and being "relatively more homogen[e]ous" and "more self-contained than the non-tribal social groups."[5] Consequently, several tensions (both perceptible and obscure) pervade relations between tribals and non-tribals, on the one hand, and the tribes and the State, on the other. The conventional, and largely accepted, solution is to balance the dichotomy between assimilation of tribal peoples and their independent identity, and delineate the contours of a national policy that would allow them to preserve their way of life without compromising development.[6]

Although relatively simple to capture as a concept, India has struggled to maintain the balance in practice. The most common problems relate to

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1 The 2001 Government of India Census recorded 8.2 per cent of India's population as tribal.

2 There are 622 recognized tribes in India. See Ministry of Tribal Affairs, Government of India, online: <http://tribal.nic.in/index1.html>.

3 See W.V. Grigson, "The Aboriginal in the Future India" (1944) 74 J. Royal Anthropological Inst. Gr. Brit. & Ir. 33.

4 Chanana Karuna, "Accessing Higher Education: The Dilemma of Schooling Women, Minorities, Scheduled Castes and Scheduled Tribes in Contemporary India" (1993) 26 Higher Educ. 69 at 71.

5 Virginius Xaxa, "Empowerment of Tribes" in Debal K. Singha Roy, ed., *Social Development and the Empowerment of Marginalised Groups: Perspectives and Strategies* (Thousand Oaks, CA: Sage Publications, 2001) at 203.

6 Known as the "development-deference dichotomy". See Shubhankar Dam, "Legal Systems As Cultural Rights: A Rights Based Approach To Traditional Legal Systems Under The Indian Constitution" (2006) 16 Ind. Int'l & Comp. L. Rev. 295 (claiming that development and deference cannot triumph together).

recognizing that the tribes have a right to autonomy and not merely decentralized administration;[7] that they have a right to seek justice within their own traditional or customary laws;[8] and that they have a right to own and exploit the natural resources in their habitat. These issues are addressed in the Constitution of India ("Constitution") and through tribal-people-specific statutes, but there are considerable differences in the way the northeastern and peninsular tribes are treated in the Indian legal system.[9] The distinction in the extant law is based on the two criteria that had guided the colonial British Indian government in determining the degree of self-government that the tribes would exercise: (a) whether the tribe had the ability to manage its own affairs,[10] and (b) whether the tribal region in question had a significant non-tribal population.

Judged by these two criteria, the northeastern tribes—who are also isolated but seen to be more 'socially advanced'—have been given considerable autonomy under the Constitution, while the tribes in the rest of the country have been placed under the aegis of provincial governors.[11] This arrangement has been codified in the Constitution's Fifth Schedule for tribes

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7 Throughout this paper I use the terms "decentralization" and "autonomy" contradistinctively. See Part III (Autonomy as a "New Deal" Between the State and the Tribes) for a description of the difference between these concepts.

8 This is important because customary law traditionally settled tribal disputes until English common law became the sole legitimate recourse for enforcing rights. Predictably, the usual difficulties with any *imposed* law—prolonged procedures, impractical rules of evidence, and delays in disposal of cases—hinder a verdict even in the simplest of cases. Indigenous communities therefore prefer the swift justice delivered by extremists (such as the Naxalites and Maoists) flourishing in the hinterlands over the procrastinated conventional court system to which they are unaccustomed. They thus become ready recruits for extremist groups like the Maoists in central and south India who promise protection of the tribes' natural rights in return for material and political support. See "A Spectre Haunting India" *The Economist* (17 August 2006), online: The Economist <http://www.economist.com/world/asia/displaystory.cfm?story_id=7799247>.

9 I want to emphasize that tribal rights in India are generally argued without reference to indigenousness. Much of the anthropological research suggests that almost all races that have lived on the subcontinent are in some respect 'indigenous'. See Crispin Bates, "'Lost Innocents and the Loss of Innocence': Interpreting Adivasi Movements in South Asia" in R.H. Barnes, Andrew Gray & Benedict Kingsbury, eds., *Indigenous Peoples of Asia* (Michigan: American Association for Asian Studies, 1995) at 103-104. The domestic consensus thus appears to be in favour of discarding references to indigenousness for simply the equitable term "tribal". The distinction is crucial, because a policy predicated on 'indigenousness' raises apprehensions that autonomy or self-government "will lead to further divisions of the society and fuel violent ethnic separatism." Bengt G. Karlsson, "Anthropology and the 'Indigenous Slot': Claims to and Debates about Indigenous Peoples' Status in India" (2003) 23 Critique of Anthropology 403-423.

10 See *e.g.* Amit Prakash, "Decolonisation and Tribal Policy in Jharkhand: Continuities with Colonial Discourse" (1999) 27 Soc. Scientist 113.

11 In Indian legal parlance such socially and educationally disadvantaged communities are termed "backward," a term used in contrast to "forward" communities in the Constitution. See e.g. Constitution of India, 1950, Art. 15(4) and Art. 15(5). See also R. K. Sabharwal v. State of Punjab, [1995] 2 S.C.C. 745 at para. 4 and Indira Sawhney v. Union of India, A.I.R. [1993] S.C. 477.

in peninsular India, and the Sixth Schedule for the northeastern tribes.[12] The separate systems were approved by the Constituent Assembly formed at the time of independence after receiving recommendations that the distinct 'community structures' and 'attitudes' of the tribes in the two regions could not be treated in a common law.[13]

In this paper, I focus on the Fifth Schedule areas. Though an overwhelming majority of India's tribal people inhabit this region, they were only recently introduced to decentralization when the Indian Parliament legislated the *Panchayat (Extension to Scheduled Areas) Act*, 1996 (or PESA) exclusively for these areas. PESA mandated the states to devolve certain political, administrative and fiscal powers to local governments elected by the communities (whether tribal or non-tribal).[14]

PESA did not amend the Fifth Schedule, however. Instead, it sought to secure the participation of the tribal communities through limited self-government, expecting this arrangement to be better suited to their 'level of advancement'. After a decade, it is apparent that PESA is clearly not achieving that objective. On the contrary, blatant violation of tribal interests and the reluctance (in some cases, sheer procrastination) of the state administrations to cede authority have often compelled tribes in the Fifth Schedule areas to reassert their identity and rights violently.[15]

Yet, there has never been a serious debate about alternative schemes for governing the tribal regions in peninsular India, even though various developments in the past few years—the creation of two new states, Jharkhand and Chhattisgarh, in 2000 through tribal political movements, the soon-to-be introduced revision of the National Tribal Policy, and the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, passed in December 2006, which grants tribes some measure of ownership in forest lands and produce for the first time—emphasize that tribal rights are increasingly figuring as a prominent national concern.

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12 Currently, the Fifth Schedule covers tribal areas in nine peninsular states, namely, Andhra Pradesh, Orissa, Jharkhand, Chhattisgarh, Madhya Pradesh, Maharashtra, Gujarat, Rajasthan and Himachal Pradesh. Tribal areas in the northeastern states of Assam, Meghalaya, Tripura and Mizoram are excluded from the purview of the Fifth Schedule, and are instead governed by the Sixth Schedule.

13 B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (Delhi: The Indian Institute of Public Administration, 1967) at 771-772.

14 The Act had been hailed as "[p]erhaps the most progressive law passed since [i]ndependence," granting tribal communities radical powers to preserve their traditions and customs, besides entrusting them with the authority to manage their community resources. See Vidhya Das, *PESA—A Reality Check* (Agragamee, 2005), online: Agragamee <http://www.agragamee.org/newinitiatives_pesa.htm>. See also Abha Chauhan, "Sustainability through Self-Governance in Tribal Areas of India—A Gender Perspective" (paper presented to the International Sociological Association, 1998) [unpublished].

15 See *e.g.* Stuart Corbridge, "The Continuing Struggle for India's Jharkhand: Democracy, Decentralisation and the Politics of Names and Numbers" (2002) 40 Commonwealth & Comp. Pol. 55.

Almost all interest groups presume that the fault lies not with the substantive content of the Fifth Schedule or PESA, but with their implementation. But this hardly tells the whole story. I argue that a major cause for the failure of governance in these tribal areas is the top-down approach of decentralization adopted in the Fifth Schedule and PESA. I therefore advocate a range of constitutional and statutory reforms that would institutionalize tribal autonomy (a bottom-up approach),[16] such as the introduction of a fundamental right to tribal property in the Constitution, exclusive administrative and legislative powers for the predominantly tribal communities, and (time-sensitive) duties to be discharged by the centre (both the central government, that is the administration, and the central legislature, that is the Indian Parliament) and the states.

This paper is arranged as follows. Part II provides a background of centre-state relations (which include central-government–state-government relations) on tribal affairs in India before it reviews the impact of both the Fifth Schedule and PESA on tribal governance in the last 10 years. In Part III, I offer a structural reconstruction by arguing that tribal autonomy (through constitutional and statutory means) should replace the theme of decentralization characterized by the Fifth Schedule-PESA model.[17] The last topic of this part also highlights some important issues which, though beyond the scope of this paper, would nonetheless be implicated in a general task of regulatory reform. Part IV concludes.

II BACKGROUND: FEDERALISM AND TRIBAL GOVERNANCE IN INDIA

The Constitution of India establishes a detailed federal structure in which legislative authority is divided between the Indian Parliament and the central government ("the Union") on one hand and the state legislatures and governments on the other.[18] "Local government, that is to say ... local authorities for the purpose of local self-government or village administration" is a subject of state legislation.[19] These local governments are of two types—local governments in the urban areas (termed "municipalities") and those in the rural areas (traditionally, and now statutorily, called "Panchayats"). Though states could invoke their jurisdiction under the Seventh Schedule of the Constitution to legislate for municipalities and Pan-

16 However, I strictly differentiate autonomy from "self-determination". See Russel Lawrence Barsh, "Revision of ILO Convention No. 107" (1987) 81 Am. J. Int'l L. 756 at 759-760.

17 While the precise extent of the State's engagement with tribal governments is a key facet of any alternative structure, I will not minutely examine the transition to tribal autonomy.

18 See *Constitution of India*, 1950, Art. 245(1). The subjects of legislation (known as 'entries') are collected under the Seventh Schedule and are arranged as the "Union List" (List I), the "State List" (List II) and the "Concurrent List" (List III). The union and the states may both legislate on subjects in the Concurrent List, but Parliamentary legislation preempts state law when the former occupies the field.

19 *Constitution of India*, 1950, Sch. VII, List II, Entry 5.

chayats when required, 40 years of experience revealed that power remained captured within state administrations and the local governments were non-functional.[20] Therefore, in 1992 the Indian Parliament decided to decentralize state executive and legislative authority by adding two entirely new parts to the Constitution. Part IX[21] required the states to establish local government bodies (or Panchayats) in rural areas, while Part IX-A[22] similarly mandated municipalities in urban areas. The intention was "to enshrine in the Constitution certain basic and essential features" of such local bodies "to impart certainty, continuity and strength to them."[23] The state legislatures were then tasked with determining—through departmental rule-making or statute—the precise political, administrative and fiscal authority that such local bodies would exercise.

For purposes of this paper, we are concerned only with Part IX, which established multi-tiered local government institutions in rural India with village government bodies at the lowest level. While Part IX broadly lays down the composition and jurisdiction of the local governments, the states, as mentioned earlier, have a significant role to play in this scheme. Almost all the provisions in Part IX require implementation through state law.

Initially, Part IX was intended to create local governments only in non-tribal rural areas. With the introduction of PESA in 1996, however, Part IX was extended (albeit exclusively) to the Fifth Schedule tribal areas. Thereafter, states that had jurisdiction over these areas were to somehow foster tribal self-government, even though the Fifth Schedule was not amended and continued to perpetuate state government control in tribal affairs. The resultant legal scheme in place today thus appears inherently unworkable.

In the following sections I will provide a summary of the relevant constitutional and PESA provisions, and examine their impact on tribal governance in peninsular India.

The Authority of the Centre and the States in Tribal Affairs

The Fifth and Sixth Schedules of the Constitution

The term "Scheduled Areas" denotes the tribal regions to which either the Fifth Schedule[24] or the Sixth Schedule applies.[25] The two Schedules have very different mechanisms for governing their jurisdictional areas.

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20 Though Article 40 of the Constitution asked the State "to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government," it was merely a (non-binding) Directive Principle of State Policy.

21 *Constitution of India*, 1950: amended by the *Constitution (Seventy-third Amendment) Act*, 1992.

22 *Ibid*.

23 *The Constitution (Seventy-third Amendment) Bill*, 1991, Statement of Objects and Reasons.

24 See *supra* note 12. The criteria for extending this Schedule to an area are: (i) the preponderance of tribal population, (ii) compactness and reasonable size of the area, (iii) the ability to form a

The Fifth Schedule was, until PESA was legislated, an entirely centralized system where the communities—the majority being tribal—were directed in their affairs by provincial governors. The Schedule permitted the states to extend their executive power to the Scheduled Areas,[26] and granted the Governor of each state the authority to "make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area."[27] The Governor was thus the "sole legislature for the Scheduled Areas and the Scheduled Tribes,"[28] competent to make laws on all subjects enumerated in the Constitution's Union, State, and Concurrent Lists.[29] The Governor could also preclude the application of any federal or state law in the Fifth Schedule areas.[30] Gubernatorial authority was "of a very wide nature"[31] and subject to only two restrictions:[32] (i) that the Governor would consult a Tribes Advisory Council "before making any regulation";[33] and, (ii) that all regulations would receive Presidential assent before taking effect.[34]

In contrast, the Sixth Schedule has always given the tribes considerable autonomy. This Schedule divides the tribal areas in India's northeastern states into "autonomous" regions, each allocated to a particular tribe.[35] The elected councils in the Sixth Schedule areas are vested with administrative

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viable administrative entity such as a district, and (iv) the area's lack of economic development (its "backwardness") as compared to neighboring regions.

25 The Fifth and Sixth Schedules are made applicable to their respective jurisdictions by Article 244 of the Constitution.

26 *Constitution of India*, 1950, Sch. V ¶ 2.

27 *Ibid*., Sch. V ¶ 5(2).

28 *Edwingson Bareh v. State of Assam*, A.I.R. [1966] S.C. 1220 ¶ 47 (Justice Hidayatullah dissenting). See also *Constitution of India*, 1950, Sch. V ¶ 5(1). This view appears to be incongruous with the colonial policy of allowing the Governor to act in his or her discretion only in Excluded Areas (present day Sixth Schedule areas).

The term "Scheduled Tribes" refers to those tribes designated as such through a "process of identification … based on the procedures/provisions made in [Article 342] the Constitution of India." In designating a tribe as a Scheduled Tribe, the government would consider their traits, distinctive culture, geographical isolation, level of contact with communities beyond their own and general social and educational development. Religion is not a consideration. Meenakshi Hooja, *Policies and Strategies for Tribal Development: Focus on the Central Tribal Belt* (New Delhi: Rawat Publications, 2004) at 19-20. The inclusion of a tribe in the list of Scheduled Tribes permits the government to take affirmative action in favour of such tribes.

29 See Justice Y.V. Chandrachud, V.R. Manohar & Justice Bhagwati Prosad Banerjee, eds., *Durga Das Basu: Shorter Constitution of India*, 13th ed. (Nagpur: Wadhwa, 2002) at 1709 [*Durga Das Basu*] (citing *Chhaturam v. Commr. of I.T.,* [1947] F.L.J. 92).

30 See *Constitution of India*, 1950, Sch. V ¶ 5(1).

31 The Governor's law-making powers permit even retrospective legislation. See *Ram Kripal Bhagat v. State of Bihar*, A.I.R. [1970] S.C. 951 at 958, and *V.S.S. Sastry v. State of Andhra Pradesh*, A.I.R. [1967] S.C. 71 at 74.

32 See *Edwingson Bareh v. State of Assam*, A.I.R. [1966] S.C. 1220 at para. 45.

33 See *Constitution of India*, 1950, Sch. V ¶ 4.

34 The Governor's authority remains unchanged even after PESA. The most reasonable interpretation would therefore be that the Governor can continue to make laws for the Fifth Schedule areas, subject to the powers of self-government guaranteed by PESA.

35 See *Constitution of India*, 1950, Sch. VI ¶ 1.

authority,[36] make laws with respect to a variety of subjects,[37] and even exercise judicial authority through traditional legal systems embedded with certain features of federal law.[38] The councils are also financially independent and do not labour under the executive authority of the states.[39]

Though the Sixth Schedule's scheme renders all exercise of executive and legislative authority by the councils subject to the approval of the provincial Governor, the superior courts have interpreted the Governor's authority to be considerably restricted.[40] The Indian Supreme Court's decision in *Pu Myllai Hlychho*[41] clarified that even though the Sixth Schedule is not a "self-contained code"[42] or a "Constitution within the Constitution,"[43] the courts must nevertheless defer to the legislative, administrative and judicial independence that the Schedule grants District and Regional Councils.[44]

There were two reasons for the different treatment that the tribes received. First, the tribes in Fifth Schedule areas were considered incapable of self-government.[45] Second, unlike the Sixth Schedule areas, some tribal

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36 See *ibid*., Sch. VI ¶ 2(4).

37 See *ibid*., 1950, Sch. VI ¶ 3(1) (laws can be made to regulate social customs, land use, forest management, and cultivation; or to appoint Chiefs or Headmen, and administer villages or towns. These laws become enforceable after the assent of the Governor of the state is received.).

38 The Councils are authorized to establish their own justice dispensation system with tribal courts that adjudicate disputes "between the parties all of whom belong to Scheduled Tribes." See *ibid*., Sch. VI ¶ 4(1) and ¶ 4(2). See also *State of Meghalaya v. Richard Lyngdoh*, [2006] 2 G.L.R. 328 at para. 17.

39 Paragraph 7 of the Sixth Schedule enables provincial Governors to establish District and Regional Funds. The District and Regional Councils also have the power to "assess and collect land revenue and to impose taxes" [para. 8]. Paragraph 9 authorizes the Councils to collect the royalties accruing each year from mineral licenses or leases granted by the state governments in respect of any area within an autonomous district.

40 For instance, in Cajee v. Siem the Indian Supreme Court held that "the administration of an autonomous district shall vest in the District Council and this in our opinion [is] comprehensive enough to include all such executive powers as are necessary to be exercised for the purposes of the administration of the district." See T. Cajee v. U. Jormanik Siem, A.I.R. [1961] S.C. 276.

41 *Pu Myllai Hlychho v. State of Mizoram*, [2005] 2 S.C.C. 92.

42 *Contra Edwingson Bareh v. State of Assam*, A.I.R. [1966] S.C. 1220 at para. 11 ("the scheme of the Sixth Schedule … purport[s] to provide for a self-contained code for the governance of the tribal areas").

43 See *Pu Myllai Hlychho v. State of Mizoram*, [2005] 2 S.C.C. 92 at para. 21 ("The Sixth Schedule to the Constitution is a part of the Constitution and cannot be interpreted by forgetting the other provisions in the Constitution.").

44 But see *District Council of the Jowai Autonomous District v. Dwet Singh Rymbai*, [1986] 4 S.C.C. 38 at para. 11 ("The powers enjoyed by these District Councils cannot be equated with the plenary powers enjoyed by a legislature. Their powers to make laws are limited by the provisions of the Sixth Schedule.").

45 Modern sociology has however extra-legally compelled a review of the "colonial theories and practices" that categorized the primitive and the civilized based on "modes of subsistence", "transformation of the physical environment", "literacy" and the presence of "codified laws regulating society". See Ajay Skaria, "Shades of Wildness Tribe, Caste, and Gender in Western India" (1997) 56 J. Asian Stud. 726 at 730-731.

communities in peninsular India coexisted with a minority non-tribal population, and autonomy for the tribes in such a case seemed impractical. These were considerations that had been settled well before independence,[46] so that by voting on the inclusion of the Fifth Schedule in the Constitution the founding fathers were, in a sense, continuing the colonial typecast that the tribes' contentment depended not so much on "rapid political advance as on experienced and sympathetic handling, and on protection from economic subjugation by the [non-tribal] neighbors."[47] Even the Supreme Court of India later endorsed this paternalist justification when it said that "[t]he tribals … need to be taken care of by the protective arm of the law, … so that they may prosper and by an evolutionary process join the mainstream of the society."[48]

The Panchayat (Extension to Scheduled Areas) Act 1996

In 1996, however, Parliament exercised its reserved legislative authority to extend the provisions of the Constitution's Part IX exclusively to the Fifth Schedule areas.[49] As a result, any habitation or hamlet "comprising a community and managing its affairs in accordance with traditions and customs"[50] could now exercise limited self-government.[51]

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46 *The Government of India Act* 1935, which introduced special measures for the protection of the tribes in India, had earlier reclassified the tribal regions of the country into "Excluded' and 'Partially Excluded Areas' based on the preponderance of tribal communities and the feasibility of introducing civil administration in those regions. See Indian Statutory Commission, *Report of the Indian Statutory Commission* (London: Her Majesty's Stationary Office, 1930). Thus, "where there was an enclave or a definite tract of country inhabited by a compact tribal population, [the area] was classified as an *Excluded Area*," while regions with a substantial tribal population, but a minority non-tribal population, were declared Partially Excluded Areas. J.K. Das, *Human Rights and Indigenous Peoples* (Delhi: A.P.H., 2001) at 135 (both regions "were excluded from the competence of the Provincial and Federal Legislatures," but "the administration of *Excluded Areas* was vested in the Governor acting in his discretion" and that of the Partially Excluded Areas "was vested in the Council of Ministers subject … to the Governor exercising his individual judgment"). After independence, the drafters of the Indian Constitution adopted the distinction between Partially Excluded and Excluded Areas and renamed them with minor modifications as the Fifth and Sixth Schedules respectively. See B. Shiva Rao, *supra* note 13 at 681-782.

47 See Amit Prakash, *supra* note 10 at 122. See also Indian Statutory Commission, *Report of the Indian Statutory Commission*, vol. 2 (London: Her Majesty's Stationary Office, 1930).

48 *Amrendra Pratap Singh v. Tej Bahadur Prajapati*, [2004] 10 S.C.C. 65 at para. 15. The situation bears a striking resemblance to the United States' belief that the Native American tribes "were the 'wards' of the government in need of protection." See Joseph William Singer, "Lone Wolf, or How to Take Property by Calling It a Mere Change in the Form of Investment" (2002) 38 Tulsa L. Rev. 37 at 39.

49 *Constitution of India*, 1950, Art. 243-M(3A)(b), allows "Parliament ... [to] extend the provisions of this Part [IX] to the Scheduled Areas … subject to such exceptions and modifications as may be specified in such law."

50 *Panchayat (Extension to Scheduled Areas) Act*, 1996, s. 4(b).

51 PESA was thus meant to benefit not only the majority tribal communities, but also any minority non-tribal communities. The Act nonetheless ensured that primacy was given to the tribal

After PESA was enacted, communities in the Fifth Schedule areas (the majority of whom were tribal) were directed to follow democratic elections, conform to the hierarchical Panchayat system stipulated in Part IX, and exercise the powers thought "necessary to enable them to function as institutions of self-government."[52]

On the other hand, while devolving power to the local communities the states were to ensure that (i) their laws comported "with the customary law, social and religious practices and traditional management practices of community resources,"[53] and (ii) the Gram Sabhas (bodies "consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level"[54]) were "competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution."[55]

PESA is therefore considered by many as a "logical extension of [both] the Fifth Schedule" and Part IX of the Constitution.[56] But, as innocuous as it may seem, this—top-down—model has in the last 10 years progressively denied tribal communities self-government and rights to their community's natural resources. I illustrate below.

A Review of PESA: The Impairment of Tribal Rights in a Decentralized Government

Even though PESA is projected as legislation transforming tribal representation in Fifth Schedule areas, the tribes feel as much "culturally deprived and economically robbed" as under colonial rule.[57] Neither PESA in the last decade, nor the Fifth Schedule before it, has helped the tribal communities "acquire the status and dignity of viable and responsive people's bodies," as

communities by guaranteeing them half of the seats in the elected local governments and the seat of the Chairperson at all hierarchical levels of the Panchayat system. See PESA, s. 4(g).

52 *Constitution of India*, 1950, Art. 243G. The powers are subject to a number of "exceptions and modifications" ranging from general guidelines to specific demarcation of tribal administrative authority.

53 PESA, s. 4(a).

54 *Ibid*., s. 4(c).

55 *Ibid*., s. 4(d). The specific powers of the village governments are set forth in clauses (e) through (m) in section 4 of PESA.

56 See India, Planning Commission, Planning at the Grassroots Level: An Action Programme for the Eleventh Five Year Plan (New Delhi: Planning Commission of India, 2006) at 84, online: Planning Commission, Government of India <http://planningcommission.nic.in/plans/stateplan/sp_scy2stat.pdf>. The Government of India's Ministry of Tribal Affairs believes that "PESA … clearly supports the fifth schedule and the rights of the Gram Sabhas in the scheduled areas." See, India, Ministry of Tribal Affairs, Fifth Schedule and Other Related Laws, online: Ministry of Tribal Affairs <http://tribal.nic.in/fifthschedule.html>.

57 H.L. Harit, "Tribal Areas and Administration" in Rann Singh Mann, ed., *Tribes of India: Ongoing Challenges* (New Delhi: M.D. Publications, 1996) 49 at 53.

Parliament had intended.[58] Tribal local governments are often ignored in development plans and the benefits of any actual development "rarely percolate down to the local tribes," which are "subordinated to outsiders, both economically and culturally."[59] PESA and the Fifth Schedule have also not prevented large corporations from gaining "control over the natural resources which constituted the life-support systems of the tribal communities;"[60] neither have they made the tribes prosperous from the mineral-rich land on which they live. In fact, the tribes have "gradually lost control over community resources such as forests" to both settlers and the State;[61] and one author would go so far as to equate non-tribal acquisitions with tribal displacement.[62]

Deceit and the active connivance of state employees with non-tribal communities is another debilitating factor reversing, in this case, the benefits of land reform legislation. Shankar's study of tribal lands in the northern state of Uttar Pradesh revealed a nexus between traditionally influential non-tribal landowners and corrupt government officials. The latter exercised their discretionary powers to favour non-tribals by transferring lands over which tribal communities may have had a valid claim.[63] Even in a tribal majority state like Jharkhand in the north, the tribes are the worst affected in the population since the state government's mining operations and hydro-electric power projects exploit natural resources in the resource-rich tribal areas, thus making the tribes "outsider[s] in [their] own land."[64]

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58 See *The Constitution (Seventy-third Amendment) Bill*, 1991, Statement of Objects and Reasons. Illustrative is the report of the first-ever National Commission to Review the Working of the Constitution that entirely overlooked the Schedule. See India, National Commission to Review the Working of the Constitution, *Report of the National Commission to Review the Working of the Constitution*, Vol. 1 (New Delhi: Government of India, 2002) at 315, online: Ministry of Law, Justice and Company Affairs <http://lawmin.nic.in/ncrwc/ncrwcreport.htm>. Instead of suggesting reforms in Fifth Schedule governance, the federal Commission recommended improving autonomous tribal government in the northeastern states (see National Commission to Review the Working of the Constitution, vol. 2, *ibid.* at 1135) and supported more decentrailzation in non-tribal areas. National Commission to Review the Working of the Constitution, *ibid*. at 955.

59 Govinda Chandra Rath, "Introduction" in Govinda Chandra Rath, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 15 at 28.

60 *Ibid*.

61 See R.K. Barik, "Faulty Planning in a Tribal Region: The Dandakaranya Development Authority" in Govinda Chandra Rath, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 92 at 101.

62 *Supra* note 59 at 29.

63 See Kripa Shankar, "Land Alienation among Tribals in Uttar Pradesh" in Govinda Chandra Rath, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 169.

64 See generally Sajal Basu, "Ethno-regionalism and Tribal Development: Problems and Challenges in Jharkhand" in Govinda Chandra Rath, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 133. Walter Fernandes agrees, adding that "no provision has been made in the law or in practice either to get the consent of the families to be deprived of their livelihood in the name of national development or to minimize

Faced with this onslaught, many tribes have resisted settlers, the government and private enterprises, and sought to reassert their identity.[65] For instance, in the Bengal region the Kamatapur tribal movement has cited neglect, exploitation, and discrimination, and demanded a separate state.[66] Tribes in the neighbouring state of Orissa have demanded a prohibition on private consortiums that intend to mine bauxite from one of the most richly endowed regions in India.[67] Similarly, in the south, Kerala's tribal population has recently begun to defend its rights by banding together in various political groups at the state and local community levels in order to compel the administration to review land alienation, poverty, and exploitation by private enterprises.[68]

It is far too easy to dismiss these incidents as mere consequences of "misplaced development strategies" and lack of interest among state administrations.[69] The critics of tribal governance in India see the dangers in an extremely narrow compass, criticizing provisions in PESA as "impracticable" or the states as legislatively ignorant.[70] In sum, they believe that good civil administration alone will assuage tribal woes.[71]

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its negative effects on those who are thus deprived." Walter Fernandes, "Development-induced Displacement and Tribal Women" in Govinda Chandra Rath, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 112.

65 See Madhu Sarin *et al.*, *Devolution as a Threat to Democratic Decision-making in Forestry? Findings from Three States in India*, Working Paper 197 (London: Overseas Development Institute, February 2003) at 2. The successful movement for a separate tribal state of Jharkhand is an example of ethno-regionalism where local communities asserted their superior rights over natural resources that otherwise profited only more developed, non-tribal regions. See Basu, *supra* note 64. See also Corbridge, *supra* note 15 and Yatindra S. Sisodia, *Political Consciousness Among Tribals* (New Delhi: Rawat Publications, 1999).

66 See I. Sarkar, "The Kamatapur Movement: Towards a Separate State in North Bengal" in Govinda Chandra Rat, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 112.

67 "Orissa's Kashipur Alumina Project Rekindles Tribal Wrath" *Down to Earth* (25 February 2007), online: Down to Earth <http://www.downtoearth.org.in/full6.asp?foldername=20050115&filename=news&sec_id=4&sid=16> (recounting a police action on tribal protestors that caused injury and death).

68 See Jos Chathukulam & M.S. John, "Issues in Tribal Development: The Recent Experience of Kerala" in Govinda Chandra Rath, ed., *Tribal Development in India—The Contemporary Debate* (New Delhi: Sage Publications, 2006) 182 at 190-193.

69 See generally A. Damodaran, "Tribals, Forests and Resource Conflicts in Kerala, India: The Status Quo of Policy Change" (2006) 34 Oxford Dev. Stud. 357.

70 Impracticality of provisions is asserted even by the Draft National Tribal Policy. See India, Ministry of Tribal Affairs, *Draft National Tribal Policy* (New Delhi: Government of India, 2006) at 21.

71 I do not dispute are undoubtedly necessary, particularly in the light of Kijima's statistical analysis of the disparities between tribal and non-tribal communities from 1983 to 1999 that "districts with a higher proportion of the [tribes] are associated with poorer public goods such as schools, tapped water, paved roads, electricity, and health facilities." Yoko Kijima, "Caste and Tribe Inequality: Evidence from India, 1983-1999" (2006) 54 Econ. Dev. & Cultural Change 369 at 390-391.

I argue, however, that if we look in greater detail we will find that both PESA and the Fifth Schedule are replete with structural flaws and ideological biases. These affect not only the participation of states in tribal governance, but also tribal rights in natural resources and the acceptance of local government forms that are not necessarily reflective of traditional institutions of governance. I examine these issues in the following sections.

The Anathema of State Legislative Incompetence

To begin, PESA only marginally altered the power balance between state governments and the tribes because of ineffectual participation by the former,[72] and the "general tendency at the state level to monopolize power rather than share power with people at large."[73] This apathetic attitude has manifested itself in two forms. First, the majority of the states with tribal populations procrastinated in their decentralization programs.[74] Although all states with Scheduled Areas have now enforced PESA,[75] their past dilatory performance has led to the risk of delays in future amendments necessary to reflect changed circumstances.

Second, when they did legislate, the states either ignored tribal "customary law, social and religious practices and traditional management practices of community resources"[76] or enacted incomplete laws. Samal gives one such example: though PESA stipulates a community as the basic unit of governance, the Orissa Gram *Panchayat (Amendment) Act* of 1997 conferred authority on the larger Gram Sabha comprising *all* communities in a demarcated territory.[77] As a result, the Orissa legislation disregarded the "distinct socio-cultural practices and different interests" of the individual communities within that territory.[78]

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72 Similar apathy was noted before PESA was introduced. The states "trivialized" tribal development and specifically designed legislation for the Scheduled Areas on only two main themes—land alienation and tribal debt. See Dr. B.D. Sharma, *The Fifth Schedule*, vol. 1 (New Delhi: Sahyog Pustak Kuteer Trust, 2000) at 72.

73 *Xaxa*, *supra* note 5 at 220.

74 Some, like Himachal Pradesh in the north and Maharashtra in western India, had not promulgated laws for Panchayats in Scheduled Areas until as recently as 2002 and 2003, respectively —more than six years after PESA became law. See *e.g.*, India, *37th Report of the Standing Committee on Urban and Rural Development: Implementation of Part IX of the Constitution* (New Delhi: Government of India, 2002).

75 Nonetheless, substantive disparities continue to exist between the objectives of PESA and the state laws. See Planning Commission, *supra* note 56.

76 As required by PESA, s. 4(a).

77 Avinash Samal, "Institutional Reforms for Decentralized Governance and the Politics of Control and Management of Local Natural Resources: A Study in the Scheduled Areas of India" (paper presented to the RCSD Conference, Chiang Mai, Thailand, 11–14 July 2003) [unpublished], online: Digital Library of the Commons <http://dlc.dlib.indiana.edu/archive/00001084/00/Avinish_Samal.pdf>.

78 *Ibid.* Similarly, an example of incomplete legislation comes from the state of Rajasthan which simply left the task of tribal empowerment to later legislation by stating that the allocation of

The unenthusiastic response of the states appears to be a product of policies advocated by the first national commission on Scheduled Areas and Scheduled Tribes established in 1960.[79] The Dhebar Commission, as it was known, allegedly did not favour the creation of more Scheduled Areas in the country, and is said to have considered the Fifth Schedule "as a temporary expedient" until the tribes were brought on par with the rest of society.[80] The Commission's 1961 report[81] thus gave "State Governments, which had 'openly' or 'subtly' practised the art of rebalancing demographic equations in tribal areas … an alibi to stall demands for 'tribal republics'."[82]

The later realization that assimilation alone could not be the solution to tribal underdevelopment caused Parliament and the federal executive to change tack, but the damage had already been done. The states which exercised actual authority in the Scheduled Areas had settled into a mode of governance predicated on the belief that programmatic state-supervised development was the only solution to primitive tribal societies. Attempts to devolve decision-making powers upon tribal communities have since been largely unsuccessful because the primary responsibility for implementing PESA remains the prerogative of those very states.[83] This reinforces the view

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jurisdictional authority amongst different levels of local government would be in a manner "as may be prescribed." See further Sanjay Upadhyay, "Tribal Self-Rule Law and Common Property Resources in Scheduled Areas of India—A New Paradigm Shift or Another Ineffective Sop?" (paper presented to the 10th Conference of the International Association for the Study of Common Property, Oaxaca, Mexico, 9–13 August 2004) [unpublished], online: United Nations Public Administration Network <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN021306.pdf>.

79 Part of the reason may also be that the federal government was initially reluctant to propose decentralization in the tribal areas and hoped that the state governors would suitably adapt laws for such regions. See Sharma, *supra* note 72 at 108-109.

80 A. Damodaran, "Result of skewed development?" *The Hindu* (27 April 2003), online: The Hindu <http://www.hinduonnet.com/thehindu/mag/2003/04/27/stories/2003042700280400.htm>.

81 See India, *Report of the Scheduled Areas and Scheduled Tribes Commission 1960-61* (New Delhi: Government of India, 1961).

82 *Supra* note 80 ("The idea was simple. Marginalised communities were 'history-less'—they did not deserve their language and, finally, did not deserve to exist except as insignificant cogs of a monolithic State."). Virginius Xaxa believes that "[t]he national objective to build up a productive structure for future growth and resource mobilization" had much to do with this outcome. Xaxa, *supra* note 5 at 206. The tribal people were recast as subjects of development to be ultimately integrated into the larger social structure, and the "simple tribal was rendered vulnerable on almost every count concerning his personal and community life." Dr. B.D. Sharma, *The Little Lights in Tiny Mud Pots—50 Years of Anti "Panchayat Raj"* (New Delhi: Sahyog Pustak Kuteer Trust, 1998).

83 Of late, certain quarters within the federal administration are growing concerned with the import of this situation. A report to the Planning Commission of India suggests that the central government enact interim legislation granting tribal communities genuine self-governing powers. See Planning Commission, *supra* note 56 at 87. Though normatively appealing, a federal legislation directly intervening to determine local government authority may unsettle centre-state relations. The states are (politically) unlikely to accept a statutory intervention that appears to militate against the Constitution's federalist substructure.

that self-government is, in many ways, a *privilege* granted to the tribal communities rather than an inherent right.[84]

The Fading Tribal Rights in Natural Resources

In 10 years PESA has facilitated the gradual evisceration of tribal rights in the natural resources of the Scheduled Areas. The complication arises because PESA delegates the management of natural resources to tribal communities, without divesting control or ownership by the State.[85] My objective here is to provide support for this claim in the context of tribal rights in land, forest and water resources.

The Continuous Erosion of Tribal Land Rights

One of the most basic rights that inures to the benefit of a community is a right in the commons.[86] Therefore, property rights have become a natural rallying point for modern Indigenous peoples' movements around the world;[87] and nations have been seen to have a duty to recognize "people's proprietorship of the land they occupy and to which they have long had a sense of belonging" as a "principle of human justice."[88] Yet, the tribes in India are regularly deprived of their property rights predicated on the low (and ambiguous) thresholds of 'consultation' and 'recommendation'.[89]

While some states have individually sought to protect tribal rights

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84 A sub-committee of the Indian Parliament had earlier castigated this outcome, recommending that the courts rule once-and-for-all whether PESA was merely a "legitimate guideline for the State Legislatures" or a mandatory directive of Parliament. See *supra* note 74.

85 See Upadhyay, *supra* note 78 at 1-2.

86 Incidentally, India had ratified the (now revised) Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957. Article 11 of the 1957 Convention specifically declared that: "The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised."

87 See *e.g.*, Peter H. Russell, *Recognizing Aboriginal Title—The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005) at 155 ("The denial by … states of Indigenous peoples' ownership of the lands and waters that supported them for generations is the root cause of the injustice these peoples have suffered. Endeavouring to overcome this injustice is what distinguishes the political movement of Indigenous peoples from that of any other group or minority within the world's nation-states.").

88 *Ibid*. But see International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILO, 75th Sess., Report III, Part 4A (1988). The ILO Committee of Experts held in a complaint involving tribal people in India that the rights attaching under Article 11 of ILO Convention 107 also apply to lands presently occupied irrespective of immemorial possession or occupation.

89 For the tribes, ownership of water bodies (*jal*), forests (*jungle*) and land (*jameen*) is critical for self-governance, and they have continually expressed their opposition to state control of these resources. See Satyakam Joshi, "Politics of Tribal Autonomy—A Case of South Gujarat Tribals" in Bhupinder Singh & Neeti Mahanti, eds., *Tribal Policy in India* (New Delhi: B.R. Publishing, 1997) at 69-71.

through laws prohibiting private non-tribal purchases of land,[90] there is no legislation restricting acquisitions by the State in the "public interest".[91] Instead, appropriations are legislatively backed by the *Land Acquisition Act* of 1894 in order to justify the government taking personal property for numerous purposes.[92] The root of the problem is that the tribes cannot exercise a *fundamental* right to property under Indian law. Fundamental rights are given much greater deference and have a special status in the Constitution.[93] In contrast, the tribes can only invoke a *legal* right to property under Article 300A of the Constitution ("[n]o person shall be deprived of his property save by authority of law").[94]

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90 See *e.g.*, *Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation*, 1970; *Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Act*, 1999; and, *Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation*, 1956. In addition, 12 other states have also legislated to prevent the alienation of tribal land and for restoring alienated land. See further B. Goswami, *Constitutional Safeguards for Scheduled Caste and Scheduled Tribes* (New Delhi: Rawat Publications, 2003) at 96. Gnana Prakasham however reports that laws prohibiting alienation of tribal land have been largely unsuccessfully in halting non-tribal purchases that are often carried out through intimidation, manipulation of land records, and foreclosures of tribal land used as security for high interest loans. Gnana Prakasham, "Tribal and Their Right to Livelihood: Tribal Right to Land in Madhya Pradesh" in D.C. Sah & Yatindra Singh Sisodia, eds., *Tribal Issues in India* (New Delhi: Rawat Publications, 2004) at 70.

91 The term "public interest" in PESA has the same meaning as "public purpose" defined in inclusive language in section 3(f) of the *Land Acquisition Act*. See *State of Bihar v. Kameshwar Singh*, A.I.R. [1952] S.C. 252 ("The expression 'public purpose' is not capable of a precise definition … The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual."). Interestingly, the federal government had at one point contemplated amendments to the *Land Acquisition Act* to expedite acquisitions of tribal land for new industrial projects. See Walter Fernandes, "Land Acquisition (Amendment) Bill, 1998: Rights of Project-Affected People Ignored" (1998) 33 Econ. & Pol. Wkly. 2703.

92 The purposes include wildlife sanctuaries, irrigation canals, resettlement colonies for people affected by other development projects and State-sponsored industrial ventures. See Gabriele Dietrich, "Dams and People: Adivasi Land Rights" (2000) 35 Econ. & Pol. Wkly. 3379. See further Biswaranjan Mohanty, "Displacement and Rehabilitation of Tribals" (2005) 40 Econ. & Pol. Wkly. 1318, M.L. Patel, *Changing Land Problems of Tribal India* (Bhopal: Progress Publishers, 1974) and Devasish Roy, *Traditional Customary Laws and Indigenous Peoples in Asia* (London: Minority Rights Group International, 2005) at 13. The Government of India has also expressed an interest in promoting ecotourism in protected areas. See India, Ministry of Environment & Forests, *National Environment Policy* (New Delhi: Government of India, 2006) at 27.

93 Fundamental rights are enumerated in Part III of the Constitution of India, while those rights recognized or created in any other part of the Constitution are considered 'legal right.' The difference between the two rights can be better appreciated when a violation is claimed. A petitioner alleging violation of fundamental rights can directly approach the Supreme Court of India, but claims that legal rights were violated are first entertained by the jurisdictional High Courts. See *Constitution of India*, 1950, Art. 32. Petitions claiming fundamental rights violations also alter the default rules governing the burden of proof. Normally, violations of legal rights must be established by the claimant; but, this burden shifts to the State when a violation of fundamental rights is alleged. See, *e.g.*, *Laxmi Khandsari v. State of Uttar Pradesh*, [1981] 2 S.C.C. 600 at para. 12 and *Saghir Ahmad v. State of Uttar Pradesh*, A.I.R. [1954] S.C. 728 at para. 27.

94 Religious minorities are the only denomination guaranteed the fundamental right "to own and acquire movable and immovable property." See *Constitution of India*, 1950, Art. 26(c).

Since the tribes' right to property is merely a legal right, and not a fundamental right, the State can acquire their property with just compensation if it can establish that such appropriations are by "authority of law".[95] That "authority of law" is found in section 4(i)[96] of PESA which explicitly authorizes the acquisition of land in Scheduled Areas.[97] What is also evident is that the categorization of tribal property rights as legal rights reinforces PESA's low and ambiguous thresholds mentioned earlier. Because the burden of establishing a violation of the legal right to property lies with the tribes, they face a formidable task disproving that the State did not properly 'consult' or seek 'recommendations'.

Moreover, the Indian Supreme Court has ruled that the government is the "best judge" to determine if a public purpose is served by an acquisition.[98] This substantially eases the burden on central and state governments to defend a particular acquisition, and, with later Supreme Court decisions opining that the *Land Acquisition Act* is "a complete Code by itself,"[99] the central and state governments' powers of appropriation have been strengthened because government agencies are no longer obligated to refer to any other legislation for determining the propriety of their actions.[100] It also means that the *Land Acquisition Act*, which does not provide special protective rights in tribal land, can be incidentally applied to prevail over any proprietary rights otherwise guaranteed to the tribal communities in either PESA or the Fifth Schedule.[101]

Against this background, it appears illogical that the maximum protection provided in PESA against usurpation of tribal land is the obligation that state agencies should consult the local governments "before making the acquisition of land in the Scheduled Areas."[102] PESA does not stipulate the

95 See *ibid*., Art. 300A.
96 *Infra* note 102.
97 Though the actual process is detailed in the *Land Acquisition Act* of 1894.
98 See *Daulat Singh Surana v. First Land Acquisition Collector*, [2006] 11 SCALE 482. Of course, such administrative decisions would be subject to judicial review. The only other restriction on the government's wide-reaching powers is the detailed procedure for acquisition and compensation specified in the *Land Acquisition Act*.
99 *State of Andhra Pradesh v. V. Sarma Rao*, A.I.R. [2007] S.C. 137 at para. 6.
100 *Hukumdev Narain Yadav v. Lalit Narain Mishra*, [1974] 2 S.C.C. 133 at para. 17.
101 Section 5 of PESA does provide in pertinent part: "…. any provision of any law relating to Panchayats in force in the Scheduled Areas … which is inconsistent with the provisions of Part IX … shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from the date on which this Act receives the assent of the President." This section however applies only when the provisions of the *Land Acquisition Act* are "inconsistent with the provisions of Part IX [of the Constitution]."
102 PESA, s. 4(i). This is not to say that consultation always translates into notice-and-comment decision-making. For instance, the tribes in Rayagada district of Orissa complain that the state administration acquired land without substantive consultation. See Vidhya Das, "Kashipur: Politics of Underdevelopment" (2003) 38 Econ. & Pol. Wkly. 81. The low threshold for obtaining such recommendations exacerbates an iniquitous situation where mineral exploration in

precise manner in which those consultations should take place, and the ambiguity lowers the standard for ensuring procedural safeguards since the courts are unlikely to assail an acquisition for a public purpose unless that action was shown to be egregious or patently illegal.[103] Consequently, administrations conveniently refrain from investing any more time and effort than that required to satisfy the requirement for a consultation as mandated by PESA.[104]

The inconsistency regarding the true nature of the rights in land that Parliament afforded tribal communities when it enacted PESA has become a source of discord between the judicial and executive branches of the State. The controversy can be traced back to the Supreme Court's *Samatha* decision in 1997, where the court had ruled that the Fifth Schedule enjoined governors to make regulations preventing the purchase and exploitation of tribal land for mining activities by any entity that was not state-owned or a tribal enterprise.[105] The judgment had prompted an opposite reaction from the federal Ministry of Mines, which proposed a constitutional amendment that granted governors unfettered authority in the "transfer of land by members of the schedule[d] tribe[s] to the Government or allotment by Government of its land to a non-tribal for undertaking any non-agricultural operations."[106] The Ministry also believed that *Samatha* had altered the balance of power stipulated in the Fifth Schedule by "tak[ing] away the sovereign right of the government to transfer its land in any manner."[107] Although the Constitution was ultimately not amended, the controversy has since encouraged various

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Scheduled Areas have directly displaced 313,000 tribal people and indirectly affected 1.3 million others. See Mohanty, *supra* note 92.

103 Such acquisitions are considered policy decisions in which, the Indian Supreme Court has made clear, the courts "will not interfere." See *Narmada Bachao Andolan v. Union of India*, [2000] 10 S.C.C. 664. "Of course, whether there is any legal or constitutional bar in adopting such policy can certainly be examined by the Court." *R.K. Garg v. Union of India*, [1981] 4 S.C.C. 675 at 413.

104 A relatively recent phenomenon has been the acquisition of tribal land for State-owned corporations in the national interest, following which such corporations are privatized. This practice allows the government to justify the initial acquisition, besides allowing later investors to avoid negotiating with tribal communities or risking any potential violation of state laws that prohibit alienation of tribal land. Such indirect alienation of tribal land has been inadvertently legitimized because of the uncertainty created by the Indian Supreme Court in *BALCO v. Union of India*, [2002] 2 S.C.C. 333. The *BALCO* court upheld the sale of the state-owned Bharat Aluminium Company Limited (with major installations in Scheduled Areas) to a private stakeholder. The decision appears to contradict an earlier, binding ruling of the same court in *Samatha v. State of Andhra Pradesh,* [1997] 4 SCALE 746 where the court had expressly proscribed commercial exploitation of tribal resources by non-tribal entities.

105 *Samatha v. State of Andhra Pradesh*, [1997] 4 SCALE 746.

106 India, *Note for Committee of Secretaries Regarding Amendment of the Fifth Schedule to the Constitution of India in the Light of the Samatha Judgment, No. 16/48/97-M.VI* (New Delhi: Ministry of Mines, 10 July 2000).

107 The Ministry concluded that the judgment "will have adverse effect not only on mining sector but on all other non-agricultural activities specially industrial activity and will impact the economic development throughout the country." *Ibid.*

states to express similar views on their competence to permit exploitation of natural resources in the Scheduled Areas by private, non-tribal enterprises.[108]

Insufficient Protection for Tribal Forest Rights

Forest laws in India classify forests into three categories: reserve forests (which should be left untouched);[109] protected forests (where exploitation is allowed unless specifically prohibited);[110] and village forests (that are assigned to local communities for management and use).[111] The ability of a tribal community to exploit a forested region for consumption would thus depend on its classification. So, for instance, even though PESA grants tribal communities "the ownership of minor forest produce,"[112] the right is almost sterile unless state governments ensure that forested areas near tribal communities are denoted village forests and not reserve forests.[113] Despite such clear federal restrictions on forest use, PESA does not provide any guidance on the manner in which the states should protect tribal rights to forestlands.[114]

Interestingly, even a program that encourages cooperation between the state forest departments and village communities for conservation has proved counterproductive. The Joint Forest Management (JFM) program is the preferred national policy for forest conservation under which a state can constitute separate village committees supervised by that state's forest department, alongside local governments and empowered under PESA.[115]

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108 A later ruling of the Supreme Court—*BALCO Employees' Union v. Union of India*, [2002] 2 S.C.C. 333—did express "strong reservations with regard to the correctness of the majority decision in Samatha's case," but the court declined to overrule *Samatha,* citing the different laws implicated in the two cases.

109 See *Indian Forest Act*, 1927, ch. II.

110 *Ibid.* ch. IV.

111 *Ibid.* ch. III.

112 See PESA, s. 4(m)(ii). The federal Ministry of Environment and Forests defines "minor forest produce" as "all non-timber forest produce of plant origin as notified by the State/Union Territory as Minor Forest Produce …." See *State/Union Territory Minor Forest Produce (Ownership of Forest Dependent Community) Act*, 2005, s. 2(d).

113 See *Forest (Conservation) Act*, 1980, s. 2. Even when a person validly claims rights in reserved forestlands the *Forest Act* authorizes the administration to either: (i) "exclude such land from the limits of the proposed forest"; (ii) reach an agreement "with the owner thereof for the surrender of his rights"; or (iii) "proceed to acquire such land in the manner provided by the *Land Acquisition Act*, 1894." *Indian Forest Act*, 1927, s. 11. Since the *Forest Act* gives equal dignity to all three avenues, tribes that vigorously oppose the reservation of their forestlands could immediately risk forcible acquisition under the third option. To be sure, the *Forest Act* does permit joint management of forests where the administration and private citizens have a common interest. See *Indian Forest Act*, 1927, s. 80. However, joint management under the statute is elective and the states would not violate PESA if they seized tribal forestlands for reservations "in the manner provided by the *Land Acquisition Act*, 1894." See also *supra* note 101.

114 The National Environment Policy (2006) realizes this, but presents no solutions other than the need for understanding the implications of PESA and to secure the "traditional entitlements of forest dependent communities." *Supra* note 92 at 24-25.

115 Under the JFM program, village communities are entrusted with the responsibility of protecting and managing forests in return for a share in timber revenue. India, *Joint Forest Manage-*

Although such committees would ideally be staffed entirely by members of the tribal community in Fifth Schedule areas, they are for all intents and purposes separate institutions controlled by the state administration. The lack of interoperability between village committees constituted under PESA and those formed under the JFM program is evident from the fact that the JFM guidelines released in 2000 (and revised in 2002) by the federal Ministry of Environment and Forests does not so much as mention PESA.[116] State conservation agencies have also frequently asserted that PESA should not be interpreted as securing tribal rights over protected forestlands, irrespective of whether the communities have traditionally exploited those resources. Sarin *et al*. therefore conclude that "devolution policies [such as JFM] have largely reinforced state control over forest users, giving the relationship new form rather than changing its balance of power or reducing the conflict between state and local interests."[117]

Tribal Rights to Water Resources Remain Ambiguous

PESA provides that local communities in Scheduled Areas should be entitled to manage "minor water bodies"—a statutorily undefined term.[118] While states would typically follow administrative guidelines setting out the rules for managing such water bodies, the difficulty is that the directives identify a "minor water body" based on acreage rather than territorial jurisdiction and traditional use patterns of the tribal communities.

The problems are compounded when some states either devolve management responsibilities without ascertaining community needs or neglect to pass new laws.[119] The contrasting actions taken by the states of Madhya Pradesh and Maharashtra are noteworthy: while the state of Madhya Pradesh in central India swiftly and properly delineated rules for the use of minor water bodies in Scheduled Areas, the Maharashtra legislature entrusted management of minor water bodies to local governments, but left the actual determination of authority amongst the tiers of local government to the absolute discretion of the state executive.[120]

The lack of community participation in policies to manage water resources in Scheduled Areas is also an issue that the federal government

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ment Resolution, Res. No. 6.21/89-PP (New Delhi: Ministry of Env't & Forests, 1 June 1990).

116 See India, *Guidelines for Strengthening of Joint Forest Management (JFM) Programme, Letter No. 22-8/2000-JFM (FPD)* (New Delhi: Ministry of Env't & Forests, 21 February 2000), and, India, *Strengthening of Joint Forest Management (JFM) Programme, Letter No. 22-8/2000-JFM (FPD)* (New Delhi: Ministry of Env't & Forests, 24 December 2002).

117 Sarin *et al.*, *supra* note 65 at 6.

118 For a status report on conservation of water bodies in India see, India, *Annual Report 2005-06* (New Delhi: Ministry of Environment & Forests, 2006) at 104-110, online: Ministry of Environment and Forests <http://envfor.nic.in/report/report.html>.

119 See Planning Commission, *supra* note 56.

120 *Supra* note 74.

has been unable to resolve. Though the National Water Policy released in 2002 recommends "[s]pecial efforts … to investigate and formulate projects either in, or for the benefit of, areas inhabited by tribal or other specially disadvantaged groups,"[121] the policy fails to identify the rights and responsibilities of tribal local governments.[122]

The Tribal Struggle to Cope with Imposed Laws

Contrary to PESA's guarantees that state laws would respect tribal customs and traditions,[123] the Act has debased the tribal traditions of self-governance. The propensity to violate tribal norms is not only a product of subnational apathy, but also the outcome of a statutory scheme that compels the tribes to adopt non-tribal concepts.[124] By promoting the system of local government prescribed for non-tribal communities in Part IX of the Constitution, the Indian Parliament has instantly abolished centuries-old systems of Indigenous governance.[125]

The abrupt shift from traditional institutions to alien concepts of elected representatives and Panchayats has resulted in "very low" tribal participation and an underutilization of the institutions.[126] Thus, for example, the Lanjia Saoras, a tribe in the state of Orissa, have been unable to adopt the electoral system of government mandated by Part IX of the Constitution,[127] as have the Santals.[128] Similarly, the tribes in Madhya Pradesh that were asked to adopt the Panchayat form of government have not seen "the importance of

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121 India, *National Water Policy* (New Delhi: Ministry of Water Resources, 2002) at 4.

122 See R. Iyer, "The New National Water Policy" (2002) 37 Econ. & Pol. Wkly. 1701. See also Ajit Menon, "Environmental Policy, Legislation and Construction of Social Nature" (2006) 41 Econ. & Pol. Wkly. 188.

123 PESA, s. 4(a).

124 Sharma notes that the Scheduled Areas are often inundated with "exotic laws and institutions" insensitive to tribal customs and traditions. Sharma, *supra* note 82.

125 The proposal to adapt non-tribal institutions of government for Scheduled Areas was conceived by the Bhuria Committee appointed by Parliament. See India, *Report of MPs and Experts—To Make Recommendations on the Salient Features of the Law for Extending Provisions of the Constitution (73rd Amendment) Act 1992 to Scheduled Areas* (New Delhi: Ministry of Rural Development, 1995) at para. 1-3, online: Overseas Development Institute <http://www.odi.org.uk/Livelihoodoptions/forum/sched-areas/about/bhuria_report.htm>. Critics argue that the committee rarely interacted with tribal communities. See "Non-tribals Need to be Educated About Tribals" *Down To Earth* (31 July 2003). Contra Sharma, *supra* note 72 at 109.

126 For instance, authors describe how the "gram sabhas [a body of adult community members with specific powers under PESA] are almost a formal institution with no role in various assigned tasks." Yatindra Singh Sisodia, "Tribal People's Empowerment through Grassroots Level Institutions: A Case of Madhya Pradesh" in D.C. Sah & Yatindra Singh Sisodia, eds., *Tribal Issues in India* (New Delhi: Rawat Publications, 2004) at 107.

127 Nityananda Das, "The Tribal Situation in Orissa" in K. Suresh Singh, ed., *The Tribal Situation in India* (Shimla: Indian Institute of Advanced Study, 2002) at 178.

128 *Ibid*.

panchayat … for their own welfare [or] societal development,"[129] while in Gond and Bhil societies the Panchayat system eroded the significance of traditional councils and strained ties within the community.[130]

A more subtle reason for the tension between the customary and the received is the entrenched perception in India that the tribes are primitive communities with little or no order in society.[131] Of course, such a view can only be seen as a product of the dominant culture's prejudice against, and ignorance of, the culture of both settled and nomadic tribal peoples, particularly those deemed 'primitive', since each of these groups, of course, has its own customs, traditions and laws.[132] The Manki-Munda system in the state of Jharkhand, for instance, competes with state laws enacted to enforce PESA because the tribes prefer their traditional law's emphasis on collective and consensual decision-making.[133]

PESA's drafters mistakenly believed that an ambiguous directive to the states to design their laws in consonance with such "customary law, social and religious practices and traditional management practices of community resources" would resolve the dichotomy.[134] What they overlooked was the inevitable displacement of indigenous laws and institutions that accompanies the imposition of a non-native system of governance.[135]

III "OUR RULE IN OUR VILLAGES"—A PROPOSAL TO INSTITUTIONALIZE AUTONOMOUS TRIBAL GOVERNMENTS

The discussion in Part II of this paper exposes the wide schism between the Indian Parliament's vision of participatory democracy and the tribal aspiration for self-governance. The discussion also convinces me that cosmetic changes in the *form* of the legislation, or reforms in civil administration

129 S.N. Chaudhary, "Tribal Leadership in Panchayats: A Study of their Profile, Performance and Plan" in D.C. Sah & Yatindra Singh Sisodia, eds., *Tribal Issues in India* (New Delhi: Rawat Publications, 2004) at 117.

130 Hooja, *supra* note 28 at 159.

131 See generally Roy, *supra* note 92.

132 On the customs of so-called "primitive" tribes such as the Marias of Chhattisgarh and on the clan rules of the Bhils in central India, see *e.g.* Shyamlal, *Tribal Leadership* (New Delhi: Rawat Publications, 2000) at 36. For a discussion of the traditions of the Birhors, a nomadic tribe in central India, see K.P. Singh, "Birhor—A Vanishing Tribe" in Ashok Ranjan Basu & Satish Nijhawan, eds., *Tribal Development Administration in India* (New Delhi: Mittal Publications, 1994).

133 Bhubneshwar Sawaiyan, *An Overview of the Fifth Schedule and the Provisions of the Panchayat (Extension to the Scheduled Areas) Act, 1996* (Commonwealth Policy Studies Unit, 2002) at 4-5, online: Commonwealth Policy Studies Unit <http://www.cpsu.org.uk/downloads/Bhubnesh.pdf>.

134 PESA, s. 4(a).

135 *Cf.* Marc Galanter, "The Aborted Restoration of 'Indigenous' Law in India" (1972) 14 Comp. Stud. in Soc'y & Hist. 53. But see Andrew Harding, "Global Doctrine and Local Knowledge: Law in South East Asia" (2002) 51 Int'l & Comp. L.Q 35 at 45 ("[L]egal systems *do* develop out of legal transplants, and that is, further, nothing to be ashamed of. Far from being impossible, transplants are a necessary catalytic element.").

alone would make a negligible difference in the long run. If tribal local governments are truly to become institutions of self-government, they should exercise autonomous powers rather than devolved authority.

In the following sections I propose just such an alternative where constitutionally recognized autonomous tribal governments are supplemented by federal and state statutes conducive to tribal welfare. The local government forms that I recommend are more legitimate than those established by PESA because they are not only built on the (now) accepted foundation of the tribes' ability to self-govern,[136] but are also modelled to avoid the pitfalls identified in Part II.

Why "Autonomy" is Preferable to "Decentralization"

In order to set the scene for my proposal, it is worth addressing the question of why an alternative structure of tribal governance should be premised on autonomy rather than on a different method of decentralization. I answer this question in three gradual steps: first, by briefly explaining the theoretical superiority of autonomy that the advocates for tribal governance in India often ignore; second, by explaining how decentralization fosters 'agency capture', which is perhaps the most important debilitating factor in the exercise of tribal rights in a country where inequalities abound; and third, by arguing that tribal autonomy has now firmly replaced decentralization as the preferred model of governance even in international legal instruments.

Autonomy as a "New Deal" between the State and the Tribes

Contemporary theory about decentralization identifies four major arrangements: (1) devolution (characterized by subnational units that have the responsibility for governing and whose activities are substantially outside the direct control of central government); (2) delegation (where subnational units are assigned specific decision-making authority with respect to functions defined by a central government); (3) deconcentration (that is, a spatial relocation of administrative responsibility to inferior levels within the central government); and, (4) divestment (where administrative responsibility is transferred to non-governmental institutions, and is synonymous with privatization).[137] In India, decentralized governance in the tribal regions follows the traditional, top-down approach of defining the political, administrative and fiscal powers of a self-contained community, such as a tribe,

136 See also PESA, s. 4(b) and the discussion on tribal societies in Part II (A Review of PESA: The Impairment of Tribal Rights in a Decentralized Government) of this article.

137 See Robertson Work, "Decentralization, Governance, and Sustainable Regional Development" in Walter B. Stöhr, Josefa S. Edralin & Devyani Mani, eds., *New Regional Development Paradigms: Decentralization, Governance, and the New Planning for Local-Level Development*, Vol. 3 (Connecticut: Greenwood Press, 2001) at 29.

with the expectation that the empowered entity would function within the parameters (and towards the objectives) envisioned by the retreating State. Therefore, in terms of the decentralization theory described above, the extant Indian model of tribal governance can hardly be considered devolved authority because even though there has been a transfer of some degree of responsibility for governing (which is one constituent of devolution), the activities of the tribal governments are not "substantially outside the direct control of central government" (which is the second inextricable determinant). Essentially, decentralized tribal governance in India is an "[a]ssignment of [the] specific decision-making authority" stipulated in PESA, thereby reducing in intensity to 'delegation'.[138] In such a paradigm where the State sets out the legal terms and conditions for exercising power in its stead, subordinate groups—such as the tribes and women—invariably remain disadvantaged pending a redistribution of the "assets and entitlements" amongst community members.[139]

On the other hand, autonomy is an equity-facilitating step where the State accepts that *its* definition and vision of what a community can (or should) achieve does not necessarily reflect the aspirations of the target community. Hence, the State would encourage the target community to develop indigenous political, administrative and fiscal structures, with the conventional bureaucracy playing a support function. This is a bottom-up approach where governance evolves from the members of the community. An autonomous government is therefore anchored in a new deal between the State and the tribes (with civil society as a mediator) to design government according to tribal culture and tradition.[140] "Because of [this] legal character, the life of an autonomous entity is not subject to simple administrative measures or decisions made by a higher authority. It is in this sense that autonomy is more than mere decentralization."[141]

Autonomy also ensures "a dramatic increase in [tribes'] representation in the political system and their participation in decision-making processes that affect their own development."[142] The extant policies of decentralization should accordingly be perceived only as the initial steps towards that ideal, offering avenues for participation that can be cultivated into independent decision-making. In other words, "autonomy lies at the end of a progression

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138 *Ibid.*

139 Craig Johnson, *Decentralisation in India: Poverty, Politics and Panchayati Raj*, Working Paper 199 (London: Overseas Development Institute, February 2003) at 1-2.

140 See also Deborah J. Yashar, "Democracy, Indigenous Movements, and the Postliberal Challenge in Latin America" (1999) 52 World Pol 76.

141 Hector Diaz Polanco, *Indigenous Peoples in Latin America: The Quest for Self-Determination*, trans. by Lucia Rayas (Colorado: Westview Press, 1997) at 103.

142 D.L. Van Cott, "Indigenous Peoples and Democracy: Issues for Policymakers" in D.L. Van Cott, ed., *Indigenous Peoples and Democracy in Latin America* (New York: St. Martin's, 1994) at 13.

of rights that can be demanded by … [I]ndigenous communities [to exercise] meaningful internal self-determination and control over their own affairs in a manner that is not inconsistent with the ultimate sovereignty of the [S]tate."[143]

It is unclear whether Parliament considered PESA as ultimately presaging autonomy for the tribes in the Scheduled Areas.[144] But it is evident that regardless of legislative intentions, the State has become overbearing and directs (rather than assists) tribal government. Indeed, as demonstrated earlier in this paper, the life of the tribal local government in a decentralized State apparatus *has* become subject to simple administrative measures and decisions made by higher authorities.

Decentralization Becomes an Instrument of Elite Hegemony

A top-down approach also raises the spectre of agency capture where interest groups with a comparative advantage are able to influence sufficiently higher levels of administration involved in policy-making.[145] In the context of tribal governance in India, that interest group is usually a (non-tribal) political and bureaucratic clique. For convenience, I will analyze PESA's statutory scheme to explain my point.

As a blueprint for tribal self-government, PESA actually achieves the opposite.[146] Despite the seemingly radical language, the image of the tribes as primitive societies incapable of governing themselves is the subtle undertone of this legislation because it was born from the entrenched belief of politicians, bureaucrats and national and subnational institutions that the tribes' only chance of salvation was benevolent rule by the State.[147] In other

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143 Tomasz Branka, "Autonomy—Old Concept, New Tasks" in *Current Issues of the International Politics through the Eyes of Young Europeans* (Prague: University of Economics, 2005) at p. 55.

144 But see PESA, s. 4(o), which asks states to design their decentralized local governments as close as possible to the pattern of autonomous governments as set out in the Sixth Schedule.

145 For a description of factors that contribute to agency capture see, Clayton Gillette & James Krier, "Risk, Courts, and Agencies" (1990) 138 U. Pa. L. Rev. 1027.

146 See John D. Huber & Charles R. Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002) at 44 (The statute as a blueprint "may contain instructions for bureaucrats, cabinet ministers, judges, or other actors who create, implement, and enforce policy.").

147 The rationale for the Fifth Schedule and PESA has remained unchanged since the Indian Statutory Commission concluded in 1927 that the "backwardness [of the tribes] precluded them from any kind of representative Government." J. K. Das, *supra* note 46 at 134. For that reason, the Fifth Schedule in the Constitution is symbolic of an eight-decade-old perception that the tribes are primitive societies in urgent need of care and development by the (civilizing) State. And, when PESA is considered a "logical extension" of the Fifth Schedule, the colonial prejudice is perpetuated even in a decentralized administration. See Planning Commission, *supra* note 56. See also the discussion in Part II (The Fifth and Sixth Schedules of the Constitution) of this paper.

words, the elite believed that the tribes could be "civilized" in time by State-directed development programs and proper administration.[148]

The National Tribal Policy also subtly hints at this belief when it says that the central and state governments should ensure the "welfare and protection of [the Scheduled Tribes] and their tribal domain" by bringing them "the benefits of development" as the foremost objective.[149] Social scientists supplement the flawed perception with studies alleging that the tribal "concept of development is narrow, and the realization of which is completely based on government grant."[150]

The convergence of the opinions of politicians, bureaucrats and federal and state administrations in a decentralized paradigm has been shown to almost always result in high-discretion laws which allow the executing agencies (the states) considerable freedom to decide the fate of the target populace (the tribes).[151] That is precisely what has happened: PESA has granted state administrations ample latitude in formulating the scope and structure of devolved authority. This result is expected, considering that federal (or decentralized) structures encourage parties to write more detailed, low-discretion legislation only when "the national-level authors of statutes are most likely to have goals that diverge from those of the implementers of policy at the subnational level."[152]

The Recognition of Tribal Autonomy in International Law

Another compelling reason to embrace autonomous local governments is the international acceptance of the tribes' inherent right to autonomy as a

148 C.B. Tripathi, "Approaches to Tribal Development and Experience" (1988) 68 Man in India 335 at 349. This perception is not unique to India or to tribal people. The elites in post-colonial administrations have often arrogated the right to determine the pace, process and objectives of development intended to benefit the poor, disenfranchised, marginalized or otherwise disadvantaged communities. See, *e.g.*, Tania Murray Li, "Compromising Power: Development, Culture, and Rule in Indonesia" (1999) 14 Cultural Anthropology 295 and John Briggs & Joanne Sharp, "Indigenous Knowledges and Development: A Postcolonial Caution" (2004) 25 Third World Quarterly 661 at 662-663.

149 *Supra* note 70 at 2. Partha Chatterjee would describe this as a situation where "autonomous forms of imagination of the community were, and continue to be, overwhelmed and swamped by the history of the postcolonial state." Partha Chatterjee, *The Nation and its Fragments: Colonial and Post-colonial Histories* (Princeton: Princeton University Press, 1993) at 11.

150 *Supra* note 127 at 124. Charsley accordingly surmises that "[t]he opposition of 'backwardness' and 'modernity' found in Indian government, academic, and development agency discussions implies a linear model of social evolution, with the Tribals at a lower stage …. This model helps explain why the thrust of government policy has been towards their 'upliftment', and is largely integrationist …." Katharine Charsley, "'Children of the Forest' or 'Backwards Communities'? The Ideology of Tribal Development" (1997) 7 Edinburgh Papers in S. Asian Stud. 4, online: Centre for South Asian Studies <http://www.csas.ed.ac.uk/fichiers/CHARSLEY.pdf>.

151 See Huber & Shipan, *supra* note 146.

152 See *ibid*. at 191, 209.

people. The International Labour Organization (ILO) Convention 169,[153] which is the only binding international treaty dealing with Indigenous peoples and land rights, replaced the ILO Convention 107[154] that had focused "on the goal of integration and assimilation rather than on the protection of [I]ndigenous peoples[']lands, culture, and distinctiveness."[155] The ILO Convention 169 takes a different approach by requiring State parties to the convention to respect the cultures and institutions of Indigenous and tribal peoples, their right to continued existence within their national societies, their right to establish their own institutions and to determine the path of their own development.[156] ILO Convention 169 was therefore designed to reverse the integrationist policy which "came to be associated with 'destruction and absorption'."[157]

India ratified the ILO Convention 107 but did not sign the 1989 Convention, objecting to the latter's use of the term "indigenous", and what was perceived as a dangerous shift in favour of autonomy.[158] Yet, curiously enough, domestic laws like PESA selectively incorporate certain concepts from the 1989 Convention. For instance, like the 1989 Convention, PESA guarantees tribal participation in governance;[159] environmental protection[160] and management of natural resources in tribal territories;[161] enforcement of national laws and regulations in a manner sensitive to tribal customs and customary laws;[162] and the protection of tribal interests in land ownership,[163] employment opportunities,[164] rural entrepreneurship[165] and education.[166]

However, more fundamental issues concerning the imposition of alien systems of governance that contradict tribal "values, practices and institu-

153 *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 I.L.M. 1384 (entered into force 5 September 1991) (*ILO Convention 169*).

154 *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S. 247 (entered into force 2 June 1959) (*ILO Convention 107*).

155 Marcos A. Orellana, *Mining, Minerals & Sustainable Dev., Indigenous Peoples, Mining, and International Law* (International Institute for Environment and Development, 2002) at 13, online: International Institute for Environment and Development <http://www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf>.

156 ILO Convention 107 had earlier signalled the "growing isolation and marginalization of Indian groups in the wake of national development" in the Americas. "Hence, [ILO Convention 169] urged states to ensure that [I]ndigenous and tribal peoples participate in and benefit from development, rather than being merely displaced by projects." Barsh, *supra* note 16 at 756-757.

157 *Barsh*, *supra* note 16 at 759.

158 See *supra* note 9.

159 Drawing from ILO Convention 169, Art. 7(1).

160 *Ibid.* Art. 7(4).

161 *Ibid.* Art. 15.1.

162 *Ibid.* Art. 6(1)(a) and Art. 8(1).

163 *Ibid.* Art. 18.

164 *Ibid.* Art. 20(1).

165 *Ibid.* Pt. IV.

166 *Ibid.* Pt. VI.

tions,"[167] disregard for the tribes' "right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy"[168] and the absolution of states from securing the "free and informed consent" of the tribes prior to land acquisitions[169] remain pressing domestic concerns.

The irony is that the values of tribal autonomy cherished in ILO Convention 169 were also initially the principles guiding independent India's tribal policy. Five decades ago, India's first Prime Minister, Jawaharlal Nehru, espoused the *Panchasheel* doctrine that the tribes could flourish and develop only if the State interfered minimally and functioned chiefly as a support system.[170] Somewhere down the years, those values were lost and the very same bureaucratic stranglehold that Nehru warned against ultimately led India to reject the notion of autonomy in the 1989 Convention.

Recently, however, India appears to have softened its stand against autonomy for tribal people. In September 2007, India voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)[171] which affirms various rights to autonomy that are inherent in the tribal peoples of the world.[172] The UN Declaration, although not binding, has been variously described as an "international norm-building document"[173] that reflects the "widespread agreement"[174] with respect to Indigenous rights among many nations,[175] and which, along with other developments, "can be seen as giving rise to a body of customary international law on the subject."[176] By supporting the UN Declaration India agreed that nations must respect some form of autonomy for Indigenous people, but the vote was conditioned on the fact that the UN Declaration recognizes the

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167 *Ibid.* Art. 5(b).
168 *Ibid.* Art. 7(1).
169 *Ibid.* Art. 16(2).
170 The *Panchasheel* (five-point) doctrine advocated tribal development based on Indigenous genius and minimal State intervention, State assistance in building a team of tribal people capable of administration and good government, respect for tribal rights in land and forests, co-opting tribal social and cultural institutions in the administration of tribal areas, and the measurement of success based on the "quality of human character that is evolved." See Jose George & S.S. Sreekumar, *Tribal Development Legislation and Enforcement* (New Delhi: Commonwealth Publishers, 1994) at 12. See also Sharma, *supra* note 72 at 60 (arguing that the *Panchasheel* had been "accepted as the corner stone of [the] State's policy on tribal affairs in that early phase").
171 *Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UNGAOR, 61st Sess., UN Doc. A/RES/47/1 (2007).
172 See, *e.g.*, UN Declaration, Art. 3-5.
173 Maivan Clech Lam, "Remembering the Country of Their Birth: Indigenous Peoples and Territoriality" (2004) 57 J. Int'l Aff. 129 at 132.
174 S. James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2004) 21 Ariz. J. Int'l & Comp. L. 13 at 24.
175 The UN Declaration sets the "minimum standards for the survival, dignity and well-being of the [I]ndigenous peoples of the world" that States are expected to enforce. (Art. 43.)
176 James Anaya, *supra* note 171 at 15.

right to *internal* autonomy for tribal people and not the right to impair the territorial integrity of sovereign and independent nations that India has so vigorously opposed.[177] Even so, the government's acceptance of the right to internal autonomy for the tribes under international law greatly strengthens the case for constitutional reforms proposed in this paper.[178]

Designing an Alternative Legal System for Tribal Governance in India

I now attempt a structural reconstruction of tribal governments. This shift from an abstract general legal notion of autonomy to a fuller, more textured model of local government will focus on constitutional amendments, supporting legislation by the states, and the contribution of civil society actors. It is difficult to classify the proposed structure strictly in the mould of "minimal" or "maximal" autonomy, but in the "complex spectrum of gradations" that lie in between, the framework leans more toward "[m]aximal autonomy with broad legislative and executive faculties" that require "a distribution of competences that is constitutionally regulated and supported by status."[179]

My suggestions are normative and begin by highlighting the importance of securing tribal property rights which form the core of other overlapping rights and duties.

Securing Tribal Property Rights

As noted earlier, securing property rights has been a key part of modern Indigenous peoples' movements around the world; yet the tribes in India are regularly deprived of these rights. Also noted was the root of the problem that the tribes have a legal rather than *fundamental* right to property under

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177 See "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President", *UN Press Releases and Meetings Coverage* (13 September 2007), online: UN Press Releases and Meetings Coverage <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> ("[India's representative] Ajai Malhotra [said] it was his understanding that the right to self-determination applied only to peoples under foreign domination and that the concept did not apply to sovereign independent States or to a section of people or a nation, which was the essence of national integrity") ("Country representative press release"). See also, UN Declaration, Art. 46(1) and Stefania Errico, "The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview" (2007) 7 HRLR 756 at 758, describing such a right to internal self-determination. Equally important in India's decision to support the UN Declaration was the fact that the resolution did not define "[I]ndigenous peoples", thereby leaving it open for the government to argue that India's tribal people did not qualify for such rights because they were not technically Indigenous.

178 India had also voted to adopt the draft text of the UN Declaration in the UN Human Rights Council. See Stefania Errico, "The United Nations Declaration on the Rights of Indigenous Peoples" (2006) 10 ASIL Insight, online: The American Society of International Law <http://www.asil.org/insights/2006/08/insights060814.html>.

179 See *supra* note 139 at 105. The author rightly cautions that "…. what may be seen as maximal autonomy in one situation may be considered minimal in another and vice versa." *Supra* note 139.

Indian law, which has made it possible for the State to acquire tribal lands if it meets the low threshold of having consulted or sought recommendations before doing so.

The most straightforward way of substituting 'consent' for 'consultation' is to alter the balance of power between the states and the tribal local governments by making property a fundamental right for the tribes as well.[180] Even though states can still acquire tribal community property by qualifying this right (as almost all other fundamental rights are) and paying just compensation,[181] the extent of police powers would be significantly curtailed, since any state action[182] interfering with fundamental rights will be judicially reviewable for its effects and consequences under the well-established principles of the Indian Supreme Court.[183]

The mandate for such a provision has been constitutionally given to Parliament, which can make "any special provision for the advancement of … the Scheduled Tribes."[184] If recognized, the fundamental right would be one of many provisions securing tribal interests: the Fifth and Sixth

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180 Private property rights have had a checkered history in India. Individuals currently do not exercise a fundamental right to property and any appropriations—including those of tribal lands—can only be challenged if it violates the legal right guaranteed in Article 300A cited earlier. However, what is interesting to note is that in the last 15 years India has taken a turn with the New Economic Policy adopted in 1991 which deregulated and liberalized the economy. The resultant growth in capitalism has made private property and the modern social relations theory, which connects property rights to "personhood, health, dignity, liberty, and distributive justice," increasingly relevant. See Madhavi Sunder, "IP3" (2006) 59 Stan. L. Rev. 257 at 259 (citing Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957, Joseph William Singer, *Introduction to Property* (New York: Aspen Law & Business, 2001) at 2-19, and Stephen R. Munzer, "Property as Social Relations" in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) at 36). As a result, some sections of society have begun appealing for the reinstatement of the fundamental right for all citizens. See, *e.g.*, Kaushik Das, "The Right to Property: It is High Time the Government Makes it a Fundamental Right Again" *Business Standard* (14 April 2004) .

In order to navigate between the conceptual shoals that may be implicated when thinking about the possibility of granting the tribes such a right, I offer a beginning. The tribes' right to property should be considered a corollary to the various state laws that prohibit alienation of tribal lands. Many, such as the Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation of 1970, vest all land in the Fifth Schedule areas with the tribes unless proven otherwise. A fundamental right would ensure that this default rule is not altered in the future because of political pressure.

181 The Constitution may place "reasonable restrictions" on the right. Such restrictions qualify most other fundamental rights in the Constitution, including the fundamental right of religious minorities to own and acquire property. See *supra* note 87.

182 "The prerequisite for invoking the enforcement of a fundamental right … is that the violator of that right should be a State [entity]." *Zee Telefilms Ltd. v. Union of India*, [2005] 4 S.C.C. 649 at para. 28.

183 See *e.g.*, *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, A.I.R. [1991] S.C. 101 at para. 294 ("The effect of restriction or deprivation and not of the form adopted to deprive the right is the conclusive test.").

184 See *Constitution of India*, 1950, Art. 15(4).

Schedules are examples, and so is Parliament's ability to legislatively restrict a citizen's right to travel or reside in any part of India if such law was "for the protection of the interests of any Scheduled Tribe."[185]

On a conceptual plane, this fundamental right ought to lie between the "castle" model and the "investment" model of property.[186] The middle ground is supported by Professor Joseph Singer, who argues that "[o]wners do not live alone and when their exercise of property rights affects others, the interests of those others need to be taken into account to determine whether any obligation imposed on a property owner is just or fair."[187] There would be numerous occasions where the use of tribal property would be imperative for national development, and where an absolute right for the tribes may unduly jeopardize the greater good. The fundamental right to property must therefore impose some obligations on the tribes.[188] In order to balance rights with concomitant duties, the 'just and fair' test mentioned above allows us to abjure the extreme positions of the two models, fitting in nicely with the fact that the test would be applied by the Indian judiciary, which has usually supported tribal property rights.[189] In this way, my proposal would be an extraordinary measure to remedy the "collective inferiority" of the tribal peoples.[190]

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185 See *ibid*., Art. 19. A fundamental property right specifically for tribal communities would not violate the principle of equality embodied in the Constitution of India. The Indian Constitution, like that of every other modern democracy, has an equal protection clause (Article 14) with a "generality-requiring task" as well as a "generality-correcting task" which "prevent[s] government from establishing or reinforcing through the laws collective disadvantages inconsistent with the principle that in a democracy each person should count as one." Roberto Mangabeira Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561 at 603. In other words, a fundamental right to property for tribal communities in the Scheduled Areas would correct the unexplained imbalance in the Constitution where minority religious communities alone are guaranteed such rights while other socially coherent groups like the tribes are not.

186 The "castle" model "conceptualizes owners as having absolute domain over their property as long as they do not use it to harm others," while the "investment" model "conceptualizes property as a form of investment in a market economy that creates reasonable expectations likely to yield economic rewards." See Joseph William Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" (2006) 30 Harv. Envtl. L. Rev. 309.

187 *Ibid.* at 332.

188 *Ibid.* at 334 ("We can argue about what those obligations can be, but we cannot reasonably argue that they do not exist.").

189 See *Samatha v. State of Andhra Pradesh*, [1997] 4 SCALE 746. The *Samatha* court did not qualify the government's right to acquire tribal mineral resources because the Fifth Schedule, as it stood then (and now), provides no such limitation where the appropriation is in national interest. If there was a fundamental right to property for the tribes, the court's opinion leads me to conclude that it would have surely truncated the State's power to take tribal property.

190 A phrase I borrow from Roberto Unger. See *supra* note 181 at 606. Interestingly, Mahapatra *et al*. provide a vivid account of 1,500 tribal villages in a resource-rich region that declared themselves "village republics" in a desperate attempt to prevent non-tribal intrusions and takings by the State. See Richard Mahapatra *et al.*, "The Second Independence: What Makes Villages Declare Themselves Republics?" *Down to Earth* (31 August 2002).

Towards Autonomous Tribal Local Governments

Once property rights are secured, they must be sustained by a legal paradigm that strengthens tribal autonomy. Tribal autonomy is not a challenge to India's sovereignty. Rather, in claiming the right to self-determination the Indigenous communities are "seeking new ways of being recognized by national laws and systems of decision making without losing their autonomy and their own values."[191]

Before I venture to reconstruct the schema of tribal local governments in Fifth Schedule areas, it might be helpful to revisit the Sixth Schedule. While by no means an ideal,[192] the Sixth Schedule, as described in Part II of this paper, has certain features that can be implanted in any governance model for tribal areas in the rest of the country.[193] In particular, I am interested in drawing from the Sixth Schedule's concepts of constitutionally specified administrative and legislative subjects that are the exclusive domain of the local governments, the proscription on the states' executive authority, and financial independence for the local governments.[194]

The Constitutional Scheme for Tribal Autonomy in the Fifth Schedule Areas

The structural reconstruction that I propose envisages discarding PESA and revising the Fifth Schedule. Embedding the new autonomous scheme in the Constitution would give a level of legitimacy and permanency that legislation would otherwise not provide.

The basic unit of administration in an alternative structure should continue to be a community that manages its "affairs in accordance with [shared] traditions and customs."[195] There has never been an objection to the community as the foundation for governance in tribal areas. On the contrary,

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191 See Marcus Colchester & Fergus Mackay, "In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent" (paper presented to the 10th Conference of the International Association for the Study of Common Property, Oaxaca, Mexico, 9-13 August 2004) [unpublished], online: Forest Peoples Programme. <http://www.forestpeoples.org/documents/law_hr/fpic_ips_text_only_aug04_eng.pdf>.

192 See Sharma, *supra* note 72 at 181 ("[T]he Sixth Schedule … cannot be accepted as sacrosanct. It can be taken as a model for guidance but with a clear proviso that such elements … must be suitably adapted and even could be rejected outright wherever necessary"). Sharma however argues that the "Sixth Schedule was designed for the most favourable setting of homogen[e]ous single-tribe tracts …. The first premise in any scheme of transformation in this situation, therefore, has to be that *the system must be built on what exists on the ground*." *Ibid*.

193 Perhaps in recognition, Parliament required that "the State Legislature shall endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district levels in the Scheduled Areas." PESA, s. 4(o).

194 I hesitate to suggest an outline for an Indigenous judicial system for reasons explained later in this part.

195 See PESA, s. 4(b).

the community *is* the fundamental institution of all tribes whether settled or nomadic.[196]

At the grassroots, the tribal community should be empowered to constitute a local government that, for reasons given elsewhere, is based on *traditional* systems of government. The revised Fifth Schedule should also prescribe the method of determining the hierarchically superior levels of tribal administration which may in many cases lie entirely within a homogeneous tribe settled over a vast area.[197] For example, the Biar and Bhinjhal tribes of central India split their traditional governing bodies into two tiers —one at the village level, and the other at the regional level.[198]

It is also extremely important that the Fifth Schedule allow sufficient flexibility to accommodate traditional governments that may not closely follow the conventional division of authority between the legislative, executive and judicial branches. Many tribes in peninsular India appoint traditional councils that act both as executive and legislative bodies. Note that PESA itself does not draw a bright line between legislative and executive branches of local governments, and entrusts certain powers at the village level to both—that is, to the elected Panchayats and to the adult body of electors (the Gram Sabhas).

At this juncture I want to introduce the concept of legislative autonomy for the local governments at each hierarchical level. For this purpose, I propose a fourth constitutional list—alongside the earlier described Union, State, and Concurrent Lists[199]—with a diverse range of subjects that would be exclusively legislated by the tribal local governments.[200] To collate themes to be included in this fourth list, we could look at PESA, which as I mentioned earlier provides a description of the areas in which the local governments would be asked to shoulder responsibility.[201] We could also look at the Sixth Schedule, which lists various subjects on which "the [tribal District and Regional Councils] shall have power to make laws."[202] Taken together, these sources are indicative of the possibility and plausibility of codifying exclusive subjects for legislation by tribal local governments in the Fifth Schedule areas.[203]

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196 Demarcating the community is inherently linked to the determination of the local government and its hierarchy, which is a two-step process that I briefly outline in the following section.

197 Where such homogeneity is not to be found, the states may intervene in the manner described in the next section on state responsibility.

198 K.S. Singh, *The Scheduled Tribes* (New Delhi: The Anthropological Survey of India, 1994) at 175-178 .

199 See discussion in Part II of this paper.

200 Note that this legislative authority is currently exercised by the provincial Governors under the Fifth Schedule. See *supra* notes 27-34 and accompanying text.

201 See *supra* note 55.

202 *Supra* note 37.

203 The tribes must have a say in such a process and the list should complement the substantive provisions in the revised Fifth Schedule so that the subject areas are appropriately distributed

Constitutional law in India requires each heading in such a legislative list to be given "the widest scope of which their meaning is fairly capable because they set up a machinery of Government."[204] Accordingly, autonomous tribal governments would have the discretion to legislate on the subjects in the fourth list, as well as establishing the mechanism to achieve the objective of that legislation.[205]

The Constitution should also describe the supporting bases for autonomous tribal government. Thus, the revised Fifth Schedule could *inter alia* establish procedures for funding and audits,[206] disqualifying candidates for and office-bearers of tribal governments,[207] supervising election or selection processes for fairness,[208] and contesting elections or selections in a court of law.[209] In addition, the Fifth Schedule should enjoin the Indian Parliament, within a definite time frame, to amend all federal legislation that offends tribal autonomy.

Of course, a serious concern with this scheme is that it discounts the presence of the non-tribals who are minorities in the Fifth Schedule areas.[210] There is a fear that tribal communities exercising administrative or legislative autonomy may at times infringe non-tribal rights and interests. While I accept that this presents a problem that demands a level of examination beyond the scope of this paper, there are two avenues of reconciliation. Where the non-tribals manage their "affairs in accordance with [shared] traditions and customs," they themselves qualify as a community.[211] Therefore, the non-tribal community ought to be entitled to the same autonomous

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amongst the various levels of government.

204 See *Durga Das Basu*, *supra* note 29 at 1732 (citing *Dunichand Rataria v. Bhuwalka Bros.*, A.I.R. [1955] S.C. 182, *Banarasi Das v. W.T.O.*, A.I.R. [1965] S.C. 1387 at 1389, and *Hans Muller v. Supdt. Presidency Jail, Calcutta*, A.I.R. [1955] S.C. 367).

205 For the laws made by the tribal local governments to be constitutionally valid, the law-making body must establish a 'rational connection' between the legislation and the concerned subject matter in the list. See *Navnit Lal C. Javeri v. I.T.A.A. Commr., K.K. Sen*, A.I.R. [1965] S.C. 1375. The legislative authority of the autonomous tribal governments would also be tempered by judicial rulings that demand deference to other parts of the Constitution. *Cf. Lala Hari Chand Sarda v. Mizo District Council*, A.I.R. [1967] S.C. 829. The legislative competence on subjects listed in the Seventh Schedule would allow the tribal law-making body greater flexibility than that presently enjoyed by the autonomous District Councils in Sixth Schedule tribal areas. See *District Council of the Jowai Autonomous District v. Dwet Singh Rymbai*, [1986] 4 S.C.C. 38. Even an impugned law would benefit from a presumption of constitutionality. See *Diamond Sugar Mills v. State of Uttar Pradesh*, A.I.R. [1961] S.C. 652 at 655. See also *M.L. Kamra v. N.I.A.*, [1992] 2 S.C.C. 36, and *All Saints School v. Government of Andhra Pradesh*, [1980] 2 S.C.C. 478.

206 Following Articles 243H, 243I and 243J of the Constitution.

207 Detailed in Article 243F ("Disqualification of membership") of the Constitution.

208 At present, Article 243K ("Elections to the Panchayats") of the Constitution authorizes the State Election Commissions to supervise, direct and control all local government elections.

209 See *Constitution of India*, 1950, Art. 243O.

210 See the discussion in Part II of this paper on Excluded and Partially Excluded Areas: The Authority of the Centre and the States in Tribal Affairs.

211 See text accompanying note 55.

powers as the tribal communities. On the other hand, if the non-tribal people coexist with a tribal community, the Fifth Schedule could include a set of protective clauses that guarantee certain minimum rights to the non-tribal people and restrain the tribal local government from unreasonably infringing others.

The Role of the Centre and the States

It is impossible to locate the entire paradigm of tribal laws in the Constitution. Many functions would have to be discharged through rules and statutes promulgated by state functionaries. The crucial departure from existing practice would be to introduce time-sensitive enabling provisions in the reworked Fifth Schedule. I describe some of these functions in the following paragraphs.

As I mentioned before, the revised Fifth Schedule presupposes the basic right of tribal communities to elect or choose local governments. Identifying those communities should be the responsibility of district administrations. At present, the tribal communities are demarcated for PESA's purposes on the basis of a revenue village system and not on the basis of an actual tribal 'community'. The system is again a colonial construct in which natural communities are reshaped as viable revenue-generating areas.[212] In a bottom-up approach, the tribal areas would have to be realigned to conform to the community as a social construct, perhaps through a cooperative approach involving the local administration and the tribes.[213]

The states may also be enjoined to recognize the forms of election or selection adopted by the tribal communities. At the grassroots, this is uncomplicated; but establishing a procedure for appointing members to higher levels of government may become a difficult task. In the latter case, it may seem incongruous to compel one form of appointment on subsumed local governments which may follow different systems. Again, I suggest dialogue as the initial means to resolve the impasse.

Later, in forming the hierarchical levels of government, a distinction must be drawn between tribes that intrinsically allocate administrative powers amongst traditional levels of government and those that lack such an

212 See FAO Investment Centre, *India: Overview of Socio-Economic Situation of the Tribal Communities and Livelihoods in Madhya Pradesh and Bihar* (Rome: FAO, 1998). See also India, Office of the Registrar General & Census Commissioner of India, *Indian Census in Perspective* (New Delhi: Government of India, 30 April 2000), online: Census of India <http://www.censusindia.net/census2001/history/censusterms.html> ("The revenue village need not necessarily be a single agglomeration of the habitations. But the revenue village has a definite surveyed boundary and each village is a separate administrative unit with separate village accounts. It may have one or more hamlets. The entire revenue village is one unit.").

213 The task may be onerous considering that the tribal regions have always been administered as revenue villages, and never before have the tribal regions been organized based on the community.

arrangement. In the former, the state administration can recognize the established arrangement,[214] while in the latter it may have to negotiate between disparate communities. One way to reach a consensus would be to establish the "joint committees" envisaged in the local government laws of many states. Such committees are formed between two or more local governments "for any specific purpose common to all of them, or for any purpose in which they are jointly interested or for which they are jointly responsible" when each passes a resolution to that effect.[215]

The state administrations should then ring-fence the autonomous tribal governments with welfare legislation on subjects that are outside the legislative or administrative competence of the local governments. For instance, states may refine or enact new laws minimizing the impact of "exceptional measure[s]" such as land acquisitions or relocations,[216] preventing discrimination against vulnerable groups (women, destitute and particular castes) in appointments to the tribal governments,[217] outlawing tribal customs and practices that violate fundamental rights guaranteed by the Constitution or the human rights recognized internationally,[218] extending health care and education to tribal areas, or improving funding for tribal governments.

Finally, federal institutions can support tribal governments through laws and programs that states may be incapable of producing. On this issue, the efforts of the central government and the Indian Parliament have been encouraging. Amongst other achievements, federal institutions have successfully criminalized atrocities against tribal people,[219] reserved jobs for them in central and state government positions and in public sector enterprises,[220] implemented numerous programs for the education of tribal children,[221]

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214 As I mentioned earlier, tribes such as the Biar and Bhinjhal of central India have an indigenous two-tier administrative structure at the village and regional levels. See K.S. Singh, *supra* note 198.

215 See *e.g.*, *The Karnataka Panchayat Raj Act*, 1993, s. 79(1) (providing the procedure for establishing such "joint committees" in the state of Karnataka).

216 ILO Convention 169, Art. 16(2).

217 Legislation designed to prevent discrimination of vulnerable groups would not jeopardize traditional tribal selection processes. Tribal traditions, and autonomy, must comport with constitutional provisions which guarantee equality, protection from discrimination on the grounds of religion, race, caste, sex or place of birth, and the right to freedom of speech and expression. *Cf. Lala Hari Chand Sarda v. Mizo District Council*, A.I.R. [1967] S.C. 829.

218 A legislative mandate also acknowledged by ILO Convention 169. See ILO Convention 169, Art. 8(2).

219 *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act*, 1989 prevents the "commission of offences of atrocities against the members of the … Scheduled Tribes," provides for "Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences."

220 See *e.g.*, Stuart Corbridge, "Competing Inequalities: The Scheduled Tribes and the Reservations System in India's Jharkhand" (2000) 59 J. Asian Stud. 62 at 69.

221 See India, *National Policy on Education 1986* (as modified in 1992) (New Delhi: Ministry of Human Resource Development, 1998) at 9-10, online: Ministry of Human Resource Development <http://education.nic.in/policy/npe86-mod92.pdf>.

augmented state-level tribal programs with generous federal funding,[222] created cooperative bodies for tribal people to market traditional arts and crafts,[223] and implemented a comprehensive nation-wide tribal development policy.[224] A normative provision in the Fifth Schedule would encourage the federal institutions and Parliament to continue to legislate on these lines.

The goal is to mirror the relationship between the centre and the states in a federal system where the former respects state autonomy and, at the same, reinforces such autonomy with funds, policies, and welfare legislation.

The Contiguity Provided by Civil Society

There is no gainsaying that federal and state efforts cannot succeed without being reinforced by civil society. This "protected sphere of individual liberty … serves to balance the power of the [S]tate" and prevents it from having to "step in to organize individuals" unable to organize themselves.[225]

The recognition of tribal autonomy *ipso facto* means that civil society actors shoulder a significant responsibility for well-functioning tribal governments. Many of these formal and informal actors (or civil society organizations) have been transforming, and continue to transform, tribal life in the Scheduled Areas. Non-government organizations, political parties, peasant and labour unions, and social and religious movements have promoted everything from education, civil rights and health care to micro-credit and agricultural reforms.[226] After PESA, much effort has also gone into "enabling tribal communities to take advantage of openings created by the state for articulating demands for self-rule" and to deepen democracy.[227]

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222 Details of the allocation for 2006–07 by the Ministry of Tribal Affairs (Government of India) are available online: Ministry of Tribal Affairs, Government of India <http://tribal.nic.in/index1.html>.

223 The federal Ministry of Tribal Affairs currently oversees operations of the Tribal Cooperative Marketing Development Federation of India Limited (TRIFED), and provides grants-in-aid to state Tribal Development Cooperative Corporations (TDCCs).

224 The Tribal Sub-Plan (TSP) strategy covers all tribal inhabited areas in the country under one of four programs—the Integrated Tribal Development Project (ITDP), the Modified Area Development Approach (MADA), Clusters, and programs for Primitive Tribal Groups. Federal funding for TSPs is provided under Article 275(1) ("Grants from the Union to certain States") of the Constitution.

225 Francis Fukuyama, "Social Capital, Civil Society and Development" (2001) 22 Third World Q. 7 at 11.

226 For example, the well-known Narmada Bachao Andolan (Save the Narmada Movement) (NBA) opposes the construction of a network of hydroelectric dams on the Narmada River. The NBA gives voice to the scores displaced by the project, an overwhelming majority of whom are tribal people demanding compensation or alternative lands. Similarly, NGOs in Orissa and Jharkhand States facilitate the representation of tribal communities deprived of their ancestral lands by mining projects. See Prafulla Das, "Spreading Resistance" *Frontline* (10 February 2006).

227 See Neema Kudva, "Shaping Democracy through Organizational Practice" (2006) 2 Int'l J. Rural Mgmt. 227.

In a nation where the tribal communities would have autonomous governments, I expect the civil society organizations to take on the additional responsibilities of augmenting administration, helping societies purge discriminatory practices,[228] preventing the resurgence of pre-existing inequalities and continuously expanding the tribal vision so that there is functional contiguity between national and tribal development. Civil society organizations are particularly suited to this role because they can directly engage tribal societies through non-threatening, collaborative approaches.[229] Without such intermediaries many of these reforms would have to be brought about by state agencies or through legislation, both of which are likely to be suspected by the tribes as an intrusion into their newly attained autonomy.

IV CONCLUSION

The introduction of PESA in 1996 definitively signalled the Indian Parliament's intention to abandon command-and-control for "new governance" in the tribal areas.[230] However, by choosing decentralization the law-makers made the mistake of matching the right idea with the wrong solution. Although decentralization—including its many subtypes: devolution, deconcentration, delegation and divestment—has proven indispensable whenever national or provincial governments have desired local solutions for local problems, the system is demonstrably inapposite for tribal governance.

Instead, the right solution is some form of autonomous tribal government grounded in the Indian Constitution and supported by the conventional administration and civil society. In this paper, I provided one such arrangement. Autonomy is preferable to decentralization because while "[t]he decisions of the decentralized organs may be replaced by the state; the decisions of autonomous organs may be annulled but not definitively replaced."[231] In other words, what I have proposed is "freedom within the law"[232] for almost one hundred million tribal people. This is certainly achievable, and the legal

228 But see Felix Padel, *The Sacrifice of Human Being: British Rule and the Konds of Orissa* (Delhi: Oxford University Press, 1995) at 64-108 (describing the sometimes brutal use of armed force by the British to stop the tradition of human sacrifice among the Konds).

229 See also Walter B. Stöhr, "Introduction" in Walter B. Stöhr, Josefa S. Edralin & Devyani Mani, eds., *New Regional Development Paradigms: Decentralization, Governance, and the New Planning for Local-Level Development*, Vol. 3 (Connecticut: Greenwood Press, 2001) (arguing that overcoming a sense of disempowerment at the local level requires not only institutional changes, but also time and the genuine cooperation of national and local administrations, as well as civil society organizations).

230 For a discourse on the various "new governance" models see, Michael C. Dorf & Charles F. Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 Colum. L. Rev. 267, and Stöhr *et al*., supra note 229.

231 Polanco, *supra* note 141 (citing Eduardo L. Llorens, *La Autonomia en la Integración Politica* (Madrid: Editorial Revista de Derecho Privado, 1932) at 81).

232 *Ibid.*

change would be "a highly effective way of transforming ideology to create a sense of entitlement [amongst the tribes]."[233]

Significantly, this paper examined the constitutional and statutory law governing tribal territories in India rather than reforms in civil administration by state departments and development programs. There were two reasons for this choice. One was that current literature on tribal law in India treats tribal concerns within the "larger problem of efficient implementation of development policies" and bureaucratic apathy, rather than as a distinct issue in constitutional and statutory law requiring more systemic change.[234] The other was that tribal development policies and state administrative departments provide area-specific solutions. The Fifth Schedule, as part of the Constitution, applies to pockets of tribal areas scattered within the peninsular regions of a vast country. Encompassing these issues in a single work runs the risk of trivializing the distinct problems faced by the tribes.[235]

The federalist autonomy model proposed here would be a major change, and it raises additional questions outside the scope of a single paper. One such issue is to consider the mechanisms that might be used by tribal governments for funding and revenue generation. Another is to explore the possibility of tribal courts, which has few precedents in India even beyond Fifth Schedule areas and poses a number of challenges. There are likely others. I hope to address some of these issues in future work.

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233 William L.F. Felstiner, Richard Abel & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming …" (1980-81) 15 Law & Soc'y Rev. 631 at 643.

234 See *supra* note 10 at 136.

235 See Yashwant Govind, *Development in Overexploited Tribal Regions* (New Delhi: Inter-India Publications, 1990) at 17 ("It has rightly been stressed by Prof. Sundaram (1982) that there can be no single and invincible solution … and each area['s] situation has to be analysed in its particular context.").