

# CONSTITUTIONAL PROTECTION OF INDIGENOUS RIGHTS IN INDIA AND CANADA

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## ABSTRACT

*This study provides a comparative analysis of the constitutional protections of indigenous rights in India and Canada. The indigenous communities in both countries have faced marginalization and discrimination in history. That led to the erosion of their traditional cultures, languages, way of life, and their connectedness to nature. This study focuses on the historical context in which the indigenous rights have evolved. In India, the constitutional provisions aimed to protect the Schedule Tribes are enshrined in Article 46 of the constitution which provide direction to the state and emphasize to promote the educational and economic interest of the Schedule Tribes. Schedule V, VI, and Article 244(1) of the Constitution provides for the special provisions for these communities and administration of scheduled and tribal areas. Canadian Constitution in Section 35 recognizes and affirms the existence of aboriginal people and treaty for the rights of indigenous peoples. Protecting the rights of the indigenous people is a complex and multifaceted issue in both the countries.*

## Introduction

India and Canada have diverse tribal populations. Each has their own character and nature, which requires different treatment in the different geographical areas. For example the requirement of the tribal people in different geographical locations and circumstances is different. In India, the tribal population was treated fairly post independence but still they were fighting for their rights to protect their local culture, tradition and life-style.<sup>1428</sup> In Canada indigenous communities include three main groups- First Nations, First Nation communities located across Canada and they consist of various distinct nations, each with its own language, culture and history. Metis- The Metis are descendants of mixed Indigenous and European ancestry, primarily of First Nations and

French Canadian descent. They have a unique culture, including a distinct language (Michif), traditional foods, and a rich history of resistance and resilience. Inuit- Inuit are the indigenous people who primarily inhabit the Arctic regions of Canada, they have a distinct culture, language- Inuktitut, and a deep connection to the land and sea.<sup>1429</sup> In India, The indigenous people are often referred to as Scheduled Tribes or Adivasis. These communities are diverse, with hundreds of distinct tribes spread across the country. Some of the prominent tribal groups in India include the Gond, Santhal, Bhil, Munda, and Oraon tribes. They have their own languages, cultures, and traditions, often closely tied to their environment and land.

In Canada, Section 35 of the Constitutional Act, explicitly recognizes and affirms the existence of the indigenous people,

<sup>1428</sup> Mohinroo A, "Rights of Tribals and Indigenous Persons in India" *Nyaaya* (2022), available at: <<https://nyaaya.org/guest-blog/rights-of-tribals-and-indigenous-persons-in-india/>> accessed on May4, 2024.

<sup>1429</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

also recognizes and affirms the aboriginal and treaty rights of indigenous people.<sup>1430</sup> The Canadian Courts interpreted the Section 35 of the Act, very broadly and emphasized the importance of the reconciliation and the duty to consult and accommodate the indigenous peoples in matters that their rights may be affected.<sup>1431</sup> In India, the indigenous people are termed as Schedule Tribe in the Constitution.<sup>1432</sup> There are various provisions in the Indian Constitution to protect the rights of the tribes and make them advance. Article 46 of the Constitution which is designated as 'the directive principles for state policies' provides and directs the state to promote the educational and economic interest of Tribes. Schedule V and Schedule VI of Indian Constitution provides for the demarcation of the scheduled area and administration and control of the scheduled areas and scheduled tribes. Article 244(1) also provides for the administration of the scheduled area and scheduled tribes.

### Historical Context

Kim Lane Scheppele, in her writing "The Agendas of Comparative Constitutionalism" emphasized on the need of history and its significance to the development of shaping constitutionalism in different countries.<sup>1433</sup> To understand the relationship between the law and politics through the lens of constitutional history is crucial. The development of constitutionalism is developed by various factors including the political power between the king and competing political groups, The bargaining of rights between the sovereign and the public, that has been developed through the gradual process and throughout the time.<sup>1434</sup> In Canada, including the first nations, Metis and Inuit were well established with their culture, languages, and governance structure.

They lived in harmony with land relying on hunting, fishing, and agriculture to sustain. Throughout the 18th and 19th centuries, European colonization expanded across Canada, resulting in the signing of numerous treaties between indigenous nations and the British Crown. These treaties, known as the "Numbered Treaties," recognized indigenous land rights and established a framework for coexistence between indigenous peoples and settlers. However, many of these treaties were not fully honored, leading to land disputes and conflicts. The Indian Act of 1876 was a significant turn in the indigenous rights and culture in Canada.<sup>1435</sup> This legislature established a system that reserved Indian status and undermined the indigenous autonomy and restricted their rights. This act also introduced the residential school which forced the children of indigenous community to reside in the residential school and assimilate with the Euro-Canadian culture. In the 20th century the indigenous rights started getting momentum. In 1960, the indigenous people first time received the right to vote in federal elections and in the 1970s Canada saw the movements for indigenous rights with landmark events such as Calder Cases which recognised the indigenous rights and the formation of the National Indian Brotherhood, now the Assembly of First Nations. The indigenous rights in Canada received a significant boost in 1982, when the Section 35 of Constitutional Act was adopted which recognized and protected the rights of aboriginal people of Canada.<sup>1436</sup>

Before the arrival of the Britishers in India, India was home to a diverse range of tribal communities with distinct cultures, languages, and traditions. The indigenous communities are often referred as Adivasis or Scheduled Tribes in India. The British colonial administration made a significant impact on the tribal communities, including the laws and policies that undermined

<sup>1430</sup> Constitution Act, 1982 (Canada).

<sup>1431</sup> Constitution Act, 1982 (Canada).

<sup>1432</sup> Constitution of India, Art. 342.

<sup>1433</sup> Lane Scheppele K, "The Agenda of Comparative Constitutionalism" *University of Pennsylvania Law Review* (2008)

<sup>1434</sup> Tushnet M, "Authoritarian Constitutionalism" 24 *Harvard Journal of Law and Public Policy* (2018).

<sup>1435</sup> The Indian Act, 1876 (Canada).

<sup>1436</sup> Hurley MC and Wherrett J, "The Report of the Royal Commission on Aboriginal Peoples" *Parliamentary Research Branch* 99-24E, available at: <<https://publications.gc.ca/Collection-R/LoPBdP/EB/prb9924-e.htm>> (accessed Dec 10, 2024).

the autonomy, their cultures, traditions, and the way of life. Land alienation, forced labor, and discriminatory practices were very common and resulted in exploitation and marginalization of the tribal communities. During the freedom struggle for the country the leaders and activist such as Mahatma Gandhi played a crucial role to advocate the indigenous rights of tribal communities, emphasizing on the importance of respecting tribal rights and preserving their cultures and traditions. After independence of the Country in 1947, the government took the steps to eradicate the historical injustice faced by the tribal communities. The Constitution of India, adopted in 1950. The Constitution of India includes the provisions which directs the state to promote the educational and economic interest of the STs under Article 46, Schedule V, Schedule VI, and Article 244(1) provides for the demarcation and administration of the scheduled and tribal areas. The power has been conferred on the President of India to declare the certain area as scheduled area, where the tribal communities reside.<sup>1437</sup>

### Constitutional Protection in India

In India, the indigenous people, referred to as tribes or Adivasis are granted various constitutional protection through the various constitutional provisions and other enactments. The aim behind these protection is to protect and safeguard the indigenous rights, cultures, traditions, and their interest. For example Article 46 of the Indian Constitution, which is designated as Directive Principles of State Policy, directs the state to promote the educational and economic interests of Scheduled Tribes and other weaker sections of the Society. This provision emphasizes the need for the special care and protection of the indigenous communities.<sup>1438</sup> Article 244(1) of the Constitution of India provides for the administration for the tribal areas, empowering

the President of India to declare certain areas as scheduled areas where the tribal communities reside. This provision ensures that the tribal communities have a say in the governance of their area. The Fifth Schedule of the Indian Constitution contains special provisions for the control and administration of scheduled areas and tribes. It includes the provisions for the protection of tribal rights and the establishment of autonomous councils in tribal areas. The Sixth Schedule provides for the administration of tribal areas in Assam, Meghalaya, Tripura, and Mizoram, with provisions for the establishment of autonomous district councils to administer these areas.<sup>1439</sup>

Panchayats (Extension to Scheduled Areas) Act, 1996, also known as PESA empowers tribal communities in scheduled areas to manage their affairs through traditional systems of governance. It provides for the establishment of gram sabhas and vests them with certain powers to manage local resources and implement development programs. In *Samatha vs. State of Andhra Pradesh, 1997*<sup>1440</sup> case, the Supreme Court held that the state cannot alienate tribal land in scheduled areas to non-tribals without prior approval from the central government. This decision protects tribal land from unauthorized alienation. In *Nandini Sundar vs. State of Chhattisgarh, 2011* case<sup>1441</sup>, the Hon'ble Supreme Court issued guidelines to protect tribal communities in areas affected by Maoist insurgency. The court emphasized the need to respect tribal rights and ensure their participation in decision-making processes. Forest Rights Act, 2006 is not a constitutional provision, the Forest Rights Act is a landmark legislation that recognizes the rights of forest-dwelling communities, including many indigenous tribes, to forest land and resources. Despite these constitutional protections, challenges remain for the indigenous communities in India. Challenges such as land alienation, displacement due to the

<sup>1437</sup> Virginius Xaxa, "Tribes as Indigenous People of India" 34 *Economic and Political Weekly* (1999).

<sup>1438</sup> Mohinroo A, "Rights of Tribals and Indigenous Persons in India" *Nyaaya* (2022), available at: <<https://nyaaya.org/guest-blog/rights-of-tribals-and-indigenous-persons-in-india/>> (accessed on Dec 10, 2024).

<sup>1439</sup> Constitution of India, 1950.

<sup>1440</sup> *Samatha v. State of Andhra Pradesh & Ors*, AIR 1997 SC 3297.

<sup>1441</sup> *Nandini Sundar v. State of Chhattisgarh & Ors*, (2011) 7 SCC 547

development projects and lack of access to the basic service are the major issues.

### Constitutional Protection in Canada

In Canada, the rights and protection to the indigenous people are granted through the various enactments, provisions and the judicial decision. These provisions for their protection uphold their rights, cultures, interests, and their way of life. Section 35 of the Constitution Act, 1982 this section recognizes and affirms the existing aboriginal and treaty rights of indigenous peoples in Canada. It provides a constitutional basis for the protection of indigenous rights and has been broadly interpreted by the courts to include a wide range of rights, including land rights, hunting and fishing rights, and self-government rights. The Indian Act is a federal law that governs the relationship between the Canadian government and indigenous peoples. While controversial, it provides a framework for the recognition of indigenous rights and the provision of certain services to indigenous communities. Treaty Rights, Canada has entered into treaties with many indigenous nations, particularly in the western provinces. These treaties recognize and protect the rights of indigenous peoples, including rights to land, resources, and self-government. In *Calder v. Attorney General of British Columbia, 1973*<sup>1442</sup>, a landmark case, the Hon'ble Supreme Court of Canada recognized the existence of aboriginal title, or the inherent land rights of indigenous peoples, even in the absence of a treaty. This decision laid the groundwork for future cases recognizing indigenous land rights. In *R v. Sparrow, 1990* case<sup>1443</sup>, the Supreme Court of Canada established the Sparrow test, which sets out the criteria for determining when the government can infringe on indigenous fishing rights. The court held that any infringement must be justified and meet certain criteria, including being for a valid legislative objective and being consistent with the Crown's fiduciary duty to

indigenous peoples. In *Delgamuukw v. British Columbia 1997* case<sup>1444</sup>, the Supreme Court of Canada recognized the existence of aboriginal title and set out principles for proving and recognizing such title. The court emphasized the need for consultation and accommodation of indigenous interests in land use planning and resource development. United Nations Declaration on the Rights of Indigenous Peoples, While not legally binding in Canada, UNDRIP provides a framework for the recognition and protection of indigenous rights. Canada has endorsed UNDRIP and has committed to implementing its principles.

### A Comparative Analysis

In comparing indigenous rights in India and Canada, it is evident that both countries have taken steps to recognize and protect the rights of their indigenous populations, though their approaches differ significantly. In India, indigenous peoples, known as Scheduled Tribes or Adivasis, are constitutionally recognized and protected through provisions such as Article 46, Article 244(1), the Fifth Schedule, and The Sixth Schedule. These provisions aim to promote the educational and economic interests of Schedule Tribes and provide for the administration of scheduled areas and tribal areas. However, there are criticisms regarding the lack of specificity and implementation of these protections, leading to ongoing challenges such as land alienation and displacement.

In contrast, Canada's approach to indigenous rights is characterized by explicit recognition and affirmation in the constitution through Section 35 of the Constitution Act, 1982. This section recognizes and affirms the existing aboriginal and treaty rights of indigenous peoples, providing a strong legal basis for their protection. Canada's approach also emphasizes reconciliation and the duty to consult and accommodate indigenous peoples, as demonstrated in landmark court cases and

<sup>1442</sup> *Calder v. Attorney General of British Columbia*, 34 DLR (3d) 145.

<sup>1443</sup> *R v. Sparrow*, [1990] 1 SCR 1075.

<sup>1444</sup> *Delgamuukw v. British Columbia*, 153 DLR (4th) 193.



legislation. This approach has been praised for its progressive nature, particularly in recognizing indigenous land rights and supporting indigenous self-government and autonomy. Overall, while both countries have made efforts to protect indigenous rights, Canada's approach appears to provide more explicit and comprehensive protections, with a stronger emphasis on reconciliation and self-determination.

While both India and Canada have constitutional protections for indigenous rights, there are notable differences in their approaches. Canada's explicit recognition of indigenous rights and its emphasis on reconciliation and self-government have been praised for their progressive nature. In contrast, India's approach, while providing some protections for tribal communities, has been criticized for its lack of specificity and implementation. Both countries can learn from each other's experiences and work towards strengthening the protection of indigenous rights, essential for building more inclusive and equitable societies.

### Conclusion

The comparative analysis of indigenous rights in India and Canada highlights the complex and multifaceted nature of indigenous rights protection. While both countries have constitutional provisions aimed at safeguarding the rights of indigenous peoples, Canada's approach appears to be more explicit, comprehensive, and progressive. The explicit recognition of indigenous rights in the Canadian constitution, along with the strong legal framework and jurisprudence supporting indigenous rights, demonstrates a commitment to reconciliation and the recognition of indigenous sovereignty.

On the other hand, India's approach, while providing some protections for tribal communities, has faced criticism for its lack of specificity and implementation. Issues such as land alienation, displacement, and lack of

access to basic services continue to be significant challenges for indigenous communities in India. However, India has made progress in recognizing and protecting indigenous rights, particularly through provisions such as the Fifth Schedule and the PESA.

Both countries can learn from each other's experiences and approaches to indigenous rights protection. Canada can learn from India's efforts to involve indigenous communities in decision-making processes and to empower them through traditional systems of governance. India, on the other hand, can learn from Canada's explicit recognition of indigenous rights and its emphasis on reconciliation and self-government. Moving forward, it is essential for both countries to continue working towards strengthening the protection of indigenous rights. This includes addressing ongoing challenges such as land rights, resource management, and self-government, as well as promoting greater understanding and respect for indigenous cultures and traditions. Ultimately, the recognition and protection of indigenous rights are essential for building more inclusive and equitable societies in both India and Canada.

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