

Tribes right and fifth schedule of the Constitution of India

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ABSTRACT

India is a unique country, having varieties of cultures, cast, creed, colours and races, and all groups practicing a specific tradition. Here I would like to discuss about the specific race known as Adivasi or tribe, they are considered as indigenous people of India, who inhabited the country at the time of conquest and their social, cultural and economic condition are different from other sections of the Community. As per the census report of 2011 the tribes' population is 8.60 percent in India, which is approx 10.45 Crore. In India Adivasi society is prominent in in Andhra Pradesh, Chhattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Maharashtra, Orissa, West Bengal, some North Eastern states and Andaman and Nicobar Islands. Most of the tribes are concentrated in forest areas and they have inaccessibility with limited political for economic significance. The economy of most of the tribes are based on agriculture, hunting and gathering. Now industrialisation and deforestation deeply affected their livelihood. In India Adivasi is considered as a marginalised and neglected class. Still they are not with the main stream and Adivasi community is suffering from poverty, malnutrition, food insecurity, ill health etc and they are far away from the development.

The Tribe society is considered as a minority class, refers to category of the people who experience relative disadvantages as compared to two members of dominant social group. In India, still more than 90% scheduled tribe population live in rural area. The condition of schedule tribes are still pathetic, they are treated as untouchable/slave as well as illiteracy is dominating in the tribal society. The society still feels insecure. Tribes are by nature innocent, they don't have idea of cunningness of general people, as well as due to illiteracy and non-communication with the common people, they could not able to understand the thing in the right manner, that's why the Indian laws in some extent consider the Adivasi people just like minor or idiot person, that's why special protection has been given under the Constitution of India to the Adivasi.

The constitution of India has given a special status to the schedule tribes, and so many specific provision has been made for them under the Constitution for their safeguard and development. So that their life, limb and culture of the Adivasi could be protected. The objective of the Constitution is written in its preamble and as per preamble India is a socialist country, it means the Constitution will prevent the concentration of wealth in too few hands. Further Constitution gives Liberty of thought, expression, belief, faith and worship along with equality of status and opportunity to promote all. In this pursuance the Fundamental Rights and Directive Principle of the State Policy plays an important role in our Constitution.

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Constitutional Protection to the Tribes

In Constitution of India, in order to satisfy the objective of the Preamble, there are various specific provisions has been made for the protection of schedule tribes, so that their lifestyle could be upgraded. Article 330 of the Constitution provide a specific reservation of seats for schedule tribe in Lok Sabha and Article 337, reservation of schedule tribe in Legislative Assembly. There is a special provision in respect of reservation of seats in Panchayat elections as well. Articles 14, 15, 16 and Article 335, 320; it gives a special protection to the scheduled tribes in the Government employment. As per article 19 (5) the government can make a special provision in order to provide safeguard to the tribal interest, that acquisition and the possession of the property in India may be restricted in tribal areas by the non tribal. Under Article 23 human trafficking is strictly prohibited for forced labour or any other purposes. So far cultural and educational rights of minority group like scheduled tribes is concerned that, the State cannot impose upon them any culture other than the community, in view of Article 29 of the Constitution of India. Article 164 talks about minister in charge of tribal welfare in the state of Madhya Pradesh, Chhattisgarh, Orissa and Jharkhand; in which, a substantial tribal population is resides. The Minister will looking after tribal welfare only. It is an evidence that framers of the Constitution where well alert for the safeguard of the interest of Scheduled Tribes. Government of India has made special enactment in order to empowerment of schedule tribes, the provision of Panchayati Raj Act 1996 and Minor Forest Produce Act 2005, with view of social and economic development of schedule tribes. Again the land acquisition, rehabilitation and resettlement Act, 2013 which is protecting the interest of schedule tribes in case of displacement. The government is also making provision for providing

special schemes to enable access to opportunity, including scholarship for education and skill building for setting up enterprises. There is a specific policy has been made by the various States of India for reservation in job and a special Court to redress instances of atrocities and violence against the scheduled tribes. Prevention of Atrocities (SC and ST) Act, 1989 is especially meant for prevention of atrocities against the Schedule Caste and Scheduled Tribes. Further the government is making a special strategy for development of schedule tribes by providing various facilities like Gas stove, Pakka Makan, Electricity, Water facility, Road, Medical facilities, construction of toilets for the purposes of sanitation etc.

Fifth Schedule and Rights of Tribal

Under the constitution of India, there are various schedules, which is one of the important parts of the Constitution. The schedules categorised and tabulated, bureaucratic activities of the Government. In Indian Constitution there are 12 schedules. Normally the schedules are mentioned as a table which contain additional details, which is not mentioned in the particular Article. Here article 244 and 244- A of the Constitution talks about the specific provisions for or schedule tribe area. The provision relating to administration and Control of the scheduled area and Scheduled Tribes in the States other than Assam, Meghalaya, Tripura and Mizoram. Fifth schedule provides the executive power of the state extended to the scheduled areas. Under the fifth schedule the Governor of the State has given special responsibility regarding in such areas. He is required to make a report to the President of India annually regarding the administration of these areas. The executive power of the Union shall extend to give the direction to the state regarding the administration of the said areas. The article 244 will always read with fifth schedule.

As per the fifth schedule, there would be a tribal advisory Council in each State in scheduled area consisting not more than 20 members as representative of the scheduled tribes in Legislative Assembly. The council is established for schedule tribes in the state which will advice on matter pertaining to the Welfare and advancement of the scheduled tribe, in the area refers to them by the Governor. So far Article 244 A is concerned, it's empower to Parliament to form an autonomous State comprising certain tribal areas in Assam and create local legislature or Council of Ministers of State. It may, by law lay down the Constitutional power and function of legislative and council of minister in such law as referred in the Article will not be deemed to be an amendment of the Constitution for the purposes of Article 368, notwithstanding that it is contended in any provision which are meant for amend the Constitution. As per the Constitutional provision under Article 244 (1) of the Constitution the schedule area define, as such area as the President of India may by order or notification declared to be scheduled area.

The specification of Scheduled area in relations to the State by notified order of the President after consultation with the Governor of the state. The president it may increase the area of Scheduled area in a state, after consultation with Governor of the state and make such order re-defining the areas which are to be scheduled area. In same manner in case of any alteration increasing, decreasing or incorporating of a new area or any order relating to schedule area may declared in the State of Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odissa and Rajasthan. It means the Governors with approval of President of India may make special law or policies for the Welfare of scheduled tribes under this scheme.

Criteria for Declaring Scheduled Area under the Fifth Schedule

Basic criteria for declaring scheduled area under the fifth schedule are the tribal population compactness and reasonable size of the area of Administrative entry such as district, block, economic backwardness of the area as compared to the neighbouring area etc. Constitution of India has not given a specific criteria for declaring to a particular area as a scheduled area. Although it would be decided only by notification of the President of India. The main purpose of declaring an area as a scheduled area is for the preservation of the tribal autonomy, their culture economy empowerment, to ensure social economic and political justice and preservation of peace and good governance. In another word it may say that fifth schedule gives right to frame a Constitution within a Constitution for the welfare of tribes which would be valid.

Basic Reasons for Incorporating Fifth Schedule are as follows:

1. The tribal people could able to develop along with the line of their own genius and we should avoid imposing anything on them which they dislike. We should always try to encourage everywhere there own traditional art and culture.
2. The rights of tribal to land and forest should be respected.
3. Through this schedule we are trying to train and build up a team of their own people to do the work of Administration and development some technical Personnel from outside will no doubt be needed especially in the beginning. But we should avoid introducing too many outsider into tribal territory.
4. We should not over administrator these areas or help them with a multiplicity of a scheme. We should rather Work through their own social and cultural institutions.

5. We should judge result, not by statistics of or amount of money spent but by quality of human character.

Accordingly scheduled area should be understood through the Panchayati Raj system only. The Panchayats get Constitutional status in 1993 with the 73rd amendment to the Constitution. The amendment introduces the specific provision for the setting up of Panchayat across the country in rural areas. For better understanding of the fifth schedule, it is necessary to look into the specific role of Governor and Tribal Advisory Council of a particular State.

Role of the Governor under Fifth schedule

The Governor of the State is exercise all his power as per the advice of Council of Ministers of the elected State Government. Here in case of fifth schedule the power conferred upon the Governor by the fifth schedule, can exercise without explicitly sanctions from the State Government and he is in fact Bond by Advice of Central Government. The Governor is not bound by the advice of Council of Minister and he will exercise the function independently as it is confirmed by the various courts in various judgements. In case of *B.K.Manish and other versus State of Chhattisgarh*, (LAWS(CHH)-2013-3-17; the Court held that the Governor has power to make rules and appoint members for Tribal Advisor Council and mode for selection of Tribal Advisory Council. The Tribal Advisory Council rendered their advice to him as and when they would be called upon by him, never of its own.

The fifth schedule gives, the power to the Governor to restrict the applications of any central and State legislation to the State in the scheduled area either completely or subject to exceptions and modification. The power of making exceptions and modifications including the power to amend these laws.

Further it empowers the Governor to make regulations for the peace and good governance of scheduled area. The power is general in nature and terminology adopted by the Constitution is not only wide in terms of the subject matter covered, is also category clearly stated that this power is notwithstanding anything contained in the Constitution. The subject matter of law is related with the Central or State or Concurrent list contended in the seventh schedule it doesn't make any difference. It is further stated that Governor while making such regulations and repeal central or state legislation for this purpose with regard to its applications to scheduled area, must take assent from President of India.

In most of the States the Governor has made the law regarding prohibition and restrictions of transfer of land from and between schedule tribes. Almost in every State in the country of scheduled area have enacted legislation, relating to prevention/ prohibition of land transfer in scheduled area by tribal to non-tribal and in same case even the transfer of land between tribal inter-se is restricted. The Governor can make regulations of allotment of land to tribal in scheduled area. Further the Governor can make the regulations of money lending in scheduled area to tribal. Before making any law the Governor requires prior consultations with Tribal Advisory Council and the assent of the President is necessary for brought into force.

The constitutional validity of the laws, which is made under schedule Fifth has been challenged by several times, considering it violation of Fundamental Rights to Equality under Article 14, right to life and livelihood under Article 21 and right to carry on the profession business or trade under Article 19 (1) (g) but this all challenges has been rejected by the Courts several times.

Role of the Tribal Advisory Council

As per fifth schedule of the Constitution, there would be a Tribal Advisory Council in each State is necessary, which has a scheduled area declared by the President of India. The Tribal Advisory Council may be established another State which have large tribe population, if the President so directs even if it is not scheduled area. The Tribal Advisory Council should not have more than 20 members in State and at least 3 /4 members must be from the elected representative (MLAs) of schedule tribe community. Further if the number of elected representatives is less than 20 then the remaining seats can be full filled with other member of tribal community. The main function of Tribal Advisory Council is to provide advice to Governor when he seeks it, on matter related to Welfare and advancement of schedule tribe in the State. The advisory council of tribes does not render advice to the Governor suo-moto but one asked him to do so. Advice is not binding upon the Governor, it is however compulsory to consult the Tribal Advisory Board before making any regulation related to governance in the scheduled area, including land alienation, land transfer and control of money lending the provision requires consultations, rather than consent. But Courts held in numerous judgement that any consultation must be meaningful and must inform the decisions making process in substance. At present ten States, viz Andhra Pradesh, Chhatishgarh, Gujrat, Himachal Pradesh, Jharkhand, Madhay Pradesh ,Maharastra, Orissa, Rajsthan and Telangana have established Tribal Advisory Council. Tamilnadu and West Bengal have also set up TAC in non-scheduled Area.

From the entire discussion it's clear that the constitution has given special status to the schedule tribes and under the fifth schedule, for the Welfare of Scheduled Tribes. In this regard the Governor

has been given special power to make the law for the Welfare of the tribal society in a particular area.

Mining Rights of Tribes in Scheduled Areas

In order to protect the culture of the tribal society and community, and proper application of fifth scheduled, the mining is the most serious threat to the tribes, in scheduled area. That's why under the national mineral Policy, it is assume that there is a need to ensure the effective application of displaced person in the name of mining and development. There is recommendation that schedule tribe should be given preference in grant the mining lease in the scheduled area. In **Samatha versus State of Andhra Pradesh (AIR 1997 SC3297)**; where the High court held that under the fifth schedule of the Constitution the Government is a person, within the meaning of Regulation and that the grant of a mining lease to non-tribal are amounted to transfer the land to non tribal, violating the provision of law and spirit of fifth schedule, hence the grant of the mining lease was held illegal. The Court ruled that henceforth the mining lease in schedule area in Andhra Pradesh shall be granted to the State Government mining company or Corporation or Cooperative of schedule tribe only not to the any private person or non Governmental Company. In this case Court recognised the 73rd amendment Act and the Andhra Pradesh Panchayata Raj (Extension to Scheduled Areas) Act, 1996. The role of Gram Shabha are most important in all circumstances in the scheduled area before leasing.

In the same manner urbanization of the scheduled area and declaring an area as urban area, there are so many restrictions has been implemented which is directly or indirectly protecting the rights of the tribes in Scheduled area to protect their culture and civilization.

Fifth Schedule and Land Alienation/Transfer in scheduled Area

The alienation of land is one of the biggest cause of deprivation of livelihood and displacement of home land of tribal is a big problem in India. In this pursuance, under the schedule fifth, tribes for enjoying their traditional and customary rights over their particular land or area recognises the traditional rights of the schedule tribes. Further in compliance of paragraph 5 of the fifth schedule most of the State have elected legislation restraining and prohibiting the transfer of a land from tribal to non tribal in scheduled area and provides rule for restoration of alienated land e.g. in Jharkhand Chotanagpur Tenancy Act, 1908; Santhal Parganas Tenancy Act, 1940; Bihar Scheduled Areas Regulation, 1969; Wilkinson's Rule, 1837 etc, is the best example. In case of **Narmada Bachao Andolan**; the Supreme Court while dealing the case it was observed that the environmental as well as social and economic activities of the tribe are fundamental right. The supreme court took note of the detailed articulations after considering the petition and held that, the rights to life under Article 21 of the Constitution read with Article 12 of the Rio convention number 107 while accepting the legal propositions that International Treaty and component can be read into domestic law the court went to the dismiss the contains of petitioners regarding the specific violations of Article 12, as follow this the said Article clearly suggest that, when the removal of the tribal population is necessary, as an exceptional measure, they shall be provided with land of quality at least equal to that the land previously occupied by them, they shall be fully compensated for any resulting loss of injury, along with the rehabilitation package. The State of Gujarat and other States promise that the land required to be allotted to the tribal will be equal to the land acquired by the Government.

Recently in the year 2006 the Government passed a law for the scheduled tribe and other

traditional forest dwellers, recognition of forest right, under the Forest Rights Act 2006. Whereby the law relating to forest and their governance has been radically transformed. The Forest Right Act has seen some dramatic success in the recent year. The transformative potential of the Forest Right Act has been noted in a recent judgement of the Supreme Court **Niyamgiri Hills Case, Orissa** in W.P(C) no. 180/2011, dtd- 18/04/2013, the rights of scheduled tribe over land and its resources has been explained. The Court held that the rights of forest dwelling schedule tribe is that, they should be consulted before using forest for commerce. For the protection and preservation of the religious and cultural rights mentioned in Article 25 of the Constitution. The court has also held that consultation and decisions of the Gram Sabha is necessary before the using the forest for commercial purposes.

Conclusion:

In view of Article 244 read with schedule fifth of the Constitution (self Government through traditional Gram Sabha and self elected village body) in conformity with the customary law and social and religious practices of the said village, they can implement self Govt. As per fifth schedule every Gram Sabha needs to provide safeguard and preservation to the traditions and Customs of the people, so that cultural identity and community resource of the said area shall not be disturb. The Gram Sabha or Panchayat at scheduled area have been given power to manage their own affairs at their own level; e.g. Land acquisition, resettlement and rehabilitation; mining lease, management of minor water bodies, regulation and restrictions of sale and consumption of liquor, management of village market, control of money lending, ownership of minor forest produce etc. These aforesaid rights under the Panchayat (Extensions to Scheduled Area) Act 1996, (PESA) which is part of

Panchayati Raj Act for implementation of Part IX of Panchayati Raj Act. The PESA which aimed at recognised tribal governance but no law can be implemented till rules are made under the PESA. Fifth scheduled of the Constitution is basically empowering Gram Sabha in scheduled area.

It is reality that due to non implementation of PESA the tribal are suffering in the Jharkhand and other states. The decisions of Supreme Court and High Courts are not being implemented in in Scheduled Areas, hence the educated tribal people feels himself being cheated.

The tribal are considered as natural persons and they are closely related with the nature; people and the Government in the name of development, are destructing natural beauty and causing pollution in the name of development. In this regard deforestation, destruction of the earth and water resources are one of the most basic problems of the scheduled area, hence there should be the specific policy for environmental protection in this area. It is very unfortunate that the beautifications, cleanness, wild animals, forest are being distracted in the name of the development, without any justification. Finally it is ruining the life of the tribal society. Considering special status of the Tribal the Constitution of India has given some privileges to this community. The fifth schedule of the Constitution has given protection to the tribal for preserving their home land and culture. For proper implementation of the provision there is need of special policy for self Government, control over resources and environmental protection. As before entry of British the tribes enjoying their rights of ownership and management over the natural resources like land, forest, river, other sources of water, wild life, fish, mining etc without any interferes of others. In the

process of development, the aforesaid rights were snatched from tribes. Further due to lack of education, displacement in the name of big projects, the tribes lost their identity and their existence. Their cultures, life style, social structure, rituals, values, source of economy are lost. The tribes are member of Indian society for protection of their interests there is need of special attention.

The real solution of the tribes in India is only tribes; they must mingle up with the new community and avoid the distance. Isolation cannot provide them any solution in modern society. As some tribes used to refuse to accept the progress which is detrimental to the society as well as to the tribes.

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