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**STATE OF TRIBAL RIGHTS IN MODERN INDIA: A Study of Tribal Laws and Issues**

*Vasundhara Sharan & Kushagra Jain*

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# STATE OF TRIBAL RIGHTS IN MODERN INDIA: A Study of Tribal Laws and Issues

*Vasundhara Sharan & Kushagra Jain\**

*[Abstract: The Indigenous and Tribal Peoples Convention, 1989, elucidate the identity, autonomy and rights of the indigenous communities, stipulates that 'Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.' Unfortunately, in India, the tribals, accounting for approximately one-twelfth of the population, have been grossly marginalized, with their rights, indigenous culture, practices and livelihood neglected and conveniently displaced. The three pillars of the country, while they substantiate to accustom themselves with the prevailing circumstances, and formulate ideal solutions to the same, the resulting drafts and rulings remain hollow letters, as has been observed since and before colonial rule. The authors, through this research paper, work towards presenting a holistic view towards the plight faced by these communities and the persisting reasons for the same.*

*Therefore, the paper seeks to review and subsequently analyse the issues and challenges the tribal communities face in degradation of their human rights in numerous and pertinent spheres. Further, the authors scrutinize the existing legal structure, its history and most importantly, its practice and application. It elucidates over the prescribed protection and safeguards and their impact on the subjects of this research. Consequently, the research flows towards the tribes of Dongria Hills and their story, which reflects a narrow window of transformation, sensitivity and change.]*

## I

### Introduction

The term 'tribe' originates from the Latin word 'tribus.' Tribes, or 'Adivasi' and refers to a group of people that bear a common name, speak a common dialect, share a common culture, occupy a common territory, and are descent from a common ancestor.<sup>1</sup> They

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\* The authors are students of 5<sup>th</sup> year of B.A.LL.B. Five-Year Integrated Programme at Symbiosis Law School, Noida. Email: sharanvasundhara@gmail.com | kushjain2000@gmail.com

<sup>1</sup> D.N. Majumdar, RACES AND CULTURES OF INDIA 151(1961).

are heavily dependent on nature and land for their livelihood. Even in the era of globalization, these communities adhere to their traditional values, customs, and beliefs.

According to the 2011 census,<sup>2</sup> 8.61% of the population consists of tribals. India has the largest tribal population in the world. Belonging to over 703 different ethnic groups, scattered over 30 States and Union Territories of India,<sup>3</sup> the 553 different tribes are home to over 80 million tribals.<sup>4</sup> They are faced with various developmental issues, such as violation of basic human rights, displacement, poverty, sanitation, education, unemployment, trafficking, etc.

The concentration of poverty among the tribal population is higher than that in both urban and rural areas. Their relative 'backwardness' is the cumulative effect of their low rank in the socio-economic and political hierarchy, lack of access to developmental measures, and insufficient participation in state institutions.<sup>5</sup> The Constitution of India has formulated multiple provisions for the welfare and upliftment of tribal communities, but even with those in place, the greatest challenge faced by the Government of India has been the proper implementations of provisions to ensure social justice to its tribal population.

Therefore, the authors assess the various facets of tribal living being disrupted and neglected, with gross human rights violations. The situation is further worsened by the legal structure and framework governing these communities, and is a key research point of this paper. However, the study reveals a recent trend of transformation, which if propelled by the right will and bodies, can lead to a change, pertinent to the tribal identity, rights and status.

## II

### Obstacles to Tribal Development

Tribes in India are geographically isolated, and follow a distinct culture. They possess primitive traits, and have minimal contact with the developing world, which makes them economically, and socially backward. They are a marginalized group, and therefore, face a plethora of social, educational, and health issues, amongst others. From a historical point of view, the tribals have been subjected to the worst of societal

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<sup>2</sup> Ministry of Home Affairs, India, *Census Info 2011* (2011) [hereinafter *Census 2011*].

<sup>3</sup> Ministry of Tribal Affairs, India, *Statistical Profile of Scheduled Tribes in India 2013* (2014) available at: <http://www.tribal.nic.in/ST/StatisticalProfileofSTs2013.pdf>.

<sup>4</sup> Purshottam, Vanita Dhingra, *Understanding the Indian tribal life and their issues*, 5(7) INT'L. J. ADV. RES. 1588, 1590 (2017).

<sup>5</sup> A. Punnaiah, *Issues and Challenges of Tribal Education: A Study of Telangana State*, 4(1) INT'L EDUCATION & RES. J. 1, 21 (2018).

exploitation. Over the years, they have remained landless, and have had little control over the resources that they're dependent on, such as the forests they inhabit. In 2011, 40.6 percent tribals were below the poverty line<sup>6</sup>. A large part of India's agricultural labour consists of the tribals, as a result of which they have low levels of education, restricted access to healthcare, and financial restraints.

### **Healthcare**

The World Health Organisation has stated that '*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.*'<sup>7</sup> A main component of development is the free-flowing access to proper healthcare. Tribals severely lack healthcare facilities, which is a gross violation of their human rights.

Health problems in tribal areas vary from endemic diseases like malaria, tuberculosis, to diseases such as malnutrition and anemia. The prevalence of chronic diseases such as hypertension and diabetes, hitherto is rising rapidly in these areas, and are becoming the main causes of death.<sup>8</sup>

In 2016, the National Family Health survey<sup>9</sup> showed that one-third of all pregnant women from tribal communities in India do not receive any type of prenatal care during their pregnancy. Majority of the deliveries take place at home, and usually in absence of a medical professional. This poses a grave threat to the health of a newborn, and could also be the reason for the high infant mortality rates in tribal areas.<sup>10</sup> Tribes are diverse groups, and while some of them have assimilated with mainstream society, most of them still follow more traditional ways of life. Their belief in age-old practices often act as a hindrance to development in and access to Maternal & Child Health facilities. The gaps between healthcare provided to tribal women and women of other communities continues to be wide.<sup>11</sup>

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<sup>6</sup> Census 2011, *supra* note 2.

<sup>7</sup> Dr Tedros Adhanom Ghebreyesus, *Health is a fundamental human right*, WORLD HEALTH ORGANIZATION (Dec. 10, 2017) available at: <https://www.who.int/news-room/commentaries/detail/health-is-a-fundamental-human-right>.

<sup>8</sup> Soumya Swaminathan, *Taking healthcare to India's remote tribes*, THE HINDU (Sep. 02, 2014) available at: <https://www.thehindu.com/opinion/op-ed/taking-healthcare-to-indias-remote-tribes/article6370400.ece>

<sup>9</sup> Ministry of Health and Family Welfare, India, *National family Health Survey*, International Institute for Population Sciences (2016) available at: <http://rchiips.org/nfhs/chapters.shtml>.

<sup>10</sup> Abhimanyu Niswade et al., *Neonatal Morbidity and Mortality in Tribal and Rural Communities in Central India*, 36(2) IND. J. COMMUNITY MED. 150,156 (2011).

<sup>11</sup> Ministry of Health and Family Welfare, India, *District Level Household and Facility Survey*, International Institute for Population Sciences (2008), available at: [http://www.rchiips.org/pdf/INDIA\\_REPORT\\_DLHS-3.pdf](http://www.rchiips.org/pdf/INDIA_REPORT_DLHS-3.pdf).

Deaths on account of underdeveloped healthcare facilities and lack of access to basic sustenance have led to public interest lawsuits, and have got the attention of many governmental and non-governmental organisations.<sup>12</sup> Malnutrition is widespread in India, with a whopping 48% of Indian children showing signs of long-term malnourishment; tribal children are disproportionately affected, with almost 53% of tribal children being malnourished.<sup>13</sup> Similar to infant mortality rates, the rates of malnutrition are also significantly higher in states with a larger tribal population.<sup>14</sup>

For the past two or three decades, tribal way of life has seen large-scale changes. This disruption and reorientation in their livelihood patterns, socio-cultural practices, and land practices brought on by assimilation is important to factor in when studying the health outcomes of tribal communities. It is imperative, thus, to contextualize when analysing tribal health indicators.

Challenges to tribal healthcare are complex and require holistic and comprehensive solutions. These issues include but are not limited to:

**Lack of Knowledge of Healthcare:** Tribal communities often rely on traditional methods for dealing with health issues, due to their underdevelopment. There is a strong reliance on Placebo and religious methods as a substitute to modern medicine. As a result, even in situations where healthcare institutions are accessible, Tribals are less likely to utilize or approach these institutions.

**Limited Paying Capacity:** Endemic poverty has been a persistent issue for tribals. Lack of monetary resources acts as a large barrier keeping them from being able to afford medication, treatments, and modern amenities.

**Inaccessibility to Medical Services:** The areas largely occupied by tribal communities are ones lacking in infrastructure. This means that hospitals, clinics, and basic services aren't readily accessible for these individuals and travelling long distances isn't always logistically or economically viable.

**Non-Availability of Healthcare Workers:** Developing countries have a chronic shortage of healthcare workers. This lack of skilled and specialized personnel disproportionately affects individuals in rural and tribal settings.

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<sup>12</sup> National Institute for Research in Tribal Health, India, *Annual Report 2008-09 (2009)*, available at: [http://www.nirth.res.in/publications/annual\\_report/annual\\_report\\_2008-09.pdf](http://www.nirth.res.in/publications/annual_report/annual_report_2008-09.pdf).

<sup>13</sup> Maitreyi B. Das, Soumya Kapoor, Denis Niketin, *A closer look at child mortality among Adivasis in India*, Policy Research Working Paper – World Bank (2011).

<sup>14</sup> World Bank, *ATTAINING THE MILLENNIUM DEVELOPMENT GOALS IN INDIA: HOW LIKELY AND WHAT WILL IT TAKE TO REDUCE INFANT MORTALITY, CHILD MALNUTRITION, GENDER DISPARITIES AND HUNGER- POVERTY AND TO INCREASE SCHOOL ENROLLMENT AND COMPLETION?* (World Bank, 2004).

## Education

Article 26 of the Universal Declaration of Human Rights states that 'Everyone has the right to education.'<sup>15</sup> Concurring with the same, the Legislature introduced the Constitution (Eighty-sixth Amendment) Act, 2002 which added Article 21-A to the Constitution of India,<sup>16</sup> which mandated children of age group six to fourteen years to be provided free education. Subsequently, The Right of Children to Free and Compulsory Education (RTE) Act, 2009 was passed for the implementation and practice of Article 21-A to ensure that every child has a right to full-time elementary school education in a quality learning environment.

Literacy is an incredibly useful indicator of development. Observing the stagnant rates of the tribals, the Indian Government allocated funds to facilitate primary school education, as a result of which literacy rates increased in the last 50 years. The trend of tribal literacy, although gradually growing with the literacy rate being 8.45% in 1961<sup>17</sup>, and growing to 63.1% in 2011,<sup>18</sup> does not provide a positive picture, with a large percentage uneducated.

**Table 1: Literacy Trends of Tribals Over The Years (In Percentage)**

Year	Male	Female	Total
1961	13.83	3.16	8.54
1971	17.63	4.85	11.39
1981	24.52	8.05	16.35
1991	40.65	18.19	29.60
2001	59.17	34.76	47.10
2011	71.70	54.4	63.1

Source: National Commission for SC & ST, Fifth Report & Census, 2011<sup>19</sup>

## Governmental Policies and Programmes

Article 46 of the Constitution of India<sup>20</sup> promises to promote Scheduled Tribes and other weaker sections of society by protecting their economic interests and furthering their education.

<sup>15</sup> Universal Declaration of Human Rights, U.N.G.A. Res. 217 (III) A, 1948, art. 26.

<sup>16</sup> Indian Constitution, 1950, art. 21, cl. A, added by the Constitution (Eighty-sixth Amendment) Act, 2002.

<sup>17</sup> Ministry of Home Affairs, India, *Census Info 1961* (1962).

<sup>18</sup> Census 2011, *supra* note 2.

<sup>19</sup> Census 2011, *supra* note 2.

<sup>20</sup> Xaxa Virginius, *The Status of Tribal Children in India: A historical perspective*, 7 IHD UNICEF 19 (2011).



The First Five-Year Plan initiated in 1951, kickstarted a series of plans that intended to ensure development on all fronts to the tribal people. Although hopeful, they have all been unsuccessful in ensuring free and fair education to the tribals.<sup>21</sup>

The *Janshala Programme*, a collaboration between the Government of India, and the five UN Agencies - UNDP, UNICEF, UNESCO, ILO, UNFPA. This programme, launched in 1997, was a community based primary education programme, which aimed to make primary education available for all children in tribal communities, along with other marginalized groups.<sup>22</sup>

The Ministry of Tribal Affairs, utilising the grants provided under Article 275 (1) of the Constitution of India,<sup>23</sup> set up the Elkavya Model Residential School (EMRS) in 1997. The objective was to provide quality education to tribal students in remote areas of the country, and to achieve parity with the non-tribal population.<sup>24</sup> Setting up of an EMRS was mandated to every block that had a tribal population of more than 50%, and over 20,000 tribal persons, by 2022.<sup>25</sup>

Even with all these policies and programmes in place, the literacy in tribal areas has been growing slowly, with the literacy rate increasing only 16% between 2001 and 2011<sup>26</sup>. The role of governmental bodies is to ensure that quality education is provided to tribal communities to ensure equality of opportunity, but looking at the state of education of tribal areas as compared to the rest of the country shows that equality of opportunity is farther than we think. There is a dire need of educational institutes that are catered only toward tribal children.

Due to their secluded lifestyle, along with the fact that tribals usually live in extreme poverty, they have hindrances to education that people from other communities do not face. They include, but are not limited to:

**Financial Problems** – Tribals are poverty-stricken, and the most exploited communities in India.<sup>27</sup> To have a quality education, they need to bear a number of expenses, such as purchasing textbooks, stationary, uniforms, and other learning materials. Further, agriculture, hunting, fishing are income generating occupations for tribals, which is why parents encourage their children to get engaged in income generating activities.

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<sup>21</sup> Kabita K. Sahu, *Challenging Issues of Tribal Education in India*, 3(2) IOSR JEF 48, 52 (2014).

<sup>22</sup> Ministry of Human Resource Development, INDIA, *A PROMISING START: PROCESSES AND INTERVENTIONS OF THE JANSHALA PROGRAMME* (Janshala National Office, 2003).

<sup>23</sup> Indian Constitution, 1950.

<sup>24</sup> Ministry of Tribal Affairs, India, *Revised Guidelines for Setting up Eklavya Model Residential School (EMRS) (2010)* available at: <https://tribal.nic.in/DivisionsFiles/sg/EMRSguidlines.pdf>.

<sup>25</sup> Ministry of Tribal Affairs, India, *Eklavya Model Residential School (EMRS)*, available at: <https://tribal.nic.in/EMRS.aspx>.

<sup>26</sup> Census 2011, *supra* note 2.

<sup>27</sup> A. Mukherjee, *TRIBAL EDUCATION IN INDIA: AN EXAMINATION OF CULTURAL IMPOSITION AND INEQUALITY* 102 (2009).

**Lack of Parental Support** - For wholesome academic learning, students need assistance from their parents. Research has indicated that tribal parents do intend to educate their children, but due to their own illiteracy, and poverty, are unable to implement it. Children are usually employed to do household chores while their parents are working. This is an unavoidable hindrance that tribal children face.

**Lack of Motivation** - Tribal children possess low levels of motivation to have a classroom education.<sup>28</sup> This is usually due to learning difficulties, language barriers, lack of support from parents, and mainly their desire to work to earn money. These issues become impediments during the course of their education, and could be a result of the high dropout rate as well.

**Facilities and Amenities** - Tribal schools are underdeveloped, which means they lack basic facilities and amenities essential for healthy classroom learning. These facilities include teaching materials, furniture, clean drinking water, functioning restrooms, extra-curricular activities, amongst others. These are not well-developed in tribal schools, even after the numerous efforts of the government.

**Health Issues** - The health conditions in tribal areas are deplorable. These issues usually originate from their engagement in manual occupations, along with their dependency on traditional healthcare methods. For children in tribal communities, who are extremely susceptible to diseases, health issues mean a large disruption in their education as they end up staying at home to be treated.

### ***Tribal Women & Education***

The United Nations has defined the status of women as '*conjunction of position a woman occupies as a worker, student, wife, mother...of the power and prestige attached to these positions, and of the right and duties she is expected to exercise.*'<sup>29</sup>

The marginalisation of the tribal women can be depicted through their literacy rate, via the 2011 census, which was only 54.4% as compared to the 71.7% rate of their male counterparts.<sup>30</sup> They have a low literacy rate, lower enrolment rate, and high drop-out rate.

Due to various reasons, tribal women have a literacy rate lower than non-tribal women. These problems are linked to the way that young girls are perceived in tribal areas. The aim of education is to bring about change in cultural norms and the pattern of life of tribal women to ensure that they have financial independence.

Education would give tribal women freedom from age-old practices that believe that a woman's job is only to run a household. Social mobility is inextricably linked with

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<sup>28</sup> Swaroopa Rani, PROBLEMS FACED BY TRIBAL CHILDREN IN EDUCATION 25 (2006).

<sup>29</sup> Ministry of Home Affairs, India, *CensusInfo 1975* (1975).

<sup>30</sup> G.S. Rani, N. Rajani, P. Neeraja, *An Analysis of Tribal Women's Education in India*, 5 INT'L CONF. SOCIAL S. & HUMANITY 507, 511 (2011).

economic mobility. Providing tribal women with a formal education would allow them to eventually gain an income. This economic empowerment will help them further their social standing in society.<sup>31</sup> Even with the shortcomings of the education system that is repeatedly failing women, there has been a gradual increase in the percentage of tribal girls pursuing higher education,<sup>32</sup> which despite being slow and long overdue, is a small step in the right direction.

### ***Displacement and Rehabilitation***

Since colonial times, India, in lieu of development, economic growth and industrialization, has invested in numerous dams, mines, power plants, and other industrial projects.<sup>33</sup> This development has been facilitated by acquisition of land, and the subsequent displacement of the residents. This displacement and the following rehabilitation have been a major point of concern while assessing the said development projects, due to the far-reaching and enormous, yet neglected consequences of the same.

The supplanting of people from their native place to another is known as displacement. Displacement is a looming threat over many communities, which results in a feeling of alienation, helplessness, and economic insecurity.<sup>34</sup> Being one of the most underprivileged and marginalized communities, the tribals with meagre social and economic status and resources,<sup>35</sup> displacement has a far more disastrous impact on these communities.<sup>36</sup>

Tribal culture, identity, community, and livelihood is intertwined with the land that they inhabit. This relationship is ignored during these 'development' projects. They are forced to forgo an affluent and functional ecosystem, with socio-economic benefits and environmental connections, which they had in the displaced land.<sup>37</sup>

Further, the process of displacement and rehabilitation brings grave uncertainties and difficulties of commencing a new form of life, one which these communities are vastly

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<sup>31</sup> P. Mahadevappa, *Tribal Women Education In India: Opportunities and Challenges*, 4(9) INT. J. ADV. RES. 2315, 2317 (2016).

<sup>32</sup> Ministry of Human Resources, India, *Internet Selected Educational Statistics* (2005).

<sup>33</sup> Lok Sabha Secretariat, *Displacement and Rehabilitation of People Due to Developmental Projects*, No.30/RN/Ref./December/2013, [http://164.100.47.193/Refinput/New\\_Reference\\_Notes/English/DisplacementandRehabilitation.pdf](http://164.100.47.193/Refinput/New_Reference_Notes/English/DisplacementandRehabilitation.pdf)

<sup>34</sup> Kalim Siddiqui, *Development and Displacement in India: Reforming the Economy towards Sustainability*, J. Phys.: Conf. Ser. 364 1, 7 (2012).

<sup>35</sup> Sarup R. Mathur, Robert B. Rutherford, Jr., *Teaching Conversational Social Skills to Delinquent Youth*, Sage J. 1, 4 (1994).

<sup>36</sup> Biswaranjan Mohanty, *Displacement and Rehabilitation of Tribals*, 40(13) Econ. & Pol. Wkly. 1318, 1319 (2005).

<sup>37</sup> CARLOS ESCUDERO, *INVOLUNTARY RESETTLEMENT IN BANK ASSISTED PROJECTS: AN INTRODUCTION TO THE LEGAL ISSUES* (Washington, World Bank, 1988).

estranged from.<sup>38</sup> The apprehension stems from the fear of losing their culture, customs, traditions, beliefs, festivals, rituals, songs and dances, social organizations, community life, i.e., their identity, when rehabilitated to a new location.<sup>39</sup>

**Table 2: Displacement Trends Through Development Projects**

Type of Project	Tribals (% of all Displaced)	Resettled	Backlog
<b>Dams</b>	63.21 (38.5)	15.81	47.40
<b>Mines</b>	13.30 (52.2)	3.30	10.00
<b>Industry</b>	3.13 (25.0)	0.80	2.33
<b>Wildlife</b>	4.5 (75.0)	1.00	3.50
<b>Others</b>	1.25 (25)	0.25	1.00
<b>TOTAL</b>	85.39 (40)	21.16	64.23

Source: Fernandes, 1997<sup>40</sup>

The displacement and the subsequent erosion of the tribals' rights, is facilitated by numerous issues persisting with the system and the authorities which are enumerated as follows:

**Disguise of 'public interest':** Tethering with legislative sanction under the Land Acquisition Act, 1894,<sup>41</sup> majorly with governmental backing, the projects are made under the farce of 'public interest' and development, completely negating the rights, resources of and the threat to the tribals in the process.

**Lack of autonomy to tribals:** There is no explicit deliberation or communication with the tribals who are the subject and the vulnerable parties mainly affected by the project. The tribals do not have any role or participation in the way and manner the projects will progress.

**Lack of stern safeguards:** The Government, and the private individuals, pressing for the stated development projects, are facilitated further by the meagre and vague safeguards provided to the residing tribal communities. The Panchayat (extension to Scheduled Areas) Act, 1997<sup>42</sup> sanctions the said acquisitions. Moreover, there is only

<sup>38</sup> Puja Mondal, *Displacement and Resettlement of Tribals*, YourArticleLibrary (2016), <https://www.yourarticlelibrary.com/society/indian-society/displacement-and-resettlement-of-tribals/39251>.

<sup>39</sup> CHRISTOPH VON HAIMENDORF, *TRIBES OF INDIA: THE STRUGGLE FOR SURVIVAL* (University of California Press, c1982) (1982).

<sup>40</sup> Ankur Yadav, Shashikala Gurpur, Aparajita Mohanty, *Displacement Crisis of Rural Community in India*, 6(6) J. OF CRITICAL REV. 168, 171 (2019).

<sup>41</sup> Land Acquisition Act, 1894, No. 1 of 1894, INDIA CODE (1894).

<sup>42</sup> Panchayats (Extension to the Scheduled Areas) Act, 1996, No. 40 of 1996, INDIA CODE (1996).

compensatory recourse due to the nature of the right to property being legal, and not fundamental.

**Lack of attention and care in rehabilitation plans:**<sup>43</sup> The rehabilitation plans are observed to be vague, lacking detailing, care and comprehensiveness. The process of rehabilitation, due to the fallacies with the plans, usually fails to successfully resettle the affected population.<sup>44</sup>

Therefore, with the State and authority favouring systems, along with complete negation of the human rights of the communities, the balance between the development and the sustenance of the rights of these communities is heavily tilted and one which needs sound attention.

### III

#### **State Governance and Rule over Tribals: Dichotomy between tribal autonomy and State authority**

On a national level, the Indian constitution has attempted to give due regard to tribal welfare, and in the process have delegated immense powers in the hands of the Government to monitor and function the legal protection mechanism.

Article 21 of the Constitution of India, embodies the right to life,<sup>45</sup> and the Constitution subsequently, right to social and economic empowerment, to the prime subject of this research paper.<sup>46</sup> The Constitution of India, through Article 15(3) and 16(4), further essays to grant sufficient adequacy of representation of backward classes in the services, but fails to observe that numerous communities advocated to be protected under the said stipulations, who are vulnerable and living in forests, will never be part of the social structure to avail the said reservations and protections, and provides benefit to those Scheduled Tribes, induced into the said structure, who have the means and the status. Thereafter, under Article 46 of the Directive Principles of State Policy,<sup>47</sup> dealing with the promotion of tribal welfare in terms of education and economic empowerment, does

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<sup>43</sup> Mohanty, *supra* note 36, at 1319.

<sup>44</sup> Bradford Morse and Thomas Berger, SARDAR SAROVAR: REPORT OF THE INDEPENDENT REVIEW (Resource Futures International, 1992).

<sup>45</sup> Prashanth Sabeshan, *The Sarovar Project and its Implications: Developmental Questions and Legal Responses*, 8 STUV ADV 282 (1996).

<sup>46</sup> P.S.Narayana, *Safeguards, Constitutional Provisions, and Legislative measure and their Adequacy*, PL WEBJOUR 15 (2003).

<sup>47</sup> Indian Constitution, 1950, art. 46.

not probe into any substantive action, and thereby, does not really affect the condition of the discussed tribal population.<sup>48</sup>

The Constitution, thereby, introduced Articles such as 338-A and 164(1) which mandate the establishment of the National Commission for the said tribes and the appointment of Minister of Tribal Welfare, respectively, for the welfare and growth of the enumerated communities.<sup>49</sup> Their faulty implementation, or obligatory manifestation, has been a mere theoretical action and hasn't bloomed into anything substantial.

Encountering these fallacies in the constitutional approach, it was observed that the solution or the key to preserving the status and rights of the tribal people, while simultaneously not hindering development, is to balance the dichotomy between grasping and encumbering the tribal people, their needs and their independent identity, and formulating the structure and provisions of a national policy.<sup>50</sup> While treading on the said path, the Indian legal system and administrations have failed to recognize the right to autonomy of the tribal people, and proceed towards an arbitrary decentralized administration.<sup>51</sup> The latter's right to seek justice within their own traditional or customary laws<sup>52</sup> and their right to own and exploit the natural resources in their habitat is neglected and the balance is never achieved.

### ***History of the Tribal Population***

The tribal population is concentrated in the north-eastern and the peninsular regions of India. However, the treatment of the two regions has been vastly different,<sup>53</sup> wherein the peninsular region, governed solely by the Fifth Schedule of the constitution until Panchayat (Extension to Scheduled Areas) Act, 1996 [hereinafter referred as PESA], was an entirely centralized system where the communities were directed in their affairs by provincial governors, who was the sole legislature for the Scheduled Areas and the Scheduled Tribes.<sup>54</sup>

In contrast, the tribals of the north-eastern region, governed by the Sixth Schedule of the Constitution, have been vested with more autonomy than the other. The Schedule

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<sup>48</sup> Avinash Singh, *Forest Right and Tribal affairs in contemporary India*, Symbiosis International University (2015).

<sup>49</sup> Satish C. Shastri, *Indigenous People: A Historical Mistake Rectified ? Myth or Reality?*, 1 RMLNLUJ 17 (2008).

<sup>50</sup> Shubhankar Dam, *Legal System as Cultural rights: A rights based approach to traditional legal system under the Indian Constitution*, IND. INT'L & COMP. L. REV. 295 (2006).

<sup>51</sup> Apoorv Kurup, *Tribal Law In India: How Decentralised Administration is Extinguishing Tribal rights and why autonomous tribal governments are better*, 7(1) INDIGENOUS L. JOURNAL 92, 98 (2008).

<sup>52</sup> *India's Naxalites: A Spectre Haunting India*, TheEconomist (Aug 17, 2006), <https://www.economist.com/asia/2006/08/17/a-spectre-haunting-india>.

<sup>53</sup> R. K. Sabharwal v. State of Punjab, (1995) 2 SCC 745.

<sup>54</sup> Indian Constitution, 1950, Sch. V ¶ 2.

divides the tribal areas into various 'autonomous regions', with the elected councils of each divided region vested with administrative authority,<sup>55</sup> power to make laws and even exercise judicial authority through traditional legal systems.<sup>56</sup>

This arrangement, formulated by the colonial British Indian Government, rests on two notions:

1. The tribes in the Fifth Schedule were considered incapable of self-governance;<sup>57</sup>
2. Some tribal communities in the Fifth Schedule co-existed with a minority non-tribal population, which thereby questioned practicality of vesting equal autonomy to the said groups.<sup>58</sup>

This incapability has been further asserted by the Supreme Court of India in *Amrendra Pratap Singh v. Tej Bahadur Prajapati*,<sup>59</sup> wherein they held that '[t]he tribals need to be taken care of by the protective arm of the law, so that they may prosper and by an evolutionary process join the mainstream of the society.'<sup>60</sup> The notion was reiterated by the Indian Parliament when they legislated the PESA, exclusively for the peninsular areas encompassed under Schedule V, directed said communities to function under the Panchayat system enumerated under Part IX of the Constitution, conduct elections, and exercise State supervised self-governance.<sup>61</sup>

PESA, projected to transform and uplift tribal representation, after nearly two decades of functioning, has failed to achieve its objective and the situation of the tribes, as observed, is as culturally and economically poor as it was during colonial rule.<sup>62</sup> Gross violations of tribal interests along with the lax conduct and reluctance of State administrations to delegate authority have further worsened the process, along with divesting them to reassert their identity and rights violently.<sup>63</sup>

### ***Panchayat (Extension to Scheduled Areas) Act, 1996: A Study***

With the aim to preserve and protect the identity and rights of the tribal communities, while providing a balance between autonomy and control, PESA, prying deeper into the dependency of the tribals on the Government, mandated the States to devolve

<sup>55</sup> India Constitution, 1950, Sch. VI ¶ 2(4).

<sup>56</sup> India Constitution, 1950, Sch. VI ¶ 4(1) and ¶ 4(2); see also *State of Meghalaya v. Richard Lyngdoh*, [2006] 2 GLR 328.

<sup>57</sup> Ajay Skaria, *Shades of Wildness Tribe, Caste, and Gender in Western India*, 56 J. ASIAN STUD. 726, 730-73 (1997).

<sup>58</sup> J.K. DAS, HUMAN RIGHTS AND INDIGENOUS PEOPLES 135 (APH Publishing, 2001).

<sup>59</sup> (2004) 10 SCC 65.

<sup>60</sup> *Id.*

<sup>61</sup> India Constitution, 1950, art. 243, cl. G.

<sup>62</sup> GOVINDA CHANDRA RATH, TRIBAL DEVELOPMENT IN INDIA: THE CONTEMPORARY DEBATE 28 (Sage Publications, 2006).

<sup>63</sup> Stuart Corbridge, *The Continuing Struggle for Indias Jharkhand: Democracy, Decentralisation and the Politics of Names and Numbers*, 40 Commonwealth & Comp. Pol. 52, 55 (2002).

political, administrative and fiscal powers to community-elected local governments.<sup>64</sup> The States were to ensure that their laws were in consonance with the customary law, practices and management of the tribal communities and that the elected local government must protect the traditions and conditions of the said communities, their cultural identity, resources and the traditional dispute resolution mechanism practised by them.<sup>65</sup>

The tribals, even post its enactment, continue to lose their natural resources, in the form of land and forest cover,<sup>66</sup> to large corporations and States.<sup>67</sup> This was attributed to the influential and well-connected landowners as well as corrupt State officials who, using the vague and vast powers vested in them, favour the powerful non-tribals.<sup>68</sup>

The following sections delve deeper into the adequacies of the present legislations in the realms of tribal rights in respect of natural resources, the functionality of the local governments and their impact on preserving the traditional tribal governance.

### *Lack of State Initiative and Interest*

The States, vested with the power and responsibility of upholding the tribal's customary law, practices and societal status, have been incompetent in doing so, by frequently enacting incomplete laws.<sup>69</sup> Further, they indulge in State control, rather than dissolution of power to the locals as mandated under the provisions.<sup>70</sup>

The same has been continuously observed in numerous forms observed via the State's inadequacy and lack of interest. It rests on a very primitive and outdated notion of their importance and emergence to uplift the governed tribal societies, which therefore has resulted, in theory, and as well as in practise, the implementation of the principles and actions enumerated in PESA being the State's prerogative.

*It seemed, by practise, that self-government is, in many ways, a privilege granted to the tribal communities rather than an inherent right.*<sup>71</sup>

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<sup>64</sup> Vidhya Das, *PESAA Reality Check*, Agramee (2005), <[http://www.agramee.org/newinitiatives\\_pesa.htm](http://www.agramee.org/newinitiatives_pesa.htm)>.

<sup>65</sup> S.4(i), Panchayats (Extension to the Scheduled Areas) Act, 1996, No. 40 of 1996, INDIA CODE (1996).

<sup>66</sup> Rath, *supra* note 58, at 92.

<sup>67</sup> Rath, *supra* note 58, at 15.

<sup>68</sup> Rath, *supra* note 58, at 169.

<sup>69</sup> Kurup, *supra* note 48, at 98.

<sup>70</sup> 1 DR. B.D. SHARMA, THE FIFTH SCHEDULE 72 (Sahyog Pustak Kuteer Trust, 2000).

<sup>71</sup> Government of India, 37th Report of the Standing Committee on Urban and Rural Development, *Implementation of Part IX of the Constitution* (2002).



### *Tribal Rights and Natural Resources*

The dichotomy between control and autonomy immersed itself in the functionality of PESA which provides the tribal communities with the management of the natural resources, while stalling the control and ownership of the same with the State.<sup>72</sup> This mandate, coupled with the incompetence and inadequacy of the State, has led to gradual erosion of their rights in various natural resources.

### *Tribal Land Rights*

The devolution of management rights rest on a vague and imprecise process of consultation and recommendation with the local government before any activity as to the governed land,<sup>73</sup> which is exploited by State administrations to acquire land, backed by the Land Acquisition Act, 1894,<sup>74</sup> in the garb of 'public interest', as the administrations indulge in the bare minimum requisite of consultation which has been stipulated under the Act.

The State administrations exploit the tribal land rights based on two other legal anomalies, namely:

*Firstly*, the tribals only have recourse to a legal right to property under Article 300A of the Constitution, and not a fundamental right, thereby providing a mere compensatory remedy, which doesn't help their status or their position;<sup>75</sup> *Secondly*, the Supreme Court has time and time again backed the said acquisitions, with the Land Acquisition Act<sup>76</sup> and the Government vested with vast powers and confidence to make such appropriations.<sup>77</sup>

### *Tribal Forest Rights*

Section 4 of the Act provides the tribals ownership of 'minor forest produce',<sup>78</sup> but does not state that the forest area has to be categorized as village forests, and not reserve forests. This misleads the tribal communities who are exploited due to this detailing and

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<sup>72</sup> Sanjay Upadhyay, *Tribal Self-Rule Law and Common Property Resources in Scheduled Areas of India A New Paradigm Shift or Another Ineffective Sop?* International Association for the Study of Common Property, Oaxaca, Mexico (2004).

<sup>73</sup> S. 4(i), Panchayats (Extension to the Scheduled Areas) Act, 1996, No. 40 of 1996, INDIA CODE (1996).

<sup>74</sup> Land Acquisition Act, 1894, No. 1 of 1894, INDIA CODE (1894).

<sup>75</sup> Kurup, *supra* note 48, at 99.

<sup>76</sup> Land Acquisition Act, 1894, No. 1 of 1894, INDIA CODE (1894).

<sup>77</sup> *Daulat Singh Surana v. First Land Acquisition Collector*, [2006] 11 SCALE 482.; *see also State of Andhra Pradesh v. V. Sarma Rao*, AIR 2007 SC 137.

<sup>78</sup> S. 4(m)(ii), Panchayats (Extension to the Scheduled Areas) Act, 1996, No. 40 of 1996, INDIA CODE (1996).

categorization. Moreover, the Act sets out no explicit safeguards or guidelines for the State to implement or practice for the preservation of the tribal forest rights.<sup>79</sup>

Although, PESA stipulates village communities can be set by the respective States,<sup>80</sup> this further adds onto the State's discretion, thereby fueling the power and autonomy the State possesses.

*Tribal forest rights and their management and preservation via PESA, does nothing to alter the balance of power but merely acts as yet another illustration of State control over the tribes residing in the forest.*

However, the shortcomings and fallacies of PESA, have been theoretically catered to by the Forest Rights Act,<sup>81</sup> which acknowledges the relationship and interdependence of the forest dwelling tribals and forests. Observed as a social welfare/remedial statute, through its numerous provisions, it recognizes, and vests the rights to the forests in the tribals whose entire livelihood and culture resides in the forests. The Legislature observed the gross injustice caused to the tribals by scraping away their right to the forests since the colonial period, and further assessed the importance and essentiality of the stated forest dwellers to the forest ecosystem, its growth and sustainability. The Act intends on protecting custom, usage, practices necessary and inherent for the forest dwellers, and lists out chapters recognizing their rights, subsequently vesting the powers, and the duties attached, like PESA. Even then, as elucidated by the Ministry of Tribal Affairs, there are numerous problems with its implementation in both practice and the internal intention, with the States vested with the responsibility of initiating action and implementation, along with the task of setting up committees to monitor the same.<sup>82</sup>

## IV

### ***Orissa Mining Corporation Limited v. Ministry of Environment and Forests:*<sup>83</sup> A Change in Sight?**

Tribal communities, due to the inadequacy and nonchalance of the State administrations, have been battling to preserve, and retain their rights from the very

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<sup>79</sup> Gabriele Dietrich, *Dams and People: Adivasi Land Rights* 35 Econ. & Pol. Wkly. 3379, 3379 (2000).

<sup>80</sup> Ministry of Env't & Forests, India, Joint Forest Management Resolution, Res. No. 6.21/89-PP (June 1, 1990).

<sup>81</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2 of 2007, INDIA CODE (2007).

<sup>82</sup> Ministry of Tribal Affairs, India, No. 23011/32/2010-FRA [Vol.II (Pt.)] (July 12, 2012) available at: <https://tribal.nic.in/FRA/data/Guidelines.pdf>.

<sup>83</sup> (2013) 6 SCC 476.

authorities and groups who should have been their shield.<sup>84</sup> With the legislation reduced to mere letters, without any sincere upheaval towards the established objective, the tribals have to constantly protect their habitat and resources.<sup>85</sup> The State authorities are delving into their resources under the farce of development, industrialization and public policy. The section addressing the legal framework concerning the tribals rights to their land and resources, presents a clear picture of the exploitation,<sup>86</sup> and uncertainty the tribals face in respect of their generational inheritance: their land and forests.

It is, therefore, observed that the degree of exploitation and disrespect towards the tribal resources and norms is the result of lack of subnational empathy coupled with the gradual decline of their status and rights, due to the unsatisfactory and inadequate statutory scheme and actions.<sup>87</sup>

The Government has seen the contra-relationship between tribals and urban development as a dichotomy, instead of a challenge. Instead of amalgamating the two, the lands and resources belonging to the tribals, and along with that, their livelihood, occupation and inheritance, are snatched and their cultural identity, social organization and relevance destroyed. There is no due consideration of the meaning and importance of the resources being applied for 'development', which worsens their grasp on the already minute status, and aggravates the prevailing discontent among the already marginalized sections of the society.

However, the Supreme Court of India, bridled and apprehensive about the above-stated situation, in the case of *Orissa Mining Corpn. Ltd. v. Ministry of Environment and Forests*,<sup>88</sup> concerning the fate of the tribals residing in the Niyamgiri Hills, Orissa, invoked international conventions. Necessitating the harmonization of the local legislation with the inherent obligations, it emphasized and trod at length on the *need to preserve social, political and cultural rights of the indigenous people*. Finally, it analysed the rights of the tribal people in context to the human rights, to establish the necessity of growing conscious and subsequently taking action in respect of the plight of the marginalized people in discussion.

The Appeal to the Apex court originated from an agreement signed between Vedanta Industries and the Orissa Government in 2004 for a project of bauxite in the Niyamgiri Hills. The agreement, ignoring the rights of the tribes residing in the said region, the

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<sup>84</sup> Anurag A., Meena Neha, *Juxtaposition between Development and Tribal Rights: A Story of Determined Struggle of Niyamgiri Tribes*, SCCOnline (2019) available at: [https://www.sconline.com/blog/post/2019/08/09/juxtaposition-between...l-rights-a-story-of-determined-struggle-of-niyamgiri-tribes/#\\_ftn36](https://www.sconline.com/blog/post/2019/08/09/juxtaposition-between...l-rights-a-story-of-determined-struggle-of-niyamgiri-tribes/#_ftn36).

<sup>85</sup> Armin Rosencranz, Sharachandra Lele, *Supreme Court and India's Forests*, 43 EPW 5, 11-14 (2008).

<sup>86</sup> Ajit Menon, *Engaging with the Law on Adivasi Rights*, 42 EPW 2239, 2242 (2007).

<sup>87</sup> A. Damodaran, *Result of Skewed Development?* THE HINDU (Apr 27, 2003) available at: <http://www.hinduonnet.com/thehindu/mag/2003/04/27/stories/2003042700280400.htm>.

<sup>88</sup> (2013) 6 SCC 476.

Dongria Gondh, threatened them with arrests in cases of non-compliance.<sup>89</sup> Post sanctions by the lower court, and rebuttal by both, the Ministry of Environment and Forest, and the Ministry of Tribal Affairs, the matter was brought to the Supreme Court.

It was observed that while sanctioning the project, the lower court, the parties to the agreement as well as the Authorities involved, failed to consider and sensitize themselves with the intrinsic relationship of the tribals with the forest and the subsidiary resources. The lands under contention, specific to the Dongria tribe as well as in general, have been the most pertinent asset for the sustenance, preservation of the economic and social status, and livelihood for the tribals of the region. Consisting of dense forest reserve and river valleys, the Dongria tribe have a sacred affiliation to the land, which is being violated, negated and curbed on by the project. The Hills, being culturally, ecologically and socially important,<sup>90</sup> have been consistently exploited, through projects such as these, which eliminate and diminish the tribal's rights to the resources, and a standard of living and culture which they enjoyed and possessed.<sup>91</sup>

The Government, without paying heed to the importance of socio-cultural as well as the environmental aspects of Niyamgiri Hills, continued to allow the exploitation of natural resources by bringing resource-intensive mode of development which in all probability would create ecological instability and thereby violate the fundamental rights of thousands of people.<sup>92</sup>

The Ministry of Environment and Forest, issuing a letter in response to the clearance sought by the parties to the Agreement, promulgated as to the '*blatant disregard displayed by the project proponents with regard to rights of the tribals and primitive tribal groups dependent on the area for their livelihood*'.<sup>93</sup>

The Supreme Court, in *Samatha v. State of Andhra Pradesh*<sup>94</sup> addressed the importance of land and the attachment to the same to the tribals. Concurring with the Ministry of Environment and Forest, along with the Court's ruling in *Samatha v. State of Andhra Pradesh*,<sup>95</sup> the Apex Court, for the first time, acknowledged the role of these tribal communities in the environmental management and development, owing to their knowledge and traditional practices. Harmoniously reading Article 21 with Article 25

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<sup>89</sup> Geetanjoy Sahu, *Mining in the Niyamgiri Hills and Tribal Rights*, 43(15) EPW 19, 21 (2008).

<sup>90</sup> *Orissa Mining Corp. Ltd. v. Ministry of Environment and Forests*, (2013) 6 SCC 476.

<sup>91</sup> Kumkum Dasgupta, *Vedanta's India Mining Scheme Thwarted by Local Objections*, THE GUARDIAN (Aug 21, 2013) available at: <https://www.theguardian.com/global-development/poverty-matters/2013.aug/21.india-dongria-kondh-vedanta-resources-mining>.

<sup>92</sup> *Norwegian Government Indicts Vedanta as 'Grossly Unethical'*, MINES AND COMMUNITIES (Nov 12, 2007) available at: <http://www.minesandcommunities.org/article.php?a=8260>.

<sup>93</sup> *Orissa Mining Corp. Ltd. v. Ministry of Environment and Forests*, (2013) 6 SCC 476.

<sup>94</sup> (1997) 8 SCC 191.

<sup>95</sup> (1997) 8 SCC 191.

and 26, the rights of the tribal people in respect of their beliefs and practices were explicitly mentioned and defended.

Further, while treading on the gross injustice caused to these communities, and the unfavourable functioning of the local legislations due to the dual facets of vague provisions and inadequate State action, the Court promoted the participation of indigenous people and the recognition of customary or traditional land of indigenous people, while ensuring the protection of the indigenous people from the adverse consequences of the development process.<sup>96</sup>

The pronouncement, an act of constitutional institutionalism per se, aims to have far-reaching consequences in the sphere of intention, action and preservation of tribal rights, status and development. It also acknowledges the dire need of protecting the sociocultural and environmental rights of the said communities from such anti-human development plans.

## V

### **Conclusion**

Even after 73 years of independence, the conditions of tribal groups in India have been down trodden and fighting every day for their identity, rights, and culture. Constituting the weakest section of the Indian society, they live in extreme poverty, and are exploited, both, economically and socially, by the State and other communities alike.

This research paper dealt with the various challenges being faced by tribal communities along with the constitutional provisions and legislative enactments in place for their safeguard and upliftment. The programmes initiated for their well-being, ranging from education, employment to monetary benefits, have been ambitious but have failed to alleviate their place in society. Their practice and implementation have turned them into hollow letters, and have failed to achieve their designated motive. Developmental projects, under the guise of facilitating progress, carry with them widespread repercussions and loss to these tribal communities, who lose their ancestral property, heritage, livelihood and more. The study shows the systematic upheaval and decline of these communities despite the numerous policies, programmes and plans adopted by the Government for the alleviation of this underprivileged section of the society.

The gradual loss of economic power coupled with the shift in societal structures and perspective, the tribals have been vastly marginalised. Coerced to move, to give away their resources, their land, and with that their human rights, and identity, they have been consistently socially disintegrated. As the research depicted, many of these

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<sup>96</sup> Anurag & Neha, *supra* note 76.

activities of coercion, without proper consideration and deliberation, not only erode the economic, social, political and civil rights of the communities through degrading treatment of the latter, but also grossly tread on their human rights neglecting them of parity, respect and due inclusion.

The tribals have faced unjust and unfair treatment since the colonial time. They have been failed and neglected by their government, and by their fellow citizens. Still, they hold tight to their culture and community, and continue to develop and grow. Accounting for one-twelfth of the entire population, battling the violations and displacements, they have managed to make a place for themselves by rising to the challenges they face and overcoming them.