

Evolution of V & VI Schedule in the constitution of India

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UNIT-3: SCHEDULE V AND SCHEDULE VI

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1. Introduction

Majority of communities classified as Scheduled Tribes have been living in the hilly and forest regions of the country. They have been living in isolation for generations and evolved culture of their own. They never liked interference of outsiders. Even after the kingdoms of the plains conquered their lands, their de facto rule was continued by the Hindu kings as long as their de jure rule is accepted by the tribal chiefs in the form of ceremonial submission of the bow and arrow. When the British took over, their administration percolated to these areas. Disturbances occurred in tribal areas and the British introduced a policy of separately administering by notifying them as Scheduled Districts. After independence, these areas were notified as Scheduled areas as per provisions of the constitution by with various provisions for administration.

2. Objectives

The objectives are:

- a) To explain special provisions of Fifth Schedule
- b) To explain special provisions of Sixth Schedule
- c) To explain the violations of provisions of these Schedules and orders of Courts there on

3. The polity in the hill tracts of India

In Indian sub-continent, the hill tracts, between North East Frontier Agencies (NEFA), Eastern Ghats and Western Ghats are habitats of tribal people. In these hill tracts, the tribes used to practice barter system, resolve the disputes in village councils with consensus, transmitting their knowledge through oral tradition, whereas the kingdoms in the plains abutting the hill tracts used to rule their territory through force (Police and military) and treasury (coins and gold) and inscriptions. Some of the defeated kings used to take shelter in the hill tracts. Some of the chieftains of tribes in the hills were recognized as subordinate rulers, entered in to marital alliances with the kings also. There are many occasions where the kings and chieftains joined hands in opposing the onslaught of aspiring emperors. Some of the marginalized communities in the

plains migrated in to the hill tracts but their caste based social status remained the same as in the plains (*Nirmal Kumar Bose, 1996*).

4. Evolution of Governance in the present day V Scheduled areas

While the Hindu Rajahs performed the tribal rites and rituals, they also participated in social functions and festivals of tribes, even though the tribes resented the exploitation of elite. For example, in 1836, a military campaign was waged against the refractory Rajah of Gumsur, who was one of the oldest hill Zamindars of Ganjam (present day Odisha), belonging to Bhanja Family. The British Government came into conflict with his tribal subjects (the Khonds) also because of this relationship. The British Government's hunt for the Rajah, sheltered by the tribes escalated into a full scale war against the tribesmen. The Gumsur war that broke out in 1836 has expedited the action on the part of the Government as can be seen from Mr. Russel's report in 1836, in which he suggested the need for removing the existing causes of irritation on the part of hill Zamindars by exempting the areas from ordinary laws. He suggested for placing the areas exclusively under the Collectors of the districts, who should be vested the entire civil administration of government and also criminal justice. His reports and the observations of Governor have resulted in enactment of Ganjam and Vishakapatnam Act, 1839. In this Act the District collectors were designated as Agents to the Government (Dr. V.N.V.K Shastry, K.V.Subba Reddy, 1991).

The British introduced individual property rights and registration of the transfers and judicial Courts to adjudicate both civil and criminal disputes. The decrees of Courts used to attach the property of indebted tribes. Such actions unknown before provoked them to rebel.

Mr. Sullivan, the first member of Revenue Board in Madras presidency, enquiring in to the causes of tribal revolt in Rampa country in the present East Godavari of Andhra Pradesh, observed that 'the tribal dares to enter in to a den of tiger but not in to the judicial court of Rajahmundry'.

Education without empowerment

To transport the military troops to suppress the rebellions in the disturbed areas, British laid roads deep in to the hill tracts and this infrastructure accelerated the integration of tribal economy in to market economy (*David Arnold, 2005*). British opened schools to educate the people "The British were willing to accept the complaints against the subordinate officials but not against the rules themselves..(-Standen, Confidential no.60). [B.P.Standen, Chief Sec. to CC CP 1910]". "They wanted one person in every household to read and write so that they could explain rules to the rest. – Debrett, Confidential no.4417. (Officer on Special Duty, Bastar state 1910). – Page no.148 & 149; *Subalsterns and Sovereigns. An anthropological History of Bastar, 1854-1996 Nandini Sundar, Oxford University Press 1997*". But the syllabus in the schools didn't enable the people to gain the minimum knowledge of administrative systems at local level.

Confronted with struggles, fituries and revolts, the British introduced several protective measures for the tribal areas in the hill tracts and started the process of identifying the tribal communities. In 1874, the Scheduled Districts Act XIV (Central Act) was passed, under which, Scheduled Districts were defined to mean the territory mentioned in the First Schedule and Parts thereof and would include any other territory to which the Secretary of State for India by resolution in Council may declare. The provincial Government issued rules prescribing the procedure to be followed by the officers appointed there under to administer Agency Tracts.

Bihar, for instance had a substantial tribal population largely located in its plateau region (now Jharkhand state). The colonial administration brought in the Wilkinson Rules 1839, the Chotanagpur Tenancy Act, 1869 and the Santal Parganas Act, 1855, creating a legal frame work for the protection of the land belonging to tribes following recurrent rebellions in the tribal area. The Regulation I of 1796 laid down the foundations of the preset Santhal Policy, which continues to this date without much alteration. Such protectionary legislation existed in other states as well such as the States of Assam including what was then called the North East, Central India and tribal areas of the Bombay and Madras Presidencies. All these Acts and rules exhibited certain

common features. The areas covered by these Acts and rules were removed from the general administration and were placed in a special category, in the recognition of the facts that the tribal people constituted a special category and that they could not be administered along with the general populace. The Deputy Commissioners are entrusted with the administration of tribal people and areas inhabited by them.

The Montague-Chelmsford Reforms (1918) considered the tribal question and excluded them from the Provincial Governments. The Government of India Act, 1919 categorized the excluded territories into two parts, the wholly and the partially excluded. The wholly excluded areas were small while the latter were more extensive and were entrusted to the joint responsibility of the Governor and the Governor-General-in-Council. The Montague-Chelmsford Reforms had suggested that the areas inhabited by the Primitive Tribe Groups should be excluded from the proposed political reforms and should be administered by the Governor of the Province. The tribal issue also attracted the attention of the Indian Statutory Commission (Simon Commission), which considered the inhabitants of their areas being politically not “advanced”. They required security of land tenure, protection from subjugation and freedom to pursue their traditional livelihood and customs. The Simon Commission felt that the duty of educating these people could not be left to the missionaries or the individual officials. The Government should earmark funds for such educational and welfare activities. The Commission suggested the whole or partial exclusion of these areas from the ambit of generally administered areas in recognition of these Principles. The Government of India Act, 1935, treated the Scheduled Districts as wholly or partially excluded. A notification to this effect was issued Under Sections 91 of the Government of India Act, 1935. Under Sections 92(1) & (2) of this Act, the administration of these areas was exclusively vested into the Governor of the Province [S.92 (1), (2) & (3)].

5. Features of The V Schedule in The Constitution Of India

Administratively and legally the habitat of the tribes is divided into three groups. The first group comprises the areas declared as the Scheduled Area under Clause 6(1) of Schedule V of the Constitution. Under Section 6(2) of

Schedule V, the President of India may, at any time, order either deleting an area from the Scheduled Areas in consultation with the Governor of the State. Thus the specification of Scheduled area in relation to a particular State/ Union Territory is notified by an Order of the President, after consultation with the State Governments concerned. Same procedures would apply while altering, increasing or rescinding any order(s) relating to Scheduled Areas.

No criteria seemed to have been followed in declaring the V& VI Scheduled areas and most of the areas notified as Partially Excluded Areas under 1935 Act were declared as V Scheduled Areas and the Wholly Excluded Areas mostly became VI Scheduled Areas. Dhebar Commission pointing out this fact commented that the law and order approach followed by British to exclude the tribal areas from normal administration continued after independence. However the Government evolved criteria to be followed for declaring an area as Scheduled Area which includes 1.Preponderance of tribal population 2. Compactness and reasonable size of the areas 3. Under – developed nature of the area and 4.marked disparity in economic standard of the people. These criteria have become well established over the course of the time. They embody principles followed in declaring ‘Excluded’ and ‘Partially – Excluded areas’ under the Government of India Act 1935, Schedule ‘B’ of recommendations of the Excluded and partially Excluded Areas, the Sub Committee of Constituent Assembly and the Scheduled Area and Scheduled (Dhebar) Commission, 1961. **The orders in operation relating to the scheduled Areas are provided at the end of the Unit.**

6. Important Provisions of Fifth Schedule

The Governor of a state has been entrusted with special responsibilities in the administration of the Scheduled Areas in the state. The Governor has been vested with legislative powers.

- a) He/she is required to prepare a special report annually or whenever required and submit to the President regarding the administration of the Scheduled Areas. [Section 3 of Schedule V].
- b) The Union Government can issue appropriate directives to the State Governments as to the administration of the Scheduled Areas.

- c) This Schedule also provides for constitution of the Tribes Advisory Council with 20 members of whom 3/4 should be the scheduled tribe members of the state legislature to advice on such matter pertaining to the welfare and advancement of the Schedule Tribes as may be referred to them by the Governor [S 4(2)].
- d) The Governor may make rules regarding the number of members of the Tribes Advisory Council, its conduct, meeting and other incidental matters [S4 (2)].
- e) The Governor may further direct, by public notification, that a particular Act of the Parliament or of the State Legislature shall not apply to a Scheduled Areas or to its parts with such exceptions as may be directed [S 5(1)].
- f) The Governor may make Regulations for peace and good governance in the Scheduled Areas by which she/he may, among other things, prohibit or restrict the transfer of land by the members of the Schedule Tribes amongst themselves; regulate the allotment of land to members of the Scheduled Tribes in such areas; and regulate the business as money-lender by persons who lend money to members of the Schedule Tribes, etc., [S 5(2)]. While making such regulations the Governor may, in consultation with the Tribes Advisory Council, repeal or amend any Act of parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question [S 5(3)]. The Governor shall submit all regulation, which applies to such Scheduled Areas forthwith to the President, and these shall be effective only with the assent of the President [S 5 (4)].

7. Historical background of Administration of tribal areas in the North East

The administration of the tribal areas in this region which were earlier known as “backward tracts” has a history of its own. The grant of Dewany of Bengal to Robert Clive in 1765 secured for the East India Company “superintendence of all laws and the collection of all revenues” in the Presidency of Bengal. As a result of this, the estates bordering North-East region rich in timber, ivory, wax, eri, muga etc. allured the East India Company to develop trade relations and interests in the North-East Frontiers. Though the company had appointed

its own officers for the collection of public revenue, the actual collection continued to be made by the Zamindars and their officers. The internal quarrels among the Zamindars soon led the authorities at Calcutta (Kolkata) to make inquiries into the happenings of unrest in these areas, For this purpose, reference may be made about the work after extensive tour of the areas submitted an elaborate report in August, 1816 by David Scot, the Magistrate of Rangapur. The recommendations of Scot received the approval of the Governor General in council and some areas were separated from the District of Rangpur and placed under the special charge of an officer to be called as Civil Commissioner of North-East Rangapur.

Soon thereafter Regulation X of 1882 was passed which laid the foundation for the pattern of administration of the tribal areas of North-East India to be followed by the British. A beginning was made of a new form of administration popularly known as the Non-regulated System. The powers of Collectors, Magistrates and judges were centered in the same hands, and an intensely centralized and all powerful executive was constituted for the bringing the administration within the reach of the people through simple and personal procedure.

8. Features of The VI Schedule in Constitution Of India

According to Dr. Ambedkar, the tribal people of Assam differed from the tribes of other areas. As for the latter, they were more or less Hinduised, more or less assimilated with the civilization and culture of the majority of the people in whose midst they lived. As for the former, their roots were still in their own civilization and their own culture. They had not adopted either the modes or the manners of the Hindus who surrounded them. Their laws of inheritance, their laws of marriage, Custom, etc. were quite different from that of Hindus. He felt that the position of the tribes of Assam was somewhat analogous to that of the Red Indians (Now referred to as American Indians) in the United States, who are a Republic by themselves in that country, and were regarded as a separate and independent people. He agreed that Regional and District Councils can be created on the line which was adopted by the United States for the purpose of the Red Indians.

This schedule provides for two kinds of governing units in the Tribal Areas: the Autonomous District Councils and the Autonomous Regions.

- a) The Governor has the Power to include, exclude or diminish any of these areas or define their boundaries [S1].
- b) There shall be a District Council for Each Autonomous District comprising not more than 30 members and a Regional council for the Autonomous Regions.
- c) The powers of administration shall be vested in these Districts and Autonomous Council [S 2(4)]. The Governor shall be entitled to make rules for the constitution of the Councils, its Composition, and terms of office, appointment of officers and staff and procedure and conduct of business.
 - i. The Elected members of the council shall have normal term of five years [S 2(6&7)].
 - ii. The District and the Regional Council have the power to make rules in respect of lands other than the Reserved Forest, use of canal or water courses for agriculture, regulation of jhum other forms of shifting cultivation, establishment of village or town committees, appointment or succession of chief or headmen, inheritance of property, marriage and divorce and social customs with the prior approval of the government [S3].
 - iii. The District and the Regional Council are also empowered to constitute village councils for trial or suits and cases except those, which has been excluded otherwise. They may similarly prescribe and lay down their procedures for trial and enforcement of their decisions [S4].
 - iv. The Governor may delegate the additional powers under the code of civil procedures and code of criminal procedures. The District Councils may establish and manage primary schools, agriculture, animal husbandry and other community projects [S6].

- v. They have their own district and their regional funds and may assess and collect land revenue and impose taxes, grant licenses and leases for minerals [S 9], make regulations for control of money lending and trading by non-tribes [S 10], Regulate publications [S 11], etc.
- vi. The Governor has the powers to direct the exclusion or modification of any act of the State Legislature of the Arunachal Pradesh, Assam, Manipur, Mizoram, Meghalaya, Nagaland, Tripura relating to the consumption of non-distilled alcoholic liquor [S 12, 12A to 12B]. The Council shall prepare their Annual financial Statement and the same shall be placed before the Commissions of formed by State Legislature [S13].
- vii. The Governor has powers to appoint Commissions to enquire into the affairs of any Council [S15] annul or suspend any office acts or resolutions and dissolve the Council and direct general elections subject to the prior approval of the State Legislature [S16].

9. Some Case Studies where the VI schedule provisions were not followed

There were some instances in which the VI schedule provisions were not implemented. Some of them are

The suspension or dissolution of Councils

Due to the extraordinary situations arising from time to time in these states of North-East, the Councils as well as the Governors in many occasions dissolved the Councils. Such dissolutions were contested in Courts of Law. Here are the extracts from the Court orders.

- a) “The Governor while assuming to himself the powers and functions of District Council on completion of its term is not required to consult the Council of Ministers and acts in his individual discretion. The requirement of consultation with the Council of Ministers is relevant only in case of premature dissolution of the District Council and not when action is taken at the end of the term of the District Council”.

- b) “The Governor cannot take over judicial power of the District Council by issuing notification under paragraph 16(2) in as much as once Courts are established under paragraph 4 of the Sixth Schedule. Those Courts alone perform the judicial functions under the supervision of the High Court and Supreme Court” *D. Uphing Maslai v. State of Assam, 2001 (2) GLT 299; (3) GLR 510; AIR 2002 Gau old 64.*
- c) Governor of Assam issued Notification under paragraph 16(2) dissolving the Karbi Anglong District Council and assuming to himself the administration and all the function of District Council which was assailed by writ petition before the High Court. The writ petitioner contended that the District Council can be dissolved only under sub paragraph (1) after fulfilling the conditions set out therein. The High Court on the analysis of the notification came to the conclusion that the impugned notification was in fact and substance notification under subparagraph (2) and as such it was not void on account of absence of pre conditions contemplated in subparagraph (1). The Court further held that the satisfaction of the Governor is subjective and a narrow judicial scrutiny is permissible to the extent of judicial review in regard to action taken under Article 356 of the Constitution since language of Para 16(2) is identical to the language used in Article 356 of the Constitution. On merits, it was found that none of the grounds referred in the notification had no nexus to the object under paragraph 16(2) and there was clear non application of minds by the State to the relevant aspects. Accordingly the notification struck down. As regard scope and ambit of sub paragraphs (1) and (2), the High Court held as under.
- d) “A close study of the provisions of paragraph 16 reveals that action to be taken under Sub-paragraph (1) and (2) are of different nature and amplitude and the procedure to be followed and the consequences following are also different. Sub-paragraph (1) contemplates dissolution be followed by fresh general election either immediately or within twelve months. In either case, alternative arrangement may be made in regard the administration of the area pending fresh election, but the period cannot exceed twelve months. For dissolution of the Council, the

- pre-condition for assumption of administration of the area is previous approval of the Legislature and an opportunity to the District Council of Commission and satisfaction of the Governor must be based on relevant grounds having nexus with the matters in regard to which the Commission was appointed. The action to be taken under sub paragraph (2) is not dissolution; it is what may be regarded as ‘suspension’ of the District Council for a period, the initial period being not exceeding six months, but with an option to extend the period by six months at a time.
- e) Scope of judicial review against proclamation issued under Article 356 has been explained in *S.R. Bommai v. Union of India, 1994 (3) SCC1: AIR 1994 SC 1918*. The subjective satisfaction contemplated under sub paragraph (2) is that the administration cannot be carried on in accordance with the provisions of the Sixth Schedule. Under sub Paragraph (2) there is no dissolution and no assumption of the administration of the area. There is only assumption of the functions and powers and functions by a person or authority.” *Dr. Jayantha Rongpi v. State of Assam, 1994(1) GLJ 229. SLP(C) 10388 of 1993 filed by the state of Assam before the Supreme Court against the aforesaid order of the High Court was dismissed as withdrawn on 28-7-1993.*
- f) “The Constitutional provisions quoted above clearly shows that the Governor is empowered to extend the term of the Council for a period not exceeding one year when circumstances exists in which holding of election Governor is to act in his discretion to form an opinion as to whether holding of election of a District Council is impracticable before the Governor decides to extend the term of office. The word “may” incorporated in sub-paragraph (6A) (of paragraph 2) quoted above clearly shows that the extension of term is discretionary even when the Governor is of the opinion that holding of election is not practicable ... Consequently, it emerges that powers of extension of the term of an Executive Committee of a District Council as embodied in sub-paragraph (6A) of Paragraph 2 is discretionary even when the Governor is of the opinion that circumstances, exist which render the holding of election impracticable. The Petitioners, therefore, have no enforceable

right for continuance in office after expiration of the term on the ground that the election could not be held within time.” *Prakanta Warisa v.State of Assam, 2001(3) GLT500.*

- g) The frequent suspensions or dissolutions of Councils is resented by tribal communities. They demand a Tribal advisory council be formed on the similar lines in V schedule making the consultation with TAC mandatory.

10. Omissions and Commissions in invoking V Schedule

a) Scheduled villages deleted

When there is no popular government many villages deleted from the scheduled areas of erstwhile Madras presidency. [*The Madras scheduled areas (Cesser) order 1951. Dated. 22-6-51*]

23 villages in the scheduled area of Warangal district were deleted by High Court of AP in 1997. The govt. did not file appeal.

b) Implementation of LTR stayed over a decade in certain scheduled villages

Non-tribes started obtaining stay orders against the implementation of 1/70 regulation in their villages in the scheduled areas since 87. The Court in 97 vacating the stays allowed them one month time to file a petition before the Governor. (*W.P.No. 7337/92. The petitioners may avail of one month's period from the date of receipt of a copy of this order for making such representation and having regard to the fact that there is unrest in the areas concerned and also law and order problem, the representation may be considered by the Governor as expeditiously as possible and preferably within a period of four months from the date of submission of such a representation. All interim orders hitherto granted stand vacated. Direction on 29-10-97, Dismissed*).

c) No follow up of TAC resolutions

The Andhra Pradesh Scheduled Area Land Transfer Regulation (LTR) as amended in 1970: The State Govt. argued that LTR has retrospective effect, the Courts ruled that they are prospective; The Andhra Pradesh government

did not pursue the resolutions of Tribal Advisory Council to amend LTR accordingly.

d) A.P.M.D.C was allowed to acquire lands for mining

The LTR presumes that the entire land in scheduled area is a tribal land “Transfer of immovable property by a members of a Schedule Tribes, until the contrary is proved, any immovable property situated in the Agency tracts and in the possession of a person who is not a member of Scheduled Tribe, shall be presumed to have been acquired by person or his predecessor in possession through a transfer made to him by a member of Scheduled Tribes”). The LTR did not differentiate between government land and private land in scheduled areas. Therefore, even government land cannot be transferred by government to non tribal(s). In 1991, Andhra Pradesh government issued an order allowing APMDC (Andhra Pradesh Mineral Development Corporation) to acquire lands for mining purpose “Provided that this sub-section shall not apply to an undertaking owned or controlled by the states or central government or to a society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies act, 1964 which is composed solely of members of scheduled tribes” (GO.Ms.No.264, Ind. & Com., dt.7.8.1991, (w.e.f.14.8.91). This means that the land can be transferred to a cooperative with 100% tribal membership.

e) The Supreme Court of Australia declaring in the Mabo case in 1992 (*Mabo and others v. Queensland no.2 1992, 175 CLR 1 F.C.92/014. Aborigines - Constitutional law – Real property “Terra nullius and natural resources”*)

With the Supreme Court of Australia declaring in the Mabo case in 1993 that the principle of terra nullius cannot be recognised as valid any more (Cockburn 1993), the question of the close link between the indigenous peoples and the natural resources has been brought to the fore once again during the U.N. Year of the Indigenous Peoples of the world. White colonisation of indigenous lands of the Amerindians in the Americas and those of the aboriginal populations in Australia and New Zealand was based on the assumption that they were terra nullius i.e. that they belonged to on one. As such “civilised populations” had a right to occupy them. The Australian Supreme Court has struck at the very roots of this principle and has returned to the indigenous populations what had rightly belonged to

them till colonial settlers took them over forcibly. As such anyone who wants to occupy these lands has to negotiate with their original owners i.e. the Aborigines. The link between the indigenous identity, natural resources and self-determination has thus been re-established at least in one country in which aboriginal rights has been violated for long.

- f) In some form or the other, the same principle of terra nullius (referred to in this country as “eminent domain”), is applied also in India to make it possible for the dominant classes to take control of these resources. In some cases it is used to take over land that was once under the control of the tribes, in others to displace people who have lived in a region for centuries though they might not have acquired the type of patta or land document required by the colonial law. In other cases it is used to take control over the forests from which they had traditionally got more than 50 per cent of their food and had met most other needs. Thus, the efforts of the dominant sections to control the natural resources and the use they make of principle of “eminent domain” have become basic to the life of the tribes also in India. Agitations, as for example those against Narmada and Subarmarekha, have only brought this issue to the fore, and have not created the problem as those supporting these schemes claim.
- g) The principle of “eminent domain” is used in this case, because much of the land the tribes have been living on is what is considered common property over which they have no right whatever according to the present legal system. Most tribes affected by these schemes are illiterate and have not been exposed to the formal economy and legal system of the State. For centuries they have survived in the informal society of a culture based on the word of mouth, legitimation by the community and common property resources. The formal society, on the contrary, depends on the principle of a written document given to an individual. Property owned by an individual is basic to this economy.” (Walter Fernandes “Indian tribes and search for an indigenous identity” p.35,36; *Social Change: June-September 1993, Vol.23 Nos.2&3.*)

Thus, the Australian Supreme Court has struck at the very roots of this principle and has returned to the indigenous populations what had rightly belonged to them till colonial settlers took them over forcibly. As such

anyone who wants to occupy these lands has to negotiate with their original owners i.e. the Aborigines. (“Indian tribes and search for an indigenous identity” p.33 Walter Fernandes; *Social Change: June-September 1993, Vol.23 Nos. 2&3*)

- h) Dr. Ambedkar moulded the VI Schedule on the model of the administrative systems following the models of governance in the United States. The government of Andhra Pradesh through 1/70 regulation presumed that the scheduled area is tribal land.

Though the Courts in the Western Countries ruled out the concept of “eminent domain”, as described above, the Supreme Court of India in Samata case allowed the above Government order (*G.O.Ms.No.264, Ind&Com., dt: 7-8-1991*) as APMDC is a state instrument (wholly owned by government), (Civil Appeals Nos.4601-02 of 1997) *AIR 1997 SC 3297, (1997(8) Supreme Court cases 191 Samata Vs State of A.P, Para “116.* It is seen in this case that, the transfer was claimed to have been made in favor of the State instrumentalities, i.e., APMDC Ltd., It has already been held that transfer of the government but one of entrustment of its property is for public purpose. Since, admittedly, a public corporation acts in public interest and not for private gain, such transfer stands excluded from the prohibition under Para 5(2)(b) of the Fifth Schedule and Section3(1)(a) of the Regulation or lease, therefore, stands upheld. But a transfer of mining leases to non-tribal natural persons or company, corporation aggregate or partnership firm etc. is unconstitutional, void and inoperative”). But the above Government order (*G.O.Ms.No.264, Ind&Com., dt: 7-8-1991*) was challenged in the High Court of A.P as it was not issued consulting Tribal advisory council and National commission of Scheduled castes and Scheduled Tribes, and also any amendment requires the assent of the President of India. (*W.P.No. 1571/2006*). The Court put the agreements entered into by Government of Andhra Pradesh. “In the petition filed in public interest, the petitioners have prayed for declaring as unconstitutional the following expression appearing in proviso ‘to an undertaking owned or controlled by the State or Central Government or’ to sub-section (5) of Section 11 of Mines and Minerals (Regulation and Development) Act, 1957 (*Inserted by G.O.Ms.No.264, Ind&Com., dt:7-8-1991, w.e.f.14-8-91*). They

have further prayed for quashing the agreement entered into between the State Government and respondent No.7 (*M/s. Jindal South West holdings public limited, Jindal mansion, 5-A, Dr. G.Deshmukh marg, Mumbai-400026*) for supply of Bauxite mineral through respondent No.6 in an extent of 2,446 hectares in Araku and Sapparla area of Visakhapatnam District”, “till the required permission is obtained by the State Government in terms of Section 2(2) of the Act as also environment clearance is granted by the competent authority, the agreement entered into between respondent No.1 (*The Principal Secretary to Govt., Government of Andhra Pradesh, Industries and Commerce {mines} department, Secretariat, Hyderabad*) and respondent No.7 shall not be implemented.

i) A G.O. was quashed but similar G.O.s are still in force

The High Court, quashed the Andhra Pradesh government orders “G.O.129 Section 3(1) (a) - G.O.M.s.No.129, Social Welfare Department, dated 13-08-1979) exempting the small non tribal farmers from the per view of LTR, as the order was not issued invoking V Schedule (W.P.No.1755/79 dated 5-12-1984 A.P.Girijana welfare students and youth union Vs govt. of A.P.). But similar order by Andhra Pradesh government (G.O.Ms.No.41, Revenue, dated 12-1-1971 Orders were issued to the effect that such of those landless poor non-tribes in Scheduled areas who are in possession of Government lands to the extent 2 ½ acres of wet or 5 acres of dry land for a period of not less than 10 years should not be evicted.” It still in force, though it is against the LTR.

j) Memo issued without invoking v schedule was set aside

The recent example is on providing seats in the Schools of Excellency according to the status of tribes in development. Prompted by the TAC resolution (dated: 1-7-2005), the Govt. issued a memo of instructions. This memo was challenged in the High Court of AP. The Govt. argued that under V schedule it can issue such instructions. The Court, pointing out that the memo was not issued invoking V schedule, quashed the memo. There was no follow up to revise the instructions in the above memo in tune with the resolution of TAC. (1-7-2005 “14/05 Classification of tribes. Resolution. A lengthy discussion took place on the proposal to classify STs in the state into different categories as the statistical evidence reveals that most of the

education and job opportunities are being availed by new tribes only. The majority of members suggested that backward areas and backward tribes may be identified and special package/special weight ages may be provided to them under different schemes like training programmes, coaching, Best Available Schools and Institutions etc, to reduce imbalance by giving them adequate preferential weight age and representation. Hence, resolved accordingly”. Extract from the minutes of the 96th Meeting of A.P Tribes Advisory Council, 1-7-2005) *Annexure No.4*

k) CrPC and Judiciary was introduced without consulting TAC

In the scheduled areas of the state of Andhra Pradesh, the old CrPC (Criminal Procedure Code) was in operation. When this was brought to the notice of the Supreme Court [Writ Petition (Civil)] No.324 of 2003 *A.Sadguru Prasad Vs. State of A.P and others*), the Government of Andhra Pradesh, without consulting TAC issued orders (G.O.Ms.No.33, Law (LA&J Home Courts-B, Department dated 25-03-2004) for the extension of new CrPC, 1973 to scheduled areas by repealing the government order issued earlier in 1974 (G.O.Ms.No.485, Home (Court-B) Department, dated 29-3-1974). The Court accepted the G.O and directed the government to introduce New CrPC Later, the Tribal Advisory Council in its meeting on 1-7-2005 resolved advising the Government to bring out a law suitable to the tribes taking into consideration of their Customary Law also. Now there is proposal to extend the jurisdiction of Civil Courts to scheduled areas. Various tribal associations and NGOs working in scheduled areas have raised objections to this extension without consultation with affected tribes. A committee constituted by Tribal Welfare Department have gone into the details and finalized the report. Only the beneficial provisions of old and new CrPC and CPC are proposed to be extended and the justice is proposed to be taken to door steps of tribes. It is proposed to discuss all the issues relating to CrPC and CPC and extension of Civil Courts jurisdiction, so that TAC will advise government on a law suitable to the tribes taking into consideration their own customary Law also. Now the Supreme Court is seized with a case for introduction of CPC. The Civil society groups requested the Govt. to follow up the commitment given to the High Court of AP and to work out the modalities in this regard in consultation with TAC

“It is clearly evident from the averments made in the counter-affidavit filed by the Commissioner of Tribal Welfare that the Government is seized of the matter and the issue is under active consideration, for which purpose, the Government has rightly appointed a committee of experts. We are not inclined to issue any directions at this stage even before the TAC under the Constitution. It is needless to direct that the Government shall take an appropriate decision in the matter in the light of the recommendations of the committee and the views of the TAC For the present, we are not inclined to issue any directions in the regard,” (*Extract from the order of the W.P.No:14275 of 2004 of High Court of Andhra Pradesh*). This is a case where government can examine the implications of the extension of CPC and civil courts to scheduled areas especially in the context of customary law and also the statutory law applicable to scheduled areas (PESA, LTR etc), and bring it to the notice of Honorable Court after discussing it in TAC. The Supreme Court in Civil Appeal No.5030-5036 of 2004 allowed this stand.

1) Customary resolution of disputes dropped

The Notified tribal area rules of erstwhile Hyderabad state Dated 16-11-1949 empower Panchayats to decide certain category of Criminal Cases where both parties are tribes. Rule no 17. “The Panchayat shall have power to compel attendance of the parties and witness and to impose a fine up to Rs 50/- if they fall to attend. Rule No 23. (a). Verbal orders or notice only shall be requisite in any case except when the police are employed or when the persons concerned is not a resident of the Notified Tribal Areas at the time. The order shall be made known to the person affected or time. The order shall be made known to the person affected or to some adult member of his family or proclaimed at the place he was last known to reside, in sufficient time to allow him, to appear”. Such provision was not incorporated while framing the rules for PESA (Panchyat Extended to Scheduled Areas). Due to these omissions and Commissions of Government and other statutory institutions, the tribes in V scheduled areas are demanding to form Councils on the lines in the VI schedule of the Constitution.

11. Discussions on the Role of Governor

There are two views on the issue: whether the Governor can act independent of council of ministers in respect to the V Scheduled areas. One view was that the Governor’s powers are intended to be exercised in his discretion while the other view was that the Governor should exercise such powers only on the advice of the Council of Ministers. The following report of Governors Committee makes it clear that the Governor can act only on the advice of the cabinet of ministers duly consulting the TAC.

The fifth Schedule of the Constitution dealing with the administration and control of Scheduled Areas and Scheduled Tribes envisages a specific role for the Governors of States in the administration of these areas. It empowers the Governor to direct by public notification that any particular Act of Parliament or State Legislature or any part thereof shall apply with modifications or shall not apply to any Scheduled Area. It also empowers the Governor to make regulations for peace and good governance in the Scheduled Areas. The general feedback on the role of the Governor is that despite the existence of these provisions in the Constitution, the role of the Governor in this context has remained very marginal in the last half century of the Indian Republic. The present experience in all States is that the Governors have not exercised any significant role under the fifth Schedule and wherever this has been so exercised it has been on the advice of the Council of Ministers. Prominent persons who have considerable experience with regard to Scheduled Tribes had suggested that in view of the special provisions in the fifth Schedule the Governor should play a pro - active role. They have strongly urged a more positive role of the Governor who should act in his own discretion and not on the advice of the Council of ministers for the welfare of the Scheduled Tribes and the administrators of the Scheduled Area.

But the Andhra Pradesh High Court Judgment in A.V.Rao and others v/s Government of Andhra Pradesh (AIR 1955, AP 275), discussed the extent of powers of the Governor under the Fifth Schedule and had referred to the discussion in the Constituent Assembly when the provisions relating to the administration and control of Schedule Areas and Schedule Tribes were taken up for consideration. In that debate Dr. K. M. Munshi had said that in the exercise of his powers under the Fifth Schedule the Governor is bound by the advice of the Council of Ministers and the debate was closed by Dr.B.R.

Ambedkar, Chairman of the Drafting Committee endorsing the views of Dr. K.M.Munshi.

The relevant extracts “Report of the committee of Governors on certain aspects concerning the welfare and the rights of the scheduled castes and scheduled tribes, 28 April 2001” from Shri Sorabjee’s Attorney General of India vide his letter dated 21 March 2001 are as follows.

“Under our Constitutional scheme, as a general rule the Governor acts on the aid and advice of the Council of Ministers and not independently of it. The general rule is departed from in respect of certain functions to be performed by the Governor may act in his. There are certain functions which from their very nature necessitate departure from the general rule, e.g. report of the Governor to the president under Article 356 of the Constitution.

“There is no provision in the V Schedule or the Constitution which expressly empowers a Governor to act in his discretion independently of or contrary to ministerial advice. The Sixth Schedule of the Constitution contained such a provision in para 18 (3) – which has been subsequently deleted – and para 9(2) of the Sixth Schedule provides that the matters mentioned therein will be determined by the Governor “in his discretion” The omission of any such provision in the Fifth Schedule empowering the Governor to act his discretion or in his individual Judgment is significant.

“The supreme court had occasion to consider the provision of the Sixth Schedule with respect to the exercise of the powers conferred on him by para 1(3) of the Sixth Schedule. The Supreme Court rejected the submission of Shri Setalvad that a Governor in exercising his powers conferred on him by para 1(3) of Sixth Schedule function in his own individual character as a Governor and observed that the power has to be exercised on the advice of Council of Ministers. [Edwingson Barch V. State of Assam & Ors 1966(2) SCR 770 at page.788]. “In my view, The Governor in discharging of his functions under the Fifth Schedule is restricted to act under ministerial advice and not independently of it.”

The objectives of the Fifth Schedule and the Notification and Regulations made there under are to protect the tribes against exploitation by others and for peace and good governance in the Scheduled Areas, For this purpose the Governor has been empowered to issue Notifications directing any Act of Parliament or State Legislature not to apply or to apply with suitable

modifications in Scheduled Areas. He has also been vested with powers to make Regulations, subject to assent by the President, to repeal or amend any Act of Parliament or State Legislature, Inter alia, to protect the interests of tribes in their lands and prevent exploitation by money Lenders. Such sweeping powers vested in the Governor in the Constitution have given rise to expectations from many tribal leaders and groups that the Governors will be able to act independently and decisively to protect tribes interest, without being bound by the advice of the Council of Ministers.

In the light of the Attorney General’s view and in the absence of a provision similar to paras 20 BB an 20BA in the Sixth Schedule (inserted by amendments in 1988 and 1955), conferring powers in the Governor to act as considered “necessary in his discretion”, the general principle of acting on the advice of the Council of Ministers seems to binding on the actions the Governor under the Fifth Schedule.

12. Summing up

Tribes living in isolation in hilly and forest regions of the country in the Central India and North Eastern India evolved their own systems of self governance. The Fifth Schedule of the constitution contains two important provisions for governance by the Governor. They are Governor can amend any law passed by Parliament or by state legislature to define its applicability to schedule areas. The Sixth schedule provides for self governance through autonomous councils. In course of time there were attempts by the state itself and when these actions were challenged, the Courts passed several orders explaining the scope of the Fifth and Sixth Schedules.

13. Keywords

Partially Excluded Areas, Wholly Excluded Areas, Fifth Scheduled areas, Sixth scheduled areas, Autonomous councils

14. Know your progress

What are the special powers of governor in Fifth Schedule areas?

What are the powers of councils in the sixth schedule areas?

15. Know your Progress

What are the legislative powers of the Governor in V Scheduled Areas?

What are the powers of Governor in VI Scheduled Areas?

Annexure No: 1

Law Applicable to V Scheduled Areas:

1. “Notwithstanding anything in this Constitution the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Schedule Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exception and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.
2. The Governor may make regulations for the peace and good government of any area in a State, which is for the time being a Scheduled Area. In particular and without prejudice to the generality of the foregoing power, such regulations may-
 - I. Prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area.
 - II. Regulate the allotment of land to members of the Scheduled Tribes in such area;
 - III. Regulate the carrying on of business as money - lender by persons who lend money to members of the Scheduled Tribes in such area.
3. In making such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the legislature of the State or any existing law which is for the time being applicable to the area in question.
4. All regulation made under this paragraph shall be submitted forthwith to the president and, until assented to by him, shall have no effect.
5. No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.” (Extracts of the fifth schedule of the constitution)

Annexure No: 2

The Regional and District Councils in VI scheduled areas:

- (6). The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other

representative tribal organizations within the autonomous districts or regions concerned, and such rules shall provide for-

- (a) The composition of the District Councils and Regional Councils and the allocation of seats therein;
- (b) The delimitation of territorial constituencies for the purpose of elections to those Councils;
- (c) The qualifications for voting at such elections and the preparation of electoral rolls therefore;
- (d) The qualifications for being elected at such elections as members of such Councils;
- (e) The term of office of members of 5 [Regional Councils];
- (f) Any other matter relating to or connected with elections or nominations to such Councils;
- (g) The procedure and the conduct of business 6 [including the power to act notwithstanding any vacancy] in the District and Regional Councils;
- (h) The appointment of officers and staff of the District and Regional Councils.

7[(6A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after the general elections to the Council, unless the District Council is sooner dissolved under paragraph 16 and a nominated member shall hold office at the pleasure of the Governor:

Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of the Governor, render the holding of elections impracticable, be extended by the Governor for a period not exceeding one year at a time and in any case where a proclamation of Emergency is in operation not extending beyond a period of six months after the proclamation has eased to operate:

Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the member whom he replaces.

(7) The District or the Regional Council may after its first constitution make rules [with the approval of the Governor] with regard to the matters specified in

(a) The formation of subordinate local Councils or Boards and their procedure and the conduct of their business; and

(b) Generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be: provided that until rules are made by the district or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council.

(10) Power of assuming administration of an autonomous District or Region was conferred on the Governor on his being satisfied that a situation had arisen in which the administration could not be carried on in accordance with the provisions of Schedule. Every such action?

Annexure –3

The following orders are in operation in their original or amended form

Sl. No	Name of Order	Date of Notification	Name of State / UT9s for which applicable
1	2	3	4
1	The Constitution (Scheduled Tribes) order 1950(C.O.22)	6.9.1950	Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Gujarat, Goa, Himachal Pradesh, p\ Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Orissa, Rajasthan, Tamil Nadu, Tripura and West Bengal
2	The Constitution (Scheduled Tribes) Union Territories) order, 1951(C.O.33)	20.9.1951	Daman & Diu, Lakshadweep
3	The Constitution (Andaman and Nochobar Islands) Scheduled Tribes Order, 1959 (C.O.58)	31.3.1959	Andaman and Nicobar Islands
4	The Constitution (Dadra & Nagar Haveli)	30.6.1962	Dadra & Nagar Haveli

	Scheduled Tribes order, 1962(C.O.65)		
5	The Constitution (Uttarpradesh0 Scheduled Tribes Order, 1967(C.O.78	24.6.1967	Uttar Pradesh
6	The Constitution (Nagaland0 Scheduled Tribes Order, 1970 (C.O.88)	23.7.1970	Nagaland
7	The Constitution (Sikkim) Scheduled Tribes Order, 1978(C.O.111)	22.6.1978	Sikkim
8	The Constitution (Jammu & Kashmir) Scheduled Tribes order, 1989(C.O.142)	7.10.1989	Jammu & Kashmir

Annexure – 4

TRIBAL AREAS

1. The North Cachar hills District **PART – I**
 2. ¹[The Karbi – Anglong District]

1. ¹[Khasi hills District] **PART – II**
 2. Jaintia Hills District
 3. The Garo Hills District
 Tripura Tribal Area District **³[Part IIA]**

1. ⁵[The Charma District]
 2. ⁶[The Mara District]
 3. The Lai District]

1	2	3	4
1	The Scheduled Areas (Part A States) Order, 1950(C.O.9)	26.1.1950	Andhra Pradesh
2	The Scheduled Areas (Part B States) Order, 1950(C.O.26)	7.12.1950	Andhra Pradesh
3	The Scheduled Area(Himachal Pradesh) Order, 1975(C.O. 102)	21.11.1975	Himachal Pradesh
4	The Scheduled Area (States of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977(C.O.109)	31.12.1977	Bihar, Gujarat, Madhya Pradesh and Orissa
5	The Schedules Areas (Rajasthan) Order, 1981 (C.O. 114)	12.2.1981	Rajasthan
6	The Scheduled Areas (Maharashtra) Order, 1985 (C.O. 123)	2.12.1985	Maharashtra

Annexure – 5

Following orders are in operation at present in their original or amended form:

Sl.No	Name of Order	Date of Notification	Name of State for which applicable
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Annexure – 6

1. Entrance Notification for Scheduled tribe Girls and Boys in Pratibha Schools (School of Excellence - English Medium) Rc.No.97/Acad-3/2006 Dt.28.02.2006.
2. Extract from the order in W.P. No: 9994 and 9996 of 2006, Dated: 21-9-2006 of High Court of A.P.

1. ANDHRA PRADESH TRIBAL WELFARE DEPARTMENT, HYDERABAD
 GURUKULAM (Andhra Pradesh Tribal Welfare Residential Institutions Society Regd.)

HMD floor, Damodharam Sanjeevaiah Welfare bhawan, Masabtank, Hyderabad,
Phone-2339318.

Rc.No.97/Acad-3/2006 Dt.28.02.2006.

Entrance Notification for Scheduled tribe Girls and Boys in Pratibha Schools
(School of Excellence - English Medium)

Applications are invited for admission into three Pratibha Schools (School of Excellence) functioning under the control of Tribal Welfare Department since 2005-2006, The Selection of bright ST Girls and Boys from 8th Class through conducting entrance test on merit basis in English medium for foundation IIT, HIT, NIT and Medicine. The selected students will be given free education, boarding and other facilities.

Name of the School, allotted districts and the information of seats allotted of academic year 2006-2007.

S.No.	Pratibha School Address	Districts allotted	Seats allotted
1	Principal, A. P. Tribal welfare Residential Pratibha School, ChakaBelgam. Parvathipuram, Vijayanagaram district. Cell: 9440357550	Vijayanagaram, Visakhapatnam, East Godavari District. West Godavari, Krishna Dist. ST Students.	for P.T.G Students 30 seats, for other Tribal students 60 seats. for P.T.G Students 3 seats, for other Tribal students 3 seats. for P.T.G Students 5 seats, for other Tribal students 5 seats.
2	Principal A.P. Tribal Welfare Residential Pratibha School, V.T.C Campus, Bhadrachalam, Khammam Dist.	Khammam, Warangal, Adilabad, Nizamabad, Nalgonda, Karimnagar.	for PTG Students 2 seats, Koya 15, Erukala 5, Gond/ Nayakpodu 15, Lambada/Sugali 20, other Sub-Tribes 15 seats.

	9885832258	Mahaboobnagar, Rangareddy Dist. ST	for PTG.Students 2seats, Erukala 1, Gond/Nayakpodu 2, other Sub-Tribes 3 seats.
3	Principal, A.P. Tribal Welfare, Residential Pratibha School, P.M.R.C Building, Srisailam, Kurnool Dist. Ph: 9949359236	Guntur, Prakasam, Nellore, Chittoor, Kurnool, Kadapah. Annanthapuram District	for PTG Chenchu 20 seats, Yanadi 10, other Sub-Tribes 30 seats. Chenchu Students 111, Yanadi 30, other Sub-Tribes 3 seats.
	9440675679		Chenchu Students 7, Yanadi 29, other Sub-Tribes 3 seats

2. High Court quashed the above memo

Order in W.P. No: 9994 and 9996 of 2006, Dated: 21-9-2006

"The present case is not one where any such regulation is made by the Governor in terms of the provisions of the Fifth Schedule based on the recommendations of the Tribes Advisory Council pertaining to Scheduled Area. The impugned notifications are mere executive actions pertaining to all the members of scheduled tribes whether residing in Scheduled Area or outside. The reference to the provisions of the Fifth Schedule has, therefore, no relevance to the fact situation obtaining in the present case. Any affirmative action initiated by the State for advancement of the Scheduled Tribes, a salutary effort, no doubt, shall, however, be in conformity with the provisions of the Constitution and not in violation thereof. The contention of the respondents 1 and 2 with reference to the provisions of the Fifth Schedule of the Constitution is therefore wholly misconceived. The present case is not one where any such regulation is made by the Governor in terms of the provisions of the Fifth Schedule based on the recommendations of the Tribes Advisory Council pertaining to Scheduled Area. The impugned notifications are mere executive actions pertaining to all the members of scheduled tribes whether residing in Scheduled Area or outside. The reference to the provisions of the Fifth Schedule has, therefore, no relevance to the fact situation obtaining in the present case. Any affirmative action initiated by the State for advancement of the Scheduled Tribes, a salutary effort, no doubt, shall,

however, be in conformity with the provisions of the Constitution and not in violation thereof. The contention of the respondents 1 and 2 with reference to the provisions of the Fifth Schedule of the Constitution is therefore wholly misconceived.

In the result, the writ petitions are allowed and the impugned notifications are quashed. The respondents shall now make admissions ignoring the sub-classification of the Scheduled Tribes. In the result, the writ petitions are allowed and the impugned notifications are quashed. The respondents shall now make admissions ignoring the sub-classification of the Scheduled tribes."

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