

LEGAL SYSTEMS AS CULTURAL RIGHTS: A RIGHTS' BASED APPROACH TO TRADITIONAL LEGAL SYSTEMS UNDER THE INDIAN CONSTITUTION

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I. INTRODUCTION - TRIBALS: THE INDIAN "PRIDE"

Twentieth century discourses on tribals in social history and anthropology have predominantly reflected an approach of impassioned concern. Tribes were classically depicted as an anthropological category,¹ although they were viewed on occasion as evidence of plurality.² The dominant conceptual framework, however, has been a metaphor for the victimized fragments of India's national life,³ as Sunil Janah ironically portrayed when he wrote, "[t]ribes are no longer left isolated."⁴ Modern India, with its industries, highways, markets, and merchants, has inexorably moved closer to the tribes, and they too have begun to assimilate.⁵ The tribes have been drawn in by the politics of economic development,⁶ rapacious "consumerization" of cultural lifestyles,⁷ and the allurements of "better" lives in an integrated environment. For the earliest members of the "Indian" family⁸ now facing the prospect of extinction, the processes of subjugation, dispossession, and usurpation of traditional rights live in their collective memory.⁹ Their inability to fight the invasions of colonial

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1. See Felix Padel, *Forest Knowledge: Tribal People, Their Environment and the Structure of Power*, in *Nature and the Orient* 891, 901 (Richard H. Grove et al. eds., 2000). For an introduction to tribes in India, see Virginius Xaxa, *Tribes in India*, in *Sociology and Social Anthropology* 374 (Veena Das ed., 2003).

2. U.N. WORLD CONFERENCE ON HUMAN RIGHTS: VIENNA DECLARATION AND PROGRAMME OF ACTION, U.N. Doc. A/CONF. 157/23 (July 12, 1993), *reprinted in* 32 I.L.M. 1661 (1993).

3. See David Hardiman, *Power in the Forest: The Dangs 1820-1940*, in *SUBALTERN STUDIES VIII: ESSAYS IN HONOUR OF RANAJIT GUHA* 89-90 (David Arnold & David Hardiman eds., 1994). "The history which has emerged has, more often than not, provided a tragic chronicle of uncompensated expropriation of common resources, of arrogant and unsympathetic administration by the colonial state, of loss of livelihood, cultural trauma and great suffering for the forest people." *Id.*

4. See Sunil Janah, *The Tribals of India* 7 (2003).

5. *Id.* at 7-8.

6. See Niraja Jayal, *Democracy and the State* ch. 4 (2001).

7. Janah, *supra* note 4, at 8.

8. See A. L. Basham, *The Wonder That Was India* 193 (3d ed. rev. 1967).

9. See Tanika Sarkar, *Jitu Santal's Movement, in Malda, 1924-1932: A Study in Tribal Protest*, in 4 *SUBALTERN STUDIES IV: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY* 136 (Ranajit Guha ed., 1985).

rulers¹⁰ and, more recently, the monolithic State,¹¹ has resulted in the denigration of tribal identities and hastened the unfortunate prospect of an India without her "pride."

Discourses on the erosion of tribal rights and cultures generally concentrate on an assimilation-autonomy,¹² development-deference dichotomy.¹³ The dichotomy has been analyzed through three principle processes: the colonial-tribal conflict over the usurpation of forest rights,¹⁴ movements by dominant Hindu sections to influence tribal cultures,¹⁵ and the intrusion by the Indian State into tribal areas on grounds of economic "development."¹⁶ The effect of these three processes, however, has been

10. This is not to suggest that the tribals submissively accepted colonial power and domination. In fact, much of the tribal history during the colonial period is marked by tribal uprisings against colonial rulers. The success of these uprisings varied. Even when successful, however, tribals were rarely able to avoid the consequences of colonial intrusion, either by way of settlement or introduction of foreign legal systems that were incompatible with their way of life. See, e.g., Ramachandra Guha, *Forestry and Social Protest in British Kumaun, c. 1893–1921*, in 4 SUBALTERN STUDIES IV: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY 54 (Ranajit Guha ed., 1985); AMIT PRAKASH, JHARKHAND: POLITICS OF DEVELOPMENT AND IDENTITY ch. 2 (2001); Padel, *supra* note 1, at 897. Padel writes:

The Bhils, Hos and Konds were forced to submit to British rule in the early nineteenth century in similar wars of conquest or 'pacification'. The Munda (*Kol*) uprising of 1831-2 and the Santhal *bul* (rebellion) in the 1850s point to the great increase in exploitation that took place after British rule was imposed in tribal areas: *diku* (foreigner, non-tribal) landlords, merchants and money lenders had established a hold over Mundas and Santhals

Id.

11. The 1980s and 90s have, however, increasingly seen the organizations of mass tribal movements, especially against large-scale development projects that lead to displacement. See generally Pravin N. Sheth, *The Sardar Sarovar Project: Ecopolitics of Development*, in CRISIS AND CHANGE IN CONTEMPORARY INDIA 400 (Upendra Baxi & Bhikhu Parekh eds., 1995); Jayal, *supra* note 6.

12. See generally J. Milton Yinger, *Ethnicity: Source of Strength? Source of Conflict?* (1997); Virginius Xaxa, *Empowerment of Tribes*, in *Social Development and the Empowerment of Marginalised Groups: Perspectives and Strategies* 202 (Debal K. Singha Roy ed., 2001).

13. See Rita Brara, *Ecology and Environment*, in SOCIOLOGY AND SOCIAL ANTHROPOLOGY 141 (Veena Das ed., 2003).

14. See generally Suresh Sharma, *Tribal Identity and the Modern World* (1994); Rucha S. Ghate, *Forest Policy and Tribal Development* 40 (1992); André Béteille, *Society and Politics in India* ch. 3 (1991); K. Sivaramakrishnan, *Modern Forests: Statemaking and Environmental Change in Colonial Eastern India* (1999); Dr. Taradatt, *Tribal Development in India* (2001). For a history of the gradual infiltration of the English legal system in the tribal areas of North-Eastern India, see S. K. Chaube, *Hill Politics in Northeast India* (1999).

15. See Surajit Sinha, *State Formation and Rajput Myth in Tribal Central India*, in THE STATE IN INDIA 1000-1700, at 305 (Hermann Kulke ed., 1997).

16. See Dunu Roy, *Large Projects: For Whose Benefit?* ECON. & POL. WKLY, Dec. 10, 1994, at 50; P. SAINATH, *And the Meek Shall Inherit the Earth: The Problems of Forced Displacement*, in EVERYBODY LOVES A GOOD DROUGHT 69 (1996); AKHILESHWAR PATHAK, *CONTESTED DOMAINS: THE STATE, PEASANTS AND FORESTS IN CONTEMPORARY INDIA* 39-49 (1994). In a study of large scale projects with regard to the displacement problem, it was estimated that during the forty years from 1951 to 1991, 185,000 lakhs people have been displaced – an average of 4,600 unfortunates every year. Three out of every four ousted by such

largely similar - an erosion of tribal identity and tribal "integration" into the "civilized" Indian State.¹⁷ The conflict between the development agenda of the State and the principle of substantial deference towards tribal self-governance is obvious.¹⁸ Tribals have the right to live under conditions that allow them to preserve their cultural life - style.¹⁹ The Indian State, however, does have a duty to "eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas ...".²⁰ To argue that both (i.e., development and deference) can simultaneously triumph is to romanticize the issue. To argue that one may triumph over the other is to concede that the development agenda of the State may sometimes prevail over tribal rights.²¹ This conundrum presents a need to move beyond the development-deference dichotomy and explore the viability of a rights-based approach for adjudicating conflicts between the State's duty and tribal rights.

This article addresses the nature of the institutional processes that may be employed for resolving differences within the larger framework of the Indian Constitution. The constitutional polity of India, including tribal communities, has a fundamental right of access to justice.²² The precise nature of this fundamental right remains unclear, yet it is of critical importance. The extent to which tribes may be made effective partners in resolving the development-deference dichotomy will depend substantially on one's conception of the right

dams are tribals and out of the seventy-seven percent of tribal oustees only twenty-nine percent have been rehabilitated. Dunu Roy, *supra*.

17. See Micheal M. Cernea, *Impoverishment or Social Justice? A Model for Planning Resettlement*, in DEVELOPMENT PROJECTS AND IMPOVERISHMENT RISKS 42, 54 (Hari Mohan Mathur & David Marsden eds., 2000). "Forced displacement tears the social fabric and the existing patterns of social organization. Communities are fractioned, production systems are dismantled, kinship group and family systems are often scattered, local labor markets are disrupted, and people's sense of cultural identity is undermined." *Id.*

18. See generally Anand Kashyap, *Parameters of Tribal Development: Some Key Conceptual Issues*, in TRIBAL SITUATION IN INDIA: ISSUES IN DEVELOPMENT 29 (Vidyut Joshi ed., 1998).

19. There is a growing recognition under international law of the right of tribal populations to a cultural existence in its pristine form. See Article 12, *Draft United Nations Declaration on Rights of Indigenous People Resolution* U.N. Doc. E/CN.4/1995/2 (1994), reprinted in 34 I.L.M. 541 (1995) (a more detailed discussion of application of the ILO Convention and the U.N. Declaration is found at § 3.3.2).

20. See INDIA CONST. art. 38(2). "The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations." *Id.*

21. The Chipko Movement in India is probably the only example where the community could withstand governmental and commercial pressure. It is rare in India's tribal history that the concerns of the "wild and uncivilized" have prevailed over the "larger good" of the "civilized." See generally THOMAS WEBER, *HUGGING THE TREES: THE STORY OF THE CHIPKO MOVEMENT* (1989); HARIPRIYA RANGAN, *OF MYTHS AND MOVEMENTS: REWRITING CHIPKO INTO HIMALAYAN HISTORY* (2000).

22. See INDIA CONST. art. 21. The right of access to justice under Article 21 is for every person; it is not restricted to any group or section of the people. *Id.* See Sheela Barse v. Union of India, 3 S.C.C. 632 (1986); Hussianara Khatoon (I) v. Home Secretary, 1 S.C.C 82 (1980).

of access to justice for tribal communities. It is critical also because the nature of the tribal groups' right of access to justice will have significant implications for the content and constitutionality of current and future legislation relating to the commercial exploitation of traditional knowledge,²³ biodiversity,²⁴ and other related matters.²⁵

In this Article, I argue that the fundamental right of access to justice for tribal groups essentially implies a fundamental right to the customary legal systems of the tribal communities. This interpretation best resolves the development-deference dichotomy because the adjudication negotiation processes are conducted within the framework of a tribe's customary legal system. This enables tribes to become equal and effective partners in ways the National adjudication processes would not.

This Article further argues that the current conception of the fundamental right of access to justice is premised on a positivist framework of the "court system" and that requiring tribes to participate in dispute resolution within these formal structures is to effectively deny them *their* fundamental right of access to justice. In this sense, the tribal communities' right of access to justice may be considered a subset of the fundamental right to conserve culture under Article 29(1) of the Indian Constitution.²⁶ Finally, I argue that the constitutionality of recent legislation in the areas of plant variety protection, biodiversity rights, and traditional knowledge will depend on the extent to which the enactments incorporate a broad interpretation of this fundamental right of access to justice.

In expounding on the above arguments, the Article is divided into five sections. Section II revisits the debates in the Constituent Assembly on tribal rights and the conception of deference that the founding fathers had envisioned for them. Section III argues that the current judicial exposition of the fundamental right of access to justice is derived from a positivist legal structure, the basic premises of which are not relevant in the context of tribal communities. The jurisprudential basis for a fundamental right to a traditional customary legal system is then located within the Constitutional rights to cultural heritage²⁷ and protection of cultural institutions.²⁸ Section IV develops the proposition that the constitutionality of legislation in the area of the commercial exploitation of biodiversity, plant variety rights and traditional

23. India has yet to put in place a law regulating the commercial exploitation of traditional knowledge. The argument in this article is based on the various drafts that have circulated and are currently being considered.

24. See Biological Diversity Act, ACT NO. 18, INDIA CODE (2003).

25. See Protection of Plant Varieties Protection and Farmers Rights Act, Act No. 53, INDIA CODE (2001).

26. INDIA CONST. art. 29(1). "Any sections of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." *Id.*

27. INDIA CONST. art. 21. "No person shall be deprived of his life or personal liberty except according to procedure established by law." *Id.*

28. India Const. art. 29(1).

knowledge depends on the degree to which the legislation employs customary legal system as a mechanism for adjudicating issues of property rights. Lastly, Section V concludes that unless the modern Indian State protects the customary legal systems of the tribal communities, it will have to live with the indictment of having traded a constitutional guarantee for “national development.”

II. TRIBAL CONCERNS IN THE CONSTITUTION-MAKING PROCESS: RECONSTRUCTION HISTORY

A. *“What Did the Framers Intend?” - The Promises of the Constituent Assembly*

Before a compelling argument can be made for the preservation of customary tribal legal systems, it is necessary to understand the approach the framers took towards tribal rights in the Constituent Assembly in 1948 - 49. This section endeavors to reconstruct what the framers intended when they chose to structure the Indian Constitution in the manner they did.²⁹ The proceedings of the Constituent Assembly went far beyond the basic goal of constitution drafting. The Assembly engaged diverse groups of citizens, including tribal groups, into a negotiation that had the promise of a nation-building exercise. The assurances made by the national leaders and the concessions they granted were important in securing the consent of the tribes. The legitimacy of the subsequent relationship between the Indian State and the tribal communities was dependent upon the implementation of the promises made during the nation-building exercise of the Constituent Assembly.

It would, however, be incorrect to view the efforts of the Assembly as an isolated event of nation-building. Almost one hundred years of formal colonial rule prior to the Assembly infiltrated the social and legal systems of the tribal communities.³⁰ When the Assembly decided to bring the tribal communities within the larger constitutional framework of the Indian sub-continent, they were pursuing the policies they inherited from their colonial masters.

The Garo Hills Act of 1869 (“Garo Act”) vested the colonial administration of significant tribal areas in Northeast India in such officers as the Lieutenant Governor.³¹ The Government of India Act of 1870 extended the jurisdiction of the provisions of the Garo Act to the Assam Valley, Hill Districts, and Cachar in 1873.³² Other tribal areas were designated separately under subsequent legislation. Tribal areas were declared as “Scheduled

29. The model of “intent” developed in this section will be relevant in understanding the nature of the right of access to justice of the tribals under the Constitution. This section prepares the foundation for a more substantive argument in section III of this article.

30. See generally *supra* note 14.

31. Act XXII, INDIA CODE (1869).

32. 33 & 34 Vict., ch.3.

Districts" by the Scheduled Districts Act of 1874,³³ as "Backward Tracts"³⁴ by the Government of India Act of 1919,³⁵ and as "Excluded or Partially Excluded Area"³⁶ by the Government of India Act of 1935.³⁷ These laws were enforced by intermediaries (agents who administered the law), district administrators, or by the discretionary powers of the Governor. The categorization of the tribal areas as "backward" had already affected parts of the Indian legal system by the time the Constituent Assembly was formed in 1946. The Assembly was not oblivious to the fact that State administration of tribal lands had become "legitimate" through a series of colonial legislations that forced an alien legal system on the tribal communities.³⁸ When the Assembly began functioning, it was bound by the terms of the Cabinet Mission's Statement,³⁹ which provided, *inter alia*, that a Committee containing due representation of affected parties be formed to advise on the incorporation of provisions relating to their administration under the new Constitution.⁴⁰

In keeping with the mandate of the Cabinet Mission, the Constituent Assembly set up an advisory committee on fundamental rights, minorities, and tribal areas. In pursuit of this goal, the North-East Frontier (Assam) Tribal and excluded Areas Sub-Committee ("Sub-Committee on Assam") and the Excluded Areas and Partially Excluded Areas (other than Assam) Sub-committee ("Sub-Committee on Excluded Areas") were set up. The reports of these committees are crucial to understanding the nature of the nation-building exercise the Assembly undertook and the purposes underlying the text of the Indian Constitution.⁴¹ The reports and debates thereon also provide valuable insight into the social organization of the tribal communities and the conception of the development-deference model that the framers intended.

In its report, the Sub-Committee on Assam noted the highly democratic character of the tribal village councils, created by general assent and election, and the mechanisms for dispute settlement, usually by the chief or headman or

33. Act XVI, INDIA CODE, (1874).

34. *Infra* note 35, at § 52.

35. 9 & 10 Geo. 5, ch. 101.

36. *Infra* note 37 at § 91.

37. 26 Geo. V., 81 Edw. VIII, ch.2.

38. As mentioned earlier, the Scheduled Districts Act of 1874 and the Government of India Acts of 1919 and 1935 introduced state regulation, which considerably eroded tribals' autonomy to organize their social and economic life.

39. Statement by the Cabinet Mission to India and His Excellency the Viceroy, May 16, 1946, *reprinted in* 2 SIR MAURICE GWYER & A. APPADORAI, *SPEECHES AND DOCUMENTS ON THE INDIAN CONSTITUTION: 1921-47*, at 577-584 (1957).

40. The relevant text in full reads: "[T]he Advisory Committee on the rights of Citizens, Minorities and Tribal and Excluded Areas will contain due representation of the interest affected and their functions will be to report to the Union Constituent Assembly upon the list of fundamental rights, clauses for protecting Minorities, and a scheme for the administration of Tribal and Excluded Areas, and to advise whether these rights should be incorporated in the Provincial, the group or the Union Constitution." *See id.* at 583.

41. For the text of the Report of the Committee and Sub-Committees on Tribal and Excluded Areas, see 3 B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION* 681-782 (1967).

Council of Elders.⁴² The Committee added, “[I]n the areas where no right of the chief is recognized, the land is regarded as the property of the clan, including the forests.”⁴³ The Committee concluded:

In all the hill areas visited by us, there was an emphatic unanimity of opinion among the hill people that there should be control of immigration and allocation of the land to outsiders, and that *such control should be vested in the hands of the hill people themselves*. Accepting this then as the fundamental feature of the administration of the hills, we recommend that the Hill Districts should have the power of legislation over occupation or use of land⁴⁴

In many ways, this conclusion was driven by the fears of the hill people regarding the unrestrained liberty of outsiders to engage in money lending or other non-agricultural professions.⁴⁵

Conceding that the fears of the tribes were “not without justification,” the Sub-Committee on Assam recommended that “if the local councils so decide by a majority of three-fourths of their members, they may introduce a system of licensing for the money lenders and traders.”⁴⁶ Apprehending the negative effects of imposing an alien legal system, the Sub-Committee on Assam observed:

Some of the tribals such as the system of the tribal council for the decision of dispute afford by far the simplest and *the best way of dispensation of justice for all for the rural areas* without the costly system of courts and codified laws. Until there is a change in the way of life brought about by the hill people themselves, it would not be desirable to permit any different system to be imposed from outside.⁴⁷

The Joint Report of the Sub-Committees on Minority and Tribal Rights also echoed this sentiment. Conceding that a good number of superstitious and even harmful practices were prevalent among the tribal groups, the Committee observed that the tribes had their own way of life with institutions like the tribal and village Panchayats (or councils), which were more than capable of administering village matters and personal disputes.⁴⁸ Moreover, the Committee noted that the disruption of the tribal customs was capable of doing

42. *Id.* at 691-92.

43. *Id.* at 694-95.

44. *Id.* (emphasis added).

45. *Id.*

46. *Id.* at 701.

47. *Id.* at 693-94. (emphasis added).

48. RAO, *supra* note 41, at 774.

great harm.⁴⁹ "Considering past experiences and the strong temptation to take advantage of the tribal communities' simplicity and weakness," the Committee concluded, "it [was] essential to provide statutory safeguards for the protection of the land which [was] the mainstay of the aboriginals' economic life and for his *customs and institutions* which, apart from being his own, contain[ed] elements of value."⁵⁰

The suggestion that tribal administration be vested in the tribal groups themselves is not without importance. It was based on an underlying premise that the tribes had a traditional legal system that was sufficiently developed to deal with the complexities of tribal life. The draft Constitution and the debates thereon also proceeded on the premise that it was important to recognize the right of tribes to be governed by a system that was effectively part of their own culture. The reports of the Sub-Committees clearly highlight the existence and developed nature of the tribal adjudicatory processes and the need to enact provisions on the principle of maximum non-interference.

The debates on tribal rights proceeded within the lines of the common assimilation-autonomy anthropological debate and in its final resolution, the Assembly sought to strike a delicate balance between national development (assimilation) and deference to tribal rights (autonomy).⁵¹ The Drafting Committee accepted the recommendations of the Sub-Committees and created separate schedules for the tribal regions of Assam and other tribal lands throughout the rest of India.⁵² The categorization of tribal areas as scheduled regions with substantial autonomy evoked passionate reactions in the Constituent Assembly.⁵³

Some argued in favor of the Central Government assuming full responsibility for the administration of these areas,⁵⁴ while others argued that the concept of Scheduled Tribes and Scheduled Areas amounted to racism disguised as tribal autonomy.⁵⁵ Still others argued that the scope of administrative control was not sufficient and the tribal communities required a greater voice at the state level.⁵⁶ Replying to critics who felt that the Government should assume full responsibility for the tribes, K. M. Munshi, a prominent Assembly member, argued that there was a need to protect tribes from the "destructive impact of races possessing a higher and more aggressive culture [and that tribes] should be encouraged to develop their own autonomous

49. *Id.*

50. *Id.* (emphasis added).

51. For the Constituent Assembly Debates on Fifth Schedule, see IX CONSTITUENT ASSEMBLY DEBATES, 965-1001 (1950) [*hereinafter* CONSTITUENT ASSEMBLY DEBATES].

52. Fifth Schedule of the draft Constitution was made applicable to tribal regions other than Assam and the Sixth Schedule to tribal areas of Assam.

53. CONSTITUENT ASSEMBLY DEBATES, *supra* note 51, at 977.

54. *Id.*

55. *Id.* at 981.

56. *Id.* at 976.

life”⁵⁷ Refuting the pro-assimilation position of Assembly member R. K. Chaudhuri,⁵⁸ Dr. B. R. Ambedkar argued in support of the Autonomous District Councils in Assam finding that the position of the Indian tribes was somewhat similar to the Red Indians in the United States.⁵⁹ Justifying autonomy, Dr. Ambedkar noted that tribal roots “[were] still in their civilization and their own culture . . . , their laws of inheritance; their laws of marriage and so on [were] quite different from Hindus.”⁶⁰

The debates on the provisions of the draft Constitution make it sufficiently clear that the Constituent Assembly intended to provide the tribes with considerable autonomy in matters pertaining to the administration of justice, thus enabling them to lead lives defined by tribal culture and identity.⁶¹ The draft Constitution rejected the assimilation model in favor of substantial deference to the tribal communities, subject only to a gradual self-involvement with India’s national life.⁶² The Constituent Assembly recognized the right of tribal communities to decide for themselves what the appropriate pace of “involvement” with “national” life should be. The recognition of this right has implications far beyond the tribes’ assimilation decisions and bears directly on their fundamental right to a traditional legal system.

57. *Id.* at 977.

58. R. K. Chaudhuri argued that the tribals would, given an opportunity, prefer to get assimilated rather than remain autonomous. From a national perspective, he argued that unless efforts were made by a State to assimilate them, they might prefer to assimilate with other culturally similar States rather than India. For arguments by R. K. Chaudhuri, *see id.* at 1015.

59. *Id.* at 1025.

60. *Id.* A tribal representative, Mr. J. J. M. Nichols Ray said during the debates:

The people of hills had their own culture which was sharply differentiated from that of plains. The social organization was that of the village, the clan and the tribe and the outlook and structure were generally democratic. India has to rise to that feeling or idea of equality and real democracy which tribal people had. Among the tribesmen is there no difference between class and class. Even the Rajas (kings) and Chiefs work in the fields together with the labourers. They eat together. Is that practised in the plains? The whole of India has not reached that level of equality. Do you want to abolish that system? Do you want to crush them and their culture must be swallowed by the culture which says one man is lower and another higher?

In the plains the women is just beginning to be free now, and is not free yet. But in some of the hill districts the women is the head of the family; she holds the purse in her hand, and she goes to the fields along with the man In the plains of Assam there are some people who feel ashamed to dig earth. But the Hillman is not so. Will you want that kind of culture to be imposed upon the Hillman and ruin the feeling of equality and the dignity of labour which is exiting among them?

Id. at 1022.

61. *Id.* at 1025.

62. *Id.*

B. Promises Into Provisions: Survey of Constitutional Provisions on Tribal Rights.

What effects did the Constituent Assembly's debates on tribal rights have on the final version of the Indian Constitution? Article 244 (Article 190: Draft Constitution) maintained the applicability of the Fifth and Sixth Schedules to Assam and other tribal regions. The Sixth Schedule was subsequently amended in 1971 to include the tribal regions in the new states formed by the North-Eastern Areas (Reorganization) Act.⁶³ The Fifth Schedule established Tribal Advisory Councils, which have jurisdiction to advise the Government on matters pertaining to the welfare and advancement of tribes.⁶⁴ Additionally, the Governor has the power to limit or modify the applicability of any particular statute to the Scheduled Areas.⁶⁵ The Governor also has the authority to consult with the Tribal Advisory Council in promulgating regulations for the allotment or transfer of land and money-lending businesses.⁶⁶

Although these provisions of the Fifth Schedule do not expressly recognize a right to a traditional legal system, it impliedly recognizes customary legal systems as part of the larger deference principle underlying the purpose of these provisions.⁶⁷ In contrast, the Sixth Schedule expressly recognizes the right to traditional legal system for the people residing in the tribal areas of Assam or its sister states.⁶⁸ The Sixth Schedule vests legislative power in the District and Regional Councils.⁶⁹ In pursuit of legislative power the Regional and District Councils may make rules regulating the procedures of village councils and courts, the enforcement of decisions and orders, and all other ancillary measures necessary to carry out the administration of justice.⁷⁰ The principle of substantial deference, in which the Constituent Assembly had great faith, is evident from this broad scheme of self-regulation, but this is not the only area in which tribal rights to customary legal systems have been recognized.

Subsequent amendments to the Constitution have expressly recognized the right of some tribal communities to self-governance within the framework of traditional customary legal systems. Article 371A of the Indian Constitution provides that no Act of Parliament with respect to "Naga Customary Law and procedure" and "administration of civil and criminal justice involving decisions according to Naga Customary Law," shall apply to the State of Nagaland unless

63. Initially the Sixth Schedule was only applicable in the tribal areas in the State of Assam. However, after the reorganization of North Eastern Areas in 1971, its scope was extended to the State of Meghalaya.

64. See *Fifth Schedule* INDIA CONST. § 4.

65. *Id.* at § 5.

66. *Id.*

67. See generally *id.*

68. See *Sixth Schedule* INDIA CONST. § 4-5.

69. *Id.* at § 3.

70. *Id.* at § 4.

the Nagaland legislature decides so in a resolution.⁷¹ Similarly, Article 371G provides that no Act of Parliament with respect to “religious and social practices of Mizos; Mizo [C]ustomary law and procedure; [and] administration of civil and criminal justice involving decisions according to Mizo Customary law” shall apply to Mizoram unless the Mizoram Legislature decides so in a resolution.⁷² These constitutional provisions, though limited to certain states of Northeast India, do expressly confer the right of tribal communities to be governed by the customary practices of the regions. The subsequent section of this Article will argue that these limited provisions are illustrative of the fundamental right of *all* tribal communities with adequate legal systems to be governed by the practices and procedures of those legal systems.

C. *Have We Kept the Promise? - An Afterthought*

Despite the constitutional protections of tribal autonomy, confrontations between the Indian State and the tribal communities have marked the post independence decades.⁷³ The development agenda has increasingly triumphed over the right of tribes to lead a cultural life, and the “consumerization” of the cultural lifestyle has hastened the process of tribal marginalization.⁷⁴ National elites have converted natural resources, including land, minerals, forests and water, into profit-making commodities.⁷⁵ “The wider goals of state and nation have overridden the particular interests of such poor populations on the assumption that wider gains far outweigh local costs.”⁷⁶

“In the name of development, people have been pushed off land; [and] their forests and water have been taken over by the state,” leaving them no alternative but wage labor to sustain their communities.⁷⁷ Still, the “alienation cannot be adequately described in terms of the loss of a material livelihood alone; it is most profoundly a wider loss of cultural autonomy, knowledge, and power.”⁷⁸ The constitutional safeguards have been contemptuously disregarded, and the promises of the Constituent Assembly readily forgotten, all as part of the price paid for “national development.” This loss of cultural autonomy has been devastating and has resulted in the degeneration of

71. See INDIA CONST. art. 371A (Thirteenth Amendment Act, 1962), § 2.

72. See INDIA CONST. art. 371G (Fifty-third Amendment Act, 1986) § 2.

73. See Jayal, *supra* note 6 at 151.

74. See *id.* “Finding development was an integral and even non-negotiable part of the modernizing agenda of the Indian State at Independence.” *Id.*

75. See AMITA BAVISKAR, IN THE BELLY OF THE RIVER: TRIBAL CONFLICTS OVER DEVELOPMENT IN THE NARMADA VALLEY 36 (2000). This appropriation has occurred through the institution of the state and the market, often in collaboration with foreign capital. *Id.*

76. See David Marsden, *Resettlement and Rehabilitation in India: Some Lessons from Recent Experience*, in DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS 22 (Hari Mohan Marthur & David Marsden eds., 2000).

77. BAVISKAR, *supra* note 75, at 36.

78. *Id.*

traditional legal systems, infringing on the fundamental right to culture guaranteed by the Indian Constitution.

The fundamental right to culture has also been infringed upon in less direct ways. In particular, tribal property rights have been disregarded. Interestingly, the Government of India did not have a "Rehabilitation Policy" for displaced persons until 1997. Thus, it is not surprising that every instance of large-scale development generates massive displacement and often a sordid tale of *no* rehabilitation. The Hirakud Dam,⁷⁹ Rengali Dam,⁸⁰ National Thermal Power Corporation,⁸¹ Tehri Dam, and, most recently, the Sardar Sarovar Dam⁸² have all turned countless tribal communities into cultural refugees in their own homeland. The Hirakud Dam, built in the Sambhalpur district of Orissa, was one of India's first large dams.⁸³ Modeled after the Tennessee Valley Dam in the United States, the Hirakud Dam flooded approximately 247 villages and displaced at least 100,000 people.⁸⁴ These "temples of modern India"⁸⁵ have achieved development, but not without substantial human cost.⁸⁶ Displacements due to "national projects" are not the only causes of cultural alienation.

Almost all States in India have passed laws prohibiting the transfer of tribal lands to non-tribal people. Yet, despite these legislative protections, transfer continues unabated. In Bihar, in an area of 76,411 acres, 52,127 cases of land transfers of tribal land to non-tribal people have been registered. In just over half of those cases, the decision has been in favor of restoration of tribal lands.⁸⁷ The area that remains in question amounts to 32,636 acres. Still, even when a court agrees that the land should be restored, actual restoration often does not happen. Only 1,774 acres have been physically restored.⁸⁸ The continuing tribal experiences of dispossession, displacement, and discrimination bring into question the government's success at living up to the promise of the Constituent Assembly.

79. See Padel, *supra* note 1, at 908.

80. See A.B. Ota, *Countering Impoverishment Risks: The Case of Rengali Dam Project*, in *DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS* 125 (Hari Mohan Marthur & David Marsden eds., 2000).

81. See Dinesh Agarwal, *Preventing Impoverishment from Displacement: The NTPC Experience*, in *DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS* 155 (Hari Mohan Marthur & David Marsden eds., 2000).

82. See Padel, *supra* note 1, at 908.

83. *Id.*

84. *Id.*

85. *Id.* Former Indian Prime Minister J. L. Nehru used this phrase to describe dams in India. *Id.*

86. *Id.* To date, approximately 1,000,000 people have been displaced through the process of dam creation. *Id.*

87. See Government of India, Report of the Commission for Scheduled Castes and Scheduled Tribes, Fifth Report, Apr. 1982-Mar. 1982 (New Delhi: Government of India Press, 1984) [*hereinafter* Report of the Commission]; see generally ROSS MALLICK, *DEVELOPMENT, ETHNICITY AND HUMAN RIGHTS IN SOUTH ASIA* 211-228 (1998).

88. See Report of the Commission, *supra* note 87.

While the accounts of tribal displacement reiterate the development-deference dichotomy alluded to earlier, they are also indicative of the mechanisms that have been employed to address the grievances of tribal communities in general. These struggles demonstrate, in more ways than one, that the institutions that have been employed to address tribal grievances against increasing state intrusion are both inappropriate and wholly inadequate. The problem has been confounded by inequitable decision making and grievance redressal processes. The formal structures of justice administration in India have failed to adequately protect the tribal communities' right of equal access. The statistics of land restoration in Bihar and the absence of any counter measures by the tribal communities to secure justice suggests an incompatibility between India's formal institutions of justice and their appreciation of justice administration.

Interestingly, Part III of the Indian Constitution recognizes a fundamental right of access to justice.⁸⁹ However the right rests on limitations that make it wholly incompatible with tribal understanding of justice dispensation. The literal text is unclear as to whether the right of access to justice is limited to the formal structures of justice administration or includes variants of justice administration including traditional tribal legal systems.⁹⁰ However, the framers did intend that tribes have a right to a socio-cultural existence based on the principle of substantial deference, including the right to administer justice within the parameters of traditional customary legal systems. Thus, in order for the framers' intent to be achieved, the right to a traditional customary legal system must be recognized. However, the formal structures of justice administration are limited vis-à-vis the tribes' right of access to justice and an alternative conception of the right of access to justice within the fundamental right to culture must be developed to ensure the realization of this right.

89. The Constitution does not directly expressly recognise any such right. Only article 32(1) may partly be said to have recognised a form of right to access to justice. The right has, however, more generally been read into the "right to life" in article 21. The entire Social Action Litigation (SAL) movement in India has been premised on an implied recognition of a right to access to justice. For an introduction to SAL Clark D. Cunningham, *Most Powerful Court: Finding the Roots of India's Public Interest Litigation*, in LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER 83 - 96 (eds. S. P. Sathe & Sathya Narayan 2003). See also Upendra. Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice* in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156 -209 (S. K. Verma, Kusum eds. 2000).

If the right to access to justice is limited to the conception of right provided in article 32(1); arguably the right is only limited to access to the Indian Supreme Court. However, if one prefers to use the conception of right that has been read into the "right to life" in article 21; arguably the right to access to justice may be said to include non-positivistic structures of dispute resolution.

Id.

III. TRIBALS AND THE FUNDAMENTAL RIGHT OF ACCESS TO JUSTICE: APPRECIATING THE NUANCES

A. *The Quiet Premises: A Positivist Explanation of the Fundamental Right of "Access to Justice"*

One of the consequences of the voluminous expansion of the scope of the right to life and personal liberty⁹¹ has been the inclusion of the right of access to justice under Article 21 of the Constitution.⁹² While the Court has never spelled out in explicit terms the nature of the right of access to justice, the expanding body of jurisprudence on the boundaries of the right now allows a fuller discussion of the nature and scope of the right.⁹³ The commentary demonstrates that the right of access to justice is fundamental to any system of justice; it allows the fruitful realization of all other rights.

The right of access to justice, in its existing scope under Article 21, may be said to include the right to access the court,⁹⁴ the right to a fair trial,⁹⁵ the right to a speedy trial⁹⁶ and the right to legal assistance.⁹⁷ While the right to access the court is "fundamentally" protected under Article 32,⁹⁸ it is not difficult to conceive of a right to access courts independent of the right to remedy under Article 32. The right to access the court, whether for the enforcement of a fundamental right or otherwise, is a right to a judicial remedy. It is the most elementary of all rights; a right that gives meaning to all other rights. In a way, the right to a fair trial is the substantive actualization of this right to a judicial remedy. It includes such rules as the presumption of

91. By a process of "creative" interpretation, judges of the Indian Supreme Court have extended the right to life and personal liberty under Article 21 of the Constitution to include a wide range of rights as part of "right of life and personal liberty." For a historical analysis of this "activist" functioning of the Indian Supreme Court, see S. P. SATHE, *JUDICIAL ACTIVISM IN INDIA* (2001); H. S. Mattewal, *Judiciary and the Government in the Making of Modern India*, 1 S.C.C. (Jour) 19 (2002), available at www.ebc-india.com/lawyer/articles/2002v1a4.htm.

92. See *Sheela Barse v. Union of India* 3 S.C.C. 632 (1986).

93. For a more complete discussion on the various aspects of the fundamental right to access to justice in the Indian Constitution, see Shubhankar Dam, *Breaking Barriers: A Socio-Legal Analysis of the Right to Access to Justice*, 1 SCHOLASTICUS: THE JOURNAL OF NATIONAL LAW UNIVERSITY (2) 132 (Jan. 2004).

94. See generally *Fertilizer Corp. Kamgar Union v. Union of India* (1981) 1 S.C.C. 568.

95. See *State of Punjab v. Baldev Singh* (1999) 6 S.C.C. 172; *State of Punjab v. Sarwan Singh* (1981) 1 S.C.A.L.E. 619.

96. See *Babu Singh v. State of U.P.*, (1978) 1 S.C.C. 579; See also *Hussainara Khatoon (I) v. Home Sec'y, State of Bihar*, (1980) 1 S.C.C. 81; See also *A. R. Antulay v. R. S. Nayak*, (1988) 2 S.C.C. 602.

97. See *Hussainara Khatoon*, 1 S.C.C. at 108; See also *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 S.C.C. 401; See also *M. H. Hoskot v. State of Maharashtra*, (1978) 3 S.C.C. 544.

98. See INDIA CONST. art. 32(1). "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." *Id.*

innocence,⁹⁹ the right to a public trial,¹⁰⁰ the right to appeal,¹⁰¹ and the permissibility of evidence in trials.¹⁰² "Speedy justice," Judge Krishna Iyer wrote, "is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable [sic] and the innocent being absolved from the inordinate ordeal of criminal proceedings."¹⁰³ Speedy justice can be seen as the essence of criminal justice, an inordinate delay in the conclusion of a trial is a travesty of justice.¹⁰⁴

The right to a speedy trial is protective in nature; it ensures that delay does not deny the substantive realization of the right. Furthermore, in *Hussainara Khatoon v. Home Secretary, State of Bihar*, the Indian Supreme Court saw the right to legal aid as an element of any "reasonable, fair and just" procedure.¹⁰⁵ The Court explained that judicial justice, with its procedural intricacies, legal arguments and critical examination of evidence, requires professional expertise.¹⁰⁶ Further, the absence of equal justice under the law is always a possibility when one side lacks specialized skills.¹⁰⁷ Therefore, the right to legal aid ensures that a person in the formal legal system is not denied his substantive rights because of want.

While the broad canvas of the right of access to justice, at least in theory, is sufficiently impressive, the fruitful actualization of the right rests on several presumptions that taint its effectiveness for tribal groups. The most obvious presumption is the basic use of the formal legal system; these rights may only be utilized when persons are part of the system that confers and actualizes them. It presumes an interaction within the system of courts established and maintained by the Codes of Civil¹⁰⁸ and Criminal¹⁰⁹ Procedure. The right of access to justice necessarily implicates an impressive repertoire of fundamental rights, but they are premised on a basic level of cultural knowledge about the procedural technicalities and scope of substantive law that many tribal communities do not have. The right assumes a cultural homogeneity among all Indian citizens, and it fails to recognize that a significant part of the population lies outside the positivist framework of justice administration.

As certain provisions of the Constitution demonstrate,¹¹⁰ tribal justice systems are not always assumed to exist within this homogeneity. Quite the opposite is true - the Constitution recognizes their claims to a separate

99. See *Kali Ram v. State of Himachal Pradesh*, (1973) 2 S.C.C. 808.

100. See *Chatisgarh Mukti Morcha v. State of M. P.*, (1996) 1996 Cr.L.J. 2239.

101. See *M. H. Hoskot*, 3 S.C.C. at 544.

102. See *State of Punjab v. Baldev Singh* (1999) 6 S.C.C. 172.

103. *Babu Singh*, 1 S.C.C. at 579.

104. See *Hussainara Khatoon v. State of Bihar*, (1980) 1 S.C.C. 81.

105. See *Hussainara Khatoon*, 1 S.C.C. at 108.

106. See *M. H. Hoskot*, 3 S.C.C. at 544.

107. *Id.*

108. See generally INDIA CODE Act V (1908).

109. See generally, INDIA CODE Act II (1974).

110. See, e.g., INDIA CONST. arts. 371A, 372G (*Sixth Schedule*).

conception of justice administration in both substance and procedure that is fundamentally divorced from the nature of the "mainstream" legal system. The customary nature of tribal laws and a vastly different system of enforcement do not necessitate a right to fair trial or a right to legal aid. The right of access to the court, the most elementary element of the broader right, for example, is of little value unless people actually attempt to access the established legal system.

This limitation of the largely positivist structure of justice administration, even if obvious, highlights an important point - the content of fundamental rights under the Constitution may be intended to be homogenous in application but is culture-specific in practice. Beyond this obvious limitation, there are other, more subtle, limitations that reinforce the argument that the right of access to justice has no homogenous content.

Navigating the "mainstream" system requires basic language proficiencies, the consequences of which are not always appreciated.¹¹¹ The system's complex technicalities, explained from the perspective of an "outsider" who is ignorant about its inherent dynamics, are often a mystery to people who are a part of the dominant culture. They are understandably alien to most tribal groups. The failure of the right of access to justice to provide any meaningful help to the tribal communities is almost indisputable.

In almost all states, laws have been passed prohibiting alienation of tribal lands to non-tribe members. As mentioned above, the prohibition against land acquisition has meant little in practical terms.¹¹² In Kerela, an official inquiry in 1976 revealed that a total of 9,859 acres of tribal land were alienated to non-tribe members "through various means of borrowing for domestic expenses, debt clearance, marriage, treatment of disease, encroachment, cheating, [and] disput[e]."¹¹³ The 1975 Act could not provide relief to the dispossessed tribals. "Virtually no land [was] restored to the erstwhile tribal owners [even though] [t]he Act had provided for restoration of all lands alienated since 1960."¹¹⁴ The tribes' failure to effectively use the positivist "mainstream" mechanism of justice administration in many ways illustrates the limitations of the fundamental right of access to justice unless it is construed in a culturally specific way.

111. Except in trial courts across India, English is the first language of the Court. Specifically, the Supreme Court and the various High Courts accept writ petitions only in English unless a translation is agreed by both parties or a translation is certified to be true translation by a translator appointed by the Supreme Court. This limitation is itself a significant language barrier and makes accessibility for the tribal an issue. See e.g. Order X (2) SUPREME COURT RULES, 1966, available at http://supremecourtindia.nic.in/new_s/rules.htm (last visited April 9, 2006).

112. See generally Cernea, *supra* note 17, at 81.

113. See P. Sivanandan, *Indigenous People's Rights: Struggle for Survival in Kerela*, in HUMAN RIGHTS 2000: INSTITUTE OF HUMAN RIGHTS, VIGIL INDIA MOVEMENT 55, 57 (Matthew George ed., 2002).

114. *Id.*

If we concede that tribes, just as any other members of the Indian polity, have a fundamental right of access to justice, a question arises as to the nature of that right. Given the assumptions on which the meaningful realization of the right rests, clearly it cannot mean access solely within the “mainstream” legal system. In the tribal context, it must mean something more than the right to an utterly foreign legal system; it must encompass the broader right to a customary legal system that can be utilized effectively.

B. Highlighting Cultural Differences: The Dichotomy of Parallel Legal Systems

1. Culture and Legal Systems: A Sociological Perspective

“Culture is one of the [most] basic theoretical” sociological terms, and yet it is inherently indefinable.¹¹⁵ Both in terms of its specific meaning and broad content, the understanding of “culture” has defied consensus among sociologists.¹¹⁶ E. B. Taylor’s omnibus definition asserts that culture is “that complex *whole* which includes knowledge, belief, arts, morals, law, custom and any other capabilities and habits acquired by a man as a member of society.”¹¹⁷ B. Malinowski expressed a similar conception of culture as “the handiwork of man and as the *medium* through which he achieves his ends.”¹¹⁸ Both of these definitions tacitly emphasize the “evolutionary” nature of culture in the sense of culture being a “whole” or a “medium” that enables the attainment of the objectives of human life. The definitions are also end-driven; they refer to those acquired traits that fulfill human social ends. “In this sense, [culture] includes knowledge and methods of explanation, symbolic elements and beliefs, elements of social structure, sentimental elements or social value, and even material objects inasmuch as they are bearers of meaning and value”¹¹⁹ that enable human beings to live meaningful lives.

Apart from this end-driven quality, culture also has a communal, as opposed to individual, conception.¹²⁰ It has been referred to as a “configuration

115. See Roy D’Andrade, *Culture*, in THE SOCIAL SCIENCE ENCYCLOPEDIA 161, 163 (Adam Kuper et al. eds., 1996).

116. See generally *id.*

117. See PASCUAL GISBERT, FUNDAMENTALS OF SOCIOLOGY 342 (Orient Longman 3d ed. 1973) (1957) (emphasis added).

118. Bronislaw Malinowski, A Scientific Theory of Culture and Other Essays 67 (University of N.C. Press 1942) (1944) (emphasis added).

119. GISBERT, *supra* note 117, at 341.

120. The distinction may be illustrated as follows: An individual may need to drink coffee every morning to perform his work better. That is a pattern of *individual* behavior that is neither shared nor common. The “behavior” is end driven: the individual seeks to work better. If all individuals in a community need to drink coffee to work better, then it may be regarded as part of culture of the entire community. Individual behavior may be regarded as a habit, while community behavior is an expression of culture. See generally GUY ROCHER, A GENERAL

of learned and *shared* patterns [of] behavior: including ideas, emotions and actions."¹²¹ It refers to the "whole" or the "handiwork" that enables the realization of *shared* ends. Undoubtedly, whether specific "shared ends" are an expression of culture will depend on the degree of consensus about the purposes of those ends. If one were to presume that all communal existences are motivated by at least some shared ends, one may then recast Taylor's inclusive expression of "knowledge, belief, arts, morals, law, custom and any other capabilities and habits" as the process of attaining shared ends. In this sense, culture is a continuously determining, not just determined, part of social activity. It may be taken as constituting the "way of life" of an entire society that includes codes of manners, dress, languages, rituals, norms of behavior, and systems of belief.¹²²

However, as mentioned earlier, there is no unanimity among sociologists about the scope of the process; does it include both the mental and physical, the cognitive and the affective?¹²³ Roy D'Andrade argues that "since the cultural process necessarily involves [both] mental and physical, cognitive and affective, representational and normative phenomena, it can be argued that the definition of culture should not be restricted to just one part of the social heritage."¹²⁴ If our understanding of culture is rooted in the process of attaining shared ends of communities, it follows that there is not *a* culture but rather *multiple* cultures. However, even disparate communities or culturally different communities share some similar processes of shared ends. Therefore, the sociological study of culture must concern itself not with all aspects of the "way of life" but with only those *distinguishing* or *dissimilar* processes of shared ends between communities. In other words, it consists of those "elements which are defined and differentiated in a particular society as representing reality – not simply social reality, but the total reality of life within which human beings live and die."¹²⁵ Culture, in this sense, is exclusive: it involves a process of defining oneself by defining what one is *not*. It includes references to the social and institutional processes of achieving shared ends in a way other communities do not. The protected aspect of culture that may be secured within the broad right to culture must therefore take its content from this "exclusivist" conception of culture.

The proponents of the historical school of law have vigorously argued that a culture's legal system is a defining attribute of the processes for attaining

INTRODUCTION TO SOCIOLOGY: A THERETICAL PERSPECTIVE 90 (Peta Sheriff trans., MacMillan 1968) (1972).

121. GIBBERT, *supra* note 117, at 341 (emphasis added).

122. See ROCHER, *supra* note 120, at 90 ("Patterns of behaviour, values and symbols which comprise culture include knowledge, ideas and thought, and expand to include all forms of expression of feelings as well as the rules which regulate action and which are objectively observable."); see generally RAYMOND WILLIAMS, *THE SOCIOLOGY OF CULTURE* (1981).

123. D'Andrade, *supra* note 115, at 163.

124. *Id.*

125. See David Schneider, *Notes Toward a Theory of Culture*, in *MEANING IN ANTHROPOLOGY* 197, 206 (K. Basso et al. eds., 1976).

shared ends in jurisprudence.¹²⁶ Legal systems as cultural institutions are themselves evidence of a distinguished process, but they simultaneously evidence the distinguishing characteristics of a community. The unchallenged founder of historical jurisprudence, Friedrich Karl Von Savigny, posited an interesting relationship between a culture and its legal system.¹²⁷

Writing against the universalist approach of the natural school of law, Von Savigny asserted that peculiar relationships exist between the law and the experience of various groups in society.¹²⁸ To Savigny, a legal system was part of the culture of a people.¹²⁹ "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality."¹³⁰ Savigny explained this through his analysis of *Volkgiest*, in the tradition of the German legal system and its substantive differences from Roman law.¹³¹ Law, as he saw it, was not a self-contained collection of verbal formulae, rather it was part of the complex makeup of a people's experience and character, manifest in the "common feeling of inner necessity" with which it was regarded by the people.¹³² The norms develop unconsciously in tandem with other facets of culture, like family, religion, and the economy.¹³³ Because of the law's intrinsic relationship to culture, legal systems develop based on the history, traditions, and institutions of different cultures and societies.¹³⁴ The advancement of society and its consequent complexity, however, make the law, as manifested in the "popular consciousness," imperfect. The historical school's assertions recognize the important truth that law is not an abstract set of rules simply imposed on society, but rather is an integral part of it, having deep roots in the social and economic habits and attitudes of its past and present members.¹³⁵

126. The writings of Friedrich Karl Von Savigny's are said to have led to the development of the historical school. Some of the other seminal contributors of the school are Henry Maine, William Graham Sumner, Paul Vinogradoff and Johann Herder. Maine's major works include: *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (1861); *VILLAGE COMMUNITIES* (1880); *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS* (1878). Sumner's major works include *FOLKWAYS* (1906). Vinogradoff's works include: *OUTLINES OF HISTORICAL JURISPRUDENCE* (1922); *VILLAINAGE IN ENGLAND* (1892). A description of Herder's works may be found in ISSAUAH BERLIN, *VICO AND HERDER* (1976). See generally H. Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q.R. 326 (1937).

127. See Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control* 421 (Harvard Univ. Press 1950) (1961).

128. See VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESERZGEBUNG UND RECHTSWISSENSCHAFT*, [Law of a People as an Emanation of its Common Consciousness] (Hayward trans., 1831) (1985).

129. See M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* 785 (1985).

130. See Edgar Bodenheimer, *Jurisprudence* 72 (1962).

131. SAVIGNY, *supra* note 128.

132. *Id.*

133. See Bodenheimer, *supra* note 130, at 72.

134. BERLIN, *supra* note 126, at 147.

135. See Bodenheimer, *supra* note 130, at 73.

As previously discussed, depending on the nature of difference, a legal system could itself be a cultural institution illustrative of the "process of shared ends." In this sense, the legal system is a structure. On the other hand, a legal system may be a part of culture in the sense that it is a process; a process that sustains the continuity of culture. In the latter sense, the legal system is reinforcing; it reinforces and maintains the "process of shared ends." The underlying theme, however, is that a *distinguished* legal system is a part of culture, whether in the sense of a structure or a process that in turn sustains other processes. The question that follows is whether Indian tribal legal systems are sufficiently distinguished to fall within this broad conception of "culture."

2. Traditional Tribal Legal Systems: Illustrating the Tribal "Culture"

Before a legal system can be encompassed within the meaning of "culture," it must be sufficiently distinguished from the other legal systems surrounding it. This section illustrates the nature and distinguishing traits of traditional tribal legal systems within the structure-process model discussed above. It argues that customs based traditional legal systems perform a dual role for the Indian tribal communities; they are an expression of tribal attitudes towards dispute settlement and they are an instrument for "enforcing" tribal culture.

The Indian Constitution recognizes 12,000 tribes in its schedule.¹³⁶ Not all are separate and distinct tribes; some are sub-tribes or isolated forest communities.¹³⁷ Accordingly, the discussion of the legal systems as part of tribal culture that follows is only illustrative of the many tribes that exist in India.

The Pangi tribe in the east Siang district of Arunachal Pradesh is an individual landholding community.¹³⁸ "Their traditional village council (kebang) and the inter-village council (dapung) settle all disputes. The village headman (gaonbura) is the decision-maker for both these bodies, but often he does so in consultation with other prominent persons of the community."¹³⁹ The Ramo tribe in the Tuting areas of Arunachal Pradesh similarly exercises social control through "the village council (kebang) which consists of a headman (gam), assistant headman (lampo) and some village elders who settle minor disputes by imposing a fine on the offender."¹⁴⁰ The Baigas of Madhya Pradesh exercise social control "though an informal panchayat in the form of a council of elders."¹⁴¹ The body is empowered to punish a person who goes

136. See generally K.S. Singh, *The Scheduled Tribes* (1994).

137. *Id.*

138. *Id.* at 42.

139. *Id.*

140. *Id.* at 45-46.

141. *Id.* at 80. A "panchayat" literally means a group of five.

against the rules either in cash, kind, or physical torture.¹⁴² "State" institutions are involved "only when there is a need to obtain a jural category certificate or for a loan."¹⁴³ In contrast, the Andh tribe in Maharashtra has no judicial process except a "village tribal council consisting of the heads of the families [who] act as [] mediator[s] to solve social or economic disputes."¹⁴⁴

The Bathudi of the Mayurbhanj and Keonjhar districts in Orissa "have their own community council (jati samaj) controlled by the hereditary heads like pradhan, desh chatia, chowkia, dakua and dehri."¹⁴⁵ The jati samaj exercises its jurisdiction in both internal matters and intercommunity social affairs.¹⁴⁶ "Excommunication is the major punishment and the offender is admitted only after a community feast (samaj bhoj) is hosted by him."¹⁴⁷ The Bharia of Madhya Pradesh, a forest dwelling community, "have a community council (panchayat) to maintain law and order within the community;" it "consists of a head (mukhiya), five members (panch) and one messenger (kotwal)."¹⁴⁸

The Bhils of southern Rajasthan and northern Maharashtra, the second largest tribe in India, have their traditional system of social control exercised and enforced by men.¹⁴⁹ "Most issues are referred to the village headman, the gameti, mukhi or patel. In large multi-phala villages, there are phala gametis to sort out intra-phala disputes."¹⁵⁰ "A gameti commands a position of supremacy among the Bhils; he is their leader, guide and philosopher."¹⁵¹ While the power of decision making is vested in a gameti, he "may consult a few elderly persons to seek their opinion when necessary."¹⁵² Similarly, the Mavchi Bhils of Maharashtra maintain social order through an elderly member (karabari) "along with the village council sarpanch [head of the panchayat], police patel, and other office bearers."¹⁵³ The Pauri Bhuniya of Orissa "have their own tribal council consisting of the village headman (pradhan), religious priest (dehuri) and older members of the community."¹⁵⁴ The post of the pradhan and dehuri are, however, hereditary.¹⁵⁵

In contrast to these tribes, the Biar of northern Madhya Pradesh ensure social control "by a two tier political system, in the village and at the regional

142. *Id.*

143. *Id.*

144. *Id.* at 63.

145. *Id.* at 97.

146. *Id.* at 98.

147. *Id.* at 98.

148. *Id.* at 111.

149. *Id.* at 118, 121.

150. *Id.* at 121.

151. *Id.* at 122.

152. *Id.*

153. *Id.* at 134-35.

154. *Id.* at 163-64.

155. *Id.*

level.”¹⁵⁶ “Most of their disputes are settled by imposing a penal feast or a fine on the offender.”¹⁵⁷ Similarly, the Bhinjal in the Satpura and Aravalli hills of Madhya Pradesh have “community councils at the village level (gram jati panchayat) and at the regional level (Bhinjati jati mahasabha).”¹⁵⁸ These councils deal with “intracommunity disputes and issues like divorce, adultery, rape, elopement, land ownership, disrespect towards traditional norms, insult to the traditional council, and theft.”¹⁵⁹ “Punishment in the form of a fine or excommunication is inflicted upon the guilty.”¹⁶⁰

Among the Naga tribes, justice is administered by the village court or village council, which is comprised of the elderly male representatives of all clans/families, including the chief in the village.¹⁶¹ The Nagas have a republican type of village polity in which village administration is run by the village council that performs both administrative and judicial functions.¹⁶² Any kind of dispute is settled in the village court. “In the same way, the office of the village chief is the highest court of appeal among the Kuki-Chin-Mizo” tribal group.¹⁶³ “When it is difficult to determine the guilt, the tribal people leave the matter to the divine” will, which is revealed through the performance of oath and ordeals.¹⁶⁴ “The most common methods of ordeal are dipping the parties involved into water to determine guilt,” “oaths with fire and water, [and] consuming iron (metal) powder.”¹⁶⁵

The Bodh tribe of the Zanskar and Nurba regions in Jammu and Kashmir has a community of village elders, headed by the “goba,” that exercises social control and settles family disputes, issues relating to divorce, sharing of water, collection of live stock tax, and inter-community disputes.¹⁶⁶ The Gond Gowari in the Bhandara, Amravati, and Garhchirol districts of Maharashtra have a traditional council known as the *shandhya* that performs both sacred and secular roles.¹⁶⁷ The decision making is not limited to the temporal matters of social existence but extends even to religious aspects of life. Similarly, the Kandra Gond in the Durg, Raipur, and Bastar districts of Madhya Pradesh have a traditional council headed by a king (or “raja”) and assisted by office bearers (dewan, panch) who resolve social disputes¹⁶⁸ and are empowered to punish by

156. *Id.* at 175-76.

157. *Id.* at 176.

158. *Id.* at 178.

159. *Id.*

160. *Id.*

161. See Ninglu, *Customary Practices of the Tribals in Manipur*, THE IMPHAL FREE PRESS, April 2005, at http://manipuronline.com/Features/May2002/tribalpractice05_1.htm.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Singh, *supra* note 136, at 193-94.

167. *Id.* at 321.

168. *Id.* at 322.

imposing fines or enforcing a social boycott.¹⁶⁹ The Kolbhata Gond in the Balaghat districts of Madhya Pradesh has a community council headed by an elected head (the “mukhiya”)¹⁷⁰ that is empowered to impose fines or excommunicate the offender.¹⁷¹ The Jhareya tribe in the hill tracts of Maharashtra has a traditional structure of a community council, village council, and chieftainship.¹⁷² These bodies are arranged hierarchically, with one serving as an appellate forum for the council below it.¹⁷³

A closer reading of these illustrations of tribal dispute resolution/adjudication mechanisms suggests substantial differences from that of the “mainstream” process we saw earlier. Structurally, the tribal systems may be classified as single- and multi-tiered processes. Typically, tribal legal systems do not incorporate an “appellate” forum for a reassessment of the decision. This is at least partially attributable to their conception of justice based on the “wisdom” of the elderly in contradistinction to the systems that have an elected “judiciary.” While the former typically is single tiered, the latter often has a multi-tiered process of dispute resolution. Since the source of legitimacy in the tribal systems comes from hereditary wisdom, there is clearly great faith in the ability of the wise and elderly to arrive at the “just” decision. In the case of an elected judiciary, where legitimacy is premised on the consent of community members, there is no element of divinity in their decision making, and, therefore, in tribal understanding, their decisions are more susceptible to errors.

The manner of adjudication differs substantially between tribal systems. Some recognize “adjudication,” while others emphasize the “negotiation” character of their resolution process. What underlies this process of resolution is the involvement of judges. Tribal judges are not seen as unbiased, “external” authorities seeking to adjudicate a dispute. They are wise people who share the same culture, are part of the same societal values, and share the consciousness of the tribal community. In a way, they are “involved” arbitrators rather than disinterested, withdrawn adjudicators. They do not simply decide which side “wins” in a particular dispute; they are active participants in the resolution process that we inaptly refer to as “dispute adjudication.”

The process of dispute negotiation suggests an interesting distinction. While in most cases the persons involved are the “elderly,” who rely on their wisdom and experience, the “judges” in other cases are elected to the village or community councils. The “elderly” appointed as judges often inherit the position, as if wisdom is an ethereal endowment passed on to a select few. In almost all cases, however, it would be fallacious to look at these people as involved solely in dispute resolution, whether by way of adjudication or

169. *Id.*

170. *Id.* at 325.

171. *Id.*

172. *Id.* at 346.

173. *Id.* In the first instance, the matters are heard by the community council. *Id.*

negotiation. Judging is a welfare function they perform as part of tribal governance. They do not merely apply laws to a given factual situation; they seek more flexible solutions that bring harmony to the tribe. In many cases this is illustrated by the absence of a distinction between the religious and secular matters that affect tribal existence. There is neither any "separation of state from religion" nor any obligation on judges to avoid religious determinations. As in the case of the Naga tribe, a "divine" role in justice administration is as much a part of the process as anything else.

The procedures of dispute resolution are completely oral. Neither is the law nor the evidence required to be in writing; nor are judgments given in writing. The law (i.e., customary law) is part of social consciousness which partly explains why the experienced and the elderly have an authoritative say in resolving matters. In almost all single tiered processes of resolution, the task is solely entrusted to village headmen, although they have the "consultative" power of involving other wise men. The process is an informal one with ample community involvement. These systems are premised on values wholly different from the hierarchical, disinterested, and secular processes of dispute adjudication commonly found in the Anglo-Saxon practices of "mainstream" India.

The fundamental right of access to justice rests on positivist premises that do not make sense for tribal communities that are largely outside the framework of such a legal process, and inasmuch as culture, as a sociological discourse, is concerned with the study of the distinguished processes towards the development of shared ends, this paper argues that the customs-based traditional legal system satisfies that definition. The tribal dispute resolution processes are impressively holistic, with vastly differing adjudication processes.

The customary nature of the laws and the wholly different processes clearly make traditional tribal legal systems distinguished processes. Therefore, it would seem that the fundamental right of access to justice would mean something different for tribal communities than it does for "mainstream" Indian citizens. If the fundamental right of access to justice is to be realized for the tribal communities, it can mean nothing less than a right to adjudication under the customs-based traditional legal system. However, this construction of the right of access to justice has the potential to interfere with the relationship between the tribes and mainstream communities.

C. *The Status of Tribal Legal Systems under the Indian Constitution: A Cultural Explanation*

1. *The Fundamental Right to Culture: Interpreting Customary Legal Systems.*

Article 29(1) of the Indian Constitution confers on “[a]ny section of the citizens . . . having a *distinct* language, script or culture of its own” the right to conserve the same.¹⁷⁴ One may note the emphasis on the “distinct” condition for the enjoyment of the right to culture. In other words, unless the language, script, or culture is “distinct,” it does not enjoy protection as a fundamental right under Article 29(1). This precondition is a constitutional recognition of the “distinguished” conception of culture in sociology discussed earlier.¹⁷⁵ The traditional customs-based legal system is a distinct aspect of tribal culture and also a vehicle for protecting the distinctness of tribal culture. It would, therefore, follow that the legal system may be conserved as part of a tribe’s fundamental right to culture under Article 29(1). Indeed, the mainstream judiciary, in its decisions, has formally recognized the traditional customs-based legal system as an integral part of tribal culture.

For a State that prides itself on its cultural diversity, judicial pronouncements on the nature and scope of the fundamental right to culture under Article 29(1) are surprisingly few. In *Jagdev Singh v. Pratap Singh*,¹⁷⁶ explaining the nature of the right to conserve language under Article 29(1), the Supreme Court held:

The Constitution has thereby conferred the right, among others, to conserve their language upon the citizens of India. Right to conserve the language of the citizens includes the right to agitate for the protection of the language. . . . Unlike Article 19(1),¹⁷⁷ Article 29(1) is not subject to any reasonable restrictions. The right conferred upon the section of the citizens residing in the territory of India or any part thereof to conserve their language, script or culture is made by the Constitution absolute¹⁷⁸

174. INDIA CONST. art. 29(1) (emphasis added).

175. See discussion *infra* Part III.B.1.

176. *Jagdev Singh v. Pratap Singh*, (1965) 6 S.C.R. 750.

177. INDIA CONST. art. 19. All citizens shall have the right to freedom of speech and expression. *Id.* The freedom is, however, subject to reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence under Art. 19(2). *Id.* at art. 19(2).

178. *Jagdev Singh*, 6 S.C.R. at 769 (emphasis added).

This "absolute" status of the right to conserve culture under Article 29(1) has far reaching constitutional implications.¹⁷⁹

In *Madhu Kishwar v. State of Bihar*,¹⁸⁰ a petition was filed under Article 32 challenging the constitutionality of the Chotanagpur Tenancy Act of 1908¹⁸¹ on grounds that the provision in favor of male succession to property is discriminatory and unfair against women and, thus, violates equal protection guaranteed by Article 14 of the Constitution.¹⁸² Rejecting the prayer in the petition and noting the exemption enjoyed under law by the tribes of Mundas, Oraons, and the Santhals in the State of Bihar, the Supreme Court held that "[i]n the face of . . . visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort."¹⁸³

The customary laws of a tribe not only govern its culture, but also succession, inheritance, marriage, worship of Gods, etc.¹⁸⁴ In addressing the question of whether conversion to another religion amounts to repudiation of the tribal status,¹⁸⁵ the Supreme Court noted that "[i]f by conversion to a different religion a long time back, he/his ancestors have not been following the customs, rituals and other traits, which are required to be followed by the members of the tribe and even had not been following the customary laws of succession, inheritance, marriage[,] etc. he may not be accepted to be a member of a tribe."¹⁸⁶ Thus, the Courts have left it up to the tribes to determine for themselves who can and cannot be a member of their tribe.

In *Sardar Syedra Taher Saifuddin Saheb v. State of Bombay*¹⁸⁷ an interesting question on tribal legal systems was contested in the Supreme Court. The 51st Dai-ul-Mutlaq¹⁸⁸ and the head of the Dawodi Bohra community challenged the constitutionality of the Bombay Prevention of Excommunication Act of 1949.¹⁸⁹ The petitioner, as the Head Priest of the Dawoodi Bohra,

179. For the consequences of the "absolute" status of the right to conserve culture, see *infra* Part IV.A.

180. *Madhu Kishwar v. State of Bihar*, (1996) 5 S.C.C. 125.

181. INDIA CODE Act VI (1908).

182. INDIA CONST. art. 14. The State shall not deny to any person equality before law or equal protection of the law. *Id.*

183. *Madhu Kishwar*, 5 S.C.C. at 125, para 4.

184. See *State of Kerala v. Chandramohan*, (2004) 3 S.C.C. 429, 434.

185. *Id.*

186. See *id.* at 435.

187. *Sardar Syedra Taher Saifuddin Saheb*, (1962) 2 S.C.R. Supl. 496.

188. *Da'i-ul-Mutlaq* is both the spiritual and political leader of the Dawoodi Bohra community. The leader exercises considerable powers over the community members and is as such considered as the representative of God on earth. For a description of the qualities and nature of authority of the *Da'i* see Asghar Ali Engineer, *Da'i and his Qualifications*, available at <http://www.dawoodi-bohras.com/issues/qualifications.htm> (last visited 8th April, 2005)

189. *Id.*

claimed to be the vicegerent of Imam¹⁹⁰ on Earth in seclusion.¹⁹¹ In his status as the Imam in seclusion, the Dia had not only civil powers as head of the sect, but also ecclesiastical powers as a religious leader of the community.¹⁹² In his capacity as the religious leader, as well as trustee of the property of the community, he had the power of excommunication.¹⁹³ The petition claimed that the Dia-ul-Mutlaq, as the religious leader of the community, was entitled to excommunicate any member of the Dawodi Bohra community for an offense which, according to his religious sense, justified expulsion. Therefore, he argued, any infringement on his right to excommunicate was beyond the permissible scope of Bombay's authority to legislate.¹⁹⁴

The counsel for the petitioner argued the matter under Article 26(b), which confers upon every religious denomination, or any section thereof, the right to "manage its own affairs in matters of religion."¹⁹⁵ The petitioner argued that every religious denomination is entitled to ensure its continuity by maintaining the bond of religious unity and discipline, which would secure continued acceptance by its adherents to certain essential tenets, doctrines and practices and that the right to continuity involves the right to enforce discipline, if necessary, by taking the extreme step of excommunication.¹⁹⁶ While agreeing to the submission made by the respondent that the effect of the excommunication would be to deprive the person of his civil rights, the majority of the Court upheld the petition on the ground that the "fundamental right under Article 26(b) [was] not subjected to preservation of civil rights"¹⁹⁷ and, therefore, it was of no consequence that the excommunicated person would lose his civil rights.¹⁹⁸ Judge Ayyangar, in his concurring opinion, observed that "the identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community."¹⁹⁹ Defining excommunication as a "*judicial* exclusion from the right and

190. Like the Da'I, the Iman is also a spiritual leader of the Bohra community. The Iman, however, is superior in hierarchy and enjoys spiritual appeal beyond the Bohra community.

191. *Id.*

192. *Id.*

193. *Id.* It was claimed that the power of excommunication was not arbitrary, absolute or untrammelled or had to be exercised and had to be exercised according to the usage and tenets of the community. *Id.* In other words, there were customary limitations on the exercise of the power even by the religious head. *Id.*

194. *Id.* at 856.

195. *Id.*; INDIA CONST. art. 26(b). "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion." *Id.*

196. *Sardar Syedna Taher Saifuddin Saheb*, 2 S.C.R. Supl. at 502.

197. *Id.* at 497.

198. *Id.*

199. *Id.* at 543.

privileges of the religious community to whom the offender belongs,"²⁰⁰ he held the impugned legislation as *ultra vires* on the ground that it denied the religious head the right of punishment as a measure of community discipline.²⁰¹

While the Supreme Court did not address the question from the perspective of the right to culture under Article 29(1), the court could have reached the same conclusion through an interpretation of that right. The right to culture may not have been put forth in the instant case because of the criterion of "religious denomination" that the Dawoodi Bohra community enjoys under Article 26.²⁰² However, where legislation seeks to take away the power of excommunication from any community not distinguishable on grounds of religious denomination, it seems quite possible to protect the practice under Article 29(1). The *Sardar Syedna Taher Saifuddin Saheb* Court, even without a discussion of the scope of the right to culture, tacitly recognized the status of distinct legal systems as being protected by provisions of Part III of the Constitution. The protection under Article 29(1) can only be more secure in the light of the "absolute"²⁰³ nature of the right, especially when Article 25 and the protection therein is "[s]ubject to public order, morality and health . . ."²⁰⁴

Quite clearly, in recognizing the customs and traditions of the tribal communities in Bihar or that of the Dawoodi Bohra community, the Supreme Court impliedly acknowledged the institutions that sustain and enforce these customs and traditions. For without recognition of the customary legal system, the right to tribal custom may not mean much. As discussed above, there are fundamental differences between the positivist legal system practiced in "Courts" and the tribal traditional legal systems. To require the tribal communities to enforce their customs within the "mainstream" framework of law may effectively deny them their right of access to justice. These judicial pronouncements, in other words, recognize the right of tribals to have both their spiritual and temporal disputes resolved within systems that are a part of tribal culture.

2. *International Law and Cultural Rights*

It is now well settled by a series of Court decisions that international law which is not contrary to the provisions of the Constitution or other enacted law may be considered part of Indian jurisprudence and enforceable in Indian

200. *Id.* at 549 (emphasis added).

201. *Id.*

202. CONST. INDIA, art. 26 Subject to public order, morality and health, every religious denomination or any section thereof shall have the right— (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law. *Id.*

203. See *Jagdev Singh v Pratap Singh*, (1964) 6 S.C.R. 750, 769.

204. See CONST. INDIA, art. 25.

courts.²⁰⁵ On many occasions, the Supreme Court has interpreted the scope of rights under Part III in light of the provisions of the international conventions and declarations to which India is a party. In *Neelabati Behera v. State of Orissa*,²⁰⁶ the Court used Article 9(5) of the International Covenant on Civil and Political Rights²⁰⁷ to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under Article 32 of the Indian Constitution.²⁰⁸ Similarly, in *Vellore Citizens Welfare Forum v. Union of India*,²⁰⁹ the Supreme Court interpreted Articles 47, 48-A, and 51-A(g) of the Constitution as implicitly incorporating the precautionary principle and the “polluter-pays” principle as mentioned in the Stockholm Declaration²¹⁰ and the Rio Declaration.²¹¹ In the light of these pronouncements, in elucidating the nature of the right to culture under Article 29(1) of the Constitution, it may be appropriate to use the body of international law that recognizes cultural rights, either generally or specifically for indigenous people.

The I.L.O. Convention, No. 169 of 1989, expressly guarantees specific cultural rights of indigenous people.²¹² Article 4 of the Convention provides that “[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment” of the indigenous people in accordance with their own “freely expressed wishes.”²¹³ It clearly takes a narrow approach to an understanding of “culture,” the content of which is separate and distinct from institutions, property, labor, or environment. However, traditional legal systems may either be construed as legal institutions in and of themselves, which enforce and sustain cultural values like customary law, or they may be looked upon as evidence of indigenous culture itself. Therefore, even a restricted view of culture as separate institutions, property, labor, or environment does not derogate the argument that traditional legal systems may be interpreted as part of indigenous culture. Thus, it seems that in interpreting the scope of “culture” in Article 29(1) of the Indian Constitution,

205. See *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 246.

206. *Neelabati Bahera v. State of Orissa* (1993) 2 S.C.C. 746; see also *D. K. Basu v. State of West Bengal*, (1997) 1 S.C.C. 416. .

207. G.A. Res. 2200 A (XXI), U.N. Doc. A/6316 (1966). 999 U.N.T.S. 171 (Mar 23, 1976).

208. *Id.*

209. *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647; see also *A. P. Pollution Control Board v. Prof. M. V. Nayudu*, (1999) 2 S.C.C. 716.

210. *U.N. Conference on the Human Environment: Final Document*, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 (1972), reprinted in 11 I.L.M. 1416 (1972).

211. *U.N. Conference on Environment and Development: Rio Declaration on Environment and Development*, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992).

212. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), Jun. 27, 1989, Int'l Labor Org., 76th Sess., at <http://www.ilo.org/ilolex/english/convdisp1.htm>. 3.

213. *Id.* at art. 4 (emphasis added).

the additional criteria mentioned under Article 4 of Convention 169 must be regarded as relevant factors. Article 5 of the Convention reiterates that "the integrity of values, practices and institutions of these peoples shall be respected;"²¹⁴ while Article 8 specifically recognizes "the right [of tribal groups] to retain their own customs and institutions."²¹⁵ These rights over their institutions are supplemented by Article 7 that recognizes their right to control to the extent possible, "their own economic, social and cultural development."²¹⁶

The Draft United Nations Declaration on Rights of Indigenous People expressly recognizes that "[i]ndigenous peoples have the right to maintain and strengthen their *distinct* political, economic, social and cultural characteristics, as well as their legal systems . . ."²¹⁷ Article 7 recognizes, *inter alia*, the right of indigenous peoples to have "the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for . . . [a]ny form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures . . ."²¹⁸ The emphasis on "distinct" characteristics in Article 4 is crucial. As argued above, tribal traditional legal systems fundamentally vary from their "positivist" counterparts.²¹⁹ Enforcing the "mainstream," Anglo-Saxon-based justice system with its vastly different substantive and procedural rights for *any* purpose shall amount to a legislative intervention and, consequently, an interference with the free enjoyment of the right to culture.

Similarly, under Article 19 of the Draft Declaration, "[i]ndigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making . . . through representatives chosen by themselves in accordance with their own procedures, as well as to *maintain* and develop their own indigenous decision-making institutions."²²⁰ The scope of the right to maintain indigenous decision-making is further explained in Article 39 as including the "right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes[,] "²²¹ taking into account "the customs, traditions, rules and legal systems of the indigenous people concerned."²²² Article 39, read in conjunction with Article 19, recognizes the right of indigenous peoples to have their disputes with non-

214. *Id.* at art. 5.

215. *Id.* at art. 8.

216. *Id.* at art. 7.

217. U.N. Comm. Hum. Rts., Sub-Comm. On Prevention of Discrimination and Protection of Minorities, *Draft U.N. Declaration on the Rights of Indigenous Peoples*, Aug. 26, 1994, U.N. Doc. E/CN.4/1995/2, at art. 4 (1994), *reprinted in* 34 I.L.M. 541, 549-50 (1995) (emphasis added) [hereinafter *Draft Declaration*].

218. *Id.* at art. 7.

219. See discussion, *supra* Part III.B.2.

220. *Draft Declaration*, *supra* note 217, at art. 19.(emphasis added)

221. *Id.* at art. 39.

222. *Id.*

indigenous groups decided within the precincts of the traditional customs-based legal system. This assertion has profound importance in analyzing the constitutionality of legislations, including the Protection of Biological Diversity Act of 2002, the Plant Varieties Protection and Farmers' Rights Act of 2000, and similar such legislation under the Indian Constitution.

Apart from these international documents specifically dealing with indigenous rights, Article 22 of the Universal Declaration of Human Rights recognizes that "[e]veryone, as a member of society" is entitled to cultural rights,²²³ while Article 27 reaffirms that "[e]veryone has the right to freely participate in the cultural life of the community"²²⁴ Article 27 of the International Covenant on Civil and Political Rights recognizes that "minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture" ²²⁵ Taken together, the international law conventions and draft declaration provide a sufficient basis for analyzing the consequences of recognizing a fundamental right to a traditional customs-based legal system as part of the larger right to culture under Article 29(1) of the Indian Constitution.

IV. THE CONSEQUENCES OF RECOGNITION: TRIBALS, CULTURES AND CLAIMS

A. *Constitutional Consequences: Is Culture Constant?*

If Article 29(1) of the Indian Constitution guarantees a fundamental right to a traditional legal system as part of the fundamental right to culture, what is the nature of the consequences that flow from the recognition of that right? The Supreme Court has held right to conserve language under Article 29(1) to be absolute.²²⁶ Accordingly, the fundamental right to conserve culture must be granted the same status as the right to conserve language. Thus the nature of the right to a traditional legal system must, likewise, be absolute. Additionally, the text of the Constitutional provision does not qualify or circumscribe the right in any manner. Unlike the right to equality,²²⁷ the freedom of speech and expression,²²⁸ the right to life and personal liberty,²²⁹ the right to religion,²³⁰ or

223. G.A. Res. 217 A (III), at art. 22, U.N. Doc. A/811, (1948).

224. *Id.* at art. 27.

225. G.A. Res. 2200 A (XXI), 21 U.N. GAOR, at art. 27, U.N. Doc. A/6316 (1966).

226. *Jagdev Singh*, 6 S.C.R. at 750, 769.

227. INDIA CONST. art. 14. "The State shall not deny to any person equality before law or the equal protection of the laws" *Id.*

228. INDIA CONST. art. 19(1). "All citizens shall have the right to freedom of speech and expression. . . ." *Id.*

229. INDIA CONST. art. 21. "No person shall be deprived of his life or personal liberty except according to procedure established by law." *Id.*

230. INDIA CONST. art. 25(1). "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the

the right to manage and administer religious denomination,²³¹ the right to conserve culture has not been made subject to any reasonable restrictions. To read Article 29(1) as importing an understanding of reasonable restriction on the right to conserve culture would amount to a rewriting of a constitutional provision - a task not quite within the limits of judicial functioning. Interpreted harmoniously with other provisions of the Constitution and other governing documents, the fundamental right to conserve culture must be interpreted as absolute. However, three distinct consequences flow from this conclusion, which must be taken into account.

First, the provisions contained in Articles 37(1)(A) and 37(1)(G) of the Indian Constitution exclude the applicability of any law made by Parliament to customary law and procedure or the administration of civil and criminal justice involving decisions according to customary law of Nagaland and Mizoram. They must, therefore, be read as merely illustrative. In other words, all scheduled areas wherein tribes that have their customary law and a *distinct* traditional legal system are exempt from the applicability of such laws made by the Parliament. Accordingly, the provisions relating to Nagaland and Mizoram must be read as merely illustrative of the general exemption rule for all tribal areas with a distinct legal system. It also follows that the power of the State Legislative Assembly to extend the application of such laws by a resolution must be interpreted to mean "a resolution with the consent of the tribal community." In other words, the power of extending the application of these laws would then be appropriately dependent on the consent of the tribal communities to be governed by such enacted laws.

Second, if the right is conceptualized as absolute, social reform of tribal cultural institutions by legislative enactments would not be possible. Interfering with the customary system on grounds of introducing social reform would, in effect, amount to a denial of the right. Exception in favor of "social welfare and reform" as a ground for legislative intervention has been made only in Article 25 (the right to religion), and there can be no rational basis for importing the same limitation under Article 29(1) where none exists. This prohibition on social welfare and reform is crucial because of the practices often found in tribal communities. For example, in the *Sardar Syedna Taher Saifuddin Saheb* case, the Supreme Court held the legislative prohibition on the power of excommunication by the fifty-first Dai-ul-Mutlaq unconstitutional on grounds that it interfered with the religious practices of the Dawoodi Bohra community.²³² It is important, however, to note that there are tribal communities wherein the power of excommunication is recognized as a temporal power of the "judges" in their traditional legal system. The power is purely a custom with no basis in religion. Without a prohibition on social

right to freely profess, practise and propagate religion." *Id.*

231. INDIA CONST. art. 26(a). "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes . . ." *Id.*

232. *Sardar Syedna Taher Saifuddin Saheb*, (1962) 2 S.C.R. 496.

reform by legislative intervention, a law banning excommunication as a valid punishment would not be struck down since the defense of religious practice would not be available to the community. That would render meaningless the "absolute" fundamental right to conserve culture.

Similarly, any legislation purportedly based on grounds of promoting gender equality cannot be sustained. The various tribal communities have differing ownership qualifications; women are not always entitled to own property. To allow legislative reform of such apparently discriminatory practices would amount to reforming the very institution of the traditional legal system that the right to culture seeks to protect.

The recognition of this collective right to a traditional legal system does not necessarily imply that all civil rights of all tribal persons would be protected. Not all discrimination between men and women would be regarded as invalid. Neither does the recognition of a traditional legal system, in its absolute form, guarantee every individual minimum human rights. On the contrary, the recognition of such a right includes a tacit recognition of the position that the objective truly is to sustain and promote plurality, whether or not the plural process promotes what is commonly perceived as basic human rights. However, neither does "mainstream" India, with its eloquent Constitution and wide repertoire of fundamental rights, ensure basic human rights in all instances.²³³ Laws relating to marriage, divorce, and inheritance among Hindus,²³⁴ Muslims,²³⁵ and Christians²³⁶ still recognize wide disparities between men and women.²³⁷

Underlying this argument for prohibition on reform by legislative

233. See S. P. Sathe, *Gender, Constitution and the Courts*, in *ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR* 117, 120 (Amita Dhanda & Archana Parashar eds., 1999); B. Sivaramayya, *Towards Equality: The Long Road Ahead*, in *ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR* 387 (Amita Dhanda & Archana Parashar eds., 1999).

234. See Madhu Kishwar, *Codified Hindu Law – Myth and Reality*, 29 *ECONOMIC AND POLITICAL WEEKLY* 2145 (1994).

235. See KHAN NOOR EPHROZ, *WOMEN AND LAW: MUSLIM PERSONAL LAW PERSPECTIVE* (Rawat Pub. 2003) (interpreting Islamic law with an unusually progressive approach and asserting that Muslims have been the most conservative community in terms of introducing reforms in their personal laws). Most legislative and judicial efforts to eradicate discriminatory practices have been met with stiff, if not violent, resistance. *Id.*

236. See Alice Jacob, *Uniform Civil Code: Reforms in Christian Family Law*, in *ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR* 375, 377 (Amita Dhanda & Archana Parashar eds., 1999).

237. It is interesting to note that these disparities in customary laws remain notwithstanding the grand proclamation of equality under Article 14 of the Indian Constitution and a "fundamental" obligation on the part of the State to enact a Uniform Civil Code under Article 44. Discriminatory practices, even within statutory laws, are profound. See *INDIA CODE* (1869), v.2; *INDIA CODE* (1937); *The Indian Divorce Act, 1869*, No. 4 of 1869; *The Muslim Personal Law (Shariat) Application Act, No. 26 of 1937*; *The Dissolution of Muslim Marriages Act, 1939*, No. 8 of 1939; see generally Ratna Kapur & Brenda Cossman, *On Women, Equality, and the Constitution: Through the Glass of Feminism*, in *GENDER AND POLITICS IN INDIA* 197 (Nivedita Menon ed., 1999). For a judicial comment on these discriminations, see *Rajamani v. Union of India* (1982) 2 S.C.C. 474; *Diengdeh v. Chopra*, (1985) 3 S.C.C. 62.

intervention is the need to allow tribal communities to decide the pace of reform for their own institutions without outside intervention. As argued earlier, this is in consonance with a harmonious interpretation of Articles 5, 7 and 8 of Convention 169 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries).²³⁸ The tribal communities must independently decide the rate with which they want to assimilate. The right to conserve culture in any meaningful sense must include the right to reform culture without "external" interference. Without this right, the process would be little different than coerced assimilation - a process rejected by the constituent framers during the process of negotiations. Inclusion of legislative authority of social reform may require us to question the legitimacy of the consent that was procured from the tribal groups during the drafting of the Indian Constitution. But does the denial of authority to socially reform tribal communities lead to a stagnant culture? In other words, would communities reform themselves without legislative intervention?

If the evolution of tribal communities is any indication, there could indeed be reforms without any legislative intervention. The traditional legal system of the Minijong tribe, for instance, recognized slavery in earlier times but has since abolished it.²³⁹ Similarly, economic resources like land and forests that have traditionally been under community control are gradually coming under individual proprietorship.²⁴⁰ Furthermore, although child marriage was a common tradition in the past, the Minijong now practice adult marriage.²⁴¹ Additionally, the *Padam* tribe, although formally requiring male primogeniture, now allows daughters to inherit immovable property if there are no sons.²⁴²

Additional examples of progressive tribal-initiated social and cultural change abound. One of the best known communities of Arunachal Pradesh Apatani traditionally had a relationship marked by feuds with its neighbors, the Mishing and the Nishi. Since the 1950s, the feuds and punitive raids between the different tribes have diminished. At present they maintain a relationship of co-operation which has been enhanced by the development of the territory.²⁴³ The respective tribes have taken to business and have displayed remarkably successful business acumen. The Bir Asurs of Bihar have similarly ceased practicing child marriage and now practice only adult marriage.²⁴⁴

All of these changes in social norms and customary laws have occurred over time as a result of an evolutionary process without legislative intervention. Some changes may have been driven by the necessity of changed social

238. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 212.

239. See K.S. SINGH, *THE SCHEDULED TRIBES* 35 (The Oxford Press 1994).

240. *Id.*

241. *Id.*

242. *Id.* at 37.

243. *Id.* at 68.

244. *Id.* at 72.

conditions, while other changes may be due to increasing awareness and recognition of mainstream notions of progress. The pace of all of these social changes, however, has been dictated by the tribal communities themselves, which is crucial to the retention of the distinguished attributes of tribal culture. It is crucial that in each of these instances, the communities themselves have decided the nature and extent of the change. Accordingly, an approach of non-interference achieves dual goals - it legitimizes reform without rendering the right to culture meaningless.

The third potential consequence of the recognition of a fundamental right to a customary legal system is that tribal communities would have a right to settle their disputes with non-tribal actors within the precincts of their own system. This right follows from Article 39 of Convention 169, which recognizes the right to use such customary institutions in dealings with non-indigenous tribes. With the increasing consumerization of culture and the recognition of intellectual property protection over intangible things, such as traditional knowledge and biological diversity, interaction with tribal communities has increased tremendously. The constitutionality of such legislation will depend substantially on the extent to which the legislation recognizes the traditional customary legal system in use in a particularly scheduled area. This possibility is explained further in the following section.

B. "Consumerizing" Traditions: Do Tribal Communities Have an Effective Right of access to Justice in Protecting Culture?

How does the right to a traditional legal system affect legislation dealing with the expropriation of cultural property? Until recently, it was almost inconceivable that "traditional knowledge," including arts and folklore, could be the subject of intellectual property.²⁴⁵ However, as part of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, matters that were part of the cultural lives of people have increasingly found a place within the scope of intellectual property and, consequently, is increasingly the subject of commercial exploitation.²⁴⁶ In accordance with the international mandate, India has enacted and is contemplating further legislation that affects tribal culture in significant ways.²⁴⁷ Therefore it follows from the fundamental right to a

245. Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 2 (1997) (critique of the current intellectual property regime for protection of traditional knowledge).

246. For differing approaches of TRIPS and the Convention of Biological Diversity 1992 to traditional knowledge, see Darrell A. Posey, *Protecting Peoples' Bio: Indigenous Rights to Diversity* 38 ENVIRONMENT 6 (1996); Edgar J. Asebey & Jill D. Kempenaar, *Biodiversity Prospecting: Fulfilling the Mandate of the Biodiversity Convention*, 28 VAND. J. TRANSNAT'L L. 703, 717 (1995).

247. See, e.g., The Geographical Indications of Goods (Registration and Protection) Act, 1999, No. 48 of 1999, INDIA CODE (1999); The Protection of Plant Varieties and Farmers' Rights Act, 2001, No. 53 (2001), INDIA CODE (2001); The Biological Diversity Act, 2002, No. 5 (2002), INDIA CODE (2000); N. S. Gopalakrishnan, *Protection of Traditional Knowledge: The*

traditional legal system that consent of tribal groups must be sought within the structures of the traditional legal systems and not through the formal "positivist" structures created by the State.

There is no current legislation in India that directly addresses the issue of traditional knowledge or provides a mechanism for its protection. The Biological Diversity Act of 2002²⁴⁸ makes only incidental references to traditional knowledge.²⁴⁹ While not wholly unrelated to TRIPs, the Biological Diversity Act was enacted with an eye toward the mandate of the United Convention on Biological Diversity.²⁵⁰ The Act's Statement of Objects and Reasons notes that the Central Government, after an "extensive and intensive consultation process," has decided to bring legislation, *inter alia*, "to respect and protect knowledge and information of local communities related to biodiversity . . . [and] to secure sharing of benefits with local people as conservers of biological resources and holders of knowledge and information relating to the use of biological resources."²⁵¹ The Act establishes a National Biodiversity Authority²⁵² with plenary powers to administer the Act.²⁵³

Any person who is not a citizen of India, a non-resident citizen or a corporate body not registered in India, or registered under law having non-Indian participation in its share capital or management, is not authorized to obtain any biological resource or knowledge²⁵⁴ without the previous approval of the National Authority.²⁵⁵ Furthermore, no one is authorized to transfer the results of any research relating to biological resources to any person without the previous approval of the National Authority.²⁵⁶ Any person falling within the categories mentioned in Section 3 of the Act, intending to obtain biological resources in India or any knowledge associated therewith, must make an application in the manner prescribed,²⁵⁷ and the National Authority "after making such enquiries as it may deem fit and if necessary after consulting an expert committee constituted for this purpose, by order, grant approval subject to any regulations . . . including the imposition of charges by way of royalty . . ."²⁵⁸ It is interesting to note that the provision, while empowering the National Authority to grant approval, does not in any way refer to the necessity of

Need for Sui Generis Law in India, 5 J. WORLD INTELL. PROP. 725, 725 (2002) (commenting on current legislative developments).

248. The Biological Diversity Act, 2002, No. 5 (2002), INDIA CODE (2000).

249. *Id.* An Act "to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto." *Id.*

250. *Id.* at para. 2 ("whereas India is a party to the United Nations Convention on Biological Diversity signed at Rio de Janeiro on the 5th day June, 1992 . . .").

251. *Id.* at para. 5.

252. *Id.* at ch. III, § 8 (1).

253. *Id.* at ch. IV, § 18.

254. *Id.* at ch. II, § 3.

255. *Id.* at ch. V, § 19.

256. *Id.* at ch. V, § 20.

257. *Id.* at ch. V, § 19(1).

258. *Id.* at ch. V, § 19(3).

consent of the communities whose resources are being approved.

The National Authority's discretion to grant approval is limited by a necessity to ensure "equitable sharing of benefits . . . in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers."²⁵⁹ The limitation contained in this provision is of little consequence though because it does not address the issue of consent of the communities *per se*. On the contrary, the provision presumes the existence of a standing consent and imposes an obligation on the National Authority to evolve a formula for "equitable sharing of benefits." By not allowing communities, tribal or otherwise, to decide whether to allow aspects of their cultural life to be made subject matter of commercial utilization, the provision infringes the communities' fundamental right to culture.

While the National Authority has been authorized to regulate matters relating to non-citizens or non-resident citizens, State Biodiversity Boards have been created²⁶⁰ to "regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilization of any biological resource by *Indians* . . ."²⁶¹ Any citizen of India or corporate body registered in India intending to obtain any biological resource for commercial utilization must initiate the State Board, and

[the Board] may, in consultation with local bodies concerned and after making such enquiries as it conservation, [sic] may deem fit,, by order, prohibit or restrict any such activity if it is of opinion [sic] that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity²⁶²

Below the National Authority and the State Boards, the Act does permit local bodies to create a "Biodiversity Management Committee . . . for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, [and] folk varieties"²⁶³ However, The National Authority and State Boards are only required to consult these Management Committees while making a decision relating to the use of biological resources and knowledge associated therewith.²⁶⁴

It is instructive to note that local bodies have been relegated to a

259. *Id.* at ch. V, § 21(1).

260. *Id.* at ch. VI, § 22.

261. *Id.* at ch. VI, § 23 (emphasis added).

262. *Id.* at ch. V, § 24(2).

263. *Id.* at ch. X, § 41(1).

264. *Id.* at ch. X, § 41(2) (emphasis added).

consultative entity, both with reference to the National Authority and State Boards, and they have been given no authority to veto decisions permitting the commercial utilization of cultural knowledge. The actual consent of a community to commercial utilization of its cultural property has been made irrelevant by the presumption of consent. By presuming a standing consent, the Biological Diversity Act effectively denies tribal communities any meaningful realization of their fundamental right to culture. The authority of these statutory bodies is, therefore, unconstitutional. By not allowing communities to effectively decide the manner in which cultural property may be used, the provisions unreasonably infringe on their absolute right to culture.²⁶⁵ But these provisions are also unconstitutional because they do not recognize any traditional dispute resolution mechanism to resolve differences arising from decisions permitting the commercial utilization of such cultural property.

The National Biodiversity Authority is required to give public notice of every approval granted by it under section 19.²⁶⁶ Similarly, public notice must be given when approving transfer of any biological resource or knowledge associated therewith.²⁶⁷ It is pertinent to note that public notice, even assuming it is accessible to the proprietors of the cultural properties, is required for "every approval" but there is no requirement for notice before approval has been given. In other words, public notice under section 19 would be preceded by a grant of approval, making the consent of the communities even more irrelevant.

More importantly, the Act does not provide any mechanism for dealing with objections raised in pursuance of such public notices. Even in the unlikely event that a community objects to the grant of approval to commercially utilize property, the mechanisms that would be used to resolve the problem are wholly missing. Section 50 is the only provision in the Biodiversity Act that refers to dispute settlement,²⁶⁸ but interestingly it refers only to disputes between the National Authority and a State Board or between State Boards *inter se*.²⁶⁹ In case of the dispute between the National Authority and a State Board, an appeal may be made to the Central Government,²⁷⁰ and such appeal should be disposed of in such form as prescribed by the Central Government.²⁷¹ And in case of disputes among the State Boards themselves, they shall be referred to the National Authority.²⁷² For the purposes of discharging its functions, the National Authority has been given the same powers as a civil court under the Code of Civil Procedure.²⁷³ Finally, any person aggrieved by any determination of benefit-sharing or order of the National Authority or State Boards may

265. For an argument on the nature of the right to culture, see *supra* Part III.C.

266. The Biological Diversity Act, 2002, No. 5 (2002), INDIA CODE ch. V, § 19(4), (2000).

267. *Id.* at ch. V, § 20(4).

268. *Id.* at ch. XII, § 50(1).

269. *Id.* at ch. XII, § 50(4).

270. *Id.* at ch. XII, § 50(1).

271. *Id.* at ch. XII, § 50(3).

272. *Id.* at ch. XII, § 50(4).

273. *Id.* at ch. XII, § 50(6).

approach the High Court within thirty days of such determination.²⁷⁴

It is clear from these provisions that the Act does not recognize in any way the traditional institutions for dispute resolution in tribal communities, and it requires any disputes relating to commercial utilization to be resolved within the mainstream structures of dispute resolution. Thus, compulsion to use state institutions in resolving matters squarely within the domain of cultural lives of tribal communities violates tribals' right of access to justice.²⁷⁵ The provisions of the Act are, therefore, unconstitutional. First, not providing for any mechanism to withhold consent prevents communities from effectively preserving their cultural property. Second, the Act violates the fundamental right of access to justice of tribal communities.

The Biological Diversity Act does not take into account the possibility of a dispute between the National Authority, State Boards, and tribal communities. Consequently, the Act does not recognize the availability of traditional dispute resolution mechanisms already in place in such communities. This leads to a two pronged conclusion. First, if traditional tribal legal systems are seen as evidence of culture *per se*, the fundamental right to culture, if it means anything to tribal life, must include the right to a traditional legal system as the dispute settlement mechanism for all conflicts between the tribes and non-tribe members and institutions. Second, if such a system is seen as a cultural "enforcement" process, the fundamental right of access to justice for the tribal communities, if it means anything, must mean the right of access to justice in the form of the customary practices of their traditional system.

V. CONCLUSION

Customs-based traditional legal systems are part of the inherited wisdom of India's tribal communities and, in this sense, do not constitute "renewable" knowledge. The last century has seen a increasingly marked attack by formal law and policy on tribals' customary law than has probably been the case before. Recognition of traditional legal systems will enable tribal communities to revive their practices, determine their pace of integration, and, most importantly, enable them to exercise meaningful control over their cultural resources. Unless a sincere effort is made to maintain these traditional systems, forthcoming generations of tribal populations may find their traditional customary legal systems as alien as their "mainstream" counterparts.

The process of degeneration is a real threat - one that calls for immediate attention. Constant legislative intrusion into the customary practices of the tribal communities and the denial of traditional systems a rightful place within the national constitutional scheme will only hasten their attrition. The deference-development dichotomy may be looked upon as a far less inequitable

274. *Id.* at ch. XII, § 52.

275. For a discussion on right to access to justice of tribal communities, see *supra* Part III.A.

process if the State values the customary practices of the tribal communities and their cultural importance. To deprive affected communities any say in the process of "national development" is to shame the preambular values of equality and fraternity in the Indian Constitution. Tribe members are also a part of the nation, and development that totally disregards the effect on its constituent parts cannot be, even in the most liberal sense, "national development." The fundamental right to culture is a tacit recognition of India's diversity, and is a right that the framers of the Constitution found worth fundamental protection. More importantly, tribals' consent in the national building process included a promise of substantial autonomy. To recognize traditional legal systems is not only to keep alive the diverse cultural tradition of the Indian polity but also to honor the "historical" promise of cultural autonomy.

Traditional legal systems, as the process for enforcing tribal practices and values, are themselves expressions of indigenous culture. "National development," "integration," and every such process necessarily cause a gradual diminution of this identity. Traditional legal systems, as part of the fundamental right to culture, provide an effective voice in this diminutive process and thereby legitimize it. Unless India acts to recognize traditional legal systems, the continuing dispossession, displacement, and discrimination of tribal groups will leave India without her "pride." Subsequently, posterity in the Indian polity may have to live with the indictment of having disregarded a constitutional promise as a price for "national development."