The counter-hegemonic potential of law: from the Wilkinson's Rules to the Pathalgadi movement in India

di Chiara Correndo

Abstract: Il potenziale controegemonico del diritto: dalle Wilkinson's Rules al movimento Pathalgadi in India – The paper analyses diachronically the policies of control of legal pluralism on the part of the British colonizers in the Chotanagpur Plateau in India and their codification of customary norms. Drawing from the results of the fieldwork conducted in that area, it will be argued how indigenous Adivasi communities consider colonial-era laws as part and parcel of Adivasi law. Indeed, these communities bend and use these provisions to advance claims for indigenous autonomy and counteract interference from state institutions. Moreover, starting from the failures of the legislative implementation of the 1996 Panchayat (Extension to Scheduled Areas) Act (PESA), the paper will analyze the case of the Pathalgadi movement. The Pathalgadi proponents advocated self-determination of Adivasi communities and more power to the traditional village assembly mobilizing aspects of state law (especially, PESA) which ended up being a crucial site of counter-hegemonic resistance.

Keywords: India; Adivasi; Panchayat; Colonialism; Counter-hegemonic.

1. Setting the context: some historical notes

Located in the south-western part of the Bengal Presidency, in nineteenth-century British India the Chotanagpur Plateau area was considered to be a challenging frontier. In 1780 the British set up the first local district, known as the Ramgarh Hill Tract, where they tried to exercise power over the local population through traditional chiefs. The failure of this project brought the colonial government to modify its governance strategy, adopting more oppressive military policies to crush local revolts, which earned the Adivasis[1] the label of "ungovernable

[1] Defining the word "Adivasi" is a complex task. The Adivasi population has been at times described as "tribal" or "indigenous", but both labels are problematic. As regards the "tribal" qualification, this adjective was first used during colonial times to artificially demarcate specific communities which nonetheless shared many traits with other non-tribal ones, attaching them features such as anthropometric specificities and primitive traits as regards the economic activities, the social and legal arrangements (W. van Schendel, *The dangers of belonging- Tribes, indigenous peoples and homelands in South Asia*, in D. J. Rycroft, S. Dasgupta (Eds.), *The Politics of Belonging- Becoming Adivasi*, London and New York, 2011, 21). On these cognitive bases, the British managed to build a whole system of regimentation and control to the detriment of Adivasi identity and customs. The "indigenous" label is likewise problematic, as some scholars have

DPCE online
ISSN: 2037-6677

challenged the historical claims for indigeneity and prior inhabitation put forward by some Adivasi groups on the basis of some archaeological findings. In fact, these findings pointed to a more fluid past of internal migrations and mixed communities (W. Fernandes, *Tribal or Indigenous? The Indian Dilemma*, in 102 *The Round Table* 4, 382 (2013); van Schendel, *The dangers of belonging*, 26; N. Sundar, *Introduction*, in N. Sundar (Ed.), *The Scheduled Tribes and Their India- Politics, Identities, Policies and Work*, New Delhi, 2016, 6; S. Guha, *Environment and Ethnicity in India, 1200-1991: From the Archaeology of Mind to the Archaeology of Matter*, in N. Sundar (Ed.), *The Scheduled Tribes and Their India- Politics, Identities, Policies and Work*, New Delhi, 2016, 68). The term "Adivasi" was first used in 1938 by the Adivasi Mahasabha, an organization founded in the Chotanagpur area which, in order to advance its claims, decided to use a vocabulary which was different from the one adopted by the colonizers. The term "Adivasi", therefore, was born with a view to counteract the British linguistic hegemony as well and, because of this, it is preferable. It is worth noting that in 1949, when drafting the Constitution of the newborn independent India, the government decided to make no mention to the "Adivasi" population as such, creating instead the "Scheduled Tribes" (ST) category, implicitly endorsing the socio-political rhetoric and experience that come with this term. The Scheduled Tribes category includes nowadays approximately 104 million people (8% of the total Indian population), divided into 705 "tribal" groups and located all over India (mostly, Maharashtra, Rajasthan, Gujarat, Madhya Pradesh, Chhattisgarh, Jharkhand, Orissa, Andhra Pradesh, West Bengal and north-eastern areas). Generally speaking, north-eastern communities identify themselves with the ST label, in order to distinguish themselves from the Adivasis *tout court*, living mostly in central and eastern India. As regards tribal law, it is important to note that it is not personal law: the Indian Constitution makes room for the recognition and application of customary norms (see for example art. 13.1) in which it is possible to include also tribal laws, but the fact that there is no explicit recognition of tribal laws as a self-standing category is indeed problematic. As it emerged from some interviews that I conducted among Adivasi activists, judges often consider Adivasi litigants as Hindu (see for example *Ganesh Matho v. Shib Charan* AIR 1931 Patna 305 and *Doman Sahu v. Buka* AIR 1931 Patna 198) therefore applying the norms related to the Hindu personal law (HPL) to the case despite explicit provisions to the contrary (cfr. section 2.2 of the *Hindu Marriage Act* and section 2.2 of the *Hindu Succession Act*). Some authors contend that HPL could actually turn out to be more favorable, especially to women, as against discriminatory Adivasi customary law (see M. Kishwar, *Toiling without Rights: Ho Women of Singhbhum*, in 22 *Economic and Political Weekly* 3, 95-101 (1987) and also *Madhu Kishwar & Ors. Etc vs State Of Bihar & Ors* 1996 AIR 1864, *Dr.Surajmani Stella Kujur vs Durga Charan Hansdah & Anr* Appeal (crl.) 186 of 2001 and *Rajendra Kumar Singh Munda vs Mamta Devi* F.A. No. 186 of 2008). Nonetheless, the activists that I interviewed fear that extending the scope of HPL to Adivasis may result in a process of legal colonization, progressively erasing the legal specificities of Adivasis and eventually leading to the much praised assimilation into the mainstream (i.e. Hindu) society (as explicitly stated in *Narmada Bachao Andolan vs Union Of India And Others* W.P. (C) No. 319 of 1994: "The gradual assimilation in the main stream of the society will lead to betterment and progress"). In light of this, this contribution will not analyze the complex framework of personal laws in India; instead, it will be focused on the interaction between state law and customary Adivasi law and the dynamics of "legalism from below" triggered by this interaction. The *Pathalgadi* movement will serve as a study case to highlight the potential of state law as "weapon of the weak" and the porous nature of the legal systems involved. For an analysis of the system of personal laws in India, see, among others, F. Ahmed, *Religious Freedom Under the Personal Law System*, New Delhi, 2016; D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Napoli, 2019; D. Francavilla, *Il diritto nell'India contemporanea- Sistemi tradizionali, modelli occidentali e globalizzazione*, Torino, 2010; P. S. Ghosh, *The Politics of Personal Laws in South Asia: Identity, Nationalism and the Uniform Civil Code*, London and New York, 2018; W. Menski, *Comparative law in a global context: the legal*

tribes"[2].

In fact, the penetration in the Adivasi territories of alien legal dynamics and new Hindu communities, the expropriation of traditional lands on the part of the colonial administration, the intense mining activity and the creation of natural reserves (which, as such, implied the evacuation of the Adivasi communities living in the area) fueled discontent among the Adivasis which managed to create an organized network of resistance among the affected villages to counteract the British activities[3]. It is of particular importance the so called Kol rebellion (1831-1832) which put to the test the British military forces thanks to a union of Adivasi communities (mainly Ho, Munda and Santal), mostly exhausted by the pervasive and aggressive British tax policies which envisaged the cooptation of local *rajas* in the collection of taxes from the population[4]. The Adivasi chiefs set up this complex network of contacts through which the villages managed to coordinate an armed resistance: the strategies were identified and discussed within the different *gram sabhas* (literally, the village assembly) and then communicated to the other villages with the help of arrows informing the network about the date and the agreed methods of the upcoming attack[5].

The Kol rebellion marked a shift in the governance policies adopted by the British, who acknowledged their failure in crushing the revolts and opted for a cooperation strategy; this was paired by an analytical shift in the administrative and social literature of that time which no longer described the Adivasis as barbarous warriors, but as "noble savages"[6]. The violence tribal people deployed was justified by the colonial rhetoric as being the

systems of Asia and Africa, London, 2000 as well as W. Menski, *The multiple roles of customary law in the shaping of the intercultural state in India*, in 26 *Revista general de derecho público comparado* (2019) with respect to the role of Hindu customary norms in the Indian legal system.

[2] V. Damodaran, *Indigenous Agency: Customary Rights and Tribal Protection in Eastern India, 1830–1930*, in 76 *History Workshop Journal*, 87 (2013).

[3] Sundar, *Introduction*, 18; M. Areeparampil, *Struggle for Swaraj*, Lupungutu, 2002, 23.

[4] I collected this information during the period of fieldwork that I undertook in 2017 in New Delhi and in Jharkhand, India, on the issue of the Panchayati Raj system and its implementing policies. The fieldwork developed over February, March and April and I worked in two districts (Ranchi and West Singhbhum). I managed to collect 40 interviews (among which journalists, activists, lawyers, social workers and traditional chiefs): during the fieldwork I decided that I would look for qualitative information, at that stage of the research I did not need as much quantitative data as the "pulse" of a specific situation, recollections, opinions. All the interviews were recorded but, despite having received explicit consent from some the people interviewed as regards the publication of their names, I have decided to anonymize them completely, in order to protect their identity and their activity. The reference to the Kol rebellion was made by B. M., researcher, Ranchi district, on 17 march 2017.

[5] A. Sen, *Representing Tribe- The Ho of Singhbhum Under Colonial Rule*, New Delhi, 2011, 84; the same practice was recalled by the local Adivasi historian S. S., interviewed in the West Singhbhum district on 26 March 2017.

[6] S. Das Gupta, *A homeland for 'tribal' Subjects: Revisiting British colonial experimentations in the Kolhan Government Estate*, in G. Cederlöf, S. Das Gupta (Eds.), *Subjects, Citizens and Law: Colonial and Independent India*, London and New York, 2017, 107.

DPCE online
ISSN: 2037-6677

result of a certain innate propension to "savagery" and of harsh living conditions[7].

The colonial administration adopted a special legal framework for the area, which was scheduled as a *non-regulation area*, meaning that the acts and regulations in force in the Presidency did not directly apply to the administrative division of the Chotanagpur (previously known as the South-West Frontier Agency, SWFA). Within this legal arrangement, Sir Thomas Wilkinson was appointed first Governor General's Agent for the SWFA[8]. Analysing the political dynamics in the Singhbhum area, Das Gupta underlines how the goal of the colonial administration was mainly to turn the "unruly" Ho communities (known by the name of "Larka Kol", Ho warriors) into model subjects, submitting them to strict tax and administrative rules and pigeonholing them into specific groups with well-defined traits[9]. The isolationist and protectionist policies based on the ideological project of primitivism, defined by Chandra as the "type of liberal imperial ideology of rule that has justified the subjugation of populations and places described as wild, savage or, simply, primitive"[10] were informed by a parallel production of colonial knowledge on the colonized communities, as "it was colonial knowledge which determined what constituted the subject's primitiveness, culture and tradition as well as governance and reform"[11]. The colonized subject became therefore at the same time a political object and the object of knowledge.

The ostensible protection and factual cooptation of traditional bodies of justice and governance was part of the "civilizing" mission the colonial administration intended to carry on; seemingly presented as willingness to include the Adivasi communities in the state administration, in fact "the incorporation of the village leadership within the framework of rule in effect redefined its role within the village and its relationship with the community"[12], unhinging local political dynamics and substituting them with new legal categories and political figures.

2. Acting through "lawfare": the British colonial experience in India

The British started a significant process of hybridization of customary norms and institutions to the point of bringing about what Ashoka Kumar

[7] B. B. Chaudhuri, *Towards an Understanding of the Tribal World of Colonial Eastern India*, in S. Das Gupta, R. S. Basu (Eds.), *Narratives from the Margins: Aspects of Adivasi History in India*, New Delhi, 2012, 49.
[8] *Ivi*, 50; Damodaran, *Indigenous Agency*, 88; Das Gupta, *A homeland for 'tribal' Subjects*, 108; Sundar, *Introduction*, 19.
[9] Sachchidananda in C. Upadhya, *Community Rights in Land in Jharkhand*, in 40 *Economic and Political Weekly* 41, 35 (2005).
[10] Chandra in Das Gupta, *A homeland for 'tribal' Subjects*, 109.
[11] *Ivi*, 110.
[12] *Ivi*, 88.

Sen defined as an actual identity crisis[13] exploiting the potential of the law in constituting subjectivities.

Before examining the case of the Adivasis of Jharkhand, it could be useful to provide a more general and theoretical framework about the nature of colonialism and the ambiguous role played by the law in both upholding and undermining the tenets of colonial powers.

Following Sally Engle Merry's analysis[14], colonialism in its broader sense could be defined as "a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavors to impose its cultural order onto the subordinate group(s)". Within this framework, law was put forth as the cutting edge of the colonial experience[15], the key tool deployed in the imperial "civilizing mission" to legitimate policies of subjugation and control. As Merry aptly points out[16], law (in its positivistic fashion) was conceptualized as a tool to dominate supposedly "savage" customs and contribute to the progress of the colonized societies, justifying the actions of the colonizers also in the eyes of the British public opinion[17].

Interestingly, John Comaroff[18] speaks of *lawfare* as the effort to control indigenous peoples by the coercive use of legal means: assuming that non-

[13] A. Sen, *Indigeneity, Landscape and History: Adivasi Self-fashioning in India*, London and New York, 2017.
[14] S. E. Merry, *Law and Colonialism*, in 25 *Law & Society Review* 4, 894 (1991).
[15] M. Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge, 1985, 4; also L. Nader, *Le forze vive del diritto: un'introduzione all'antropologia giuridica*, Napoli, 2003, 57.
[16] Merry, *Law and Colonialism*, 890.
[17] In his *History of Hindostan*, the British historian and military officer Alexander Dow maintained that by reason of conquest and since Indians were divided into religious communities, arguably not willing to submit to the laws of one another, it was "absolutely necessary for the peace and prosperity of the country" that the laws of England would prevail (Dow in R. Rocher, *The creation of Anglo- Hindu law*, in T. Lubin, D. R. Davis jr and J. K. Krishnan (Eds.), *Hinduism and Law: An Introduction*, New York, 2010, 78). For a gendered analysis of the attempt on the part of the colonial power to bolster its legitimacy through a critique of indigenous law and society, see V. Chitnis, D. C. Wright, *The Legacy of Colonialism: Law and Women's Rights in India*, in 64 *Washington and Lee Law Review*, 1315-1348 (2007); E. P. Moore, *Gender, Law, and Resistance in India*, Tucson, 1998; I. Sen, *Devoted Wife/Sensuous Bibi: Colonial Constructions of the Indian Woman, 1860-1900*, in 8 *Indian Journal of Gender Studies* 1, 1-22 (2001) and R. Sturman, *Marriage and family in colonial Hindu law*, in T. Lubin, D. R. Davis jr, J. K. Krishnan (Eds.), *Hinduism and Law: An Introduction*, New York, 2010, 89-104. For a broader analysis of the impact of the colonial experience on the Indian legal system see Amirante, *La democrazia dei superlativi*; Francavilla, *Il diritto nell'India contemporanea* and Menski, *Comparative Law in Global Context*, as well as R. Lingat, *The Classical Law of India*, Berkeley and Los Angeles, 1973 and D. R. Davis jr., T. Lubin, *Hinduism and Colonial Law*, in B. Hatcher (Ed.), *Hinduism in the Modern World*, New York and London, 2015, 96-110 for interesting insights as regards the Hindu legal tradition. In a critical vein, also S. N. Balagangadhara, *Reconceptualizing India Studies*, New Delhi, 2012.
[18] J. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, in 26 *Law & Social Inquiry* 2, 396 (2006).

DPCE online
ISSN: 2037-6677

Western cultures were stuck in crystallized and old customs and lacked a body of rules as well as a "modern sense of right-bearing self-hood", the colonizers set out to transplant legal institutions from one society to another, triggering clashes and encounters between the local legal culture and the transplanted one[19]. According to Comaroff[20], this pattern of domination through "lawfare" happened overtly by way of incorporating or disciplining vernacular dispute-settlement institutions and criminalizing local practices. Not only this, this process also involved the more hidden strategy of researching and adapting local practices to the needs of the British administration, with a view to modernizing them.

The culture of legality ended up being a constitutive part of the whole colonial experience[21], contributing under many respects to the creation of legal subjectivities and legal geographies[22]. Spaces became in fact "places to be possessed, ruled, improved and protected"[23], subject to patterns of individual land tenure which were in certain cases alien to local legal cultures. For example, Veena Talwar Oldenburg argues that, by way of introducing a new system of tax collection over the agricultural produce, the

[19] Merry, *Law and Colonialism*, 890.
[20] Comaroff, *Colonialism, Culture, and the Law*, 306.
[21] *Ivi*, 309.
[22] According to Merry *(Law and Colonialism)* and Hirsch and Lazarus-Black (*Contested states: law, hegemony, and resistance*, New York, 1994), courts are crucial places where the culture of the dominant group is not only performed but at times also shaped. Legal procedures and trials are, according to Merry, "cultural performances, events that produce transformations in sociocultural practices and in consciousness" (Merry, *Law and Colonialism*, 892) and, along the theoretical lines developed by Mather and Yngvesson, places where people and events are defined and specific meanings are attributed to them within a ritualized context. This is particularly evident in colonial times "when ordinary people's problems are handled in courts which embody laws or procedures of the metropolitan country, their problems are reinterpreted in the language of these new institutions, judgments are rendered in these terms, and penalties are imposed or withheld" (*ibid.*). In the same vein, also Hirsch and Lazarus-Black argue that legal procedures contribute to the making of hegemony, regulating relationships and language in a way that may contrast with the norms of interaction in other places (Hirsch and Lazarus-Black, *Contested states*, 11). For more insights on the British colonial courts in India and their impact on traditional justice systems, see K. Ananth Pur. A. Krishna, *Formal Perceptions of Informal Justice-Village Councils and Access to Justice*, in A. Singh, N. A. Zahid (Eds.), *Strengthening Governance through Access to Justice*, New Delhi, 2009, 52-64; C. Bates, *The Development of Panchayati Raj in India*, in C. Bates, S. Basu (Eds.), *Rethinking Indian Political Institutions*, London, 2005, 169-238; U. Baxi, M. Galanter, *Panchayat Justice: an Indian Experiment in Legal Access*, in M. Cappelletti, B. Garth (Eds.), *Access to Justice, Vol. 3: Emerging Issues and Perspectives*, Alphen aan den Rijn, 1979, 341-385; B. Cohn, *An Anthropologist among the Historians and Other Essays*, Delhi, 1987; J. S. Gandhi, *Law as an Instrument of Change in India*, in I. Deva (Ed.), *Sociology of Law*, New Delhi, 2005, 98-111; J. Jaffe, *Layering Law upon Custom: The British in Colonial West India*, in 10 *Florida International University Law Review* 1, 85-110 (2014); J. Jaffe, *The Ironies of Colonial Governance- Law, Custom and Justice in Colonial India*, Cambridge, 2015; Moore, *Gender, Law and Resistance in India*; A. Shodhan, *The East India Company's Conquest of Assam, India, and 'Community' Justice: Panchayats/Mels in Translation*, in 2 *Asian Journal of Law and Society* 2, 357-377 (2015).
[23] Comaroff, *Colonialism, Culture and the Law*, 309.

British administration disrupted the collective forms of land tenure in northern India and significantly altered familial balances[24]. Indeed, in the framework of customary communal land ownership, women may have enjoyed some usufructuary rights over land (or maintenance rights, the obligation usually lying with the brothers): according to the author, the introduction of individual private property schemes (usually favoring the male members of the family) for the purpose of an easier collection of revenues cut out from the enjoyment of customary rights several subjects (especially women) who were no longer able to claim their rights, whether customary or state-granted rights[25]. The first requirement of the British administration was to know who "owned" the land (and therefore who would be responsible for the payment of taxes): they requested revenue from individual members of clan and lineages and recognized individual interest in the land, as against customary communal arrangements[26]. This brought about power imbalances withing traditional joint families, reshaping local social dynamics, lowering women's status and creating new legal subjectivities. As Hirsch and Lazarus-Black pointed out[27], "while some people actively seek inclusion in legal processes for specific ends, others 'get included' in the law quite implicitly through the legalities that hegemonically organize their lives".

The same patterns were followed in Adivasi areas, where the British colonizers created the administrative category of "tribe". Hinging upon evolutionist theories much in fashion in Europe in those days[28], they shaped the (quite blurred[29]) category of "tribal people", which differed from "race" and "caste" criteria, attaching to it "a mishmash of graded characteristics"[30] ranging from their supposedly primitive modes of subsistence, their level of technology, nasal expanse, craniometric calculations and, mostly, the

[24] On the same issue, also N. Rouland, *Antropologia giuridica*, Milano, 1992, 32.
[25] V. T. Oldenburg, *Dowry Murder: The Imperial Origins of a Cultural Crime*, Oxford and New York, 2002, 117.
[26] Moore, *Gender, Law and Resistance in India*, 38; also S. B. Bharadwaj, *Myth and Reality of the Khap Panchayats: A Historical Analysis of the Panchayat and Khap Panchayat*, in 28 *Studies in History* 1, 48 (2012).
[27] Hirsch and Lazarus Black, *Contested states*, 11.
[28] See for example H. Sumner-Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, London, 1861 and, among the others, the comments by Rouland. *Antropologia giuridica*, 43 ff and S. N. Mukherjee, *Citizen Historian: Explorations in Historiography*, New Delhi, 1996. Ajay Skaria refers to this style of thinking as "anachronism", arguing that "anachronistic thought ranked […] societies in relation to each other, situating them […] in relation to modern time that was now epitomized by Europe. Different societies were thus ranked according to how much behind the time of Europe they were. The specific time that societies occupied – the question of how 'advanced' they were – was measured by various criteria" (Skaria in van Schendel, *The dangers of belonging*, 20).
[29] As confirmed by A. Béteille, *The Concept of Tribe with Special Reference to India*, in *XXVII European Journal of Sociology 2*, 299 (1986).
[30] Van Schendel, *The dangers of belonging*, 21.

DPCE online
ISSN: 2037-6677

absence (according to the colonizers) of any written or codified law[31]. This category rapidly acquired political and legal standing and this underpinned the creation and definition of new legal subjects, the "tribals". The category of "tribals", as it will be argued further in this work, will be inherited by the independent government, which not only did not question it, but also, when "re-engaged in the forcible occupation of tribal lands", used the same language of "disease and darkness which must be eradicated at all costs"[32].

The colonizers created the "customary law" label in the attempt to preserve some parts of local law (as they meant it), discarding those norms which were felt as repugnant and contrary to British principles. Native courts were required to administer this law[33] which, due to the constraints and legal boundaries imposed by the colonizers, "was not a relic of a timeless precolonial past but instead an historical construct of the colonial period (…) nature of law changed as it was reshaped from a subtle and adaptable system, often unwritten, to one of fixed, formal, and written rules enforced by native courts"[34]. This highlights the flexible character of native law, anticipating concepts which will be developed further in the following paragraph (namely, living customary law and interlegality): Sally Falk Moore, while speaking about the continuous reformulation of Chagga law as against colonial and postcolonial legal arrangements, challenges the static and obsolete nature of customary norms stressing instead the capacity of Chagga law to reshape its core, retaining some of its past and distinctiveness while reforming it[35].

3. British rationalization of legal pluralism: the codification of customary norms in Kolhan

To better control what was considered to be the most difficult area of the SWFA, namely the Kolhan (now, West Singhbhum), the colonial administration devised a system of double administration (both Adivasi and colonial). The administration of civil justice was disciplined through the so-called *Wilkinson's Rules* (named after the then Governor General's Agent,

[31] Van Schendel, *The dangers of belonging*, 21; Sundar, *Introduction*, 17.
[32] Sundar, *Introduction*, 18.
[33] In the Chotanagpur Plateau, the village panchayats were charged with the administration of civil justice (see following paragraph): in doing this, they were required to judge on the basis of laws and regulations adopted by the Governor-General-in-Council as well as the "common law of the country" (WR 20), namely, that part of customary law which did not contravene English common law and, more generally, Western principles of justice, equity and good conscience.
[34] Merry, *Law and Colonialism*, 897.
[35] S. F. Moore in Merry, *Law and Colonialism*, 903; for a more general discourse see K. Inksater, *Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and International Human Rights*, in *42 The Journal of Legal Pluralism and Unofficial Law 60*, 105-142 (2010). On the same point, also Menski, *The multiple roles of customary law*, who argues that Indic traditions have constantly adapted to new challenges, but without forgetting key elements of their ancient heritage.

Thomas Wilkinson), 31 rules adopted within the broader framework of the Regulation XIII of 1833 which came into force in 1834 in the SWFA and in 1837 in the Kolhan area[36].

Along the lines of the Benthamite utilitarianism much in vogue at that time especially among British administrators such as Munro, Metcalfe and Elphinstone, the British opted for a "statutorification" of law in India, in order to better discipline the intricated net of relationships linking religious, indigenous and British layers of law[37]. The cooptation of traditional chiefs in the administration of civil justice, as envisaged by the Wilkinson's Rules (WR), featured prominently not only in Jharkhand but in the whole British India in order to impress on local people that they were governed by their own leaders, crushing therefore any insurgency[38] and at the same time significantly cutting the costs of day-to-day administration[39].

As the Deputy Commissioner J. R. Dain observed, "the principal features of the administration have been the preservation of the existing form of village Government, direct contact between the Deputy Commissioner or the Kolhan Superintendent and the people without the intervention of (…) any of the usual machinery of justice; the settlement of all disputes as far as possible, by means of village panchayets[40] on the spot"[41]. The village panchayats could settle civil suits of the value of 300 rupees or less (WR 1), applying the "common law of the country" (which included customary law as well) and the acts adopted by the colonial government. Differently from the traditional panchayats, the people sitting in these

[36] Later, the WR's scope was restricted to the Kolhan area.
[37] Francavilla, *Il diritto nell'India contemporanea*, 106-109.
[38] Sen, *Indigeneity, Landscape and History*.
[39] S. Das Gupta, *Adivasis and the Raj: Socio-economic Transition of the Hos 1820-1932*, Hyderabad, 2011, 119; interview with B. M., researcher, Ranchi district, 17 March 2017.
[40] Panchayat literally means the "assembly of five"; they are judicial or self-governance traditional bodies in which the people sitting in it take decisions as regards disputes and issues related to the respective group from which the panchayat originated. For a general overview of these institutions see Bates, *The Development of Panchayati Raj in India*; Baxi and Galanter, *Panchayat Justice*; V. Dhagamwar, *Panch Parmeshwar*, in 44 *Economic and Political Weekly* 31, 13-16 (2009); L. Dumont, *Homo hierarchicus-Il sistema delle caste e le sue implicazioni*, Milano, 1991; R. M. Hayden, *Disputes and arguments amongst nomads- A caste council in India*, New Delhi, 1999; Z. E. Headley, *'The Devil's Court!' The Trial of 'Katta Panchayat' in Tamil Nadu*, in D. Berti, D. Bordia (Eds.), *Regimes of Legality- Ethnography of Criminal Cases in South Asia*, New Delhi, 2015, 227-257; Jaffe, *The Ironies of Colonial Governance*; C. Jeffrey, J. Harris, *Keywords for Modern India*, New York, 2014; N. C. Maiti, *Traditional Caste Panchayat and Aspects of Social Movement: a Micro Study in Eastern Medinipur*, Kolkata, 2007; C. S. Meschievitz, M. Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in R. Abel (Ed.), *The Politics of Informal Justice- Vol. 2: Comparative Studies*, New York, London, Toronto, Sydney, San Francisco, 1982, 47-77; Moore, *Gender, Law and Resistance in India*; M. Sharma, *The Politics of Inequality- Competition and Control in an Indian Village*, Hawaii, 1978; Shodhan, *The East India Company's Conquest of Assam*).
[41] Quoted in A. Sen, *From Village Elder to British Judge: Custom, Customary Law and Tribal Society*, Hyderabad, 2012, 64.

DPCE online
ISSN: 2037-6677

judicial bodies were appointed by the colonial administration (WR 22); on top of that, plaintiff and defendant could challenge any member of this forum and the panchayat was required to follow strict procedural rules in order to admit pleadings and evidence. It issued a judgement according to a *win-lose* model which could not be farther from traditional conceptions of justice, meant to protect harmony within the village through *win-win* solutions[42]. These panchayats were therefore state judicial bodies in disguise, borrowing structures from the traditional administration of justice but using language and categories of Western superimposed judicial methods.

The British administration conferred upon the appointed[43] traditional chiefs the collection of taxes on lands, the administration of justice and security functions as well as the control over natural resources, which was a traditional prerogative of the chiefs now shared with the colonial administration. Furthermore "they were required to report the incidence of transfer of land by gift, sale, mortgage or partition or of settlement of waste or relinquished land to the deputy commissioner"[44]. This arrangement was further officialized in 1908, when the British adopted the *Chotanagpur Tenancy Act* (CNT Act)[45], a land tenure act with a view to protect Adivasi land from alienation to non-Adivasis. Some of its articles disciplined the issue of *hukuknamas* (or record of rights which functioned as settlement deeds as well as records of rights and obligations for headmen as per s. 127, chapter XV) and, generally speaking, was meant to incorporate and recognize

[42] It is important to underline that this *win-win* label could be contested under several points of view, notably a gender one: many women could in fact argue against the decisions taken by traditional bodies of justice administration as being discriminatory and patriarchal in their defending the status quo often to the detriment of women victims of violence (T. Relis, *Unifying benefits of studies in legal pluralism: accessing actors' voices on human rights and legal pluralities in gender violence cases in India*, in 48 *The Journal of Legal Pluralism and Unofficial Law*, 354-377 (2016); this position was confirmed by the interviews I conducted with two NGOs offering legal assistance and development support to Adivasi women, interviewed both in the district of Ranchi on 15 March 2017 and 17 March 2017). For Adivasi women, state courts often represent an empowering tool through which they can challenge traditional patriarchal settings and duly claim rights (such as inheritance rights) which are officially recognized by the state but, more often than not, disregarded at the local level.

[43] Traditionally, the position of the chief was legitimized by its being inherited in nature or by community designation: the British claimed the right to appoint and remove the chiefs according to criteria which were completely alien to the village social and political dynamics (Das Gupta, *Adivasis and the Raj*, 121; Sen, *From Village Elder to British Judge*, 40) thus changing the morphology of leadership in the villages (the chief moved from being "primus inter pares" to being a mere stipendiary representative of the government with no need to gain community support). As Nandini Sundar underlines "while in most cases, the colonial (and post-colonial) administration may have simply confirmed existing leaders, the language of recognition was 'appointment', which suggested their presence was dependent on the administration" (N. Sundar, *"Custom" and "Democracy" in Jharkhand*, in 40 *Economic and Political Weekly* 41, 4431 (2005)).

[44] Sen, *Indigeneity, Landscape and History*.

[45] The Chota Nagpur Tenancy Act, 1908 (Bengal Act 6 of 1908).

customary tenurial arrangements followed (according to the British analysis) in the area of the Chotanagpur[46]. As clarified below in this article, the CNT Act is still in force today: its application is limited to some districts of Jharkhand and it interplays with other acts in force (*Santhal Pargana Tenancy Act, 1949* and the *Bihar Land Reform Act, 1950*)[47].

If one looks at the contents of the WRs and the CNT Act, it is possible to speak of an "invented tradition" not as much because these Acts mistook customary norms and invented something which did not exist previously, as because they contributed to an artificial and unambiguous homogenization of local norms, privileging certain legal customary patterns to the detriment of others[48]. They altered local legal cultures by injecting legal categories which had been mostly alien to the indigenous systems such as that of private property, thus sharpening socio-economic differentiations as well as power imbalances within the villages and prompting local leaders to adopt more regressive stances in an attempt to reassert their identity and social legitimacy[49].

According to Cederlof[50], the negotiations and compromises the British had to undertake with local society in order to establish control did not result in enhanced autonomy for the local populations: on the contrary, the codification of customary norms was critical to the establishment of British power in that region. Not only that, the CNTA provisions related to customary norms were based

> on a model of tribal social organization that was developed by colonial administrators, missionaries, and anthropologists during the late nineteenth and early twentieth centuries (…) It is this objectified 'traditional' Munda[51] social system that underwrote the framing of land rights and tenures in the CNTA. The law applied these principles not only to Mundari khuntkattidars living in 'traditional' villages but to all the inhabitants of Chotanagpur. As a result of this inscription of 'customary law' in formal law, what was presumably a variable and

[46] S. B. C. Devalle, *Discourses of Ethnicity: Culture and Protest in Jharkhand*, New Delhi, 1992; Sundar, *"Custom" and "Democracy" in Jharkhand*, 4431; Upadhya, *Community Rights in Land in Jharkhand*, 4435.
[47] The Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 (Bihar Act 14 of 1949); The Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950).
[48] S. Baldin, *La tradizione giuridica contro-egemonica in Ecuador e Bolivia*, in 143 *Boletín Mexicano de Derecho Comparado*, 497 (2015); G. Marini, *La costruzione delle tradizioni giuridiche e il diritto latinoamericano*, in 29 *Rivista critica del diritto privato* 2, 185 (2011).
[49] Sen, *From Village Elder to British Judge*, 47; Sundar, *"Custom" and "Democracy" in Jharkhand*, 4431; on this point also A. Diala, *The concept of living customary law: a critique*, in 49 *The Journal of Legal Pluralism and Unofficial Law* 2, 143-165 (2017).
[50] In C. Upadhya, *"Law, Custom, and Adivasi Identity- Politics of Land Rights in Chotanagpur*, in N. Sundar (Ed.), *Legal Grounds- Natural Resources, Identity, and the Law of Jharkhand*, New Delhi, 2010, 32.
[51] Munda is but one of the many Adivasi communities living in Jharkhand; according to Upadhya (*ibid.*), the CNT Act was drafted along the lines of the studies conducted by colonial administrators and researchers, especially those by John Hoffman, a missionary who dedicated many years to his research on Munda tribal customs.

DPCE online
ISSN: 2037-6677

> flexible system of social organization and land use came to be identified as the singular 'aboriginal' system of the region. Moreover, what was probably a highly adaptable kinship-based system of control over land and resources was reinterpreted through the language of property rights[52].

Despite all these problematic aspects, from the interviews I conducted in Jharkhand some crucial issues emerge: firstly, despite being oversimplified colonial norms meant to discipline a much more complex situation, both the CNT Act and the WRs are regarded nowadays by local Adivasi communities as part and parcel of their customary law, to the point of being defined as "our customs"[53]. With reference to the WRs, none of the people I interviewed could exactly tell the content of the regulation and whether it was still in force or not; nonetheless, it clearly emerged that they were using the WRs/CNTA as the legal frame against which they measured their situation.

The validity of the WRs has been widely debated also by the courts: in *Mora Ho vs State Of Bihar And Ors*[54] Justice S. J. Mukhopadhaya and Justice Sharma at the Patna High Court argued against the formal validity of the abovementioned WRs maintaining that they were not adopted by a competent authority. Nonetheless, they acknowledged that they had been followed for over 150 years in the field of civil administration, which makes them "general law". For this reason, "if these Rules are made inapplicable, now, in the absence of any suitable substitute, it may cause hardship and confusion" (parr. 3-4). This had been already noticed by the British administration which, while extending the application of the Code of Civil Procedure (1908) to the non-regulated areas of Chotanagpur, acknowledged the strength that the WRs had acquired in the area. Indeed, the Deputy Commissioner J. R. Dain wrote in 1928 that "I am still uncertain exactly what law is nominally in force in the Kolhan. In practice it does not seem to matter as the old system continues outside the ordinary law and in many respects in direct defiance of it (…) we follow the system of the Civil Procedure Code in a modified form, so far as it is not inconsistent with Wilkinson's Rules, but great use is made of the ordinary village panchayats

[52] Upadhya, *Law, Custom, and Adivasi Identity*, 35.
[53] Interview to an inter-village traditional headman, West Singhbhum district, 28 March 2017.
[54] AIR 2000 Pat 101. See also *Chaturbhuj V. Ahya v. The Deputy Commissioner, Singhbhum* 1970 Pat LJR 281 as well as *Dulichand Khirwal vs The State Of Bihar And Ors* AIR 1958 Pat 366 and *Mahendra Singh And Ors. vs The Commissioner Of Chota Nagpur* AIR 1958 Pat 603 in which the Court upheld the validity of the WRs stating that they were in force after the enactment of the Scheduled Districts Act 1874, as per section 7 of that Act. Nonetheless, the validity of the WRs has been questioned on several occasions: see for example *M/S. Tata Iron & Steel Co. Ltd. vs State Of Jharkhand And Ors* Appeal (civil) 1912 of 2004, *Sura Kudada And Ors. vs State Of Bihar And Ors.* 2000 (3) BLJR 1858 and *Jyotindra Nath Roy Vs. A.C.C. Ltd. Jhinkpani* Miscellaneous Judicial Case No. 548 of 1962, Patna High Court.

as arbitrators"[55].

Another aspect that emerged during my interviews is that, since the Adivasis believe that CNTA and WRs contain and legitimate their customary norms, these statutes and their language are used to frame the claims to self-administration of (civil) justice and against the expropriation of lands and the divestment of local headmen's powers (interview with a village chief or *Munda*, West Singhbhum district, 26 March 2017).

The codification of local customs "in Chotanagpur Land Tenure Act provided a rich source for the political formation of Adivasi identity as well as a legitimate basis for claims to local autonomy and land rights"[56]; as regards the WRs, an historian interviewed in the West Singhbhum district (25 March 2017) argued that "the question of whether the WRs are in force or not is no longer relevant, as they have now a symbolic value in their helping frame local struggles".

Therefore, Adivasis "in the face of a corporate onslaught on natural resources, (…) draw on past histories, notions of 'customs' enshrined in local tenure laws (…) to frame arguments about justice and 'natural law'"[57], appropriating legal spaces transforming them into spaces of resistance and inflecting them with counter-hegemonic meanings[58]. The use of law on the part of Adivasi communities as a tool of resistance refutes that branch of literature that some scholars have defined as "eco-romantic"[59] which depicts Adivasis as fundamentally anarchists denying any state structure or tool[60]. According to Sundar[61], "Adivasi identity and dignity lie not in 'keeping the state away', but in drawing the state into an orbit which the Adivasis have defined". This accounts for the need of Adivasi communities for an open dialogue with state institutions in order to create shared legal spaces of existence.

As a matter of fact, people regularly appropriate terms, constructs and procedures of law in formulating opposition[62]; in particular, it has been underlined how social movements have an ambivalent relationship towards

[55] J. R. Dain in A. Sen, *Wilkinson's Rules: Context, Content and Ramifications*, Chaibasa, 1997, 97.
[56] Upadhya, *Law, Custom, and Adivasi Identity*, 33.
[57] N. Sundar, *Laws, policies and practices in Jharkhand*, in N. Sundar (Ed.), *Legal Grounds-Natural Resources, Identity, and the law of Jharkhand*, New Delhi, 2010, 6.
[58] See also A. G. Nilsen, *Adivasis and the State: Subalternity and Citizenship in India's Bhil Heartland*, New Delhi, 2018.
[59] A. Prasad, *Against Ecological Romanticism: Verrier Elwin and the Making of Anti-Modern Tribal Identity*, Gurgaon, 2011.
[60] See also Dhagamwar (in Ghosh, *The Politics of Personal Laws in South Asia*, 118), according to whom the tribals "have long since concluded that the law was not for them. It was difficult to understand, it was expensive, and time consuming. Law was meant to exploit and oppress them. At all costs, one should avoid the law. It worked only for the rich and the powerful".
[61] Sundar, *Laws, policies and practices in Jharkhand*, 5.
[62] Hirsch and Lazarus-Black, *Contested states*, 11.

DPCE online
ISSN: 2037-6677

the law[63]. On the one hand, law is regarded as a force for status quo and a hegemonic tool elitist in nature as it is normally shaped and enforced by people taken from the elitist sections of society, but on the other hand the legal instrument is often mobilized by the very same social movements, in that it offers the language and the locale for resistance[64].

This kind of interaction can be aptly explained through the conceptual paradigms elaborated by Diala and de Sousa Santos of, respectively, *living customary law* and *interlegality*. By highlighting the porous nature of the "living customary law", these paradigms can in fact explain the overturned role of state law as a site and tool of resistance.

Diala[65] critiques the manner in which some scholars have conceptualized "living customary law" (LCL) as day-to-day practices or the law actually lived by people, contesting that all these definitions missed the fact that the high degree of flexibility that characterizes the so-called living customary law is also determined by interactions with state law which are more intense than expected[66]. According to Diala, horizontal definitions of LCL (confined to individuals' interactions in communities) are based on an insulated concept of the rules that inform people's everyday lives, neglecting instead the fact that they apply plural set of norms, creating a context of extreme legal plurality in which customary law intersects with socio-economic changes "of which state law, religion, urbanisation, and development agents are key components"[67]. This means that customary law extends to individuals' interactions with outsiders such as state agents, religious agents and economic agents, health agents, and development agents, creating vertical forms of interactions and acquiring flexibility[68]. Diala questions the stereotype of an insulated customary sphere: drawing from Moore's[69] definition of social fields (and semi-autonomous social fields), he provides a new theorization of LCL arguing that "in this competitive, normative interaction, people adapt customs to socio-economic changes, especially state law. This interaction, competition, and adaptation to socio-economic changes in social fields produce living customary law"[70]. The members of a single social field, not being immune to the influences and norms of "other forces" from outside the field, may end up adopting hybrid

[63] B. Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, in 18 *Leiden Journal of International Law*, 347 (2005).
[64] S. E. Merry, *Resistance and the Cultural Power of Law*, in 29 *Law & Society Review* 1, 14 (1995); Rajagopal, *The Role of Law in Counter-hegemonic Globalization*, 348.
[65] Diala, *The concept of living customary law.*
[66] *Ivi*, 152.
[67] *Ivi*, 154.
[68] *Ibid.*
[69] S: F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *Law & Society Review* 4, 719-746 (1973).
[70] *The concept of living customary law*, 157.

forms of state law, religion, and values occasioned by globalisation[71]. What remain stable are the foundational values that inform customary norms and their process of adaptation to modernity[72].

The same point as Diala's is made by André Hoekema[73], who argues that "national law and local law do not exist the one next to the other as self-contained entities" but there is constant interpenetration between them[74]. Similarly to the abovementioned observations by Rajagopal, Hoekema argues that it "often seems to be a one-way penetration only, from the powerful top to the bottom, but the minorities are not just helpless victims. They appropriate majority concepts and build these actively into their own legal outlook"[75]. This process of dynamic mutual adaptation and hybridization of legal orders is called *interlegality*, meant as a "social factual process of mutual adaptation and learning by both sides from the other system of doing justice and in the course of that learning process taking over some elements from the other"[76]. The concept, as coined by Boaventura de Sousa Santos, moves from the understanding of different legal orders as separate entities, introducing the idea of intersecting legal spaces. In particular, he argues that:

> We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing. our legal life is constituted by an intersection of different legal orders, that is, by interlegality. Interlegality is the phenomenological counterpart of legal plurality, and a key concept in an oppositional postmodern conception of law[77].

The appropriation by indigenous communities of some aspects of state law, as is the case with the Adivasis, does not automatically imply the abdication of indigenous jurisdiction, but rather a strategic use of state legal tools to advance specific claims[78]. It could be said that, having multiple identities and perceiving different legal systems, subjects of law therefore become main actors in the construction of legal knowledge, transforming the meaning of law through emancipatory practice[79]. Along the lines of a critical postmodern approach

> (l)egal subjects (…) possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of

[71] *Ibid.*
[72] Nhlapo in Diala, *The concept of living customary law*, 158.
[73] A. Hoekema, *European Legal Encounters between Minority and Majority Cultures: Cases of Interlegality*, in 37 *The Journal of Legal Pluralism and Unofficial Law* 51, 1-28 (2005).
[74] *Ivi*, 6.
[75] *Ibid.*
[76] Hoekema, *European Legal Encounters*, 86; for a comment, see also I. Hadiprayitno, *Who owns the right to food? Interlegality and competing interests in agricultural modernization in Papua, Indonesia*, in 38 *Third World Quarterly* 1, 97-116 (2017).
[77] B. De Sousa Santos, *Toward a New Legal Common Sense*, London, 2002, 437.
[78] Inksater, *Transformative Juricultural Pluralism*, 115.
[79] *Ivi*, 110.

DPCE online
ISSN: 2037-6677

> law that contribute to constituting their legal subjectivity. This transformative capacity is directly connected to their substantive particularity. It endows legal subjects with a responsibility to participate in the multiple normative communities by which they recognize and create their own legal subjectivity[80].

4. The Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996: strengths and loopholes

Within the Indian Constitution there is no reference as such to the word "Adivasi". The Constituent Assembly of India preferred to uphold the British category of "tribals", refusing the word "Adivasi" devised by the Adivasis themselves to self-represent their identity and their history of oppression. Art. 342 of the Indian Constitution, in conjunction with art. 366 (25), tautologically defines the so-called Scheduled Tribes as such tribes or tribal communities or parts of or groups within such tribal communities as specified by the President of India.

In 1992, the National Commission for ST, along with the Ministry of Tribal Affairs, tried to fill the empty shell of this constitutional definition, identifying a series of features which were supposedly typical and peculiar of ST members. These features (among which it is worth mentioning "indication of primitive traits", "backwardness", "prevalence of primitive traits in the matters of clothing, cleanliness, etc.", "no sense of savings and dependence on money lenders") echo the anthropological identikit drafted by the British along the lines of evolutionist theories. This kind of rhetoric turned out to be congenial to the creation of specific legal policies tailored to suit the "tribal" subject, depicted as in need of a civilizing and protectionist action on the part of the government[81].

[80] M. M. Kleinhans, R. A. Macdonald, *What is a Critical Legal Pluralism?*, in 12 *CJLS/RCDS*, 38 (1997).

[81] As Sundar underlines, representations of Adivasis have not changed much since colonial times, save for the fact that nowadays are fashioned in the language of "development" instead of "savagery" (N. Sundar, *Adivasi Politics and State Responses: Historical Processes and Contemporary Concerns*, in S. Das Gupta, R. S. Basu (Eds.), *Narratives from the Margins: Aspects of Adivasi History in India*, New Delhi, 2012, 239). It is worth mentioning the words of U. N. Dhebar, Chairman of the first SA and ST Commission (1959), who affirmed that "everyone who has had something to do with the tribal problem can bear witness of the burning desire of these unspoilt children of Mother India for advance and progress consistent with their notion of culture and civilized existence" (in A. Prakash, *Jharkhand: Politics of Development and Identity*, Hyderabad, 2001, 79). In the 2000 Supreme Court judgement *Narmada Bachao Andolan v. Union of India and Ors.*, W.P. (C) No. 319 of 1994, in order to justify massive displacement of Adivasis from their ancestral lands, Judges Kirpal and Anand argued that "It is not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or *due to outside compulsions*" (emphasis added) (paragraph on *General Issues Relating to Displacement of Tribals and Alleged Violation of*

Starting from the 1874 *Scheduled Districts Act* (Act no. 14 of 1874), the British colonizers created a model of separated administration for tribal areas, devising a graded characterization of these areas on the basis of their political development. The intention was to (partially or totally) exclude them from the application of general laws, as they deemed these territories were not ready for the implementation of reforms, lacking a political consciousness[82] and being "remnants of some pre-historic people"[83].

The protectionist approach adopted by the British was taken up and further developed by the independent government, which promoted the idea that it would be necessary to protect these areas in order to foster their development and, ultimately, their integration in the mainstream society[84].

With a view to implement this kind of strategy, the Scheduled Areas were excluded from the purview of the *Constitution (Seventy-Third*

the Rights under Article 21 of the Constitution). The very same role of the Constitution in allegedly fostering the development of the so-called "tribal communities" should be problematized: I have already mentioned the refusal on the part of the newborn independent Indian State to recognize within the Constitution any such group called "Adivasi", which is coupled by the assertion of the permanent Indian mission to the United Nations that "the entire population of the country at the time of independence from British rule and their successors are indigenous" (P. Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings*, New York, 2015, 7), thus wiping out the historical specificities and the claims of the Adivasi communities. Secondly, despite offering several pivotal footholds for the protection of tribal communities (as argued later in this paper), the differentiated regime of Schedule V and VI should be critically analysed, in that it provides greater autonomy for the VI Schedule tribal communities and much thinner leeway for the ST groups of Schedule V, starting from the institution of Autonomous Councils (vis-à-vis a Tribes Advisory Council) to the legislative and judicial powers granted to them. As it emerged from the interviews that I conducted among several Adivasi activists in Jharkhand, this differentiated regime was welcomed with much discontent on the part of V Schedule communities, as it may entail less autonomy in managing the indeed very rich natural local resources over which the State has instead been keeping a strong hold.

[82] *Montagu-Chelmsford Report*, containing the recommendations then submitted to the British Parliament in 1918 and which laid the foundations for the following *Government of India Act, 1919* (9 & 10 Geo. 5 c. 101).

[83] *Simon Commission (Indian Statutory Commission), 1928* quoted in Prakash, *Jharkhand*, 55. It is worth noting that the Indian Constitution upheld the division set up by the British turning the "excluded" and "partially excluded" areas created by the Government of India Act, 1935 (25 & 26 Geo. 5 c. 42) into "Scheduled and Tribal Areas" protected by Schedules V and VI of the Constitution. The Schedules provide different degrees of autonomy to Scheduled and Tribal areas: Schedule VI grants the Governor the power to create autonomous regions and districts within the territory of the State, each of them with its own District and Regional Council (whose members are for the most part elected by the population of the relevant area) endowed with legislative and judicial powers. Moreover, Acts of Parliament or of State Legislature do not apply to autonomous districts and regions. Schedule V (which include the Scheduled Areas of Jharkhand) grants much less autonomy to the areas falling under its provisions: it disciplines the creation of a Tribes Advisory Council in each State having Scheduled Areas, with advisory duties. Moreover, the Governor of the State can direct that any particular Act of Parliament or of State Legislature does not apply to an area (the default rule being the regular application of such Acts).

[84] Prakash, *Jharkhand*, 78.

DPCE online
ISSN: 2037-6677

Amendment) Act, approved by the Lok Sabha in 1992 which introduced a new Part IX in the Constitution.

Since 1947, it had been stressed the importance of the inclusion of panchayats in the processes of decentralization with a view to facilitate development through local participation. The 1992 constitutional amendment meant to make panchayats institutions of self-government "through which the people would participate in the process of planning for economic development and social justice"[85] and provided for a mandatory three-tiered structure of institutions for the rural areas: *gram panchayat* (at the administrative village level), *panchayat samiti* (block level) and *zilla parishad* (district level). Each State could endow the panchayats with such power and authority "as may be necessary to enable them to function as institutions of self-government" (art. 243G of the Indian Constitution). Despite recognizing the existence of the Gram Sabha, its powers and role were considerably downsized and subjected to provisions enacted by the several State Legislatures[86].

As already mentioned, the Scheduled and Tribal Areas referred to in Schedules V and VI were excluded from the application of this Amendment (art. 243M), but the Legislator left the door open for future amendments, providing that Parliament could by law extend the provisions regarding the Panchayati Raj to Scheduled and Tribal Areas, with due exceptions and modifications (art. 243M.4.b)[87].

Due to the ongoing violations of this exemption[88], the federal Legislator adopted in 1996 the *Provisions of the Panchayat (Extension to Scheduled Areas) Act* (PESA)[89] in order to extend the application of Part IX of the Indian Constitution to the Areas disciplined by Schedule V (Schedule VI is therefore outside the purview of PESA). It is important to note that the PESA cannot be directly applied in the States but needs further implementing provisions (the competence on "Local government" being allocated exclusively to the States, as per Schedule VII, List II.5). As regards Jharkhand, the implementing Act is the *Jharkhand Panchayat Raj Act* (JPRA)[90], adopted by the newly-created state of Jharkhand in 2001.

PESA builds upon the three-tiered structure, as envisaged by the 73rd Constitutional Amendment, introducing some important features. First of

[85] N. Gopal Jayal, *Introduction*, in N. Gopal Jayal, A. Prakash, P. K. Sharma (Eds.), *Local Governance in India- Decentralization and Beyond*, New Delhi, 2006, 7.
[86] As per Schedule VII, List II.5.
[87] On this topic, see also C. Petteruti, *Il governo locale nell'ordinamento costituzionale indiano*, in D. Amirante, C. Decaro, E. Pföstl (Eds.), *La Costituzione dell'Unione Indiana. Profili introduttivi*, Torino, 2013, 84-92; D. Amirante, India, Bologna, 2007, 77-79; D. Amirante, *I sistemi costituzionali dell'Asia meridionale*, Padova, 2019 and Amirante, *La democrazia dei superlativi*.
[88] See for example *Araka Vasanth Rao and Ors vs. Govt of AP* (WP 3817 of 1995) and *Basudeo Besra vs. Union of India* (CWJC 8262 of 1995).
[89] Act 40 of 1996.
[90] Jharkhand Act 06 of 2001.

all, the Legislator decided to overcome the concept of revenue village (the basic administrative unit which usually groups together several natural villages and which determines the relative area of the Gram Sabha and the Gram Panchayat) and to stress the importance of the "natural village" (a village which takes into account social and economic ties as well as geographical boundaries). The natural village becomes the unit against which to recognize the existence of the Gram Sabha, which shall "safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution" (art. 4.d). According to Pal[91] and Sudipta[92], the powers conferred upon the Gram Sabha can be so grouped:

- *Mandatory executive powers*: the Gram Sabha shall approve of the plans, programmes and projects for social and economic development and identify the beneficiaries of these programmes (art. 4.e.i and 4.e.ii)
- *Consulting powers*: "the Gram Sabha *or* (emphasis added) the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas" (art. 4.i).
- *Recommendatory powers*: mandatory recommendation of the Gram Sabha *or* (emphasis added) the Panchayats prior to grant of prospecting licence or concession or mining lease for minor minerals in the Scheduled Areas (art. 4.k and 4.l).

Furthermore, as per art. 4.m.iii, Gram Sabha *and* (emphasis added) Gram Panchayat are entrusted with the power to prevent alienation of land in the Scheduled Areas and to restore any unlawfully alienated land of a Scheduled Tribe.

On the one hand, it is clear that the Legislator meant to empower the Gram Sabha, by conferring upon this institution a central role in the village administration (the very same central role that customary law has always recognized to Gram Sabhas). On the other hand, it cannot be denied that there are certain major loopholes in the Act: just to mention one, the alternative provided by the "or" emphasized above left the door open for state implementing provisions which cut the Sabha out of local administrative decisions[93] conferring upon higher levels of Panchayat the said consulting and recommendatory powers.

[91] M. Pal, *Panchayats in Fifth Scheduled Areas*, in 35 *Economic and Political Weekly* 19, 1603 (2000).
[92] B. Sudipta, *Implementation of PESA: Issues, Challenges and Way Forwards*, in 4 *International Research Journal of Social Sciences* 12, 50 (2015).
[93] According to the table featured in the Policy Brief on PESA, Jharkhand scored the worst in terms of conformity of State Panchayati Raj Acts with PESA, followed by Gujarat, Odisha and Maharashtra (C. R. Bijoy, *Policy brief on Panchayat Raj (Extension to Scheduled Areas) Act of 1996*, New Delhi, 2012).

DPCE online
ISSN: 2037-6677

The JPRA recognizes the natural village as the basic unit for the Scheduled Areas, allowing the creation of multiple Gram Sabhas within the same revenue village (arguably being several natural villages, each of them with its own Sabha, within the same revenue village). While the mandatory powers of the Sabha are left untouched, the JPRA significantly intervened on the other powers which were downsized and diluted. Indeed, as per art. 10.1.a.xi and .xii the Gram Sabha shall manage natural resources according to other relevant laws in force and merely give advice to the upper Panchayat levels on small water reservoirs. The other competences enlisted in the article are minor ones (i.e. construction and maintenance of road, enhancing unity and amity among villagers, providing light on village paths, etc.) while major administrative tasks were granted to Gram Panchayats, Panchayat Samitis and Zilla Parishads.

It therefore emerges how the State Legislature exploited the weaknesses of the PESA in order to shape a watered-down Act which firmly brought back to the State key functions and prerogatives (mostly those related to land and natural resources), cutting out customary village institutions from these dynamics of local self-governance.

5. The *Pathalgadi* movement: genealogy of an uprising and its counter-hegemonic use of law

All these Acts reiterate processes of creation of identities and legal subjects, establishing the boundaries of customary institutions, their space of existence and the features of these subjects.

On the other hand, it is nonetheless true that these laws, together with the abovementioned colonial-era laws, contributed to the creation of a new consciousness and, as Merry put it[94], "a new set of understanding of persons and relationships".

The failures in the state implementation of PESA were coupled by a series of attempts on the part of the BJP-led government to amend the CNT Act. Over the decades, the Act has been diluted through a series of amendments to its core provisions (mainly those related to the expropriation of land): the first 1947 amendment modified art. 46 allowing the alienation of Adivasi land under certain specific conditions from an ST member to another ST member. In 1996 the CNT Amendment Act redefined the concept of "public purpose" in art. 49 allowing the transfer of land for industrial and mining purposes. In 2016, the BJP-led government of Raghubar Das tried to amend art. 49 again, allowing the transfer of tribal land for any public purpose such as railway, schools, water pipelines etc. As pointed out by the Chairperson of the National Commission for Scheduled Tribes[95], Rameshwar Oraon, in a note sent to the President of the Union,

[94] Merry, *Law and Colonialism*, 892.
[95] National Commission for Scheduled Tribes, *Guidelines by the Commission in 21st*

not only this would lead to a massive alienation of tribal land, but had also been done in violation of the PESA provisions vesting power in the Gram Sabha to safeguard and preserve the community resources and prevent land alienation. Indeed, these safeguards had not been included in the Amendment bills[96]. In 2017, due to the harsh protests that followed the drafting of the bills, the government announced their withdrawal, but decided to amend anyway the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* for the State of Jharkhand[97] excluding certain welfare projects from the mandatory social impact assessment (a document which should be drafted together with local panchayat institutions and then submitted to a commission with veto powers on the projects there assessed).

It is therefore not surprising that protests all over Jharkhand did not settle but, on the contrary, mounted up increasing an age-old resentment against the government which had been, according to the Adivasi leaders, "nibbling away at land that rightfully belonged to the tribals" for decades[98].

The BJP legal policies in Jharkhand laid the ground for the birth of the Pathalgadi movement, which quickly managed to spread across neighboring Odisha, Chhattisgarh, Rajasthan, Telangana and Madhya Pradesh. The term "Pathalgadi" literally means "the erection of a stone slab"[99], which is an ancient practice among Adivasis used to mark burial places (*sasandiri*, in Mundari dialect) and celebrate births. The villagers of Bhandra, in the Khunti district, were the first to erect a stone at the entrance of the village (on 9 March 2017), over which they carved references to four articles of the Indian Constitution. Namely:

- Under Article 13(3)(a) of the Constitution of India, custom or tradition is the force of law, that is, the power of the Constitution. This provision is taken to mean that existing Adivasi custom or law as defined by the village Gram Sabha (insofar as it does not violate the Constitution) has the force of the constitution[100].
- Under Article 19(5), in Scheduled districts or areas, no outsider or

meeting dated 21/09/2010 on various issues, 1992, available at ncst.nic.in/content/internal-guidelines/.

[96] See also M. Chowdhury, *In Jharkhand, Adivasis say changes to tenancy laws dilute their hard-won land rights*, in *Scroll.in*, 2017, available at scroll.in/article/828802/in-jharkhand-adivasis-say-changes-to-tenancy-lawsdilutes-their-hard-won-land-rights and A. Gupta, *Tribal Communities Protest Changes in Jharkhand Land Laws*, in *The Wire*, 2017, available at thewire.in/rights/local-tribes-protest-changesjharkhand-land-laws.

[97] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Jharkhand Amendment) Act, 2017 (Jharkhand Act 07 of 2018).

[98] A. Tewary, *The Pathalgadi Rebellion*, in *The Hindu*, 2018, available at www.thehindu.com/news/national/other-states/the-pathalgadirebellion/article23530998.ece.

[99] V. Ekka, *Pathalgadi: Tribal Assertion for Self-Rule*, in *Legal News and Views*, 7 (2018).

[100] N. Sundar, *Pathalgadi is Nothing But Constitutional Messianism So Why is the BJP Afraid Of It?*, in *The Wire*, 2018, available at thewire.in/rights/pathalgadi-isnothing-but-constitutional-messianism-so-why-is-the-bjp-afraid-of-it

DPCE online
ISSN: 2037-6677

non-customary person is allowed to freely roam, reside, settle and move around.

- Article 19(6) of the Constitution of India prohibits outsiders from doing business, trade or any other form of employment in Scheduled Areas.
- Under paragraph 5(1) of Article 244(1)(b), no law passed by the Parliament and state assembly will be applicable to Scheduled Areas. This is also meant to stress the need for the Governor to meet the Tribes Advisory Council (as per Schedule V), but the Council rarely meets.

Sharma[101], in a reportage conducted in the Khunti district, underlines that, despite the fact that this is not the exact constitutional wording[102], it is important to report these engravings as they were since they represent the community understanding of the constitutional provisions[103]. Along with these constitutional references, the communities involved in the Pathalgadi movement began to mention the PESA provisions which endowed the Gram Sabha with certain powers. As Virginius Xaxa[104] points out, "though they have been over-enthusiastic in their interpretation of some provisions", they interpreted the PESA provisions related to the Gram Sabhas as conferring autonomous legislative powers upon the assemblies and began preventing *dikus* (foreigners, mostly state officials whose authority was not recognized by the villagers) from entering the villages[105].

[101] S. Sharma, *10,000 people charged with sedition in one Jharkhand district. What does democracy mean here?*, in *Scroll.in*, 2019, available at scroll.in/article/944116/10000-people-charged-with-sedition-in-one-jharkhanddistrict-what-does-democracy-mean-here.

[102] For example, art. 244(1)(b) of the Fifth Schedule does not provide for the non-application of Acts passed by the federal Parliament or State Legislature to Scheduled Areas but, instead, grants the Governor the power to direct whether a specific law should or should not be applied to the Scheduled Areas and, if yes, to identify exemption and modifications to the law.

[103] This concept can also be found in J. Eckert, *From Subjects to Citizens: Legalism from Below and The Homogenisation of the Legal Sphere*, in 53 54 *The Journal of Legal Pluralism and Unofficial Law*, 57 (2006): speaking about the discrepancy between cases lodged and cases admitted in Indian state courts, she underlines that "rather than interpreting this active use of institutions of complaint as an expression of 'frivolous litigiousness', the discrepancy (…) could also reveal something about the negotiations over an understanding of rights and justice that people seek to engage in. The claims express the expectations of a specific notion of governmental behaviour and governing norms. They express an understanding of civil rights. The discrepancy thus reveals something about the difference between 'official' interpretations of substantiated claims, i.e. the legal version of rights, and the rights people perceive themselves to own towards the state".

[104] V. Xaxa, *Is the Pathalgadi Movement in Tribal Areas Anticonstitutional?*, in *Adivasi Hunkar*, 2019, available at adivasihunkar.com/2019/01/12/is-the-pathalgadi-movement-in-tribal-areas-anticonstitutional/.

[105] The reporter Amarnath Tewary recalls taking part to a meeting in the Khunti district during which people raised telling slogans such as "We are the Bharat Sarkar

What is most interesting is the fact that the communities sought to replace the power of the state with that of the local Gram Sabha[106], exploiting the very same parliamentary language, and the constitutional culture in which it is embedded, to advance and legitimate their claims. The Constitution was invoked as evidence of the intention of the Legislator to empower Adivasi community by way of granting more autonomy to their traditional assembly.

Under the slogan "Gram Sabha is the highest of all", many villages declared themselves autonomous and subject only to their customary rights and practices, in the shadow of the Constitution and the PESA[107].

Among other claims (for example, an Adivasi banking system and an Adivasi education system), the Pathalgadi proponents argued for a revival of traditional dispute resolution methods, along the lines of the Wilkinson's Rules which are currently undergoing a process of major dilution, following several attempts to reduce the judicial functions of the Manki and the whole complex system of the so-called "Kolhan courts"[108].

Not only does the state judicial system slow down the administration of justice, but also, according to the Pathalgadi leaders, does not deliver justice: as a matter of fact, the Adivasis have vocally protested for decades against the growing number of fake encounters happening to the detriment of villagers or false charges raised against Adivasis, accused of being Naxalites[109].

The government reacted quite strongly to the Pathalgadi uprising. Despite the wide appeal of the movement and its urban, middle-class origin, the government labelled it as an anti-national, Maoist-driven militant upsurge, directed by Christian missionaries or a cover for opium cultivators in remote tribal areas[110]. In March 2018 the police arrested the heads of the movements in some districts, charging them under Section 153A (creating hatred among people), 186 (obstructing public servants from duty), 120B

(the Indian government). We do not recognise the Central or State governments or the President, Prime Minister or Governor. Our gram sabha is the real constitutional body. We will not allow anyone to enter our areas without our permission. We will not be exploited anymore". He was stopped by a sort of village patrol which warned him against any violation of their "gram sabha law" (Tewary, *The Pathalgadi Rebellion*).

[106] EPW Engage, *Jal, Jangal aur Jameen: the Pathalgadi Movement and Adivasi Rights*, in *Economic & Political Weekly*, 2019, available at www.epw.in/engage/article/pathalgadi-movement-nation-autonomy-rights-adivasi-jharkhand.

[107] Ekka, *Pathalgadi*, 11.

[108] For an insight on the historical system of the Kolhan courts see Sen, *From Village Elder to British Judge*.

[109] Sundar, *Pathalgadi is Nothing But Constitutional Messianism*. According to the Bagaicha Research Team report, 97% of undertrials in Jharkhand arrested for Naxalite offences have actually no connection with the Naxalite movement (Bagaicha Research Team, *Deprived of Rights over Natural Resources, Impoverished Adivasis Get Prison*, Ranchi, 2016; Sundar, *Pathalgadi is Nothing But Constitutional Messianism*).

[110] Sharma, *10,000 people charged with sedition in one Jharkhand district*; Tewary, *The Pathalgadi Rebellion*; Xaxa, *Is the Pathalgadi Movement in Tribal Areas Anticonstitutional?*

DPCE online
ISSN: 2037-6677

(criminal conspiracy) of the Indian Penal Code, hoping that an acephalous movement would collapse soon. According to Sundar[111], they have been replaced by second rung leaders, who have taken the claims forward despite another massive wave of arrests and FIRs filed against arguably more than 10,000 Adivasis for sedition (art. 124A of the Indian Penal Code)[112]. It is important to note that these charges were dropped by the new Jharkhand's Chief Minister Hemant Soren (leader of a Congress-led coalition) in his cabinet's first decision[113].

Among those hit by the sedition charges then filed by the government was also the Jesuit Father and activist Stan Swamy, who circulated a note[114] in which he tried to bring back the core of the discourse to a strictly legal plan, highlighting point-by-point the failures of the government in implementing the already existing legal framework meant for the upliftment and empowerment of Adivasi communities[115].

[111] Sundar, *Pathalgadi is Nothing But Constitutional Messianism.*
[112] Sharma, *10,000 people charged with sedition in one Jharkhand district.*
[113] AsiaNews, *Jharkhand's new chief minister drops sedition charges against 10,000 Tribals*, 2019, available at www.asianews.it/newsen/Jharkhand%E2%80%99s-new-chief-minister-drops-sedition-charges-against-10,000-tribals-48915.html
[114] S. Swamy, *Does Raising Questions on the Rights of Adivasis Make Me a 'Deshdrohi'?*, in *The Wire*, 2018, available at thewire.in/rights/pathalgadimovement-adivasis-stan-swamy-sedition
[115] Father Stan Swamy, currently aged 83, was arrested on October 8, 2020 by the National Investigation Agency, which took him into custody on the basis of an investigation over some allegedly inflammatory speeches delivered at a public event (Elgaar Parishad) in Pune in 2017 and followed by one-day riots in Bhima Koregaon (Scroll Staff, *Bhima Koregaon: Stan Swamy, Gautam Navlakha and Anand Teltumbde among eight named in NIA chargesheet*, in *Scroll.in*, 2020, available atscroll.in/latest/975374/bhima-koregaon-stan-swamy-gautam-navlakha-andanand-teltumbde-among-eight-named-in-nia-chargesheet). The police argued that the event was linked to (and somewhat sponsored by) the illegal Maoist fringes, therefore Stan Swamy and other activists and journalists present at the event were charged with terrorism-related accusations under the *Unlawful Activities (Prevention) Act*. Stan Swamy anticipated his own arrest and circulated a video and a message hours before it happened in which he claimed that the case against him had been fabricated through false evidence and that the arrest "has nothing to do about the Bhima-Koregaon case in which I have been booked as a 'suspected-accused' and consequently raided twice (28 August 2018 and 12 June 2019). But it had everything to do to somehow establish (i) that I am personally linked to extremist leftist forces, (ii) that through me, Bagaicha (see note 109: Bagaicha is the Jesuit social research and training centre founded by Swamy himself, *author's note*) is also relating to some Maoists. I denied both these allegations in the strongest terms". Swamy therefore claims that his arrest is not as much related to the facts occurred in Bhima Koregaon, but rather to his lifelong activism and support to the Adivasi cause also through Bagaicha (for more information on Swamy's arrest see M. Alam, *Jharkhand CM Hemant Soren Questions Stan Swamy's Arrest, Support Pours in for Activist*, in *The Wire*, 2020, available at thewire.in/rights/jharkhand-cm-hemant-soren-stan-swamy-arrest; Scroll Staff, *Gross violation of human rights': 2,000 scholars, activists oppose Stan Swamy's arrest by NIA*, in *Scroll.in*, 2020, available at scroll.in/latest/975373/gross-violation-of-human-rights-2000-scholars-activistsoppose-stan-swamys-arrest-by-nia; S. Shantha, *NIA Arrests 83-Year-Old Tribal Rights Activist Stan Swamy in Elgar Parishad Case*, in *The Wire*, 2020, available at thewire.in/rights/stan-swamy-arrested-elgar-parishad-case).

As a matter of fact, Stan Swamy complained about the failed implementation of Schedule V and the Tribes Advisory Council provision, the dismissal of the Gram Sabha role as envisaged by the PESA, the mild action taken by the government under the aegis of the Forest Rights Act 2006[116], the enactment of the amendment to the Land Acquisition Act, the outright negligence towards that Supreme Court jurisprudence meant to protect Adivasi land. Swamy's note is in fact crucial as it helps framing the Pathalgadi movement not as being "outside the law" but as being perfectly within the purview of the law. Indeed, it has made use of law and legal language to frame its claims, exploiting the counter-hegemonic potential inherent in the law.

6. Conclusion

This paper develops along a double path of analysis: firstly, I have introduced the policies of control of legal pluralism implemented by the British in the area of the Chotanagpur Plateau, illustrating the Acts adopted by the colonial administration to codify customary norms and limit local forms of dispute settlement and governance. This contributed to shed some light on the multifaceted nature of legal instruments, which can be both a means of regulation and a means of ontological definition of legal subjects.

Secondly, I argued how the fluid and flexible nature of law implies also that the very same legal instrument which served as a tool of oppression and hegemonic control can turn out to be an instrument of emancipation.

In her analysis of new forms of legal pluralism, Julie Eckert[117] argues that Mumbai slums are witnessing an increasing role of new judicial bodies, which are reshaping the constellation of actors involved in urban disputing. The cooperation between state and non-state agencies has become progressively stronger but it does not actually follow formal rules and regulations to the point that "(n)on-state agencies of governance are implicated in the transgressions of state law by state agencies. State law is therefore also used as a defence against the collusion of state agencies and non-state local authorities and their activities"[118]. Slum dwellers, in the same way as Pathalgadi proponents, therefore consider legal literacy and state law as a vital tool of resistance: they do not refer to "law" in general but, rather, to those state norms they feel are just and emancipatory against the backdrop of a commonly shared idea of "good order"[119]. According to the author, this triggers a form of "legalism from below" which represents a major change in modes of resistance: instead of withdrawing from state law

[116] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act 2 of 2007).
[117] Eckert, *From Subjects to Citizens.*
[118] *Ivi*, 53.
[119] *Ivi*, 55.

DPCE online
ISSN: 2037-6677

and circumventing it, state law becomes a "weapon of the weak"[120]. Far from being a mere replication of hegemonical patterns, recurring to state law can be an effective means of expressing values and putting forward ideas about the relations between the governing and the governed[121].

In the same vein, speaking about the *de facto* privatization process of Chilika Lake in India to the detriment of fishing communities, Adduci[122] recounts that "the fishing population articulated their demands in terms of rights within the arena of the established law. They radically opposed the illegal privatization of Chilika lake waters, claiming in the first instance that the law should be respected"[123]: the author describes a context which is similar to that of Eckert's urban slums, in that she underlines how the socially dominant Odishan group (non-state actors) have been able to inform the action of the State in the upholding of the lake illegal shrimp cultivation[124]. Recurring to state law and state normative principles have therefore become a weapon of resistance and a way to engage with state institutions through the language of rights[125].

In line with the analytical framework presented above, the Pathalgadi proponents contested the laws that cornered Adivasi local institutions of self-government but at the same time mobilized the language of the law and specific constitutional and legal provisions in order to advance their claims for more autonomy. Despite the attempts to label this movement as an outlaw one, this paper means to demonstrate how, instead, the Pathalgadi claims navigate within the boundaries of the law and of the legal arena, exploiting the emancipatory and counter-hegemonic potential inherent in it.

Chiara Correndo
Dep. of Law
University of Turin
chiara.correndo@unito.it

[120] *Ivi*, 56.
[121] *Ivi*, 66; 69.
[122] M. Adduci, *The relentless de facto privatization process of Chilika Lake, India*, in 20 *Journal of Agrarian Change* 4, 1-19 (2020).
[123] *Ivi*, 8.
[124] *Ibid.*
[125] *Ivi*, 4.