TRIBAL LAWS *VIS-A-VIS* GRAM NYAYALAYAS ACT, 2008

I Introduction

THE PARLIAMENT of India recently legislated an Act for establishing *gram nyayalayas*,[1] to make civil and criminal justice accessible at the grass roots level.[2] In order to achieve that objective, the Act establishes local courts known as *gram nyayalayas* at the intermediate *panchayat* level and empowers the presiding officers – *nyayadhikaris* - to try various kinds of suits, proceedings and offences. Though the Act is an attempt to redesign the justice system nationally, it does not apply to the states of Jammu and Kashmir, Nagaland, Arunachal Pradesh, Sikkim, and the tribal areas in the north-east.[3]

That is not to say the applicability of the Act to the rest of India is incontrovertible. Of most concern is the Act's effect on the tribes in the "fifth schedule" areas of peninsular India.[4] A majority of India's tribes inhabit the fifth schedule areas, each with its own distinctive clan rules. But despite the bewildering array of indigenous legal systems that govern the everyday lives of thousands of tribal people in these areas, the Act does not even hint at the existence of their laws.[5] Unlike the north-east of India where tribal laws are constitutionally protected by the sixth schedule,[6] the lawmakers appear to have overlooked this important facet of tribal identity in the Fifth Schedule areas, one that touches tribal life intimately. Without

1. The *Gram Nyayalayas* Act, 2008 (No. 4 of 2009), hereinafter referred to as 'the Act'.

2. See the Preamble to the Act. The concept of a *gram nyayalaya* was initially proposed by the Law Commission of India in its 114th Report. See, Law Commission of India, *One Hundred and Fourteenth Report on Gram Nyayalaya* (1986).

3. See, Constitution of India 1950, Sixth Schedule. These tribal areas are also known as the "Sixth Schedule" areas.

4. The tribal areas are described in the Fifth Schedule to the Constitution.

5. Throughout this note, the word 'tribal law' is used in an expansive sense and includes cultural mores and practices that govern tribal life.

6. The Sixth Schedule authorizes the autonomous District Councils and Regional Councils to constitute, and make rules with respect to, village councils or courts "for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas."

such recognition, tribal laws become defunct rules and risk extinction over time. The eventual disappearance of tribal laws would not only tantamount to a loss of our national heritage, it would also ultimately damage tribal society itself.

To correct this anomaly, the Act must require *gram nyayalayas* to recognize tribal laws in the fifth schedule areas as well. Of course, before this is possible lawmakers must review the unequal legal status that the to Indian Constitution accords to tribes in the fifth and sixth schedule areas. The colonial typecast that the north-eastern tribes are more advanced than the tribes in the fifth schedule areas has much to do with the perception that the latter's laws do not deserve state sanction. After discussing this issue in part II, the paper examines the possibility of developing a hybrid system of laws for the fifth schedule areas. The system that the paper posit in part III is a mixture of conventional laws and tribal laws, with the latter governing unless eclipsed by an overriding national or state legislation. Part IV deals with a more practical problem: The need for *gram nyayalayas* to find the tribal law before applying it. The paper also suggests developing a comprehensive compilation of tribal laws that a *nyayadhikari* can look to.

II Towards equal treatment of tribal laws in fifth and sixth schedule areas

The British were the first to discriminate between the tribal communities in peninsular India and those in the north-east.[7] The Government of India Act, 1935 classified the present-day fifth schedule tribal areas as "partially excluded areas" while the tribal areas in the north-east were denoted "excluded areas". The partially excluded areas were directly administered by the colonial government because of the demographic mix (in such areas the tribal communities co-existed with a significant non-tribal populace), and because the British considered the tribal inhabitants 'backward'.[8] The status of the excluded areas on the other hand was the opposite. Since the non-tribal population was negligible in these areas and the tribal inhabitants thought to be relatively more advanced, the excluded areas enjoyed a near-autonomous status. After independence, the drafters of the Indian Constitution chose to perpetuate the separate administrative systems

7. See, Indian Statutory Commission, *Report of the Indian Statutory Commission* (Her Majesty's Stationary Office, 1930).

8. The treatment of the tribes by the British Indian government thus resembled that of the Native American tribes by the United States government in the 19th century. The United States government considered the Native American tribes 'wards of the State', who had to be taken care of to become civilized. See Marshall J's opinion in *The Cherokee Nation* v. *The State of Georgia*, 30 U.S. 1 (1831).

claiming deep socio-cultural differences between tribes in the two areas.[9]

Of late the constitutional basis for distinguishing between the peninsular and north-eastern tribes of India has been the subject of much criticism.[10] Sociologists and anthropologists more or less agree that tribes in the fifth schedule areas are far from the colonial construct of primitive, savage communities. Evidence is given that almost all tribes have governing bodies, well-settled customs, traditions and laws. For instance, the Biar and Bhinjhal tribes of central India have a two-tiered governing body,[11] the Bhils follow distinct clan rules, and the Marias of Chhattisgarh order their lives in accordance with established customs.[12] Even the nomadic Birhors of central India are known to have binding customs, traditions and clan laws.[13]

Critics also highlight Parliament's gradual abandonment of the administrative bias towards the fifth schedule tribes by citing the Panchayat (Extension to Scheduled Areas) Act,1996 (PESA). PESA mandates state governments to ensure that (1) habitations in the fifth schedule areas that "compris[e] a community and manag[e] [their] affairs in accordance with traditions and customs"[14] become self-governing, (2) state laws comport "with the customary law, social and religious practices and traditional management practices of community resources,"[15] and (3) the *gram sabhas* of the tribal communities are "competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution."[16] Given these objectives, the argument goes, it is impossible to reconcile the dichotomy between one parliamentary legislation (PESA) that explicitly recognizes tribal customs, traditions and laws, and another (the Gram Nyayalayas Act) that entirely ignores those very aspects.

There is a third, more broad, justification for jettisoning the fifth schedule-sixth schedule distinction. Recognizing and preserving tribal laws in the fifth schedule areas would not only help align the legislative objectives underlying PESA and the Act, it would also consolidate the on-

9. See, B. Shiva Rao, *The Framing of India's Constitution: Select Documents* 771-772 (1967).

10. See, Apoorv Kurup, "Tribal Law in India: How Decentralized Administration is Extinguishing Tribal Rights and Why Autonomous Tribal Governments are Better", 7(1) *Indigenous L. J.* 87-126 (2008).

11. See, for e.g., K. S. Singh, *The Scheduled Tribes* 175-178 (The Anthropological Survey of India, 1994).

12. See, for e.g., Shyamlal, *Tribal Leadership* 36 (2000).

13. See, K. P. Singh, "Birhor—A Vanishing Tribe", in Ashok Ranjan Basu & Satish Nijhawan (eds), *Tribal Development Administration In India* (1994).

14. PESA, s. 4(b).

15. *Id*., s. 4(a).

16. *Id*., s. 4(d).

going shift in government policy from assimilation of the Fifth Schedule tribes to acceptance of their autonomy. Indeed, the idea of recognizing tribal autonomy in the fifth schedule areas is not new. Over fifty years ago, Jawaharlal Nehru had espoused the *panchasheel* doctrine in the hope that the state would minimally interfere in tribal affairs, and then only to foster self-government, tribal rights and indigenous genius.[17] However, by the time the Dhebar Commission reported on the scheduled areas in 1961,[18] the doctrine was losing support and the fifth schedule was increasingly being interpreted as a temporary expedient that would eventually give way to full assimilation of the tribes.[19] While PESA reversed that trend to a great degree, the Act's silence with respect to tribal laws now seems a step backwards.

Treating tribal law in fifth schedule areas with the same reverence as in sixth schedule areas would only help engender tribal self-government rather than endanger law and justice. This understanding is the cornerstone of the hybrid system of laws that is going to be outlined in the next section.

III Imagining a hybrid system of conventional and tribal laws

Do we need new legislation to realize a hybrid system of conventional and tribal laws? Answering this question before conceptualizing the system is essential for two reasons. First, if we can accommodate the hybrid system in the existing scheme of the Act, we save enormously on legislative leg-work. An important consideration, given that it took Parliament twenty three years to enact a law after the Law Commission of India first suggested the concept of *gram nyayalayas*. Second, the ability to use the Act as a base for the hybrid system helps build on the liberal concepts of justice dispensation that the legislation embodies.

The first reason is rather obvious; if we start from scratch with a new legislation we risk delaying the recognition of tribal laws in fifth schedule areas for years, perhaps even decades. The second reason needs more explanation.

---

17. See, Jose George & S. S. Sreekumar, *Tribal Development Legislation and Enforcement* 12 (1994).

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

19. See, A Damodaran, "Result of Skewed Development?", *The Hindu* (April 27, 2003), Also see, Virginius Xaxa, "Empowerment of Tribes", in Debal K Singha Roy (ed.), *Social Development and the Empowerment of Marginalised Groups: Perspectives and Strategies* 206 (2001) wherein it is argued that plans for national development were instrumental in fostering this belief.

Parliament intended the Act to be a liberal instrument of dispute resolution. To that end, *nyayadhikaris* are not required to strictly adhere to the Civil Procedure Code (CPC) and the Criminal Procedure Code (CrPC), nor are they bound by the rules of the Indian Evidence Act.[20] Instead, the Act stipulates that, at a minimum, the proceedings of *Gram Nyayalayas* in civil cases should be consistent with the interests of justice[21] while promoting conciliation and settlement of such disputes.[22] And that criminal proceedings should promote summary trials and plea bargains.[23] Various other provisions similarly embody the general rule that *nyayadhikaris* must use the most expedient methods of justice dispensation, rather than being confined to the demands of conventional substantive and procedural laws.[24]

Since the Act already affords *nyayadhikaris* significant latitude in dispute resolution, introducing the concept of tribal laws would not require a complete rethink of the legislative scheme. In reality, if Parliament were to simply amend the Act to specify the disputes and offences subject to tribal law, it would only be tagging on such a list of matters to the civil and criminal jurisdiction already spelt out in the Act. For example, section 12(1)(a) of the Act states that the *gram nyayalayas* shall "try all offences specified in Part I of the First Schedule" and section 13(1)(a) grants *gram nyayalayas* the jurisdiction to "try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule." Were Parliament to amend the Act to recognize tribal law, it could specify the extent of such laws in a third schedule to the Act. That the Act also allows state governments (and, in civil cases, the central government as well) to introduce any additional classes of disputes and offences[25] is further proof that the issue is not so much as *how* tribal law can be incorporated, but what *jurisdiction* those laws should have.

The scope of tribal law

A dearth of studies analyzing the issues best left to be governed by tribal laws makes it difficult to readily determine the scope of such laws. Nevertheless, there are a few subjects that we can glean. Marriage and land ownership are two examples, along with community welfare and natural resource use. The common thread between these themes is that such matters

20. See, s. 30 of the Act.
21. S. 24(7) of the Act.
22. See, s. 26 of the Act.
23. See, ss. 19 and 20 of the Act.
24. See, for e.g., ss. 31 and 32 of the Act.
25. See, ss. 12(2) and 13(1)(b) of the Act.

are usually regulated by tribal laws that can be easily accommodated in the overall legislative scheme of the country. For example, most tribal communities already have well-defined rules for the exploitation of natural resources in their habitat. Often such tribal rules better protect the environment as compared to conventional legislation. As a result, many tribal communities have increasingly become assertive in claiming that exploitation of natural resources should be regulated by tribal rather than state laws. The *kamatapur* tribal movement in Bengal[26] and the tribal demands for prohibition on bauxite mining by commercial enterprises in neighboring Orissa[27] are two notable instances.[28] With enough study, it is conceivable that the Act would lay out precisely which areas of tribal life would be subject to tribal law, and those that would be ordered by national and state laws.

To be sure, there is precedence in India for a hybrid system of laws. The closest illustration is the well-established jurisprudence of personal laws. Courts tasked with such disputes draw on principles of both English common law and traditional Indian law. Thus, disputes relating to marriage and property amongst hindus or muslims are settled by substantively applying the personal laws of the litigants while following the procedural rules established by our common law traditions.

A more distant but equally relevant model of hybrid laws is the jurisprudence of international commercial arbitration recognized in India. In its simplest form, parties choose the substantive law of a particular country to govern disputes, while their choice of venue for dispute resolution may subject them to the procedural laws of another. Redfern and Hunter actually identify at least five different systems of law which in practice may have a bearing on an international commercial arbitration.[29] International commercial arbitration has therefore evolved to accommodate the laws of various countries without prejudicing the laws of any one country.

---

26. See, I. Sarkar, "The Kamatapur Movement: Towards a Separate State in North Bengal" in Govinda Chandra Rath (ed.), *Tribal Development in India - The Contemporary Debate* 112 (2006).

27. See, "Orissa's Kashipur Alumina Project Rekindles Tribal Wrath", *Down to Earth* (February 25, 2007), online: Down to Earth, http://www.downtoearth.org.in/full6.asp?foldername=20050115&filename=news &sec_id=4&sid=16 (visited September 12, 2008) (recounting a police action on tribal protestors that caused injury and death).

28. Similar claims have been made by tribes across the world. Recently, Amazonian Indians violently opposed attempts by the Peruvian government to deprive the tribes of ownership rights in forest areas that such tribes had inhabited for generations. See, "Oil and Land Rights in Peru – Blood in the Jungle", *The Economist*, June 13, 2009.

29. Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 77 (2004).

Certainly, if multiple national legal systems could be intertwined to form a cohesive mass of jurisprudence, a similar creation involving national / state laws and tribal laws should be possible.

This section can be concluded with two caveats. The first is that in any type of hybrid system, tribal laws should only apply in disputes between members of the same tribe (a concept familiar in the sixth schedule areas). Since tribes in the fifth schedule areas co-exist with a significant non-tribal population, it would be untenable and unjust for members of the non-tribal population to be subject to tribal law unless appropriate choice of law rules and the facts of the case demand such application. Secondly, the proposal for a hybrid system should not be misunderstood as a claim for establishing tribal courts in the fifth schedule areas. Although the tribal interests may ultimately be better protected by their own traditional dispute resolution mechanisms, the institutionalization of tribal courts will prove to be a much more arduous social and political process. One that requires a review and rewrite of the fifth schedule itself.[30] Instead, the near-term goal is to work with the scheme of the Act so that, at a minimum, tribal law is recognized and applied.

Some issues in the application of tribal laws

Whenever two or more systems of law have to work together, a few ground-rules need to be set. The rule of legislative precedence is paramount in this respect. Unlike the United States or Canada, the tribes in India are not sovereign, nor are they considered "first nations".[31] Tribal laws in India are, therefore, not insulated from the national or state laws that apply to

30. See, Apoorv Kurup, *supra* note 10 wherein he argues that the Fifth Schedule ought to be discarded in favor of greater tribal autonomy.

31. First nations theory is predicated on the indigenousness of tribes. India, however, rejects the notion that her tribal and non-tribal population can be distinguished on the basis of indigenousness. Instead, she contends that the centuries-old bond between her people and the lands they inhabit means that the entire population is, in a sense, indigenous. She accordingly refused to sign the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 I.L.M. 1384 (entered into force 5 September 1991) (the "ILO Convention 169") because the ILO Convention 169 used the word "indigenous" to describe tribal communities in the signatory states. See, for e.g., 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 People of Asia* 103-104 (1995). Also see, Bengt G. Karlsson, "Anthropology and the 'Indigenous Slot': Claims to and Debates about Indigenous Peoples' Status in India", 23 *Critique of Anthropology* 403-423 (2003).

tribal areas.[32] Moreover, in the legislative scheme, tribal laws would hierarchically rank lower than national or state laws since they have a smaller geographic scope and a narrower constituency. Accordingly, in the event of a conflict between national / state laws and tribal laws, the former would prevail.[33] It remains to be seen, however, if the decision that national or state laws eclipse tribal laws is reached by way of a time consuming 'pith and substance' judicial review or through clear expressions of the overriding national or state importance of the superseding legislation.

Next is the rule of precedence based on the rights of the litigants. Courts in India have consistently held that constitutionally guaranteed fundamental rights and recognized human rights trump offending national or state legislation. There is no reason to believe that the judicial dicta would be any different if tribal laws violated a citizen's fundamental or human rights.[34] As a result, in a conflict between fundamental / human rights and tribal laws, the latter would again be displaced. A hypothetical example will clarify how this rule would work. Say the laws of a tribal community mandate more onerous punishment for female members of that community (whether due to religious or cultural reasons, or simply because of their gender). In this case, the tribal law is clearly abhorrent to the right to equality guaranteed by the Indian Constitution, as well as relevant international treaties to which India is a party. To recognize and apply such

32. In the United States, tribal courts use federal and state laws (both of which are considered foreign laws since each tribe is sovereign) as tools for interpretation that are merely persuasive. While the applicable Native American law is considered mandatory authority, there may arguably be circumstances dictated by the U.S. Constitution where federal law acquires a much more important bearing on the case at hand. See, Ezra Rosser, "Customary Law: The Way Things Were, Codified", 8 *Tribal L. J.* 23 at fn. 29 (2008). The Canadian approach resembles the American, but Canada is more liberal in recognizing that national or provincial laws of overriding importance can prevail over conflicting Aboriginal laws. Thus, under Canadian government policy, the paramountcy of aboriginal laws is not unbridled. See, Ministry of Indian Affairs and Northern Development, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self Government" (1995), online: Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp (visited June 5, 2009).

33. Though the risk of a conflict between state laws and tribal laws would be minimal in the future if the mandate of s. 4(a) of PESA is implemented. That provision requires state legislation to be compatible with tribal laws.

34. Such a judicial result is acknowledged even in art. 8(2) of the ILO Convention 169, which is the current international treaty relating to indigenous peoples and their land rights. Though India is not a state party to this convention, the principles of ILO Convention 169 have great persuasive value, especially since many provisions in PESA are conceptually similar to the rules laid out in the convention. See, *supra* note 10 at p. 114 (citing provisions in PESA that are similar to those in ILO Convention 169).

an iniquitous tribal law would thus be in violation of a higher law – the Indian Constitution – and render the judicial ruling void even when the tribal community itself finds such a rule of punishment perfectly legitimate.[35]

In practice the individual rights of a tribal community member are more likely to be pitted against the collective rights of the community.[36] While "[t]he apparent tension between individual and collective rights is partially resolved once it is recognised that certain individual rights cannot be exercised in isolation from the [indigenous] community,"[37] there will

35. Further support for this proposition can be found in the interpretation of art. 27 of the International Covenant on Civil and Political Rights (ICCPR) by the United Nations Human Rights Committee. Art. 27 of the ICCPR requires states party (India has signed and ratified the covenant) to protect the right of ethnic, linguistic and religious minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language." See, International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force March 23, 1976). The UN Human Rights Committee has noted that this provision applies to indigenous peoples, but also states, in the words of the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner that:

> none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant. This includes, for example, Article 6 (the inherent right to life); Article 7 (torture or cruel, inhuman or degrading treatment); and Article 23 (requirement of free and informed consent for marriage).

See, *infra* note 37.

Specific to this example is the UN Human Rights Committee's observations regarding art. 3 (equality between men and women) of the covenant. The Committee states that:

> Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes… States should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights…

See, Human Rights Committee, *General Comment 28 – Art. 3 (equality of rights between men and women), in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc: HRI/GEN/1/ Rev.5, April 26, 2001, paras 5 and 32.

36. For, decision-making in many tribes is a collective and consensual act. The Manki-Munda tribal system in Jharkhand is one such example. See, Bhubneshwar Sawaiyan, *An Overview of the Fifth Schedule and the Provisions of the Panchayat (Extension to the Scheduled Areas) Act, 1996* 4 -5 (2002) .

37. Aboriginal and Torres Strait Islander Social Justice Commissioner (Human Rights and Equal Opportunity Commission of Australia), Issue 3: *Recognising Aboriginal Customary Law and Developments in Community Justice Mechanisms* (Submission to the Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid, Spain, November 12-14, 2003), online: http://www.hreoc.gov.au/ social_justice/madrid/issue3.htm (visited June 5, 2009).

be occasions when *gram nyayalayas* have to engineer a compromise between competing group and individual interests.

Then there is the choice of law rule. Assuming a tribal law is not contravened by national / state legislation or a fundamental / human right, the application of that law would still depend on the particulars of the case at hand. While the fact that the dispute involves a tribe or a member of a tribe is not in itself determinative, it is certainly critical. The judge would naturally also have to ascertain whether the dispute falls within the geographic (and, where applicable, pecuniary) jurisdiction of that tribal law.

Finally, we need a rule articulating when, and how much, to respect spiritually-based tribal laws. Many, if not all, tribal laws have a divine rather than evidence-based reasoning for regulation, punishment or censure that a modern court may consider illogical and at times unjustified. Nonetheless, if tribal laws are to be recognized, applying such laws becomes an inextricable part of that goal.

IV The sources for tribal law

Tribal laws do not lend themselves to codification because they are very often unwritten rules that cannot accurately be captured through conventional styles of legislation. Such laws spring from customs and traditions over the course of centuries, are never static, and usually transcend generations through practice alone. For this reason, the Law Reform Commission of Western Australia recently rejected any attempt to comprehensively codify aboriginal customary law citing not only the varying content and practice of such law, but also the stifling effect that any form of codification would have on its interpretation.[38]

Be that as it may, *recording* tribal law in some form has its advantages.[39] It would dissuade tribes from gravitating to westernized laws simply because the latter are predictable and tangible. It would also help tribes maintain

38. See, Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* 70 (2006), online: Law Reform Commission of Western Australia, http://www.lrc.justice.wa.gov.au/094-FR.html (visited June 5, 2009).

39. Though not all tribal laws can be put down on paper. Christine Zuni Cruz highlights how a conservative Native American Pueblo community in the United States recently rejected the very idea of "writing" the traditional law. See, Christine Zuni Cruz, "Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law", 1 *Tribal L. J.* 1 (2000), online: Tribal Law Journal, http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/index.php (visited June 5, 2009).

their separate consciousness and reinforce the experience that the "[a]doption of western law can create a gap between the adopted law and the people to whom it is applied."[40] And most importantly, a physical record of tribal law would make it easier for *gram nyayalayas* to recognize such law.

The solution then is some form of compilation that *nyayadhikaris* can look to. While numerous independent works have studied the laws of different tribes, there has never been a conscious nation-wide effort to develop an exhaustive database for tribal laws. This oversight is not unique to India. Australia too is grappling with the problem of recognizing aboriginal law without ever having attempted to systematically study and record the indigenous law.[41]

Of course, any record of tribal law must be dynamic in order to keep abreast of changes in such law. With the advent of internet-based resources this task is not insurmountable and a record of tribal laws can theoretically be updated almost every day.

To supplement the written word, *gram nyayalayas* should also invite expert testimonies.[42] Disinterested qualified experts can assist in determining applicable tribal law by educating the *gram nyayalayas* on recorded tribal law as well as tribal practices that intimately relate to the case. Such expert testimony should be limited to questions of law or tradition or custom applicable to a proceeding before the court and should

---

40. Cruz, *supra* note 39. Christine Zuni Cruz, therefore, aptly notes that "[t]he issue of how we incorporate traditional law into existing structures altered by colonialism is an issue worldwide. Nation-states in Africa and in the western hemisphere, such as Papua New Guinea are grappling with this very issue." *Id*.

41. In the Australian context, McLaughlin writes that:

> A further obstacle [to recognizing Aboriginal law] would be the relative lack of systematic studies of Indigenous legal codes, a result of the fact that, for the majority of Australians, 'local law and custom were officially ignored' until relatively recently. Those studies that do exist are overwhelmingly anthropological, rather than legal or jurisprudential, in nature. This situation is compounded by the fact that the Indigenous tradition itself is primarily an oral one.

Rob McLaughlin, "Some Problems and Issues in the Recognition of Indigenous Customary Law", 3 *Aboriginal Law Bulletin* 2 (1996), online: Aboriginal Law Bulletin, http://www.austlii.edu.au/au/journals/ AboriginalLB/1996/45.html (visited June 14, 2009). Also see, H. Amankwah, "Post-Mabo: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia", 18 (1) *Univ. Queensland L. J.* 212 (1994).

42. A similar suggestion was made in Australia by McLaughlin. See, McLaughlin, *supra* note 41.

not involve the particular merits of the case. Rosser, however, argues that courts may be skeptical of experts "because the works of 'anthropologists, ethnologists and other commentators' on custom often are inaccurate as only tribal members 'make the most accurate commentators on themselves."[43] To Rosser's point, inherent tribal knowledge can be comfortably mined by encouraging *nyayadhikaris* to invite expert testimonies by tribal community members who are well-regarded for their knowledge of that community's affairs (for example, the court can invite tribal elders who need not necessarily be members of a "*panchayat*" or any other similar governing body). A still more effective result may be obtained if, over time, members of tribal communities can be trained to serve as *nyayadhikaris*.

The successful integration of tribal laws into our conventional justice system is predicated on an authoritative and extensive source for such laws. Without an exhaustive database, *gram nyayalayas* (or for that matter, any court treating tribal laws) would be exposed to the distinct possibility of addressing tribal laws that may never have been studied, or acknowledging academic sources that reach debatable conclusions. This will render the recognition and application of tribal law uncertain in practice and thus chimerical in essence.

V Conclusion

Leon Sheleff states that "cognizance must always be given to the 'living law' of the community" – the rules that govern the everyday life of a people – particularly when that community "has some sort of consciousness of its separate identity."[44] Tribal communities in India already have a separate identity; the very existence of the fifth and sixth schedules is testament to that feature. Moreover, the philosophical underpinnings of the *panchasheel* doctrine and PESA (with its emphasis on decentralization) are further proof that the tribal communities need to be treated in a distinct manner appreciative of their rich cultural history. Unfortunately, the Act in its current state ignores the uniqueness of tribal law and culture and indirectly reintroduces the concept of assimilation that has long been

43. See, Rosser, *supra* note 32 at p. 26.

44. See, Leon Sheleff, *The Future of Tradition, Customary Law, Common Law and Legal Pluralism* 121 (2000).

rejected internationally.[45] If we are to reclaim the spirit of the *panchasheel* doctrine, the Act should be amended to recognize tribal law.

*Apoorv Kurup**

45. For instance, ILO Convention 169 replaced the 1957 'Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries' because the latter promoted an integrationist policy that was nothing less than destructive to indigenous communities worldwide. See, for e.g., Russel Lawrence Barsh, 'Revision of ILO Convention No. 107', 81 *Am. J. Int'l L.* 756-759 (1987).

* B.A., LL.B., LL.M. (Harvard Law School, Cambridge); Practising Attorney, New York. The author is grateful to Chinmayee Prasad for her comments to successive drafts of this paper.