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TRIBAL AUTONOMY IN INDIA: CONSTITUTIONAL FRAMEWORK, LEGAL REALITIES AND GOVERNANCE CHALLENGES

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ABSTRACT

This paper aims to critically analyse the constitutional and legal regime of tribal self-governance in India by looking at the Fifth Schedule, Sixth Schedule and the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA). The paper examines whether these provisions provide for substantive self-governance and rights for tribals or just serve as symbolic ones.

The study employs the doctrinal research methodology, as it is based on constitutional provisions, statutory laws, judgments of the superior courts, and reports. Secondarily, academic literature is consulted to look into the historical and socio-political context of tribal autonomy.

The analysis of these provisions shows an inherent structural disconnect between the intent of the constitutional framers and the implementation processes, with the Sixth Schedule providing comparatively more autonomy to tribal areas through elected bodies, the Fifth Schedule remaining predominantly administrative and under state control and the PESA, though transformational in principle, failing to gain effectiveness due to the lack of robust enforcement mechanisms and the defiance of states. Supreme Court intervention on certain occasions has also become a vital means of strengthening tribal rights, but it does not guarantee any institutionalised mechanism to implement them on a day-to-day basis. The paper concludes by stating the need for structural reforms in the form of a strong form of local governance with tribal empowerment, development of structures for consent-based development such as the concept of the principle of Free, Informed and Prior Consent (FPIC) advocated by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and development of institutional capacity and awareness.

Key words: Tribal Self Governance, Fifth Schedule, Sixth Schedule, PESA 1996, Gram sabha, self-rule, Scheduled Tribes, UNDRIP.

1. INTRODUCTION

Tribal autonomy in India represents one of the most complex confluences of constitutional law, politics, economy and social justice. While the notion of self-governance is often venerated across democratic discourse and is generally seen as a norm to be cherished and promoted; in case of tribal communities the idea of self-governance gains much of its salience from their historical experiences with the colonial era's policies of dispossession of land and livelihood, developmental displacement of their lands following independence, systematic alienation from the mainstream politics and economic life. With a population base that roughly constitutes 8.6% of India's population,

Scheduled Tribes reside primarily in some of the most resource-intensive areas, like forest belts, mineral areas and biodiversity hotspots. These aspects of the Indian demography and geography construct a structural dichotomy whereby groups, who are materially indispensable to the national economy, have to be identified as one of the most marginalised sections from a purely economic perspective (Census of India, 2011)[254]. The same inconsistency is realised even by the Constitution of India, which is the apex legal document of the nation, as in the year 1950, it grants tribals some privileges in the form of several safeguards as stipulated in the Fifth & Sixth Schedules to the Indian Constitution, read with Article 244[255], which enumerates the system of administration of Scheduled Areas, Article 46[256] of Directive Principles of State Policy, where it asks the state to protect the educational & economic interests of the Scheduled Tribes, & Article 338A[257] That sets up a machinery in the shape of the National Commission for Scheduled Tribes to take up the issues of the tribes.[258]

The reality for the tribes is, however, quite different from this sophisticated framework. With minimal prior consultation or consent, large industrial projects and mining activities continue to dispossess tribals from their ancestral lands. Governance in forest areas is disputed between State authorities, conservation organisations, and the tribes; PESA-designed Gram Sabhas continue to be ignored and have failed on grounds of procedural irregularities; and autonomy granted under the Sixth Schedule continues to be dependent upon the finance of the state government, and has a gubernatorial overriding authority.

This paper attempts to address this dichotomy through a doctrinal analysis of the Indian legal provisions on tribal autonomy and self-governance. While tracing the history of tribal policy, starting from the colonial era, mapping out the constitutional and legal framework, detailing the various legal provisions, the part played by the Indian judiciary in enforcing the rights of the tribals, and critically examining the difference between legal and practical governance of the tribals. This paper finally proposes a solution to these disparities in accordance with the constitutional comparative law and international human rights law.

It is argued that the Indian constitutional framework has failed to resolve the inherent dilemma in balancing between the protective inclination of the state and the desire of the tribals for self-determination. The gaps need to be bridged not through the piecemeal approach of reforms and policy adjustments but through a paradigm shift of looking at tribal self-governance from the point of tribal self-autonomy, and not the self-sufficiency as gifted by the state.

RESEARCH PROBLEM

The issue addressed in this paper is the divergence between the constitutional framework of tribal autonomy and its real-world manifestations. The tribal governance in India is progressive as it includes some structural provisions, additional protections against land alienation and recognition of customary institutions. The framework is testament to a normative regard for tribal rights that, at many levels, has outstripped contemporary counterparts in developing countries. Yet the real-world evidence presents a disheartening and pervasive mismatch. Despite its safeguards, the special governance structures it offers and the corpus of judicial decisions upholding tribal rights, tribal autonomy, resource abuse, bureaucratic intrusion and a disproportional susceptibility to forced displacement continue. Both official and

[254] Census of India, 2011.
[255] INDIA CONST. art. 244.
[256] INDIA CONST. art. 46.
[257] INDIA CONST. art. 388A.
[258] Office of the Registrar Gen. & Census Comm'r, India, Census of India 2011: Primary Census Abstract Data Highlights—India, Scheduled Tribes (2013).

independent research bear out that tribes face disproportional social costs from development in India, whether related to mining or dams, conservation-related exclusions, or others (Fernandes, 2004)[259]. This mismatch is not simply an implementation problem, although that aspect is certainly present; it is essentially a structural one, inherent in the conceptualisation of India's tribal governance system. The powers vested in the Governor, under the Fifth Schedule, are protective only as long as the Governor remains a tool of the central government, not tribal representatives; consultation with tribal representatives stipulated by PESA is only a consultation, not a requirement of informed consent; while more empowered, the Sixth Schedule is still dependent on considerable state intrusion. In each case, the structure presents a veneer of tribal autonomy but a reality of state control. Hence, the research problem is not merely a question of whether the Indian legal regime is being implemented; it is also, and perhaps more importantly, a question of whether the design of the system is even equipped to ensure effective tribal self-rule, through scrutiny not of the gap between law and practice but also of the architecture of normative ideals.[260]

RESEARCH QUESTIONS

1. To what extent do the constitutional and legal provisions for the tribal people, Fifth and Sixth Schedules, PESA, and FRA ensure autonomy, and why is there a gap between law and its execution?
2. What have been the effects of judicial activism and governance systems on tribal rights, and whether this has translated to effective ground-level protection?
3. How does India's tribal governance system measure up to international norms (e.g. UNDRIP) and structural, administrative and political issues that need to be rectified in order for there to be any substantial reforms?

RESEARCH OBJECTIVES

1. To trace the growth and formulation of India's system of tribal governance, including historical evolution, and significant constitutional and legislative provisions.
2. To analyse the implementation process and judicial influence on tribal rights on the laws, including PESA and the Forest Rights Act.
3. To assess the applicability of the Indian system in relation to international standards and to make recommendations for the improvement of tribal autonomy and governance.

RESEARCH METHODOLOGY

This paper adopts a doctrinal legal methodology, drawing on primary sources like the Constitution of India, PESA 1996, the Forest Rights Acts 2006, and the Supreme Court judgements alongside secondary literature by scholars including Virginius Xaxa and Walter Fernandes. The analysis is critical in orientation, examining not merely the content of the law but the structural adequacy of its design.

2. HISTORY OF TRIBAL GOVERNANCE IN INDIA

2.1 Colonial Policy and Tribal Exclusion

The historical trajectory for issues of governance among tribals in India originates with the colonial encounter. The British Colonial Administration formulated two major paradigms in relation to tribal regions: those of integration, with an emphasis on sedentary agriculture, generation of land revenue and inclusion, and those of exclusion, with an emphasis on administrative separation. Both these paradigms, it can be argued, had severe consequences that have been immensely destabilising to tribal social institutions, economy and governance structure. Through the Scheduled Districts Act, 1874, a classification of 'backward tracts' came into existence where the standard laws in the Indian provinces were not applicable, thus permitting particular administrative and policy choices. Both the

[259] Walter Fernandes, 'Development-induced Displacement: The Class and Gender Perspective' in Samar Bosu Mullick (ed), Paternalism and Prejudice: Adivasis in India (Human Rights Law Network 2004).
[260] Walter Fernandes, Mines, Mining and the Displaced in India, in Walter Fernandes (ed.), The Land Acquisition (Amendment) Bill, 1998: For Liberalisation or for the Poor 80, 80–82 (Indian Social Institute 1999).

Government of India Acts of 1919 and 1935 retained these categories of administrative exclusion through designated 'excluded areas' and 'partially excluded areas', directly administered by the Governors or through their agents and excluded from the workings of the elected provincial assemblies. Though these 'policies' aimed at the protection of tribal interests, they implicitly resulted in a lack of political representation, along with institutionalising a system of bureaucratic paternalism (Xaxa, 2008)[261]. Forest laws stand perhaps as the most critical instrument of tribal alienation during British rule. Indian Forest Act, 1927[262], formalised State ownership of forest lands, criminalised customary uses like shifting cultivation, gathering fuel wood, grazing, etc., and thus pushed the tribes into a condition of legal precariousness. Conversion of tribal community forests to State-owned property rendered tribal communities deprived of their primary resource base, thereby reinforcing the paradigm of exclusion and this continued till the post-independence period (Guha, 1983)[263]. Tribal cadastral surveys and settlement operations had transformed tribal land systems; customary community tenure over land could not be incorporated into a colonial framework of ownership, thereby leading to widespread land alienation from the tribals to non-tribal landlords, merchants, and settlers. Land alienation and consequent tribal crises have historically led to various tribal rebellions in India, including Santhal Hul (1855-56), Munda Uprising (1899-1900) and others.

2.2 Continuities and ruptures post-Independence

Colonial experience of tribal marginalisation is central to the discussions in the Constituent Assembly. B. R. Ambedkar, Chairman of the Drafting Committee, emphasised the need for strong protective clauses in the constitution for the tribals. Jaipal Singh, also a tribal from the Constituent Assembly, argued that protective clauses were not sufficient; the tribals would need strong self-governing local institutions. The outcome of this debate was the constitutional provision.

The post-independence developmental state, however, reproduced many of the contradictions of the colonial state's policy. The Nehruvian approach of planned development, which was industrialisation-oriented with building dams and extracting mines, caused large-scale tribal displacements. Walter Fernandes and Enakshi Ganguly Thukral estimated that development-induced displacement displaced 15-20 million between 1947 and 1990, of whom tribals constitute a disproportionately high percentage despite being 8 per cent of the population (Fernandes, 2004)[264].

Bhuriya Committee Report (1994)[265] on the extension of Panchayati Raj to tribal areas led to the enactment of PESA. The Committee noted that extension of the standard Panchayati Raj institutions (as recommended by the 73rd Constitutional Amendment) to tribal areas would not be sufficient for tribals' self-governance because they failed to recognise the tribal customary forms of governance. Their recommendations of expanding the powers of the Gram Sabha in control of local resources, land and settlement of local disputes were incorporated in the PESA, but their power was attenuated[266].

3. CONSTITUTIONAL MECHANISM OF TRIBAL ADMINISTRATION

3.1 Conceptual Provisions

The Constitution of India has provided one detailed and multi-dimensional machinery for the administration and protection of tribals which are, Fundamental Rights, Directive

[261] Virginius Xaxa, *State,* Society, and Tribes: Issues in Post-Colonial India *(Pearson Education 2008).*
[262] The Indian Forest Act, No. 16 of 1927, India Code (1927).
[263] Ramachandra Guha, The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya (Oxford University Press 1989
[264] Walter Fernandes, Development-Induced Displacement: The Class and Gender Perspective, in Samar Bosu Mullick (ed.), Paternalism and Prejudice: Adivasis in India 78, 78–80 (Human Rights Law Network 2004).
[265] Bhuria Committee Report (1994) on Panchayati Raj in Scheduled Areas.
[266] Report of the Committee on Extension of Panchayati Raj to the Scheduled Areas (Bhuria Committee) (Ministry of Panchayati Raj, Government of India 1994) paras. 2.1–2.6.

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Principles of State policy, Protective and Special Schedule Provisions. Article 244 explains how the tribal administration functions. The structure of tribal administration in India has been explained by Article 244. It reads as, The Fifth Schedule should be in operation to the administration; The provisions of the Fifth Schedule shall apply to the administration and control of Scheduled Areas in other states barring Assam, and the Sixth Schedule shall apply to the administration of tribal areas in Assam, Meghalaya, Tripura and Mizoram.

4. THE FIFTH SCHEDULE: A PROTECTIVE ADMINISTRATION OR A SUBSTANTIVE AUTONOMY?

4.1 Applicability and Institutional Setup

The Fifth Schedule applies to the Scheduled Areas of ten states: Andhra Pradesh, Telangana, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, and Rajasthan. Scheduled Areas that support a large section of India's tribal population are also known to possess considerable mineral and forest wealth and are sites of development-related contention. The structure of the Fifth Schedule in the Constitution involves three institutions. These institutions are the Governor's powers, the Tribal Advisory Council and the application of laws in the Scheduled Areas.

Under the Fifth Schedule, the governor of a Scheduled Area is vested with significant discretionary powers. According to the provision in paragraph 5, the Governor may direct that an Act of Parliament or of the State legislature shall not apply to a Scheduled area or shall apply with such exceptions and modifications. On the face, it presents as a potential mechanism to shield tribal communities against unfavourable legislation, but as has been established, in reality, the governor in India hardly exercises this discretion in the form of substantially protective measures by going against the position held by the state governments, which generally consider a development-centred approach over protection-centred tribal rights (Upadhyay, 2009)[267].

4.2 Tribal Advisory Councils

Under clause 4 of the Fifth Schedule, 'there shall be a Tribal Advisory Council to be constituted in every State having Scheduled Areas'. Clause 4 of the Fifth Schedule requires that a Tribal Advisory Council (TAC) shall be set up in every state having Scheduled Areas. The Council shall consist of not more than twenty members of whom at least three-fourths shall be members belonging to the Scheduled Tribes in the Legislative Assembly of the state. The TAC shall advise on any matter referred to it by the Governor relating to the welfare and advancement of Scheduled Tribes.

The essentially advisory role is the most crucial constraint for the TAC. A TAC has neither legislative power nor executive power. It does not have the binding power of enforcement upon the state, and its advice can be ignored (as it is in most cases). Unlike the District Councils provided for in the Sixth Schedule, the TACs have not been endowed with the control of land, natural resources or local dispute resolution. It stands merely as a consultative body, rather than an institution for governance. Moreover, its nature as a council composed of representatives drawn from elected legislative members (and not necessarily the traditional leadership of tribes) limits its representativeness, too.

Studies analysing the functioning of TACs in Fifth Schedule states are largely critical of their performance. Works from Jharkhand, Odisha, and Madhya Pradesh show that TACs rarely meet, function with weak administrative support and have little real influence over state policies concerning tribal areas (Bijoy, 2012)[268]. The structural insignificance of the TAC is a testament to the basic principles underlying the

[267] Report of the Committee on Extension of Panchayati Raj to the Scheduled Areas (Bhuria Comm.) (Min. of Rural Dev., Gov't of India Jan. 1995) paras. 2.1–2.6.
[268] C.R. Bijoy, India: Adivasis and the Law (Ctr. for Sci. & Env't 2012).

Fifth Schedule, of protection from above instead of autonomy from below.

4.3 The Protective Potential of the Fifth Schedule after the Samata Judgment

The most significant judicial foray into the provisions of the Fifth Schedule was in the landmark decision of Samatha v. State of Andhra Pradesh (1997)[269]. In this case, the Supreme Court, through a five-judge constitutional bench, was called upon to rule upon the constitutional validity of lease arrangements pertaining to tribal land in Scheduled Areas to non-tribal mining corporations. In an epoch-making ruling, the Supreme Court held that no transfer of tribal land in Scheduled Areas to non-tribal persons or corporate entities for any purpose whatsoever, including for mining operations, would be valid. More importantly, it was held that Paragraph 5 of the Fifth Schedule contained an obligation on the Governor's part to protect tribals, not simply a permissive, discretionary protective power.

Samatha can be regarded as the zenith of the judicial enhancement of the Fifth Schedule's potential as a protective instrument. But the implementation of Samatha faced significant push back from the state governments and was further complicated by subsequent legislative moves to circumvent Samatha through government companies for mining in scheduled areas, on the logic that a transfer to a government company is not a transfer to a private non-tribal entity. Samatha clearly demonstrates the sheer latent protective potential of the Fifth Schedule as a judicial interpretative enterprise, while at the same time highlighting the limitations of that enterprise due to systemic political and economic resistance to that interpretation.

4.4 Critical Evaluation

The main limitation of the Fifth Schedule is its paternalistic framework. The tribal people themselves or their representatives do not have power under the Fifth Schedule; rather, it is exercised by the Governor and the state government in the name of tribal people. This feature has originated from the colonial framework, where tribal areas were designated 'excluded' and 'partially excluded' under the Government of India Act 1935, and administered by the British in the capacity of protectors but under the authoritarian framework.

Consequently, tribes in tribal areas are treated not as active participants of their administration, but as subject matters to the protection being provided, and have no direct constitutional presence in the administration of Scheduled Areas under the Fifth Schedule. The constitutionally created institution, TAC (Tribal Advisory Council) for tribal consultation is only advisory in nature and its composition is not representative of all the tribes. However, the powers of the Governor as protector remain unused and the state government effectively overrides it.

Reform of the Fifth Schedule therefore should be seen not only as 'enforcement of the existing provisions', but rather a paradigm shift in its governing ideology. Provision for elected autonomous councils with legislative and executive power over their natural resources such as land, forest, etc. The Sixth Schedule would constitute the most significant structural reform.

5. THE SIXTH SCHEDULE: ORGANISATIONAL AUTONOMY AND ITS LIMITATIONS

5.1 Organisational framework

The Sixth schedule to the Constitution applies to certain areas in the tribal inhabited parts of the states of Assam, Meghalaya, Tripura and Mizoram and envisages a much deeper and organisationally differentiated model of tribal autonomy than that outlined in the Fifth schedule. Under this schedule, Autonomous District Councils and Autonomous Regional Councils (in districts with more than one tribal community) are to be constituted.

[269] Samatha v. State of Andhra Pradesh, (1997) 8 SCC 191.

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The legislative powers given to the District Councils cover many subjects that directly relate to the life of the tribals and their own governance, namely, the management of forests (other than reserved forests), the allotment, occupation or use or occupation of land, the management of village areas and the grant of licenses therefore; the management of village administration, the institution of village courts and the law applicable to the trial of suits by village courts; inheritance of property, marriage and divorce according to tribal custom, money-lending. Though legislation on many of these subjects requires the assent of the governor, the initiation of the legislation must come from the District Council and not from the state government.

Executive powers vested with the District Councils are generally proportional to the legislative powers of ADCs, which also include their role in establishing and administering institutions and agencies, as also in the provision of primary and secondary education, health and welfare activities, roads and waterways within the district, regulated markets, etc. Village courts and District Councils Courts are empowered under the sixth schedule to deal with cases, both criminal and civil, of certain types, between tribes, and to be administered in accordance with the customary tribal law.

5.2 The Representative Character of electoral accountability and legitimate governance

The District Councils, unlike the nominated TACs (Fifth Schedule), are not administrative institutions. 'All, save at least four members appointed by the Governor from among representatives of recognised tribes' (max. 46 members each), can be 'directly elected from adult franchise' and these elected institutions may carry a greater representational legitimacy which the appointed TACs could not generate and can hence act as 'real form of governance' instead of 'purely consultative bodies'

The electoral accountability of District Councils could have meaningful implications for good governance. If Council members have to be accountable to the tribal voters, they will have an institutional incentive to articulate tribal interests in matters of land, forests and cultural governance. The actual working of the Councils, as discussed in Meghalaya and Mizoram, is found to be different and varying across different councils and in different time frames. Yet the institutional accountability of the District Councils due to elections is likely to result in greater responsiveness and better governance compared to the bureaucratic model in the Fifth Schedule.

5.3 Constraints: Financial Dependence and Governor's Control

In spite of their institutional strength, District Councils under the Sixth Schedule face significant structural weaknesses. Chief among them is their financial dependence on the state government. While the taxing powers of the Councils are constitutionally granted, in practice, because the income level and the economic base of tribal regions are weak, Councils primarily rely on the grants from the state and central governments. In essence, a structural hold has been created on policy decisions of the Councils through the grants mechanism, which has led to fiscal dependence on the state government.

The Governor also wields considerable power over Sixth Schedule institutions. If the Governor finds that the administration of the district cannot be carried on in accordance with the provisions of the Schedule, he may dissolve a district council and assume all its functions. The Governor's consent is required for important acts of legislation. The use of these checks by the Governor has undermined the functioning of the tribal autonomous institutions rather than strengthening them.

The state governments have also indulged in jurisdictional encroachment upon matters within the jurisdiction of District Councils, and state agencies have been allowed to operate within the Council jurisdictions and extend state governance into the sphere of forest

management, which has hitherto belonged to the Councils. The overall ambiguity that exists regarding the delineation of spheres between Councils and state governments under the Sixth Schedule is manifested through these attempts by the states.

5.4 The Sixth Schedule as a Model

Although it is flawed in several ways, the Sixth Schedule presents the most constitutionally elaborated model of tribal self-governance. Combining elected councils with legislating and executing powers, judicial discretion over tribal customary law and a mechanism for finance (even if ineffectual), it presents a form of government that more resembles real self-governance than the 'paternalistic protective' model presented in the Fifth Schedule.

The Sixth Schedule model has been advocated as a model for reform in Fifth Schedule areas, most notably for Jharkhand, and also in response to the calls for autonomy from tribal communities in the central Indian region. There exists a clear constitutional precedent for adopting such an expansion, given the malleability of the Sixth Schedule, and doing so would be a momentous step towards creating a more consistent and rights-affirming structure for tribal self-governance.

6. PESA 1996: DECENTRALISATION AND ITS DISCONTENTS.

6.1 Legislative background and aims.

The Panchayats (Extension to Scheduled Areas) Act, 1996[270], was an attempt to provide such legislation after the Bhuria Committee was appointed to examine the extension of Part IX of the Constitution (Panchayati Raj) to Scheduled Areas. The key finding of the Bhuria Committee was that the conventional system of Panchayati Raj, tailored to the needs of non-tribal rural India, and founded on concepts of individual land holdings and village administration boundaries, was incompatible with the tribal context where community ownership of land, tribal customary institutions, and forest-related means of subsistence dominated.

PESA's intention was therefore to develop an altered Panchayati Raj regime for Scheduled areas, which took into account the Gram Sabha, an assembly of all adult villagers, as the core of self-government and granted it authority over land, resources and administration. The Act was hailed by its proponents as being vital to restoring tribal people to the 'traditional position as self-governing bodies', and an attempt to undo the processes of dispossession and exclusion under tribal governance from the time of colonial rule through to the post-independence period.

6.2 Main provisions and their governance implications.

The operative parts of PESA are section 4. The provisions require that a law made to this effect for Panchayats in the Scheduled Areas shall be consistent with the customary law, social and religious practices and traditional management practices of community resources of the tribal communities. These provisions make an important normative hierarchy that places the tribal traditional institutions on a higher pedestal than the ordinary Panchayati Raj institutions. PESA recognises Gram Sabhas ownership over, and management of, minor forest produce, money-lending to members of the Scheduled Tribe, village markets and their regulation, regulation of money lending and control over acquisition of land in the Scheduled Areas and the right of consultation with respect to resettlement of Scheduled Tribe persons. Section 4(i) of PESA provides in particular that the Gram Sabha shall be consulted before acquiring land in Scheduled areas for developmental projects and before resettlement/rehabilitation of the persons affected by such development projects within the Scheduled areas. Of special significance are the provisions granting Gram Sabha rights over ownership and management of minor forest produce, because forests and resources thereof are intrinsically linked to the livelihoods of

[270] The Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, India Code (1996).

tribals. Minor forest produce – bamboos, tendu leaves,mahua, lac, medicinal plants, etc., are one of the main sources of income for tribal families in most Scheduled Areas. Giving rights over ownership and control over these resources to the Gram Sabha was seen as a way of addressing the injustices wrought upon tribal communities as a consequence of land and forest regulations of the colonial and post-colonial periods.

6.3 Consultation Vs Consent conundrum

Probably the most controversial limit to PESA is its use of 'consultation' rather than 'consent' in provisions on land acquisition, displacement and project approvals in Scheduled Areas. According to Section 4 (i), Gram Sabha is required to be consulted before any land acquisition for a development project. Gram Sabha's opinion is not binding on the acquiring authority.

There are very significant practical implications for this distinction. Consultation creates an obligation in terms of process - an acquiring authority will have to hold meetings and obtain views from the Gram Sabha. However, this obligation leaves the final decision to the State. A requirement of consent, on the other hand, would give a veto power to the Gram Sabha to block any development project the local tribes perceive to be against their welfare and rights. The standard that has been established internationally under UNDRIP, namely, Free, Prior, Informed Consent (FPIC), demands that indigenous and tribal peoples give their Free, Prior and Informed Consent to any proposed project or policy affecting their lands, territories and resources and to their cultural integrity.

This distance between consultation and consent has proved to be a central site of tribal conflict. Courts have mostly upheld that the requirement of consultation has to be genuine and the opinion of the Gram Sabha to be taken seriously, but have not imposed an obligation for consent. Judicial position has not gone beyond an earlier approach that treated project approvals as mere administrative decisions and thus fell far short of achieving the genuine tribal autonomy envisioned by proponents of PESA.

6.4 Dilution and Implementation Failures at the State Level

PES A mandates conforming legislation by states with Scheduled Areas to implement its provisions, while allowing for modification of the Act in line with specific conditions within the states. However, the Act's empowering language has, in practice, opened avenues for states to dilute PESA rather than to strengthen the provisions therein.

Case studies of implementation of PESA in the states show a common trend of: erosion of the Gram Sabha's scope and authority, particularly concerning control over natural resources; strengthening of state bureaucracies' control over crucial decision making and development of inadequate administrative capacities for effective Gram Sabha Governance. In quite a few states, conformatory legislation was introduced only belatedly, under pressure from tribal rights organisations, and the enacted laws are far weaker than what the PESA could authorise.

In the PESA rules of Rajasthan, minor forest product owners' rights were granted to the Gram Panchayats (and not Gram Sabhas as warranted by PESA). The rules in Odisha restricted Gram Sabha powers related to land acquisition, in a manner not provided for in PESA. The states of Andhra Pradesh and Telangana have also come under sharp criticism for the inconsistent application of PESA and for allowing large-scale mining projects in the Scheduled areas, without real Gram Sabha consent.

Legislative dilutions are compounded by institutional constraints like the very limited capacity of the Gram Sabha for self - governance, a lack of awareness of legal entitlements among tribal communities about their rights under PESA, dependency of village-level institutions on the blocks and districts, and

the active opposition of state bureaucracy and corporate interest against genuine tribal control over resources.

7. THE FOREST RIGHTS ACT, 2006: CORRECTIVE JUSTICE and GOVERNANCE.

7.1 Background and legislative intent

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) has been justified as an attempt at 'corrective justice' in response to the 'historical injustice' inflicted upon the tribal populations due to colonial forestry policy. Indeed, the recognition in the legislation of the historical displacement of the tribes is remarkable; it is not very often that the legislature, acknowledging the state's complicity, undertakes measures to repair.

The law defines two categories of rights: individual forest rights, including the right of occupation and cultivation of forest land that has been in occupation of an individual member of the Scheduled Tribe or Other Traditional Forest Dweller on or before 13 December, 2005, and community forest rights, including the right over any community forest resource, community tenure of habitat and habitation, the rights to protect, regenerate and manage community forest resources and the right of nomadic and pastoral communities.

Perhaps the most significant of the individual forest rights and community forest resource rights stipulated in the FRA is community forest resource rights (3(1)(i)), which allows Gram Sabhas the right to protect, regenerate, and manage community forest resources, and thus establish a rival framework to the top-down 'fortress conservation' principles of the Forest Department.

7.2 The Record of Implementation and the Resistance of Administration

Although its legislative success has been immense, the record of implementation of the FRA has been abysmal. Ministry of Tribal Affairs data[271] continually documents exceedingly high numbers of claims (both individual and community) being rejected, and, in certain states, the number of rejected claims has been as high as 60% of claims filed. Reasons are often technical/procedural in nature (wrong form, not enough signatures, no accompanying documentation) and not substantive, indicating that the rejections are a result of bureaucratic resistance rather than lack of entitlement.

Community Forest Rights, which may arguably be the most enabling category of rights under the FRA, have fared even worse than individual rights claims. The Gram Sabhas in most of the states had not been informed of their right to submit a claim of rights, and administrative machinery for these claims is poorly developed. The Forest Department, opposed on principle to recognising tribal forest rights, has been recorded to have tried to stall the Act, for example, by coercing the village level committees to withdraw claims or to submit negative recommendations without assessment of the actual rights.

Moreover, FRA has given rise to conflicts in jurisdiction with conservation laws and policies. The Wildlife Protection Act 1972 and Forest Conservation Act 1980 have created parallel bodies of governance that have been employed by the Forest Department in opposing the rights of tribes. The shocking Supreme Court order in 2019 to evict all rejected claimants (later stayed) underscored the vulnerability of tribal forest dwellers in the realm of parallel and competing legal provisions.

8. JUDICIAL INTERPRETATION OF TRIBAL RIGHTS.

8.1 The position of the Supreme Court in tribal jurisprudence.

The Supreme Court of India has, for decades, developed a large corpus of tribal jurisprudence, which has substantively contributed to giving content to the constitutional guarantees. The jurisprudence is

[271] Ministry of Tribal Affairs, Government of India, Reports on implementation of the Forest Rights Act, 2006.

characterised by notable accomplishments as well as shortcomings, and it has an ambiguous connection to outcomes on the ground.

8.2 Samatha v. State of Andhra Pradesh (1997)[272]

The Samatha case stands as the foundation case on Fifth Schedule matters. It arose from a writ petition challenging the leasing of mining rights in the Scheduled Areas to private non-tribal companies. In a 2-1 decision, the Supreme Court ruled that transfers of tribal land in Scheduled Areas to non-tribals were not permissible under the AP Scheduled Areas Land Transfer Regulation, whether for industrial or mining purposes, and such transfers frustrated the constitutional goal of the Fifth Schedule.

The majority judgment, in which K. Ramaswamy J was the author, took this argument even further. It posited that the Fifth Schedule created a trust duty on the state to conserve tribal land and argued that where any mining takes place in Scheduled Areas, it should be shared among tribal communities. For permitted mining in the Scheduled Areas via a Government company, the court mandated that 20% of net profits were to be set aside for the development of tribal lands and for creating facilities therein. This reinterpretation that the Fifth Schedule should operate as more than merely a restraint on the transfer of land to non-tribals, but as an affirmative duty to govern the scheduled areas, was a leap forward in conceptual terms. Unfortunately, the Samatha decision has faced disappointing enforcement and has not prevented state governments, such as those in AP and Odisha, from bypassing it via other mechanisms (such as using a Govt Corporation as a proxy), and from not fully implementing its dicta in spirit. The central government has been inconsistent in this, and the Mines and Minerals (Development and Regulation) Amendment Act, 2015 and others have been accused of putting into place new mechanisms, which undo the holdings of the Samatha case.

[272] Samatha v. State of Andhra Pradesh, (1997) 8 SCC 191.

8.3 Orissa Mining Corporation v. Ministry of Environment and Forests (2013)[273]

While ruling out the advisory opinion of the Ministry, it essentially held that tribal people now have a veto power with respect to particular kinds of projects, particularly those affecting their sacred places and their religious and cultural beliefs. This decision has unfortunately not been followed in other cases, and subsequent decisions regarding mining in the tribal areas have not sufficiently respected the Niyamgiri judgment. Of special importance in this case is the fact that the judgment acknowledges the cultural and religious aspect of tribal rights and necessitates Gram Sabha consultation in the decision-making process.

The Court held that Gram Sabhas in the twelve affected villages should be convened to decide as to whether the proposed mining activity would infringe upon their religious and cultural rights under sections 5 and 6 of the FRA, and if the said area was a habitat of theirs. The Court also found that the opinion of the Gram Sabha in this regard would be final and binding upon the Ministry. After the summoning of the Gram Sabhas, twelve of them believed that the proposed mining would affect them and not proceed with it. The Ministry was therefore obliged to reject the grant of environmental clearance.

8.4 Nandini Sundar v. State of Chhattisgarh (2011)[274]

This case involves a situation that was born out of the Naxalite war that has gripped Chhattisgarh; it concerns the State's use of its obligation to equip tribal youth to form a paramilitary (Salwa Judum), for the purpose of combating Maoists. The Supreme Court held that while the state has an obligation to protect tribals, the former should not be equipped and armed by the State, and employed in counter-insurgency activities, thereby subjecting them to retributions from the Maoist forces, as well as

[273] Orissa Mining Corporation v Ministry of Environment and Forests (2013) 6 SCC 476.
[274] Nandini Sundar v. State of Chhattisgarh (2011)

from the security forces. The significance of the case in tribal governance is in its acknowledgement and engagement of the intersection between tribal self -governance, state violence and armed conflict. The court recognises that tribal people are not meant to be protected by the State alone, but protection from the State too, which is significant from a tribal rights perspective. It goes beyond the discourse on land and resources and addresses physical protection and freedom from State-Sponsored violence.

8.5 Assessment of judicial impact

It is safe to conclude that the trajectory of tribal rights jurisprudence in the Supreme Court has been positive in developing doctrinal jurisprudence. The judges have steadily enhanced the substantive aspect of Fifth Schedule rights, acknowledged Gram Sabha powers under PESA and FRA, developed the cultural and religious rights for tribal communities, etc. However, the gap between judicial pronouncements and the ground realities appears to be quite significant.

The reasons contributing to this gap between judicial verdict and ground-level situation are numerous:

(1) The limited access of tribal people to legal and other assistance and to resources and prolonged litigations, which is essential in these cases.

(2) The involvement of complex constitutional law in these cases makes the use of the judiciary to solve them long and resource-consuming.

(3) The legal capabilities of state and corporate powers involved are quite robust and are used for challenging and diluting judgments that may not be favourable to them.

(4) A sustained state administration machinery will be required to implement judicial decisions in tribal governance cases, and such machinery might not be forthcoming from the state.

(5) The fragmented nature of tribal rights as dispersed between the constitution, laws (both state and central) and custom leads to coordination issues which the judiciary cannot tackle.

9. INTERNATIONAL STANDARDS AND INDIA'S OBLIGATIONS

9.1 The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[275]

Crucially for this analysis, FPIC's demands that states, as required by their international commitments, should cooperate and consult in good faith with indigenous peoples through their representative institutions to elicit their free, prior and informed consent to the adoption and implementation of laws and regulations and administrative measures that may affect them. The document is arranged in six parts; the first is on the rights to Self -determination, Collective rights, Administration of justice, Cultural rights, development rights, and right to lands, territories and resources respectively, the right to self -determination for indigenous people is defined by Article 3 as '...shall freely determine their political status and freely pursue their economic, social and cultural development.'. According to Article 4, 'Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs', the Declaration proceeds to define indigenous peoples' right to lands, territories and resources (Articles 25-30) imposing obligations on recognising ownership rights therein

9.2 ILO Convention 169[276]

India has not ratified Convention 169; hence, it has limited direct enforceability in the Indian legal framework. Nevertheless, the provisions of Convention 169-including mandatory consultation in good faith with indigenous peoples on matters affecting them, recognition of indigenous land rights and respect for indigenous customary laws- constitute

[275] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.
[276] ILO Convention No. 169 on Indigenous and Tribal Peoples, 1989.

International good practice standards, to which India's system of tribal governance can be usefully measured.

A significant difference exists between the standards set in the Convention 169 and India's domestic framework. Convention 169 makes it mandatory to consult 'to achieve agreement or consent', this being a higher threshold than that established by PESA for consultations. It necessitates recognising and protecting indigenous peoples' ownership and possession rights over lands which have traditionally been occupied by them. This is an aspect where the FRA has been partially successful. And it necessitates the governments to take measures to ensure that members of indigenous peoples can understand and be understood in legal proceedings (the problem that tribal people face with a linguistic barrier in asserting legal rights).

10. SUGGESTIONS FOR REFORM

Recommendations for the reform of tribal governance in India:

a) Constitutional Amendment to the Fifth Schedule: Fifth Schedule to be amended for the establishment of elected autonomous councils with legislative and executive powers to govern lands, forests, minor mineral resources, local dispute resolution, in scheduled areas, like District Councils under the Sixth Schedule.

b) FPIC standard under PESA: Section 4(i) of PESA is to be amended for the substitution of consultation with consent principle, as under the FPIC principle of UNDRIP, mandating free prior and informed consent of the Gram Sabha to the development projects in scheduled areas.

c) Enforcement Mechanism for PESA: There should be an independent enforcement mechanism, modelled on the Election Commission for the Central Government, to monitor state compliance with PESA, investigate complaints about the violations of PESA and report to Parliament with its recommendations for suitable measures.

d) Implementation of FRA: The government must institute a time-bound program for all-around implementation of FRA, including resurvey of all rejected claims, constitution of independent claims verification committees with representation of members of the tribal communities, and community forest rights in all eligible areas.

e) Legal Awareness and Capacity Building: Central and state governments need to take significant measures for bringing in awareness through legal awareness programmes focusing on the constitutional rights of tribals under the Fifth and Sixth Schedules, PESA, the FRA and other applicable laws; and building up the capacities of the Gram Sabha and the District Council as institutions of governance.

f) Ratification of ILO Convention No. 169: India must take steps to ratify the ILO Convention No. 169 to bring itself under obligation in relation to international standards regarding rights of indigenous and tribal peoples and thus strengthen the Indian domestic legal regime on tribal governance.

11. CONCLUSION

The constitutional framework for tribal self-rule in India is ambitious but pragmatically weak. The multi-tier system of protective rights, special schedules, and decentralised governance mechanisms enshrined in the Indian constitution marks a deep understanding and concern for the plight of the tribal peoples of India. Key legislation, such as the PESA Act and the Forest Rights Act, further attempts to put into practice these constitutional concerns and transfer real powers to tribal people and their institutions.

However, this paper concludes that there exists an alarming disconnect between the aspirations of the Indian Constitution and its implementation on the ground. While the Fifth Schedule claims to protect the tribal people, the model of governance introduced there restricts self-rule rather than imparting autonomy to them. The provisions of the PESA Act have systematically been undermined by state-level dilution, bureaucratic inertia and inadequate

capacity building. The corrective justice project of the FRA has been impeded by the same state agencies whose power the act was supposed to check. Judicial intervention in this issue, although legally substantial, has not been able to effectively influence governance changes.

The central assertion of this paper is that if tribal self-rule in India is to become a reality, then it needs to be a structural rather than implementational process. This requires a re-conceptualisation of the Fifth Schedule, from protection to a self-governance regime; strengthening the consent clause of PESA; robust, efficient and comprehensive implementation of FRA; and bringing Indian tribal governance in line with international standards, such as the principles of FPIC enunciated in the UNDRIP.

In essence, the question of tribal self-rule in India is not an issue of legal or administrative expertise. Rather, it is an issue concerning the nature of Indian democracy. India must transform itself into a democracy that recognises tribal people as rights-based political entities that have inherent rights of governance and determining their own destiny, and not merely as the objects of a caring and benevolent State. India, which is committed to social, economic and political justice, cannot help but be an India that extends political justice to its tribal citizens.

REFERENCES

I. BOOKS

Sanjib Baruah, India Against Itself: Assam and the Politics of Nationality (Univ. of Pa. Press 1999).

C.R. Bijoy, India: Adivasis and the Law (Ctr. for Sci. & Env't 2012).

A.K. Nongkynrih, Khasi Society of Meghalaya: A Sociological Understanding (Indus Publ'g 2002).

K.S. Singh, Birsa Munda and His Movement 1874–1901: A Study of a Millenarian Movement in Jharkhand (Oxford Univ. Press 1983).

Virginius Xaxa, State, Society and Tribes: Issues in Post-Colonial India (Pearson 2008).

II. STATUTES / LEGISLATION

Constitution of India (1950).

Forest Conservation Act, No. 69 of 1980, India Code (1980).

Indian Forest Act, No. 16 of 1927, India Code (1927).

Mines and Minerals (Development and Regulation) Amendment Act, No. 10 of 2015, India Code (2015).

Panchayats (Extension to Scheduled Areas) Act, No. 40 of 1996, India Code (1996).

Scheduled Districts Act, No. 14 of 1874 (India).

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007, India Code (2006).

Wildlife (Protection) Act, No. 53 of 1972, India Code (1972).

III. JOURNAL /ARTICLES

André Béteille, *The Concept of Tribe with Special Reference to India*, 27(2) *Eur. J. Soc.* 297 (1986).

Walter Fernandes, *Rehabilitation Policy for the Displaced*, 39(12) *Econ. & Pol. Wkly.* 1191 (2004).

Ranajit Guha, *The Prose of Counter-Insurgency, in Subaltern Studies II* 1 (1983).

C. Upadhyay, *Contesting Development: Coalfield Social Movement in Jharkhand*, 39(3) *J. Contemp. Asia* 453 (2009).

Virginius Xaxa, *Tribes as Indigenous People of India*, 34(51) *Econ. & Pol. Wkly.* 3589 (1999).

IV. CASES

Nandini Sundar v. State of Chhattisgarh, (2011) 7 SCC 547.

Orissa Mining Corp. Ltd. v. Ministry of Env't & Forests, (2013) 6 SCC 476.

Samatha v. State of Andhra Pradesh, (1997) 8 SCC. 191.

V. GOVERNMENT REPORTS / OFFICIAL DOCUMENTS

Office of the Registrar Gen. & Census Comm'r, India, Primary Census Abstract: Scheduled Tribes (2011).

Ministry of Tribal Affairs, Annual Report 2020–21 (2021).

Nat'l Comm'n for Scheduled Tribes, Annual Report 2019–20 (2020).

Gov't of India, Report of the Expert Committee

on Panchayati Raj Institutions in Tribal Areas (Bhuria Committee Report) (1994).

VI. **PARLIAMENTARY DOCUMENTS**

Constituent Assembly Debates, vol. IX (1949).

VII. **INTERNATIONAL MATERIALS**

G.A. Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples* (Sept. 13, 2007).