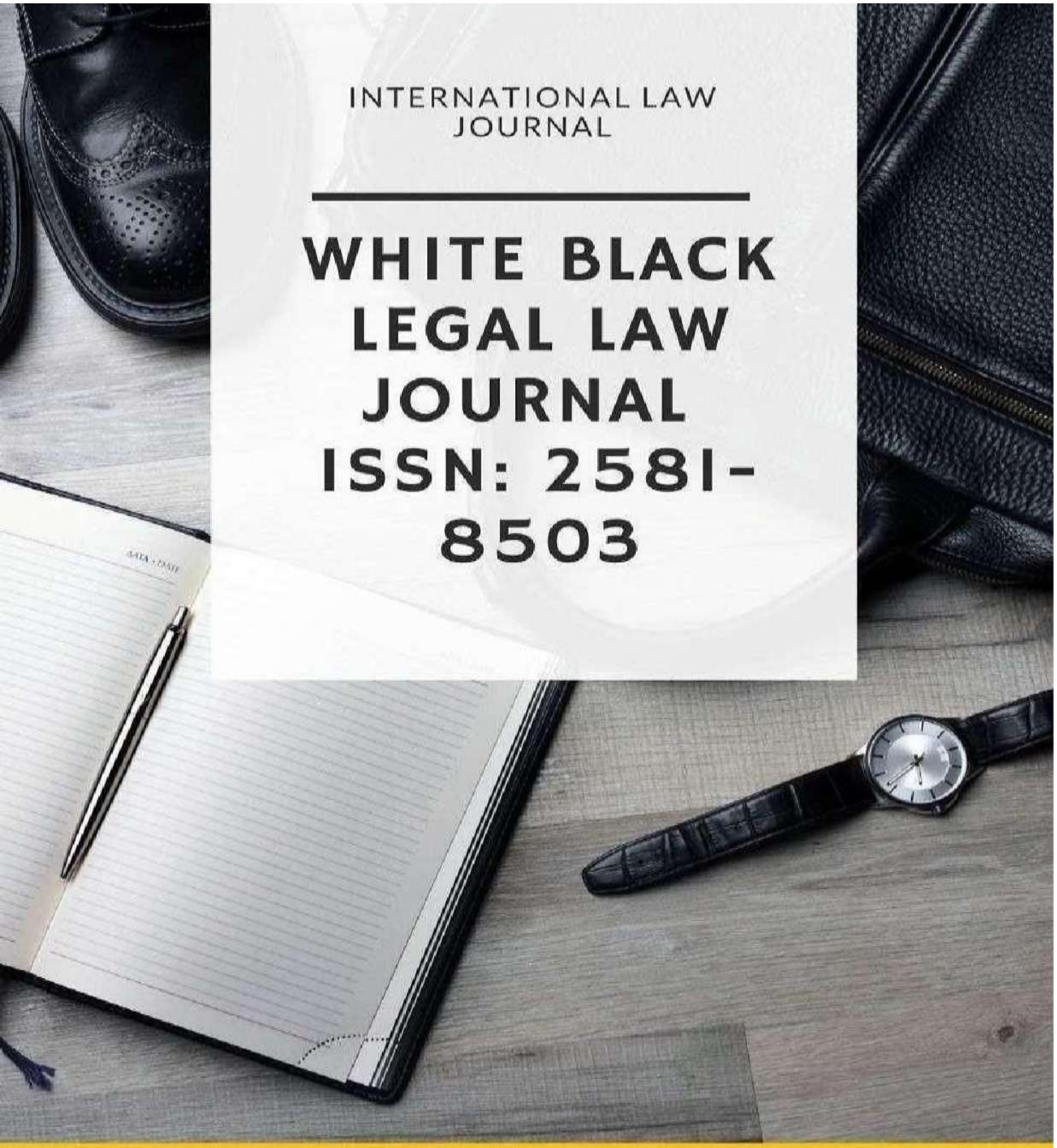

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FROM CONSTITUTIONAL PROVISIONS TO GROUND REALITIES: ANALYSING TRIBAL RIGHTS FAILURES

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ABSTRACT

This article provides an extensive comparison of how indigenous and tribal laws are applied in India while looking closely at the legal framework for these laws and what the obligations are for compliance. Due to India's vast cultural and ethnic diversity, providing protections for cultural and ethnic heritage to indigenous and tribal peoples is critical. However, whether these laws are implemented correctly has been an area of great interest.

The article begins with a historical overview of indigenous and tribal law within the Indian context, reviewing the evolution of indigenous and tribal laws within India as a result of constitutional provisions found in the Fifth and Sixth Schedules, along with the Panchayati Raj Act, 1996, the Forest Rights Act, 2006; and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013. By reviewing these laws with a legal obligation placed upon the Indian State to promote, protect and implement these unique systems of law (autonomy, tenure security and the principle of Free, Prior and Informed Consent (FPIC)) to indigenous or tribal peoples.

Through a comparative lens, the article examines how the indigenous and tribal laws have been treated in India, with examples from several states, and the issues that continue to exist that make it difficult to include those indigenous and tribal legal systems in India. Furthermore, It also looks at the roles played by governmental agencies, the courts and other entities in ensuring that the indigenous and tribal laws are enforced. Additionally, it looks at how a lack of effective dispute resolution, resource allocation and community empowerment mechanisms have contributed to the failure of constitutional provisions to be met, due to the lack of systems to ensure compliance with the indigenous and tribal laws.

This research adds to the existing discussions regarding the connection of Native and Aboriginal peoples' rights with modern law in India. A comparative model has been employed to gain greater insight into the strengths and weaknesses in the implementation of these laws in order to provide relevant recommendations to lawmakers, attorneys and academics about how to improve the legal protections and empowerment of Native and Aboriginal peoples. Recommendations for establishing an institution to enforce compliance, creating an independent oversight body and requiring courts to conduct compliance audits are made to help close the gap between the legal obligation of these laws and the actual implementation of these laws on the ground.

Keywords: Tribal rights, Forest Rights Act 2006, Free Prior and Informed Consent (FPIC), Accountability, Implementation gap, Indigenous laws.

INTRODUCTION

Long before the advent of colonial rule, India's tribal communities governed themselves through collective institutions based on democracy, customary law, and an intimate relation to the territory that belonged to them. As noted by Jaipal Singh Munda, an outstanding Adivasi leader who represented his people in the Constituent Assembly, "You cannot teach democracy to the tribal people; you have to learn democratic ways from them. They are the most democratic people on the earth."[1] He believed that Adivasis found solutions for the issues associated with democracy, village governance, and sexual equality in the distant past, owning collective territories, while other civilised nations lived according to the rules of castes.

This constitutional imagination, carried from forest societies into the halls of power, found expression in the Fifth and Sixth Schedules[2], the Panchayats (Extension to Scheduled Areas) Act (PESA), 1996[3], the Forest Rights Act (FRA), 2006[4], and the Land Acquisition, Rehabilitation and Resettlement Act (LARR), 2013[5]. All these laws suggested the implementation of a policy of autonomy, tenancy rights, and the principle of Free, Prior, and

[1] Jaipal Singh Munda, *Constituent Assembly Debates*, July 19, 1949, as quoted in *The Indian Express*, "Jaipal Singh Munda's Speech on Democracy and Tribals," Aug. 10, 2016, at 4.
[2] India Const. art. 244, schs. 5 & 6.
[3] The Panchayats (Extension to Scheduled Areas) Act, 1996, § 4, No. 40 of 1996, India Code (1996).
[4] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, § 3, No. 2 of 2007, India Code (2007).
[5] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, § 41, No. 30 of 2013, India Code (2013).

Informed Consent (FPIC). The aim was to show that the tribes were not mere recipients of the state's charity but active subjects with significant experience of living in a specific way. Thus, their contribution was invaluable in developing pluralism.

Nonetheless, seventy years hence, the yawning gap between rhetoric and reality is ever more apparent. Tribal communities still experience displacement, alienation of land and culture in the name of national development. The landmark judgment of the Supreme Court in favour of the Dongria Kondh tribe on its decision about mining of bauxite in Niyamgiri Hills is but an exception, not the rule. Time and again, mining companies secure tribal land based on fraudulent Gram Sabha resolutions; government notices routinely bypass any form of legal protection; and developmental programs displace countless tribal people without proper consent, compensation, or rehabilitation.

If India has a progressive constitution, then why doesn't it provide effective protection in real life? Why are legal provisions on paper and in court judgements unable to materialise themselves in the practice of everyday life? This study aims at exploring the obstacles inherent within India's political system that inhibit the translation of constitutional ideals into the realities of tribal lives. How do bureaucratic obstruction, corporate interests, jurisdictional divisions, judicial delays effectively undermine the constitutional protection of tribes? By tracing the history of scheduling debate from late colonial India up to now this paper seeks to understand why the constitutional imagination that once drew wisdom from forest societies has, in practice, failed those very communities and what might be done to reclaim that vision.

CONSTITUTIONAL FRAMEWORK

The Indian Constitution provides a distinctive protective framework for tribal communities through the Fifth and Sixth Schedules under Article 244[6]. These provisions were designed to apply in areas with significant tribal populations, enabling devolution of power to tribals and creating autonomous structures that safeguard their traditions and practices. Most importantly, the Constitution guarantees protection of their land rights.

The Fifth Schedul*e* applies to Scheduled Areas in nine states, establishing a framework for administration and control. Section 4 mandates the creation of a Tribes Advisory Council in

[6] India Const. art. 244, schs. 5 & 6.

each State having Scheduled Areas, consisting of not more than twenty members, with approximately three-fourths being representatives of Scheduled Tribes in the State Legislative Assembly. This Council is duty-bound to advise on matters pertaining to the welfare and advancement of Scheduled Tribes referred to by the Governor.

Section 5 gives considerable regulatory powers to the Governor, who can by notification declare that a specific Act passed by Parliament or the State Legislature would not be applicable to a Scheduled Area, or apply with certain exceptions and modifications even retrospectively. The Governor has power to make regulations for the peace and good government of Scheduled Areas, which include prohibitions on or restrictions on the alienation of land by or amongst the Scheduled Tribes, allotment of lands to Scheduled Tribes, and money-lending to Scheduled Tribes.

The Sixth Schedule offers a more detailed autonomous set-up for tribal areas in the states of Assam, Meghalaya, Tripura, and Mizoram. Section 2 lays down provision for a District Council for each autonomous district with a maximum of thirty members, where the members elected will serve a five-year term. Under Section 3, these Councils can enact legislation on specific subjects such as land allocation, forest policy (except reserved forests), utilisation of watercourses, restriction on shifting agriculture, local governance, inheritance of property, marriage and divorce laws, and social practices.

Under Section 4, these Councils are empowered to form village councils or courts to hear cases among the Scheduled Tribes, excluding the jurisdiction of state courts. Under Section 8, they are authorised to impose land revenues and taxation. Section 10 gives powers to the District Councils to control money lending and commercial activities by non-tribals, setting maximum interest rates and licensing, provided that these legislations must be passed with a three-fourths majority of the Council members and the Governor’s assent.

Despite this, these schedules apply to only limited portions of the states even though tribes exist in other regions. Pristine lands with mineral wealth, co-extensive with the locations of indigenous communities, have resulted in the suppression of tribal opinion, loss of autonomy, and dispossession of tribal land.

The Panchayats (Extension to the Scheduled Areas) Act, 1996

The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) has been enacted to provide that the provisions of Part IX of the Constitution shall apply to Scheduled Areas in accordance with Article 243M(4).[7] It implements Article 40 of the Constitution according to which there should be an organisation of village panchayats to constitute units of self-government. In order to give effect to the provisions mentioned above, PESA gives wide powers to Gram Sabhas like approval of development plans, management of community resources, selection of beneficiaries in welfare schemes, and giving prior consent for acquisition, rehabilitation, or mining.

Section 4 of the Act provides that any State law on the matters covered by Part IX-A shall be consistent with the customary law, religious and social practices, and traditional management practices of community resources[8]. The Gram Sabha is empowered under this section to protect and conserve their traditions, customs, culture, community resources, and customary modes of dispute resolution.

Crucially, Section 4(i) requires consultation with the Gram Sabha or Panchayats at the appropriate level before making land acquisition in Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects[9]. Section 4(k) and (l) mandate prior recommendation of the Gram Sabha or Panchayats for grant of prospecting licences, mining leases, or concessions for minor mineral exploitation.

Section 4(m) specifically endows Panchayats and Gram Sabhas with: power to prevent alienation of land in Scheduled Areas and restore unlawfully alienated tribal land; ownership of minor forest produce; power to exercise control over money-lending to Scheduled Tribes; and power to control local plans and resources including tribal sub-plans[10]. The Act also upholds customary laws, traditional dispute resolution systems, and endows Gram Sabhas with ownership rights over minor forest produce, water bodies, village markets, and control over social sector institutions.

[7] A.B. Ota & K.K. Patnaika, *Two Tribal Friendly Acts and Their Implications*, Scheduled Castes & Scheduled Tribes Research and Training Institute (SCSTRTI), Bhubaneswar (2009).
[8] *supra* note 3, at 2
[9] *Id*
[10] *supra* note 3, at 2

Despite the revolutionary nature of this Act, there has been a failure in the implementation process owing to political apathy, state legislation, and bureaucracy. Several state legislations limit the powers vested by PESA resulting in weak Gram Sabhas that are unable to function effectively. Land acquisition for mining and developmental activities remains a reality without any prior consent and adequate compensation.

The Forest Rights Act, 2006

In the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006[11], an attempt has been made to address the long-term exclusion of the forest-dwelling tribal population from their rights in respect to the forests and forest lands. The law officially provides recognition to the individual forest rights as well as community forest rights. Of all these provisions, the grant of rights to the Community Forest Resources can be considered to be very empowering.[12]

As per Section 3, the list of rights to be provided for in the forests include: individual rights such as the right to reside on the forest lands for habitation or for cultivation[13]; community rights such as the right of nistar; right to collect, use and dispose off minor forest produce; community rights related to fishing, grazing and traditional seasonal resources rights; right of settlement and conversion of the forest villages to revenue villages; right of conservation of the community forest resources traditionally protected by the communities; and any other customary right except hunting.

Section 6 mentions that Gram Sabha is the entity responsible for starting the process of recognising forest rights, claim verification and preparation of maps and resolution thereof[14]. Section 7 talks about penalties to those who prevent or refuse to provide the rights mentioned above as per the act[15].

However, despite its very progressive nature, the act has seen several hurdles in implementation. The verification of claims, supposed to be done with Gram Sabha involvement, is often taken over by forest officials opposed to the Act's purpose. Recognition

[11] *supra* note 4, at 2
[12] Roshni P.K., Guardians of the Land: Forest Rights Act and Tribal Livelihoods, 4 J. Contemp. Pol. 4, 174 (2025).
[13] *supra* note 4, at 2
[14] *Id*
[15] The Forest Rights Act, 2006, § 7

of community forest rights has been extremely slow, with forest departments unwilling to transfer control over forest resources.

The Right of Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act)[16] is a law passed to correct the historic wrongs committed against land owners, especially marginalised tribes. By virtue of this law, the rights enjoyed by tribes due to FRA and PESA become much more secure. It protects the interest of tribal communities against the consequences of land acquisition.

Section 41 states that wherever possible, land shall not be acquired within the Scheduled Areas; but if land is acquired, then it should be only after exhausting all other possibilities. Notification shall not be issued until prior consent has been obtained from the respective Gram Sabha or Panchayats or autonomous District Councils of Fifth Schedule area, even in urgent cases[17].

In addition, Section 41 makes it mandatory to relocate the affected Scheduled Tribe families to the same Scheduled Area and create compact areas to preserve their cultural identity. Alienation of land in violation of law is considered invalid. Tribes are entitled to rehabilitation packages when their lands are acquired.

Section 42 provides that all reservation and other benefits available to Scheduled Tribes in affected areas continue in resettlement areas[18]. Where Scheduled Tribes residing in Fifth Schedule areas are relocated outside, all statutory safeguards, entitlements, and benefits extend to the resettlement area regardless of whether it is a Scheduled Area.

Section 2(2) explicitly provides that no land shall be transferred by way of acquisition in Scheduled Areas in contravention of any law relating to land transfer prevailing in such Scheduled Areas[19]. The Act also mandates a Social Impact Assessment to evaluate broader

[16] *supra* note 5, at 2
[17] *Id*
[18] *Id*
[19] *Id*

consequences of proposed projects, taking into account environmental, economic, and social effects.

Despite these protections, the Act's implementation remains inconsistent, with tribal lands continuing to be acquired without genuine consent, and legal protections routinely sidestepped in favour of developmental imperatives.

IMPLEMENTATION FAILURES: PATTERNS AND SYSTEMIC BARRIERS

The analysis in the previous paragraphs of the constitutional structure forms the foundation for the design of the normative structure that is to protect the tribe's property rights, autonomy, and culture. In this segment, two instances of implementation failure will be analysed. To begin with, three major modes of implementation failure will be identified. These are the fabrication of fraudulent Gram Sabha consent, delaying tactics employed by forest dwellers in making their claims for rights to the land, and forced relocation under the pretence of development. The second aspect will examine the reasons behind the failure of progressive judicial decisions to effect any real change.

1. Recurring Patterns of Failure Across Odisha and Chhattisgarh

The Systematic Manufacture of Fraudulent Gram Sabha Consent

The most pernicious pattern of implementation failure across Odisha and Chhattisgarh is the systematic manufacture of community consent through procedural manipulation and outright forgery. Sections 4(k) of the PESA Act, 1996, and 6 of the FRA, 2006, confer the powers to provide or deny consent for mining leases and land acquisition on the Gram Sabha within the Scheduled Areas. Yet, empirical studies have established that statutory powers under the law have repeatedly been manipulated using a variety of administrative measures to render them meaningless.

First, corporate entities and district administrations manipulate procedural mechanics to preclude genuine participation. Gram Sabha meetings are frequently convened on working days coinciding with agricultural cycles, at locations distant from tribal habitations, or with deliberately insufficient notice. The Saxena Committee report, submitted in connection with the Niyamgiri litigation, documented how such violations systematically excluded affected

'Dongaria Kondh' and 'Kutia Kandha' communities from decisions affecting their habitat and religious practices.[20]

Second, consent is manufactured through coercive state practices. The ongoing Sijimali conflict reveals that Gram Sabha meetings are conducted in the presence of heavy police contingents, that dissenting community members are threatened with prosecution, and that pecuniary inducements are offered to secure favourable resolutions. These practices negate the requirement of free consent at the heart of the Free, Prior, and Informed Consent (FPIC) principle domesticated in Indian law.

Third, Gram Sabha resolutions are outright fabricated. Right to Information disclosures have revealed attendance records containing signatures of deceased individuals, mismatches between thumbprint impressions and demographic records, and discrepancies between recorded resolutions and actual minutes.[21] These practices constitute criminal conduct under *Section 7 of the Forest Rights Act*, which provides for penalties against officials who deny or obstruct forest rights. Nevertheless, no prosecution has ever been initiated for fabricating Gram Sabha consent.[22]

The Denial and Strategic Delay of Forest Rights Claims

It must be emphasized that the enactment of the Forest Rights Act, 2006 is transformative legislation that seeks to rectify historical wrongs by recognising individual as well as community forest rights. Under Section 3 of the law[23], among others, include rights to individual cultivation of land, rights of the community including nistar rights, collection rights of minor forest products, as well as Community Forest Resource (CFR) rights under Section 3(1)(i). However, the implementation of the provisions in Odisha and Chhattisgarh shows that there is bureaucratic resistance that renders the law nugatory.

Procedural delay has become one strategy of nullification used by the forest department. There is often refusal to recognize claims amounting to seventy or eighty percent of the total claims made. There are usually grounds for the denial of claims in terms of "insufficient documentary

[20] Report of the Saxena Committee on Niyamgiri, Ministry of Tribal Affairs, Govt. of India, *Report on Implementation of Forest Rights Act in Niyamgiri* (2013) at 23–27.
[21] Right to Information Act, 2005, § 6, No. 22 of 2005, India Code (2005).
[22] The Forest Rights Act, 2006, § 7
[23] *supra* note 4, at 2

evidence" despite Section 3(1)(b) of the Act, which provides for a rebuttable presumption that favours the claims made by tribal people, making it the duty of the government to disprove the claim.

Most significantly, recognition of Community Forest Resource rights has been extraordinarily tardy. Only three states Maharashtra, Odisha, and Chhattisgarh have recognised CFR rights in several thousand villages each, but many eligible villages remain without recognition. [24]Moreover, where CFR rights have been recognised, forest departments continue to impose their working plans for timber extraction and plantation regimes on forests nominally assigned to Gram Sabha management. This practice reduces statutory recognition to a symbolic gesture devoid of operational content. Overlapping claims of authority between Gram Sabhas and forest departments create a perpetual institutional stalemate that powerful actors navigate with ease while tribal communities find impassable.

Forced Eviction Under the Guise of Development Imperatives

Section 41 of the LARR Act, 2013 stipulates that there would be no acquisition of land in any Scheduled Area unless absolutely necessary as a last resort and subject to the prior consent of the Gram Sabha.[25] However, despite this provision, eviction remains widespread in both Odisha and Chhattisgarh states. This happens through the repetition of a particular legal fiction - that of the state government stating that "there is no habitation in the proposed mining lease area."

The fiction has been repeatedly argued in the Niyamgiri case and is a gross misrepresentation of the living conditions of tribal communities. For forest-dwelling tribes, the entire ecosystem of forests including the hills, water sources, sacred groves, and grazing areas makes up their habitat. This is evident from the provisions of Section 3(1)(e) of the FRA, which speaks about "community tenures of habitat and habitation for primitive tribal groups."[26] Nevertheless, this right is conveniently ignored by the state government while issuing mining leases.

When there are instances of resistance to forced eviction, such as in the case of the Sijimali dispute, the role of the criminal law framework in India is that of being applied not to those corporations committing the violation but to the people within communities who protest. There

[24] Ministry of Tribal Affairs, *Annual Report 2022–23*, Govt. of India, at 45-48 (2023).
[25] *supra* note 5, at 2
[26] *supra* not 4, at 2

have even been tribal women who are members of activists groups like Naringi Dei Majhi who have been arrested on charges of the Unlawful Activities (Prevention) Act[27] when accompanying women in communities to hospitals to give birth.

2. The Structural Limitations of Reactive Adjudication

Samatha v. State of Andhra Pradesh (1997)[28] *and Orissa Mining Corporation v. Ministry of Environment and Forest (2013)*[29] are two of the best examples of judicial interpretations of the Constitution in favour of the tribal population's rights. In the first case, the court decided that the term "person" used in section 3(1)(a) of the Andhra Pradesh Scheduled Areas Land Transfer Regulation should be interpreted as "State Government," implying that the government is prohibited from transferring the land owned by it to non-tribal people. In the second case, the court ruled that the religious freedoms of the "Dongaria Kondh" tribes, according to Articles 25 and 26[30], include worshipping their god Niyam-Raja, and Gram Sabha is authorised to decide if mining activities will infringe upon their rights.

Despite their revolutionary nature, neither judgment has led to any systemic change. Indian courts are reactive bodies within the constitutional framework, only having the jurisdiction to deal with cases when petitions are filed before them. The courts lack the means to enforce the law suo motu, monitor the implementation process involving thousands of Gram Sabhas and ten Scheduled Area states, and verify the legitimacy of administrative actions taken on the basis of their decisions.

This deficiency was acknowledged by the Samatha Court, which mandated the holding of a meeting of the Chief Ministers and relevant Ministers of the Union to formulate a uniform policy regarding the protection of the land and minerals of the tribes.[31] However, such a meeting was never held. Moreover, the Court made another directive that twenty percent of the net profits accruing from the mining leases be set aside in a perpetual trust for the benefit of the tribes in matters of water, schools, hospitals, sanitation, and transportation.

The Accountability Vacuum in Implementation

[27] The Unlawful Activities (Prevention) Act, 1967, § 15, No. 37 of 1967, India Code (1967).
[28] *Samatha v. State of A.P.*, (1997) 8 SCC 191 (India).
[29] Orissa Mining Corp. v. Ministry of Env't & Forest, (2013) 6 SCC 476 (India).
[30] India Const. art. 25, art. 26.
[31] *Samatha*, (1997) 8 SCC 191, 250–51

The gravest criticism of judicial enforcement stems from the total lack of accountability measures for any breaches of judicial rulings. In Samatha, the Supreme Court ruled that the State Government is a "person" under Section 3(1)(a), thus making it illegal for the State to transfer any of its land to non-tribals. In Niyamgiri, the Supreme Court ruled that decisions by the Gram Sabha on religious rights have to be considered by the Ministry of Environment and Forests before clearing forests at the second stage. But neither decision created any accountability measures for public servants failing to comply with these rulings.

Under Section 7 of the Forest Rights Act, 2006, there is punishment for any public servant who refuses or hinders forest rights.[32] But no public servant has ever faced action under this section for creating fake Gram Sabha resolutions, coercion, or systematic rejection of forest rights due to technicalities. It is not because there are no violations, but because state authorities do not wish to take any legal action against their employees or tribal people cannot avail themselves of such actions against state authorities. The risk of litigation remains a negligible cost of doing business for corporate entities and state governments, while the reward of acquiring mineral wealth remains immense.

Executive Nullification Through Administrative Action

From experience in the Fifth Schedule areas, especially Jharkhand, there appears to be a consistent trend whereby, once the judiciary upholds provisions protecting the rights of tribes, the executive acts by means of administrative classifications, circulars, and policies, thereby achieving through indirect methods that which legislation and judicial decisions expressly prohibit. The policy of "Land Bank" adopted by the state of Jharkhand where communal khuntkatti lands have been classified as gair majarua aam (State lands) constitutes a classic example of the doctrine of "colourable exercise of power."[33]

In this regard too, following the ruling on the Niyamgiri case, corporations and state governments have perfected the strategy of appropriating the Gram Sabha procedure. Instead of directly challenging the order of the Supreme Court, which would bring down contempt proceedings on their head, they have learned to manipulate procedure to manufacture compliance in form alone and deny it in substance. Insufficient notice, coercion of attendance, fraudulent documentation, and excluding the villages concerned from consultations all do the

[32] The Forest Rights Act, 2006, § 7
[33] Jharkhand Govt. Notification, *Land Bank Policy*, No. 3452/LRG (Notified on June 10, 2019).

same thing that denying consent would do, but without leaving behind any paper trail by which this denial can be proved before the court.

Jurisdictional Fragmentation as a Structural Barrier

The fragmented power exercised by the Gram Sabhas under PESA and the Forest Rights Act, Tribes Advisory Councils under the Fifth Schedule, governors with regulatory authority, forest departments responsible for environmental conservation, mining departments concerned with revenues, and the reactive jurisdiction of courts forms a jurisdictional labyrinth in which powerful individuals have no trouble navigating while indigenous communities cannot.

As seen in the Niyamgiri judgment, the Court's suggestion to nominate an independent judicial observer to ensure the fairness of Gram Sabha deliberations shows both the potential and limitations of judicial intervention in the issue. The unique mechanism of judicial monitoring of Gram Sabha meetings was successful since, on one hand, it was suggested in a Supreme Court order, and on the other, there was an actual judicial official present during the discussions. Such an approach cannot be used for protecting all of the Gram Sabhas discussing mining leases since the Supreme Court lacks the capacity to control thousands of processes in ten different states.

The Governor as Missing Constitutional Trustee

The most revolutionary element of the Fifth Schedule in the form of the Governor as constitutional trustee for tribal interests is the greatest weakness of the Fifth Schedule. Section 5 of the Fifth Schedule gives the Governor power to issue regulations for the "peace and good government" of the Scheduled Area, which include prohibition or regulation of transfer of land, regulation of allotment of land to Scheduled Tribes, and regulation of lending of money to persons belonging to Scheduled Tribes.[34] The Samatha Court took refuge in this power, suggesting that the Governor's power must be liberally construed in order to further the purposes of the constitution.

There is no record of any Governor exercising their power under Section 5(2) to make rules restricting mining leases in Scheduled Areas, notwithstanding the existence of violations of tribal land rights in many states. There is no case of any Governor withholding assent to any

[34] India Const. art. 244, schs. 5 & 6.

state law that undermines the protection of PESA, although clearly such laws are not in conformity with the constitutional framework for protecting tribes. The Governor's office has become a constitutional museum, rather than a place where tribal interests are actively protected. To make the office a vibrant guardian of tribal interests, radical changes need to be made, including independent staffing, discretionary funds, and discretionary power accountability systems that no political head will initiate.

The Ideological Antagonism Between Developmentalism and Constitutional Morality

Behind these implementation problems lies an ideological clash between two conflicting paradigms. The extractive developmental paradigm, dominant in the administrative state, regards tribal lands as potential sources of minerals that should be mined for national development. Under this paradigm, tribal communities are considered hindrances to development, as "encroachers" who occupy forest lands that should really belong to the State. The constitutional paradigm sees tribal peoples as right-bearers endowed with the capacity to self-govern. In light of the constitutional paradigm, for instance, the Samatha Court expanded the term "person" to cover the State Government, while the Niyamgiri Court declared that the religious freedoms guaranteed under Articles 25 and 26[35] extend to protecting sacred hills against industrial pollution. What must be noted, however, is that the constitutional paradigm has yet to find expression among the civil servants whose task it is to implement these decisions.

If district collectors, forest officials, and secretaries from the mining department continue to honestly feel that minerals belong to the State and that tribals interfere in the development of the nation, then whatever progressive statement made by the judiciary will not make any difference to the existing system. It is not only an administrative issue but also an ideological one. Only when there is a change in the cultural system within the institution can there be closure to this gap, rather than just making new progressive statements.

THE THEORETICAL SHIFT: FROM RIGHTS-IN-TEXT TO RIGHTS-IN-PROCESS

It is clear from the analysis undertaken above that the constitutional approach to tribal rights taken by India through the Fifth and Sixth Schedules, the PESA of 1996, the FRA of 2006, and LARR of 2013 is exceptionally progressive in theory. Nevertheless, from the evidence provided in the case studies of Odisha, Chhattisgarh, Jharkhand, and Maharashtra, it is obvious

[35] India Const. art. 25, art. 26.

that there is a great discrepancy between the theoretical and the practical. This means that until action is taken, the forced eviction, land alienation, faked Gram Sabha resolution, and failure to adequately rehabilitate tribes should force a change from celebrating text-based indigenous constitutionalism to enforcing culturally-sensitive process-based indigenous constitutionalism. This paper adds to the debate on the connection between indigenous rights and modern law in India using a comparative analysis approach in order to establish the weaknesses behind poor implementation. The comparative model used here proves that poor implementation does not arise out of mere inefficiencies within the implementation system; it arises out of failure of the system itself because of such reasons as lack of enforcement mechanism, non-accountability, reactivity and marginalising the voice of indigenous people.

The notion of "constitutional imagination" should be reconfigured to acknowledge that rights reside not in their articulation but in their enactment via enforceable procedures. The tribes inscribed themselves as constitutional agents through the Constituent Assembly proceedings, participating in the constitution-making process with unparalleled zeal.[36] In his compelling statement, "You cannot teach democracy to the tribal people; you have to learn democratic ways from them," Jaipal Singh Munda voiced a constitutional imagination that sought enlightenment from the forested societies. But this imagination has been steadily eroded by a jurisprudential framework that prioritises administrative expediency over community involvement.

A procedural approach to constitutionalism demands three parallel developments: firstly, the development of procedural machinery possessing coercive enforcement authority; secondly, the formation of an independent regulatory body free from governmental and corporate control; and thirdly, the metamorphosis of the judiciary from a reactive arbiter into an active regulator of compliance.

RECOMMENDATIONS TO STRENGTHEN TRIBAL RIGHTS

Institutional Mechanism: The Tribal Rights Enforcement Mechanism (TREM)

Lack of an independent enforcement body becomes the biggest gap within the framework governing the tribal rights regime in India. The present institutions, namely the National

[36] Rohit De & Ornit Shani, The Horizons of India's Constitutional Imagination: Tribes and Constitution Making, in Assembling India's Constitution: A New Democratic History 268 (Cambridge University Press 2025).

Commission for Scheduled Tribes, Ministry of Tribal Affairs and Monitoring Committees at State levels, have inherent deficiencies due to their lack of coercive power, poor staffing and executive influence. The National Commission for Scheduled Tribes, which has been constitutionally mandated under article 338-A of the Constitution of India, is more of an advisory and recommending body lacking the power to suspend and impose penalties.[37]

This study therefore suggests the creation of an enforcement mechanism for tribal rights, the Tribal Rights Enforcement Mechanism (TREM) characterised by the following features:

Composition and Independence: The Tribal Rights Enforcement Mechanism shall be headed by a retired High Court Judge selected through collegium system between the Chief Justice of India, National Commission for Scheduled Tribes and Ministry of Tribal Affairs. The other members of the Tribunal shall be nominees of scheduled tribes from recognised tribal autonomous councils.

Coercive Powers: The TREM is empowered to wield powers equivalent to those wielded by a Civil Court and may take steps like summoning witnesses, issuing notice to produce documents, ordering cessation of acts, and imposing penalties for the violation. Above all, however, the TREM will be empowered to order the suspension of any process of land acquisition taking place within the Scheduled Areas till such time as it gets confirmed that the provisions of PESA, FRA, and LARR have been fulfilled. This provision needs to be exercised suo motu and automatically without any judicial interference.

District-Level Presence: TREM shall establish offices in every district containing Scheduled Areas, staffed by officers appointed in consultation with the District Council or, in Fifth Schedule areas, the District Planning Committee. This decentralised presence addresses the jurisdictional fragmentation that currently allows violations to proceed unnoticed.

Digital Authentication and Anti-Forgery Measures

Given the documented existence of the “fake Gram Sabha” resolutions, where purported consents were obtained from several villages at once without prior notice to the community, there is an urgent need for technology-based solution. The Ministry of Tribal Affairs' UNDP

[37] India Const. art. 338A.

project of capacity-building in tribal areas acknowledges this, but the current measures are not enough.[38]

This research therefore proposes that any meeting of Gram Sabhas pertaining to the issue of land acquisition, mining permits, and claims to forest rights shall be compulsorily recorded via audiovisual means with digital timestamp and geolocation data. Such audiovisual recordings shall then be uploaded online into a secured platform controlled by TREM within 48 hours after the recording. The idea behind making the video-recordings compulsory as proposed by the Goa government should thus be given due consideration, but particularly in tribal areas.

The Tribal Rights Ombudsman: Independent Oversight at the District Level

While institutional structures at the national level are crucial, oversight cannot and must not be delegated. Thus, this research proposes that a Tribal Rights Ombudsman be appointed per district with scheduled areas. Such Ombudsman will have the following mandate and duties:

Appointment and Tenure: The Ombudsman shall be appointed by the State High Court from a panel of retired district judges or senior advocates with demonstrated expertise in tribal rights, in consultation with the District Council or Gram Sabha representatives. The Ombudsman shall serve a fixed term of five years and shall be removable only for proven incapacity or misconduct through a process requiring the concurrence of the High Court.

Suspension Power: The Ombudsman shall have the authority to issue a stay on any land acquisition, mining lease, or development project in Scheduled Areas upon *prima facie* finding of non-compliance with PESA, FRA, or LARR requirements. This stay shall operate immediately and shall remain in effect until a compliance review is completed. The burden of proving compliance shall rest on the acquiring body, not on the tribal community.

Complaint Adjudication: The Ombudsman shall receive and adjudicate complaints from any person or community alleging violation of tribal rights. Proceedings shall be conducted in the local language, with provisions for illiterate complainants to file oral complaints. The Ombudsman's orders shall be binding and enforceable as decrees of a civil court, with appeals lying directly to the High Court.

[38] Ministry of Tribal Affairs, UNDP Project Document, Capacity Building of Tribal Institutions for Implementation of Forest Rights Act (2019) at 12.

Annual Reporting: The Ombudsman shall submit an annual report to the State High Court and the National Commission for Scheduled Tribes, documenting compliance levels, systemic violations, and recommendations for legal reform. This reporting requirement creates a public record of implementation failures, enabling civil society monitoring and parliamentary oversight.

Court-Mandated Compliance Audits: Transforming Judicial Role

Present judicial process on tribal rights is still largely reactive. Courts come into the picture only after rights have been violated, usually years after displacement and damage caused to the environment. Though Orissa Mining Corporation was a progressive judgement recognizing the authority of Gram Sabhas, it took legal proceedings for this judgement to get passed by the Supreme Court. In Samatha, where transfers of tribal lands were declared null and void, the decision has been circumvented.

To solve this issue, it is recommended that High Courts will undertake an annual compliance audit of FRA & PESA implementation within all districts in its territorial jurisdiction. As follows:

Audit Mechanism: Each High Court shall designate a bench or division bench to oversee tribal rights implementation. The Court may appoint commissioners, retired judicial officers, or recognized non-governmental organizations to conduct field inspections and submit audit reports. The audit shall examine: (a) the status of individual and community forest rights claims under FRA; (b) the functioning of Gram Sabhas in Scheduled Areas, including the authenticity of consent documentation; (c) pending displacement and rehabilitation cases; and (d) compliance with LARR requirements for any ongoing or recently completed projects.

Public Access: Audit reports shall be made publicly available on the High Court's website and translated into local languages. Civil society organizations and affected communities shall have standing to submit supplementary information or challenge audit findings.

Remedial Directions: Where audits identify systemic violations, High Courts shall issue remedial directions, including orders for stay of ongoing projects, initiation of contempt

proceedings against errant officials, and directions for restitution of alienated lands. The power to issue *suo motu* proceedings based on audit findings shall be explicitly recognized.

Model Adopted: This recommendation draws from the Assam government's recent proposal to establish district land tribunals for protecting tribal belt lands, as outlined in The Assam District Land Tribunal Bill, 2025.[39] While the Assam model focuses on adjudication of existing disputes, the court-mandated audit mechanism proposed here is proactive, it requires judicial engagement before violations escalate to litigation.

CONCLUSION

In summary, there is no need for the gap between constitutional guarantees and actualities to exist. This is a consequence of particular institutional decisions that may be undone: the lack of enforcement machinery, the lack of transparency in the consent process, the lack of independent supervision, and judicial unwillingness to intervene.

It has been established through the above discussion that the law of India reflects a very progressive constitutional imagination. However, the experiences of Odisha, Chhattisgarh, and Jharkhand show that this progressive imagination has been subverted by official obstructionism, corporate takeover, institutional disunity, and the existence of fake Gram Sabha resolutions. While the victory of the Dongria Kondh community in Niyamgiri remains an exception[40], the construction of Polavaram has resulted in the displacement of 150,000 tribals[41], and the Hasdeo Arand forests continue to be threatened with clearance.[42]

Indeed, this research has advocated that there needs to be a paradigm shift away from text-based to enforceable process-based indigenous constitutionalism. Recommendations of TREM, a mechanism with coercive capacity, digitally authenticated video recording of Gram Sabha, a Tribal Rights Ombudsman with power to suspend in every Scheduled District, and compulsory annual compliance audits by High Courts are institutionally possible and legally defensible; they require no amendment to the Constitution but rather action from legislature as well as courts. Pilot initiatives of district land tribunals proposed by Assam government as well

[39] The Assam District Land Tribunal Bill, 2025, Bill No. 35 of 2025, § 4 (Feb. 10, 2025) (India).
[40] *Orissa Mining Corp.*, (2013) 6 SCC at 501–04 (India).
[41] *Polavaram Project Displacement*, reported in *The Hindu*, "Polavaram: Tribals Face Eviction Without Rehabilitation," Mar. 15, 2022, at A1.
[42] *Hasdeo Arand Forest Clearance*, *Down to Earth*, "Coal Mining Threatens Hasdeo Arand," Sept. 5, 2021, at 12

as the interventions of Ministry of Tribal Affairs with UNDP funding on capacity strengthening initiatives show that these mechanisms are politically feasible as well.[43][44]

All that is required now is political will. The constitutional imagination which was inspired from forest societies, the idea of learning about collective ownership, gender equality, and democratic decision-making among Adivasis as a way of constituting the Republic needs to be revived. What is needed now is not to look back at the Constitution as an instrument of law which provides protection to the rights of tribes merely on paper, but to see how they can be enforced through its institutions. Tribal communities are not passive recipients of state benevolence but active constitutional actors whose experiences have shaped the Republic's deepest commitments to pluralism. Recovering this agency is the unfinished work of Indian constitutionalism.

[43] Ministry of Tribal Affairs, UNDP Project Document, Capacity Building of Tribal Institutions for Implementation of Forest Rights Act (2019) at 12.
[44] The Assam District Land Tribunal Bill, 2025, Bill No. 35 of 2025, § 4 (Feb. 10, 2025) (India).