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Them and Their Land
Management of Tribal Rights in India

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ABSTRACT

The organization of modern India was an exercise at management of various identities and cultures. One such identity was the '*adivasi*' (tribal) community in india characterized by isolation from mainstream public life, and historically different from the lifestyle and culture of the 'modern' populace . They are closely knit with their habitat and resources, and 'occupy' resource rich forest land. Unlike in most other nation states, Indian *adivasi* community has not been identified on the basis of antecedence and previous rights but in the context of historical marginalization of the community by the others and by their unwillingness to integrate into the modern way of life. The framers of the constitution were sufficiently conscious of this difference and therefore provided for the management of these communities differently from the rest of the nation. The framework sought to balance the need for preservation of their culture against the need for development, the need for protection against the need for resource exploitation. The constitutional recognition of this difference was followed by a range of measures from the legislature and the executive to organize it and, recently, the judiciary intervened to further these interests.

While much seems to have been done, the practical impact of the design and its implementation have proved to be unfruitful. The state machinery has failed in its policies to balance the needs of the nation vis-à-vis the needs of the community, the development of the community and also honouring their independence in terms of governance. The intervention by the judiciary has only complicated the problem. *Adivasi* rights now lock horns with governmental, developmental and environmental concerns of the state.

This paper seeks to critically analyze and evaluate the legal development of tribal management in india and the 'history of failures' of the indian state in managing the adivasi community and will present a case for a better management strategy using a bottom-up approach of governance as opposed to the top-down decentralization model.

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I. INTRODUCTION

Do you want the tribals to remain hunters and gatherers? Are we trying to preserve them in some sort of anthropological museum? Yes, we can allow the minerals to remain in the ground for another 10,000 years, but will that bring development to these people? We can respect the fact that they worship the Niyamgirhi hill, but will that put shoes on their feet or their children in school? ... The debate about mining has gone on for centuries. It is nothing new[1].

- P. Chidambaram, Former Home Minister

The identity of India was not Indian. Historically, 'India' as it stands today, was organized by the British colonizers and evolved into a post independence Nation State. This Constitution of regions was so diverse; that 'one nation' brought with itself challenges of accommodating different identities and perpetuating the national identity.

One such identity was the '*Adivasi*' (Tribal) community in India. These communities are characterized by isolation from mainstream public life, organized on the basis of lineage and descent and historically different from the lifestyle and culture of the 'modern' populace. They are distinctively attached to their habitat and resources. They are self organized and self regulated and 'occupy' resource rich forest land. In the words of the Apex court "*on account of their isolation, they remained illiterate, uneducated, unsophisticated, poor and destitute*" and formed a society organized as per their customs and rituals.

The constituent assembly of India was conscious about the challenges facing the nation post-independence. Unlike its predecessor government the new nation was to be based on liberty, democracy, fraternity and could not foster inequality and exploitation among its people. Tribal management therefore became a serious issue facing the constitution makers. Adivasis[2] (Tribals) in India may have predated the Aryan invasion and are the argued to be original inhabitants of the country[3]. However, the constituent Assembly chose to not recognize the

[1] Shoma Choudhary, Halt the Violence, Give me 72 Hours: Home Minister P. Chidambaram Tehelka, Volume 6 Issue 46, Dated November 21, 2009 accessed via: http://www.tehelka.com/halt-the-violence-just-give-me-72-hours/5/ (hereinafter Shoma)

[2] The term 'Adivasi' in Hindi literally means 'indigenous people'.

[3] Dr.Prakash Chandra Mehta, Tribal Development in 20th Century, ¶ 7 [Durga Taldar Shiva Publishers,Udaipur, 2000].

antecedence but only the difference. Anthropologists debate the indigenous status of the adivasi community and the settlement of this status in favour of antecedence would imply first rights of the adivasi community on the land and resources under their occupation and dilute the eminent domain[4] of the State[5]. The Constitution of India does not use the word 'adivasi' and only refers to indigenous population as 'Scheduled Tribes' [ST]. STs have to be recognized by the executive authority of the states through notifications.[6][7]

Pt. Nehru, the first Prime Minister of India, came up with the tribal *Panchsheel* policy (five principles) which recognized the right of the tribal communities to develop along their own genius, art and culture; the right to self administration and their rights over their land and resources. It cautioned against intrusive administration or developmental schemes and set the criteria of substantial equality to monitor progress. The policy provided for the slow integration of the tribal communities in the mainstream development of the country[8]. The policy became the cornerstone of the tribal policy of India and the base for all development of the future plans of the government. The policy sought to balance the dichotomy between independence and autonomy of the tribal populace vis-à-vis their assimilation into the national identity and development[9].

The Constitution of India had created an almost autonomous system of governance for the tribes in the North-east region of India. These tribes were relatively more isolated than the other tribes in other regions. Schedule VI of the constitution is a 'constitution within the constitution' for the purposes of the governance of these tribes. Under the Schedule the tribal areas run an almost independent system of self governance.

For the other part of the country having Scheduled areas or Scheduled tribes this autonomy was denied. These tribes were given hardly any power of self governance and were only differently managed by the executive authority of the State[10]. It is here that the State has to

[4] Eminent Domain is "The legal capacity of sovereign, or one of its governmental agents to take private property for a public use upon the payment of just compensation" referring to Wallis in *State Of West Bengal v. Union Of India* [1963 AIR 1241 ¶ 451].

[5] J.J. Roy Burman Adivasi: A Contentious Term to denote Tribes as Indigenous Peoples of India [Mainstream, VOL XLVII, NO 32, JULY 25, 2009]accessed via: http://www.mainstreamweekly.net/article1537.html (Hereinafter Burman).

[6] The Constitution of India, art. 342.

[7] The researcher has used the terms Adivasi, tribal population, tribals and Indigenous population interchangeably throughout the paper. The debate about the indigenous status of the population is beyond the scope of the researcher in this paper. Reference may however be made to the following article which critically examines this issue: Burman, Supra note 5.

[8] R. R. Prasad, M. P. Jahagirdar Tribal Situation in Forest Villages: Changing Subsistence Strategies and Adaptation 153[Discovery Publishing House, 1993] (Hereinafter Pratap and Jagirdhar).

[9] Apoorv Kurup Tribal Law in India: How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better ¶ 89 [Indigenous Law Journal/Volume 7/Issue 1/2008] (Hereinafter Kurup).

[10] Id. Kurup.

run an exercise of diversity management. This paper only concerns itself with these tribal areas and communities also called as Schedule V tribes[11].

The Government of India then set the sail towards the Nehruvian ideals. While the ideals of the policy were the objectives of the underlying measures, the government misconceived the 'methodology' leading to a complete miscarriage of the program in the later years. The Tribal Panchsheel was conceptualized by the government as a centralized model of governance which essentially perpetuated alien forms of government into the tribal systems. The five year development plans ensued a similar arrangement for their implementation.

The dichotomy of assimilation and preservation was not the only issue facing the country vis-à-vis its indigenous population. The tribal populace occupy huge resource rich areas. The exploitation of these resources was essential to the development of the Economy. Exploitation by the State of its eminent domain survived the test of time. However, the interest of the State came in direct conflict with the interest of the tribal population when the State sought for the privatization of resource exploitation. The judicial intervention in this regard continued with the same paternalistic approach reaping no real benefits to the polity in the tribal communities[12]. The decision of the Apex Court in *Samata* v. *Andhra Pradesh*[13] received widespread criticism for its failure to balance conflicting interests.

Then, the sudden surge of Environmentalism which stirred the international community and the middle class population in the developing world created new issues in the spectrum of tribal management. Environmentalism and forest preservation found itself in direct conflict with tribal use of forest lands and tribal methods of agriculture and resource collection (Hunting and Gathering). Native communities were marked as 'encroachers' and such encroachment was to be governed by the continuous mandamus of the Court[14].

Fourth in line is the issue of 'giving back', the politics of correcting historical injustices. After half a century of disentitlement, deprivation and exploitation the government came up with the policy of restoration of lands to the tribal communities[15]. The policy sought to give back the community title in their land. While the policy 'may' have been conceptually well placed its impact was quite misplaced. Tribal communities had lost large stretches of land upon the vesting of the eminent domain in the sovereign republic of India. After decades of struggle the government allotted four hectares of land per family for cultivation and crystallized tribal land

[11] Issues regarding Schedule VI tribes are not within the scope of this paper. The strategy of governance within the constitution with respect to those areas is completely different and its study would differ substantially from the study of the management of Schedule V areas.

[12] The various approaches by the various bodies (Constitution, Legislature, Executive, Judiciary) are discussed in detail in the following chapters wherein the researcher has highlighted how each system evolved (rather failed to evolve) to cater to the management of the community.

[13] AIR 1997 SC 3297 (hereinafter Samata).

[14] Naveen Thayyil Judicial Fiats and Contemporary Enclosures. Conservat Soc 2009; Available from: http://www.conservationandsociety.org/text.asp?2009/7/4/268/65173 (Hereinafter Thayyil).

[15] Tribal Resettlement and Development Mission for implementation of the scheme, November 2001and The Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 [FRA].

rights. Further the resettlement program was awfully implemented and this failure has been acknowledged by the Comptroller and Auditor General of India[16]. The resettlement program came into heavy political debate between environmentalism and tribal rights which hampered its efficacy.

This paper seeks to critically examine the management of tribal communities by the Indian State through its Constitution, Legislature, Executive and Judiciary. Through the paper, the researcher seeks to highlight the conceptual and practical failures of the Indian State at multiple levels of tribal management and policy planning. The researcher suggests that the Nehruvian ideals were historically misconceived by the Indian State and 'enrooted centralization' and 'institutionalized governance' have not proven to be effective mechanisms of Tribal management. The researcher solicits a bottom up approach whereby administration is handed over at the grass roots and a communicative and consultative approach is taken up by the government for the management of the tribal population in India.

II. SCOPE AND LIMITATIONS

As discussed earlier, the researcher seeks to restrict the paper to the management of tribal populace not included under the VI Schedule. The following are the reasons:

1. The VI schedule has been a relatively successful attempt at tribal autonomy in India
2. The problems and issues of the VI schedule tribes are completely different in context from the V Schedule of the constitution

Further, the researcher does not seek to comment on the 'indigenous' status of the tribal community in India through the paper. The researcher also restricts the scope of the paper to Governance in general, governance, land rights of tribal communities and environmentalism. It does not seek to comment on the situation of the personal law of the tribal population or the Military intervention by the Indian State into tribal communities to counter Naxalism and Anti-State Maoist forces or the implementation of the Armed Forces Special Power Act.

A. Structure

The first chapter analyses the Constitutional Framework for tribal management in India. Chapter II analyzes the Legislative framework, Chapter III analyzes the executive policy planning and implementation and chapter IV analyzes the judicial intervention. Chapter V forwards an argument for a bottom-up approach involving communicative and consultative process of governance for tribal areas in India followed by a conclusion.

B. Research Methodology

[16] G Prabhakaran State gets the stick for tribal landlessness: CAG sees weak political will, highlights failure of scheme The Hindu (April 26, 2013) Accessed via: http://www.thehindu.com/todays-paper/state-gets-the-stick-for-tribal-landlessness/article4656066.ece.

This research paper is based on available doctrinal research and material in real form and over virtual databases. The researcher has subscribed to both primary and secondary sources of law along with commentaries and opinions on the law and policy of the Indian State on tribal management. This paper follows the Bluebook Uniform Style of Citation (19th Edition) for all references using footnotes.

III. CONSTITUTIONAL FRAMEWORK FOR TRIBAL MANAGEMENT- RECOGNIZING AND CATEGORIZING THE 'OTHER'

The tribal community in India had remained largely isolated until the colonial intervention. During the colonial era, the movement of Industry and infrastructure towards the tribal areas provided access to the more 'conscious' and 'enlightened' people to exploit natural resources in the tribal regions[17]. The first series of exploitation was by the settler money-lenders who gradually occupied lands in lieu of non repayment of debt[18]. The colonial government took cognizance of this exploitation and declared various areas as Agency areas to be governed by special agents of the government[19]. A series of Colonial legislation from the 19th century had legitimized modern administration of the tribal areas in India[20]. To protect against the exploitation the maximum rate of interest was regulated, the interest could not exceed the principal and no collateral could be appropriated by the money lender. The colonial administration also regulated the transfer of property by the tribal communities and prohibited transfer of lands in Agency areas to non-tribals[21]. In the later years a full fletched colonial administration governed most scheduled areas. A majority of the Scheduled areas had already been recognized by the colonial government and the constituent assembly was in a relatively mature time, dealing with issues of nation building requiring the assent of tribes[22].

In respect of the non Schedule VI tribes, two committees were set up by the constituent Assembly. The committees recognized the vulnerable nature of the tribal communities against other aggressive cultures. To address the issue, the constituent assembly provided for separate administration in these areas[23]. The Constituent Assembly found the Non Schedule VI tribes

[17] Suresh Sharma, Tribal Identity and the Modem World [Sage Publications, 1994] (hereinafter S. Sharma); Rucha S. Ghate, Forest Policy and Tribal Development: A study of Maharashtra [Concept Publishing House, 1992](hereinafter Ghate).
[18] *Samata v. State of Andhra Pradesh* Supra at Paragraph 15 (Hereinafter Samata).
[19] See: The Ganjam and Vizagapatnam Act of 1839; the Scheduled Districts Act, XIV (Central Act) 1874.
[20] Shubhankar Dam Legal Systems as Cultural Rights: A rights based Approach to Traditional Legal Systems Under the Constitution ¶300[16 Ind. Int'l & Comp. L. Rev. 295 2005-2006] (Hereinafter Dam).
[21] Samata, Supra Note 18.
[22] The Cabinet Mission Plan of 1946 required the Constituent Assembly to undergo a consultative process with effected minorities and tribal areas for their representation and participation in a new nation State. Relevant Excerpt: "(iv) A preliminary meeting will be held at which the general order of business will be decided, a chairman and other officers elected and an Advisory Committee (see paragraph 20 below) on the rights of citizens, minorities, and tribal and excluded communities set up". Accessed via: https://sites.google.com/site/cabinetmissionplan/Cabinet-Mission-Plan-May16.
[23] Dam Supra note 20 at ¶ 304.

relatively more assimilated into the national environ. Further the Non Schedule VI tribes in many cases co-existed with the majority population of the State[24] and therefore the Constitution did not provide for an autonomous governance regime to these areas. Part X of the Constitution demarcates the two categories into two Schedules. Under Part XVI of the constitution the Government may make special provisions for the representation and addressing the claims of Schedule Tribes. Schedule tribes have to be recognized by the President of India upon consultation with the Governors of State[25]. Under Schedule V of the Constitution, Scheduled areas or Scheduled tribes are governed by the executive authority of the State. The law made by the Parliament or Legislature of the State may be modified by the Governor[26] for its application to the areas or may require it to not apply vis-à-vis such areas[27]. Clause 5(2) of the Schedule empowers the Governor to make regulations for maintaining 'peace and good governance' in these areas. He may, if required, repeal or modify federal or State laws. The Constitution therefore vested in the Executive, the legislative power over tribal areas. The only agency of the tribal community which was mandated by the constitution was the 'consultation', which the government had to carry out with the tribal advisory council elected by the people in the area[28]. The Schedule requires the Governor to give annual reports about the administration of the areas to the President and empowers the Central government to issue directions to the State in respect of the administration over Scheduled areas. Given the historical context of exploitation of the tribal areas the Constitution expressly recognizes the power of the Governor to enact on the transfer of immoveable property and on money lending in these areas without prejudice to the generality of his powers under the Schedule. The constitutional framework offers only an apologetic consideration to the non Schedule VI tribes. The framework has proved to be altogether futile due to the following reasons.

Firstly, the constitutional framework does not provide for any criteria for the categorization of Schedule tribes. Therefore no fixed criteria mandates the recognition of these tribes rather, identification is based completely on a functional definition through recognition by the government. The lack of any criteria leads to multiple tribes being left unrecognized by the Government. The government has often used loose criterion subsuming primitive traits, geographical isolation and distinctive cultures. These criteria emerge from sources as obsolete as the 1931 Census or the Lokur Committtee report or the Joint Committee of Parliament Report (Chanda Committee) in 1967[29]. The lack of any guidance has lead to the arbitrary identification for the tribes. The definitions by the various committees and reports have not taken into account the possibility of transition and development among tribes and the group

[24] Kurup, Supra note 9 at ¶96.
[25] Constitution of India, Article 342 and Schedule V Clause 6.
[26] The Governor is the Executive head of the State and normally exercises his power upon the binding advice of the Council of Ministers.
[27] Constitution of India, Schedule 5 Clause 5.
[28] Constitution of India, Schedule 5 Clause 5(5).
[29] C. J. Sonowal Indian Tribes and Issue of Social Inclusion and Exclusion ¶126[Stud Tribes Tribals, 6(2): 123-134 (2008)] (hereinafter Sonowal).

specific differences[30]. Further the arbitrary distinction between the Schedule V and Schedule VI tribes on largely regional basis[31] deprives tribals in other regions of their right to culture. The Dehebar commission lays out the following criteria to identify tribal areas for Schedule VI namely, preponderance of tribal population, compactness and reasonable size of area, underdeveloped nature of area and low comparative standards of living.[32] Despite the existence of such features among various communities under non Schedule VI tribes such as the Wayanads[33] in Kerela, these groups remain deprived of their Status and right of self governance.

Second, schedule V of the constitution has obvious design faults. The TAC does not have any financial or regulatory powers of the area. The advice of the TAC has no binding effect on the Governor. Further under Schedule V all federal and State Laws apply to the tribal areas unless the governor specifically makes an exception. Therefore the Constitution provides for default application of alien laws to the tribal populace. The Schedule enables the Governor to make laws protecting tribal land from exploitation and alienations however the same is not mandatory. Most States in India have failed to control illegal alienation and appropriation of tribal lands despite the (lack of)constitutional provision (mandate)[34]. The Schedule unlike Schedule VI does not provide for tribal adjudicatory systems or tribal governance. Therefore access to justice requires recourse to regular court systems applying general laws (unless the State has sanctioned special laws for the administration of the community) disengaged from the values, culture and lifestyle of the community which does not serve indigenous interests[35]. Besides the vesting of the Legislative powers in the executive there is no substantial differential status which the constitution accords to the tribal community. Reportedly, most States have shown an utter neglect towards the administration of these areas and the annual reports by the Governors are more often irregular[36]. The overall performance of the State vis-à-vis the tribal integration policy of the Constitution has been remarkably poor with a few symbolic efforts[37].

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[30] Id.

[31] While the Constituent assembly did acknowledge the differences based on the their levels of integration, the tribals in non-Assam regions were generalized as being under one head. This broad generalization lead to all tribes in non-Assam regions being designated as Schedule V tribes.

[32] Report on Impact of the Tribal Sub-Plan Implementation in Improving the Socio-Economic Condition of the Tribal People with Special Focus on Reduction of Poverty Level covering the States of Assam and Tamil Nadu Accessed via: http://planningcommission.nic.in/reports/sereport/ser/stdy_tribal.pdf last accessed on 13 Apr. 13.

[33] Tribals in Kerala : A Case Study in Sulthan Bathery Taluk of Wayanad District accessed via: http://shodhganga.inflibnet.ac.in/bitstream/10603/222/13/13_chapter4.pdf.

[34] AITPN Report, Land Alienation of Tribals in India [Vol. III :: No. 4, October - December, 2008] accessed via: http://www.aitpn.org/IRQ/Vol-III/issue_4/story09.html.

[35] Dam, Supra Note 20.

[36] C.R Bijoy Policy brief on Panchayat Raj (Extension to Scheduled Areas) Act of 1996 ¶11 accessed via: http://www.undp.org/content/dam/india/docs/UNDP-Policy-Brief-on-PESA.pdf (Hereinafter Bijoy).

[37] Virginius Xaxa Politics of Language, Religion and Identity: Tribes in India ¶1367 [Economic and Political Weekly, Vol. 40, No. 13 (Mar. 26 - Apr. 1, 2005), pp. 1363-1370].

IV. LEGISLATIVE INTERVENTION: THE BROWN MAN'S BURDEN

Schedule V of the constitution allows both central and State laws to apply to the Scheduled areas. Legislative intervention in this regard therefore will differ from State to State. For the purpose of this paper, the researcher will only look at the two major legislative interventions at the Federal level which have shaped the debate around Tribal rights. The first intervention was the enactment of Panchayat (Extension to Scheduled Areas) Act, 1994[PESA][38]. The PESA allowed the tribal communities in a village to manage their affairs in accordance with their traditions and Customs on limited subject areas[39]. The PESA applied to the 'Scheduled Area' therefore certain non-tribal communities living in these areas would also be covered under the PESA. However, the act reserved 50% seats in proposed local governance system for the tribal population in the Hamlet[40].

The PESA was a forward looking statute. It vested the *Gram Sabha*[41] with the power to protect the culture, traditions, customs, customary modes of dispute resolution, community resources, approve plans for the development of the village and its resources; and it had to be consulted by the government in any case of land acquisition and rehabilitation programs[42]. The gram Sabha could intervene and make recommendations while awarding of mining contracts or other contracts for the exploitation of the scheduled areas. Such recommendations were mandatorily to be incorporated into such contracts[43]. The Gram Sabha could regulate the local markets, social institutions, implementation of Poverty alleviation programs, local water bodies, forest produce and money lending in the Scheduled areas[44]. As on date, all 9 states having Schedule areas have passed State Acts to bring the PESA into effect.

Despite the forward outlook of PESA, it has been criticised to be a massive failure in delivering self-governance in Scheduled Areas[45]. The act has the effect of transplanting alien systems of self- governance in tribal areas. While the Panchayati raj system has been more or less common across the territory of India, not all tribes have had a culture of Panchayat system or electoral system of governance and many tribes have failed to adopt the system to their benefit[46]. While the PESA seeks to protect the culture and traditions of these communities the transplantation of an alien system which necessarily displaces existing systems leads to impossibility in the approximation to this goal[47]. At times indigenous

[38] Constitution of India, Art. 243-M(3A)(b) allowed the Government to extend the Panchayati raj system (3 tier system of self governance at village level) to Scheduled areas.
[39] Section 4(b) PESA.
[40] Section 4 (g) PESA.
[41] A gram Sabha was the village assembly of people in the hamlet who had their names in the electoral rolls of the village.
[42] Section 4 PESA.
[43] Section 4(K) PESA.
[44] Section 4 PESA.
[45] Bijoy, Supra note 36 at ¶5.
[46] Kurup, Supra note 9 at ¶108.
[47] Id.

institutions of self governance co-exist with the State laws to enforce PESA often creating friction in the governance of these areas[48]. Even in areas where the system of panchayat raj was acceptable to the tribal population the inherent ambiguities render the entire exercise futile. PESA empowers the Gram Sabha to make 'recommendations' prior to grant of licenses and concessions by the Government. This process of obtaining recommendations from the Gram Sabha is a mandatory process[49]. Similarly before the acquisition of land by the government the Government has to consult the Gram Sabha. The act does not prescribe the weight of these recommendations and consultations to be carried out by the government. Therefore, these terms may be read to fall short of the international Standards of 'informed consent'[50]. The ambiguity carries itself into to other terms such as right to preserve customs, culture, customary mode of dispute resolution, water resources, community resources which do not give a clear outlook as to the scope and extent of the powers of the gram Sabha under the legislation[51].

This lack of clarity is then coupled with the lack of legislative disinterest or abhorrence of the States to implement the act in its spirit. Most States have failed to bring their laws applicable to schedule areas in compliance with the PESA[52]. The principle of federal Supremacy of laws[53] would dictate the nullity of laws inconsistent with the PESA. However, in respect of matters in List II of schedule VII[54] the laws enacted by the State inconsistent with PESA would continue to be applicable. Therefore despite the presence of the PESA the laws enacted by the legislature continue to apply to the tribal population[55]. In a few cases the State governments have distorted the mechanism under PESA by making villages and Panchayats as units of self rule as against the mandate of 'community' or 'Habitats' being the unit of Self Rule under the PESA[56]. States such *Odisha* have maintained the control of ordinary law over the community and land resources of tribal areas and the Gram Sabha is subject to ordinary

[48] Bhubneshwar Sawaiyan, An Overview of the Fifth Schedule and the Provisions of the Panchayat (Extension to the Scheduled Areas) Act, 1996 (Commonwealth Policy Studies Unit, 2002) at ¶4-5, online: accessed via: http://www.cpsu.org.uk/downloads/ Bhubnesh.pdf.
[49] Sections 4 (i) and 4 (l) PESA.
[50] Bijoy, Supra note 36 at ¶41.
[51] Id.
[52] Kurup, Supra note 9.
[53] *Hoechst Pharmaceuticals Ltd v. State of Bihar* [1983 SCR (3) 130] "in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists ll and III, and in case of overlapping between Lists li and III, the former shall prevail. But the principle of Federal Supremacy laid down in Art. 246 cannot be resorted to unless there is an 'irreconcilable' conflict between the Entries in the Union and State Lists".
[54] Id.
[55] Kurup, Supra note 9 at ¶100 and Bijoy, Supra note 36 at ¶39.
[56] Orissa Gram Panchayat (Amendment) Act of 1997, see also: Riyan Ramanath Tribals yet to benefit from PESA Act The Times of India (5 February, 2013) accessed via: http://articles.timesofindia.indiatimes.com/2013-02-05/bhubaneswar/36763679_1_tribal-rights-tribal-people-tribal-activist; Ajay Dandekar & Chitrangada Choudhury, PESA, Left-Wing Extremism and Governance: Concerns and Challenges in India's Tribal Districts, [Ministry of Panchayati Raj Government of India New Delhi, 2009] (hereinafter Dandekar and Chaudary). The chapter was censored and deleted from the report on recommendation of the Home Ministry. See: Ajay Dandekar and Chitrangada Chaudary The Missing Prong Outlook India (08 July 2010) accessed via: http://www.outlookindia.com/article.aspx?267052 for the full chapter.

law while managing the resources and not their customs and traditions[57]. Two of nine States have amended their Land Acquisition Statutes to give effect to the PESA and even in such cases the requirement for consultations and before amendments were only formally followed[58]. While the PESA acknowledges the power of the community over its resources and forests, problems arise when the State declares aboriginal habitats as 'reserved forests' thereby alienating the forests from the control of the community[59].

Even in States where the legislation has been closely approximated to, certain issues arise due to the underlying discrepancy of the system. While the PESA distributes power held by the State to the self government institutions, there is no adequate training and development of people to utilize these institutions for the proper implementation of the mechanisms. This inability leads to an underutilization of the systemic power and often usurpation of the same by either the State or the tribal elites to the prejudice of the people at large. In most cases the power has only transcended from the State to the Tribal Elites who do not always act in the best interest of the State[60]. The system is largely alien and unfit for the tribal situation and the transplantation of a system meant for non tribal society into tribal communities has hampered tribal rights. The failure to bring the Panchayati raj system into operation at various levels has left tribal groups in absolute deprivation and has only formalized failure of governance in these areas. The continuous exploitation of their resources and their land continues while they watch as outsiders alienated from their property without any useful recourse.

An in-operational government is only worse-off than the lack of governance and it only institutionalizes deprivation. The PESA has undertones of colonialism and of the White (Brown) Man's burden and operated by 'uninterested State governments' in oblivion to the diversity it seeks to address.

The Second legislative intervention was the enactment of the Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) act 2006 [FRA][61]. The Act sought to recognize and record the rights of traditional forest dwellers and tribes which historically remained un-crystallized[62]. The act was enacted to 'undo historical injustices' and provided for individual and collective-communal rights to tribals (as individuals) and tribes (as a

[57] Id. Dandekar and Choudary.
[58] Id. Dandekar and Choudhary, See also: Kurup Supra Note 9, at ¶ 105.
[59] See Kurup Supra Note 9 at ¶106. The Forest Conservation Act of 1980 under Section 2 authorizes the authority to either require a settlement with the owners of reserved forest lands for surrender or the acquisition of the same under the Land Acquisition Statute. In most cases the Tribal Community has a system of common ownership and therefore no crystallized title over the land can be established making it difficult for them to prove legal title. Therefore the State authorities can (and have been doing so) short-circuit the PESA to retain control over land.
[60] See: Kurup Supra Note 9.
[61] Gazette of India, EO Part II Section 1(N)/04/0007/2006-08 dated January 2, 2007 (hereinafter Gazette).
[62] Id Gazette. Statement of Objects and Reasons.

community) over their habitats[63]. The Act also provided for the development of infrastructure facilities by the State government and allowed the felling of trees and other activities for this purpose upon the approval of the Gram Sabha[64]. The rights vested in the individuals or married couples jointly as inheritable but non-alienable rights over the land[65]. The FRA also provided for the resettlement and vesting of land rights in resettled tribes if the tribes were dwelling in 'Critical wildlife area'[66].The Act fixed a cap of four hectares of land per unit[67]. Section 5 of the Act makes the Gram Sabha and the holders of Forest rights responsible for the protection and sustainable use of the habitat.[68] By a notification in 2008, the ministry of Tribal Affairs also recognized the rights of people not only dwelling but also dependent on Forest lands as having communal rights in forest lands under the Act[69].

The FRA bears testimony to the competing claims of Tribal rights and Forest conservation in India. The approach was in consonance with various environmental experts who found sense in crystallization of forest rights to limit environmental degradation[70]. However many conservationists found the act to crystallize forest encroachment in the name of tribal rights[71]. While advocates of tribal rights heralded the legislation as an important step towards undoing historical wrongs, the discovery of design faults and stale promises only left resent.

Firstly, the idea of crystallization of rights on an individual basis and community basis is inconsistent with the tribal practices such as Jhum cultivation[72] which forms a central part of culture and lifestyle of many tribal communities[73]. Secondly the Act bans hunting in the forest area by the tribes. Traditional hunting is another major aspect of tribal culture and an absolute ban without qualifications is arbitrary and against the right of the indigenous population to

[63] Section 3r/w Section 4(1) FRA. The rights under the Act are based on the Guidelines issued by the Ministry of Environment and forests under Circular No. 13-1/90-FP of Government of India, Ministry of Environment & Forests, Department of Environment, Forests & Wildlife dated 18.9. 90 addressed to the Secretaries of Forest Departments of all States/ Union Territories.
[64] Section 3(2) FRA.
[65] Section 4(4), FRA.
[66] Section 4(2), FRA.
[67] The Act provides for Family/Individuals as a unit for individual holding and community as the unit for holding communal land resources.
[68] Certain features of the act such as treatment of families at par with Individuals and the arbitrary restriction of 4 hectares are visible criticisms which one may mount against the design of the Act.
[69] Madhu Sarin India's Forest Rights Act -The anatomy of a necessary but not sufficient institutional reform 6[Discussion Paper Series Number Forty Five July 2010] available at http://www.ippg.org.uk/papers/dp45.pdf (hereinafter Sarin).
[70]Promode Kant and Wu ShuirongReducing Deforestation and Degradation through Post-colonial Settlement of Land Rights: A Case Study in India [2008 Carbon & Climate L. Rev. 300 2008] (hereinafter Kant and Wu).
[71] Lovleen Bhullar, The Indian Forest Rights Act 2006: A Critical Appraisal 20 [4/1 Law, Environment and Development Journal (2008)], available at http://www.lead-journal.org/content/08020.pdf (hereinafter Bhullar).
[72] Jhum Cultivation is the practice of Shifting cultivation by tribal communities and is also the dominant form of tribal agriculture: See: Smriti Das Pressure for Conversion of Forestland to Non-Forest Uses in India in Ramchandra Guha, et. Al. eds. Deeper Roots of Historical Injustice: Trends and Challenges in the Forests in India 172 [Rights and Resources Initiative. 2012, Washington D.C.] (hereinafter S. Das).
[73] Madhu Ramnath, Surviving the Forest Rights Act: Between Scylla and Charybdis 38[Economic and Political Weekly, Vol. 43, No. 9 (Mar. 1 - 7, 2008), pp. 37-42] (Hereinafter Ramnath).

their culture[74]. Third, the crystallization of land rights of the tribal communities is the first step towards modernization of tribal agricultural practices. The Act therefore opens the door for the modern agro-chemical industries to enter into tribal markets posing the risk of conversion of forest lands into intensive agriculture farms[75]. Fourth, the Act provides for an express system of Inheritance under Section 4 over the land allotted under the act. This scheme of inheritance may not be in consonance with the system of inheritance prevailing in the tribes and interferes with their rights under the PESA.

Further, the FRA gives right to 'Scheduled tribes' 'occupying' the forest area. The Status of a Scheduled tribe is a State specific status and therefore tribes lose their 'Scheduled tribe' status in their current situ upon migration to another State[76]. This disentitles around 50% of the Scheduled tribes living in the country from their right under the FRA who have migrated due to externalities in their original habitats into a State where they were not recognized as 'Scheduled'[77]. In the case of Other Forest Dwelling Tribes [OFTD] the act requires proven membership of 75 years preceding December, 2005 of the claimant to entitle him to his rights[78]. In most cases there was no record keeping of the settlement and movement of forest dwellers further the historically continuous movement of these tribes disentitles a large number of people of their right in land[79]. Then, the procedure under the FRA to crystallize land rights and manage bio-diversity is directed through the Gram Sabhas under the PESA[80]. In the light of the failure of PESA in most cases it is difficult to conceptualize the success of the FRA under this mechanism.

Moreover, the FRA's relation with pre-existing laws is under question given its ambiguous language. While on one hand the FRA vests rights notwithstanding any other laws under section 3, under section 13 of the act, it States that the effect of the Act is in addition to and not in derogation of existing laws. Under the Wildlife Protection Act 1972 and the Forest conservation Act, 1980 certain provisions may come in conflict with the rights of the tribal population under the FRA[81]. These provisions will restrict the enjoyment of the rights by the tribals over their land upon the crystallization of the right[82]. The extent of their application and the extent of the rights of the people under the FRA will have to be litigated to certainty unless clarified by executive policy.

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[74] Id.
[75] Arnab Sen and Esther Lalhrietpui Scheduled Tribes (Recognition of Forest Rights) Bill: A View from Anthropology and Call for Dialogue 4208[Economic and Political Weekly, Vol. 41, No. 39 (Sep. 30 - Oct. 6, 2006), pp. 4205-4210] (hereinafter Sen and Esther).
[76] *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College* [1990 SCR (2) 843].
[77] Sarin, Supra Note 69 at ¶. 22.
[78] Section 2(o) FRA. The provision was a result of a Strong resistance from the Ministry of Tribal affairs expressing its fears of non-tribals claiming tribal lands.
[79] Sarin, Supra note 69 at ¶ 23.
[80] Sections 5 and 6 FRA.
[81] Ramnath, Supra note 73.
[82] See: Ramnath, Supra Note 73; Bhullar, Supra note 71, Sarin Supra note 69.

From the perspective of conservation of Environment, the act has restricted the scope of 'protected areas' by defining critical areas as areas where cohabitation of Human and the wildlife is not possible[83]. In such cases the State Governments are responsible for the appropriate rehabilitation of the tribes[84]. An estimated 15% of the forest cover would be affected by the Act[85] however one can always argue that the centre of the environment debate need not be tribal versus Tiger. Managing bigger issues could probably reap better results. Protection of environment cannot be alienated from the values of Human rights. The Act shares the disinterestedness of the State governments with the PESA and has therefore failed to reap even the minimum expected results with the above discrepancies[86].

V. EXECUTIVE POLICY- THE POLITICS OF LAW AND THE OTHER

Despite the fact that Executive policies rank lowest in hierarchy[87] in a democratic system they bear the most proximate connection to the lives of the people. Policy is not law but certainly has the force of law as it channelizes the law into action. In most cases the judicial bodies refrain from scrutinizing policies unless certain action can be proven to have been taken, which is by its very nature, illegal, irrational or bears procedural impropriety[88]. For our immediate purpose the researcher seeks to restrict the assessment to two executive policy based events/decisions which have lead to heated encounters (pun intended) between the tribal population and the body politic.

The first instance is the decision of the Odisha State Government to grant concessions for mining purposes at the Niyamgirhi hills. In the year 2004, the State government entered into a concession with Vedanta Aluminia for mining of Bauxite in Niyamgirhi hills, inhabited by a local tribe Dongaria Kondha [DK][89]. DK claimed religious-cultural values and heritage attached to the Niyamgirhi hills and their identity was essentially linked to their territoriality and descent[90]. The Government of Odisha neglected the local culture and sentiments and

[83] Section 2(b) FRA.
[84] Section 4 FRA.
[85] Ramnath, Supra note 73.
[86] K. Chinappa 'Implementation of Forest Rights Act a panacea for all ills' The Hindu November 10, 2012Mysore available at http://www.thehindu.com/todays-paper/tp-national/implementation-of-forest-rights-act-a-panacea-for-all-ills/article4083800.ece.
[87] In India the Constitution and its Basic Structure are the Supreme law of the land followed by Legislations enacted by the legislative bodies at Central and State levels (in their own subject areas). Delegated legislations, notifications, circulars and Official memorandums follow the hierarchy and executive policy is a more flexible tool of applying the law by the executive. It is a general statement of working agenda by the executive and does not per se have the force of law.
[88] See: Wednesbury Unreasonableness: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.
[89] Geetanjoy Sahu Mining in the Niyamgiri Hills and Tribal Rights 19[Economic and Political Weekly, Vol. 43, No. 15 (Apr. 12 - 18, 2008), pp. 19-21] (hereinafter Sahu).
[90] Id.

adopted a development model by concessioning out the rights to Vedanta and also empowering Vedanta to 'acquire' land for the purposes of the mining project[91].

The decision of the Government was met with radical protests by the local population which was being forcefully displaced without any regard to their cultural or sentimental values attached to their abode[92]. Violent encounters between locals and State forces turned the peaceful forest regions into sites of massacres and arrest[93]. The concessions granted by the Government would lead to the displacement of over 250 thousand families and create a meagre 50 thousand jobs[94]. About 22% of the tribal population was under poverty and mal-nutrition and the community was mostly dependent upon the forest resources[95]. The government ignored rather concealed the vast environmental costs which the project would incur and its effect on the local communities[96]. The Minister for Home Affairs responded marking the violence as unwarranted. He justified the concession agreements on developmental grounds[97]. Vedanta Inc. faltered on its promises of job provisions to the local communities and outsourced most labour incentive facilities[98]. The State Government held a formal public hearing in the year 2007. However, a day before the hearing, battalions of armed forces were deployed into the villages to 'check violent elements'. Hardly any representation from the affected population was achieved during the hearings[99]. Complaints from the tribal population in relation to highhandedness by the Vedanta employees was met with violence from the company officials and the State machinery stood as numb witness to the violence[100]. Similar instances with narratives of privatization, deprivation and violence occurred across states of Odisha and Jharkhand which now feature as sites of Human Rights Violations by the State characterized by armed struggles between State forces and local communities[101].

The ministry for Mines has proposed further liberalization and privatization of the mining sector in India[102]. The policy seeks to increase the minimum profit sharing to 26% whereby companies mining minor minerals would now have to offer 26% of their profits towards the development funds for the local populations. However, Companies mining major minerals have to only pay an equivalent amount of annual royalty as paid to the Government[103]. The

[91] Id.
[92] Debaranjan, Is the Struggle for Livelihood a Criminal Offence? ¶19[Economic and Political Weekly, Vol. 43, No. 2 (Jan. 12 - 18, 2008), pp. 19-22] (hereinafter Debaranjan).
[93] Id.
[94] These figures had been conceded to by the State Government: See Id, Debaranjan at ¶21.
[95] S. Das Supra note 72 at ¶200
[96] Id. at ¶ 218.
[97] Shoma, Supra note 1.
[98] S. Das, Supra note 72 at 200.
[99] Debaranjan, Supra note 92.
[100] Id.
[101] See: Debaranjan, Supra note 92, Sahu, Supra note: 89 and S. Das, Supra note 72.
[102] See Official Press release- Mines and Minerals (Development and Regulation) Bill, 2011 approved accessed via: http://pib.nic.in/newsite/erelease.aspx?relid=76352.
[103] Id.

rates of Royalties in India have been notoriously low and therefore the entire effort trivializes the concern for the share of the tribal communities over their resources. Further, the irony of the funds lies in the fact that they are managed by a district mineral foundation constituted largely by the mine owners and the bureaucracy with nominal representation from Local communities[104].

The second instance of Executive policy relevant to us is Environmental and Forest management policy in India. The forest policy of India until 1988 was focussed on the commercial exploitation of ecological resources[105]. Historically, the tribal population had no say in the forest exploitation/conservation policies of the government. It was only in the year 1988 that community based management of forests was first recognized[106]. In paragraph 4.3 the policy expressly recognizes the need for conservation of forests and the rights/importance of the tribal communities dwelling in the forests[107]. Later in the year 1990 the government circulated guidelines for community based management of forest resources directly involving the tribal communities.[108] The policy marked the beginning of the system of Joint Forest management [JFM] committees involving local populations and concerned NGOs actively taking part in conservation exercise[109].

The weak planning and design of the JFM met with a massive backlash due to friction between villages jointly sharing and owning resources, between institutions such as the Panchayats and JFMs of tribal populations over sharing resources. These problems emerged as JFM identified rights of local communities to manage forest resources leading to a dispute between settlements over the rights. The problems did not arise earlier due to the mutuality between the villages which existed prior to the JFM system[110]. Besides this move of recognizing the role of tribal communities in management of forests, the larger policy of the government continued to be oblivious to indigenous community considerations. For Example, the amendment of the Wildlife Protection Amendment Act, 2002 [WPAA] identified two new categories of Protected Areas [PA]. The government notified 657 PAs in a span of 6 years. It

[104] Brinda Karat Of Mines, minerals and Tribal Rights The Hindu (15 May, 2012) accessed via: http://www.thehindu.com/opinion/lead/of-mines-minerals-and-tribal-rights/article3419034.ece (hereinafter Karat).
[105] J. V. Sharma, Kohli Priyanka Forest governance and implementation of REDD+ in India at p. 8 [The Energy resource Institute, government of India, Ministry of Environment and Forests accessed via: [http://envfor.nic.in/sites/default/files/redd-bk1_0.pdf].
[106] N. C. Saxena Forest Policy in India- Key Trends and Key Drivers in Ramchandra Guha, et. Al. eds. Deeper Roots of Historical Injustice: Trends and Challenges in the Forests in India 81 [Rights and Resources Initiative. 2012, Washington D.C.] (hereinafter Saxena).
[107] Id. at ¶83.
[108] Id.
[109] Id.
[110] Id. at ¶83-88.

thereby categorized 3 million tribal populations in these areas as encroachers depriving them of their due rights[111].

These communities had inhabited these areas and were resource-dependent on the forests[112]. In a few cases these communities were not completely alienated from the rupee based cash economy. Therefore, sustenance under the cash economy system required these communities to carry out small-scale commercial exploitation of forest resources such as fish and timber[113]. The WPAA prohibits the commercial exploitation of PAs. Therefore all small scale activities of these communities were subsequently prohibited and termed illegal encroachment following the notification of their habitats as PAs[114].

The response of the government to the conflict between tribal rights and Environmental conservation came in through the Eco-Development program which met with a mix bag of success and failures in various places.[115] The program again looked at local dweller interests as incompatible with conservation interests. The program tries to divert the interest to mainstream alternatives instead of recognizing the interdependence of these interests and harmonizing the same.[116]

The conceptualization of forest conservation policy as a conflict of tribal rights and environment protection is the reason underlying its failure in India. One can certainly mount specific concerns of mismanagement of forest by tribal populations. However, an umbrella uprooting of tribal communities cannot be a logical end to addressing these specifics. Factually speaking, it has not proven to be the right solution to the problem for the Indian State. Its failure has evidenced itself in weak results in forest conservation and depravation and poverty of the tribal communities.

VI. SAMATA AND GODAVARMAN: THE COURT WITH TWO FACES

During the 1970s the Supreme Court of India emerged as the 'savior' of constitutionalism and the watch dog of the Indian constitution. As Prof. Baxi puts it, the social narrative of the country changed the approach of the court and it started 'taking human suffering seriously'[117]. The much celebrated judgment of the Supreme Court in *Shri Keshavananda Bharti* v. *State of*

[111] Kothari Ashish and Pathak Neema, Conservation and Rights in India- Are We Moving Towards Any Kind of Harmony? In Ramchandra Guha, et. Al. eds. Deeper Roots of Historical Injustice: Trends and Challenges in the Forests in India ¶49 [Rights and Resources Initiative. 2012, Washington D.C.] (hereinafter Kothari and Pathak).
[112] Id.
[113] Id.
[114] Id.
[115] Id.
[116] Id at ¶54.
[117] Upendra Baxi, Constitutionalism as a Site of State Formative Practices [21 Cardozo L. Rev. 1183] (hereinafter Baxi).

Kerala[118], the bedrock of "Constitutional Interpretation in India"[119] marked the victory of the Judiciary over the tyranny of the majority, re-instating constitutionalism, past which access to Judicial review was democratized[120].

The argument by professor Baxi has been well contested and least to say can be disproved using multiple factual instances[121]. Be that as it may, the court for certain had become more active after the Kesavananda and the ADM Jabalpur and its decisions became more proximate to the lived realities of the people.[122] In the context of tribal rights and resource management there are two instances of judicial intervention which changed the dynamics of tribal management in the country. These two cases also show the two different faces of the Court[123]. We will look at the judgment of the apex court in *Samata v. State of Andhra Pradesh*[124] [Samata judgment] and the judicial intervention by the court in the Godavarman adjudication[125] which is one of the most litigated issues in India[126].

The case before the court contested the award of mining leases by the Government of Andhra Pradesh [A.P.] to private parties in the late 1980s. The A.P. government had enacted a tribal rights protection act which prohibited the transfer of land in a scheduled area by any person in favour of a non-tribal. The court held that the State Government would be a 'person' under the Act and therefore any transfer to private parties would be void ab-intio[127]. The court did not stop at the interpretation of the Act. The court continued to recognize the historical exploitation of tribal communities in pre and post independence era[128]. It ordered other State governments, not having such prohibitions, to consult the Central government before awarding mining contracts. It further required the central government to monitor award of mining leases through a special sub-Committee[129] and reserve at least 20% of the profits towards tribal welfare[130]. The court recognized the importance of consulting the Gram Sabhas under the PESA as an important aspect of tribal rights reiterating the right of autonomous governance of tribal populace in the country[131]. The Supreme Court read these requirements

[118] AIR 1972 SC 1461.
[119] Austin Granville, '*Working a Democratic Constitution'*, 5th Imp, OUP, 2005.
[120] Baxi, Supra note 117 at¶ 18.
[121]For example: The ADM Jabapur Case, (AIR 1976 SC 1207)- the court 'taking human suffering seriously' suspended the writ of habeas corpus during the Emergency period.
[122] Thayyil, Supra note 14 at ¶269.
[123] Both litigations occurred during the 1990s and almost together yet, the approach of the court is completely different in both cases.
[124] Supra.
[125] The original judgement was rendered by the court in *T.N. Godavarman Thirumulpad v. Union of India*, [(1996) 9 S.C.R. 982]. The implementation of the Judgement called for various interjections byt he court and the evolution of the rule of continuing mandamus which gave the court Administrative powers over the implementation of its orders.
[126] Thayyil, Supra note 14 at ¶268.
[127] Samata, Supra note 13.
[128] Id.
[129] Id at paragraph 128.
[130] Id, at paragraph 114.
[131] Id at paragraph 94.

as mandatory under the Schedule V of the Constitution failing which the spirit of the schedule would be lost[132]. The Samata judgment is contested to be a judicial overreach into policy planning and development. Irrespective of such contestation, the Court's decision goes long way in protecting tribal rights given the formalistic approach of the government towards procedural rights[133] of the tribal population.

The Samata verdict was immediately assailed by the Ministry of mines as hampering development and industrialization of the country. The ministry proposed the amendment of the Constitution to undo the effect of the decision[134]. The Government filed a petition with the Supreme Court to give the effect to the judgment only prospectively however these petitions were dismissed by the court in the year 2000[135]. The Samata judgment was certainly not best fit for national industrial interests. It completely overlooked the need for exploitation of mineral wealth by the government by placing an absolute prohibition. Further, the court has also debarred any possibility of a community willing to participate in an industrialization exercise and freely willing to give up its rights for a return in terms of economic returns, rehabilitation, and development which is as much a part of a right of integration as is 'preservation of culture and resources' and 'isolation'.

The judicial intervention in Godhavarman precedes Samata in time but continues until date. The judicial intervention in the Godhavarman case has been criticized as judicial management of Indian forests and usurpation of executive power by an unelected body through continuing mandamus[136]. Not only did the Supreme Court opt for a judicial overreach, the entire exercise was orchestrated in complete disregard to tribal rights, by the very court, which emphasized on the acknowledgement of historical injustices and protection of tribal rights in Samata. The case arose out of a Public Interest Litigation by a plantation owner against the illegal felling of timber in forests in South India. During the initial stages the adjudication by the court was restricted to the legislative framework and the orders requiring the State governments to carry out specific duties against illegal timber harvesting[137]. However, in its decision in December 1996, the court redefined the term 'forestland' under the Forest Conservation Act 1980[138], as

[132] Id. from paragraph 168.
[133] State governments do not take up the right of consultation with Gram Sabhas and duty of giving consideration to the recommendations of the gram Sabha as a part of substantive rights and only pay a formal lip service to these rights- Discussed earlier at p.
[134] The Ministry of Mines drafts & circulates a Secret note (Ref: 16/48/97-MVI) To the committee of Secretaries proposing an amendment of the V Schedule to overcome the Samata judgement to facilitate the leasing of and in tribal areas.
[135] Samata, The Fifth Schedule of The Constitution And The Samata Judgement Accessed via: http://www.samataindia.org.in/documents/SAMATA_EDIT1.PDF.
[136] Thayyil, Supra note 14. See also: Armin Rosencranz and Sharachchandra Lele Supreme Court and India's Forests [Economic and Political Weekly, Vol. 43, No. 5 (Feb. 2 - 8, 2008), pp. 11-14] (hereinafter Armina and Lele); Armin Rosencranz, Edward Boenig, and Brinda Dutta The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests [37 ELR 10032, 1-2007] (hereinafter Armin, Boenig and Dutta).
[137] Thayyil, Supra note 14 at ¶271.
[138] The Forest Conservation Act requires the permission of Central Government to convert it for non-forest uses.

including areas falling within the dictionary meaning of the term 'forests' and all pastures marked as 'forests' in government record, irrespective of their ownership[139]. By the above definition communally held pastures and residence areas marked as woodlands vested in the Forest department[140]. Further many states passed resolutions to bring the decision into effect often providing for an expansive definition of forest land bringing the land rights of tribal communities into legal conundrum regarding their title[141].

In the year 2002, the Court constituted a Centrally Empowered committee [CEC][142] which received a Statutory Status after approval of the Ministry of Environment and Forests[143]. Under the continuing mandamus scheme, the case was to remain open for filing applications against non implementation of Court directives by States. The CEC would look into these applications and dispose them off to assist the court. The CEC was largely comprised of forest conservationists who handed down decisions without any regard for the impact which such decisions would have on local communities[144]. In the year 2001 the amicus curiae had filed an Interim application [IA] 703 reporting the issue of massive-illegal 'encroachment' on the forest land across the country. In response the Court passed a restraining order against the regularization of temporary tribal community rights over the forests by the State governments. In 2002 the CEC after consulting the Ministry of Environment and Forests [MoEF] and Forest departments recommended that every regularization of land rights in any form over the forest lands must be prohibited[145]. No other representation was sought by the CEC and the primitive communities were labeled as encroachers[146]. In the year 2004 the court stayed an attempt by the government to regularize land rights in favour of traditional communities under IA 1126 filed by the Amicus curiae on environmental grounds, quoting lack of records and hailed regularization as formal encroachment[147]. The Stay continues until date and deprives tribal communities of crystallization of their land rights in the forests.

The court has obligated State governments to create a fund equivalent of the Net Present value of the Forest area being regularized for tribal communities. The fund has to be invested by the State governments for compensatory afforestation of an equal area. The Court ordered these steps to precede the regularization of land[148]. The MoEF filed an Affidavit via IA no 1126 with the Supreme Court to state that the compulsory NPV would delay the regularization of land rights of tribal communities and adversely affect their interests. However, the court refused to amend the orders.

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[139] *T.N. Godavarman Thirumulpad v. Union of India*, [(1997) 2 S.C.C. 267] at paragraph 4.
[140] Thayyil, Supra note 14 at ¶271.
[141] Id.
[142] [2002 (5) SCALE 6].
[143] Notification dated 8.6.2002 fn. 1-1/CEC/SC/2002.
[144] Thayyil, Supra note 14 at ¶ 272.
[145] Recommendations of the CEC in IA 703 of 2001, Accessed via: http://cecindia.org/cec_documents/(22)%2006.11.2006%20Recommendations.pdf.
[146] Thayyil, Supra note 14 at ¶273.
[147] Id. at ¶274.
[148] [2003 SCALE (PIL) 4].

While the court may have the best of intentions to secure the conservation of the environment, the same cannot be done at the cost of life and sustenance of tribal community and without giving them due representation before disposing off such matters. The Court in Godavarman litigation has been criticized heavily for acting as a protector of middle class rights against the exploitation by the poor and shifting the focus of the debate from Industry v. Environment to Tribal v. Tiger. The Court made no distinction between commercial encroachment and living space of tribal people. No representations were sought from the tribal communities despite the fact that the Court's decision had maximum impact on these communities. The Judiciary ignored the human suffering underlying the environmental debate which defies Baxi's claim that the Court takes human suffering seriously.

VII. IT IS ALL ABOUT 'US' IN A DEMOCRACY: THE THEORY OF COMMUNICATIVE ACTION AND A POSSIBLE OUTLOOK TOWARDS TRIBAL MANAGEMENT IN INDIA

> "Someone who does not see a pane of glass does not know that he does not see it. Someone who, being placed differently, does see it, does not know the other does not see it." --*Simone Weil*

Developing the odel of Communicative action by Jürgen Habermas, Iris Young argues that the perusal of democracy as a competition among private and conflicting interests represents a false dichotomy. It obliterates the real essence of democracy as a deliberation between rationally constituted structural differences which form the source of communicative action[149]. Young furthers the idea of democracy in mass populations as a system of interaction which goes beyond the inclusive electoral process[150]. It is system wherein the representatives and the people interact beyond the electoral system through civil societies and movements to participate in the social debate[151]. Critiques against Habermas have been cynical of the theory claiming it to be an illusory idealization of societal competence in an unequal society. They assail it as yet another grand theorization of a universalizing modernization project[152].

Habermas in his theory of Communicative Action recognizes the intrinsic relation between freedom and democracy forged through communication between people[153]. He is cognizant about the differences which are caused by a lop-sided development of potentials of modernity which distort the communicative capacity in a Democracy[154]. He contends that manipulated

[149] Iris Marion Young Inclusion and Democracy ¶7[OUP, New York, 2002] (herein after Young I and D).
[150] Id.
[151] Id. at ¶8.
[152] Id at ¶8.
[153] Martin Morris Rethinking the Communicative Turn: Adorno, Habermas and the problem of Communicative Freedom ¶7[State University of New York Press, 2001] (hereinafter Morris).
[154] Id.

communication which then occurs in a Democracy is condemnable as an evidence of unfreedom, domination and oppression[155].

Oppression in the traditional sense carries a degree of visibility of one group 'oppressing' the other. However, distorted forms of communication in liberal societies lead groups in to 'oppressed categories' defined by unquestioned, embedded identities and assumptions leading to immobilization of the people from their reduced categories[156]. As a result, various groups suffer through ordinary processes of life mediated through stereotypes, cultural and structural hierarchies and market mechanisms[157]. The systemic form of oppression does not require a correlate oppressing group and injustice is perpetrated through economic, political and cultural hierarchies which may or may not operate through the vehicle of Law[158].

This model of Oppression does not substitute the traditional understanding but only expands the purview beyond conventional means of oppression and surgically discovers the underlying structures which channelize oppression. Under this model Young recognizes five faces of oppression as 'exploitation'[159], 'marginalization'[160], 'powerlessness'[161], 'cultural imperialism'[162] and 'violence[163]' which distort communicative action and the ability of the person to attain social justice[164]. Social Justice is the set of institutional conditions necessary for the realization of values of good life. Young identifies two core values of good life. First, *the development of one's capacity and expressing ones experience* and second, *participating in determining ones action and its conditions*[165].

The concept of Justice under this model traverses beyond the boundaries of distributive justice into Habermas' idea of justice as the ability of the people to deliberate, participate, confront and resolve issues in a democratic process without domination and oppression[166]. The model of Justice includes questions of distributive justice but is not restricted thereto. It is largely

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[155] Id.
[156] Frye Marilyn "Oppression" in The Politics of Reality" [Trumansburg, NY Crossing, 1983](hereinafter Frye).
[157] Iris Marion Young, "Five Faces of Oppression" in Justice and Politics of Difference [Princeton University Press, New Jersey, 1990] (hereinafter Young).
[158] Id.
[159] Refers to economic and social exploitation caused by positively using inequalities to the greater benefit of the powerful and by marginally (or even not) benefitting the weaker. See Id. Young at 49-50.
[160] Refers to the elimination of a group from meaningful social participation making themvulnerable to severe material deprivation or even extermination See Id. Young at p. 53.
[161] Refers to the inability of a person to take part in any decision making process which may subsequently boil down to a culture of silence and self presumption of incapacity. See Id. Young at p. 56.
[162] Refers to the stereotyping of a group of persons by a dominant aggressive group and the same leading to a virtual acceptance of the identity by the group as its real identity. They are marked and made irrelevant to the general social experience which is 'the experience'. See Id. Young at p.58.
[163] Refers to active damage caused to a group and includes the constant fear within the group of random unprovoked attacks which are intended to damage, humiliate or destroy the person. Id. See young at: p. 61.
[164] Id.
[165] Iris Marion Young, "The Distributive Paradigm" in Justice and Politics of Difference 37[Princeton University Press, New Jersey, 1990].
[166] Heller Agnes, Beyond Justice [Wiley-Blackwell, 1987] accessed via: http://www.marxists.org/reference/archive/heller/works/beyond-justice/ (hereinafter heller).

dependent on Habermas' idea of the ability and necessity of the human being to reason out and communicate rationally to co-exist[167]. Therefore as Young argues Democracy may lead to compromises mostly and in certain cases victory of one over the other but is always guarded in acceptability of the solution to everyone with their free their conscience[168].

The Indian State has grappled itself with the debate around tribal management under the distributive model of justice driven by the process of law however it failed to forge a solution. Each of the attempts in the above four chapters was inherently colored with one or more forms of 'oppression' (as shall be delineated shortly and summarily) which lead to their failure. Therefore a new outlook towards the issue from the perspective of communicative ethics could prove to be a valuable attempt.

The governance debate is the foremost example of the inheritance of colonialism by the Indian State in discharging the White Man's burden, the first evidence of cultural imperialism. The centralized structure never enabled the tribal population to actively contribute their experiences in the political debate. Similarly the PESA also failed, one, due to its design faults (alien systems of governance) which never activated representation, two due to the indifference of the State Governments in implementing self-governance which lead to marginalization and powerlessness. The formal requirement of consultation lacked the idea of deliberation and was never given its true effect leading to exploitation of the people by the State through formal means. The powerlessness of the powerless within the powerless coupled with the institutionalization of self governance allowed the appropriation of power by the tribal elites in most cases[169]. Even the FRA, which sought to undo historical injustices was designed on the basis of the State's understanding of Distributive justice. The failure of the legislation partly stems from its incompatibility with the cultural and social situation of the tribals.

The contest between imminent domain of the State and the economic and cultural rights of the tribal communities also met similar fate. The policy until long time gave no representation to the tribal communities before resource exploitation. The lack of any participative dispute resolution before the allocation of mining contracts or of any intention on the part of the State to gather consensus or compromise lead to severe exploitation of the community. Any dissent was met with violence creating a regime of fear and perpetuating powerlessness. The Samata Judgment was an attempt by the court to simply overturn the power dynamics without any regard to the lack of consensus between the parties. This attempt would not and did not render any useful result given the lack of a mutually acceptable democratic solution[170].

[167] Morris, Supra note 153 at ¶8.
[168] Young I and D Supra note 149 at ¶ 3.
[169] Kurup, Supra note 14.
[170] The court by turning the tables ended up ignoring the destructive passions between the two parties which only hid the problem under the blanket of a new legal rule. This approach can never lead to a deliberative resolution of a problem: See John Denvir, William Shakespeare and the Jurisprudence of Comedy [Stanford Law Review,

The debate of tiger versus tribal also countenanced the problems of distorted communication. First, the extreme stand taken up by the conservationists did not pay any service to the legitimate interests of the tribal population. This essentially means that the conservationist side was never ready for a democratic solution. The FRA was assailed as an anti-environment legislation and strong public pressure and State disinterest hampered the effectiveness of the legislation. The environment policy largely acted in isolation from the tribal community. This was despite the fact that it heavily impacted their interests. The tribal population was mostly powerless in this regard. The already marginalized position of the tribals given their socio-political situation made them more vulnerable to the impact of the conservationist attempts. The environment policy and litigation were strongly influenced by the middle class idea of conservation which looked at tribals as exploiting the environment. It thereby carried the essence cultural imperialism which perpetuated deprivation through both policy and Godhavarman litigation. The failure of the Court to respect audi alteram partem was in complete violation of principles of Natural justice. Un-deliberated decision making has been the root of all failures of Indian State in the past half a century.

VIII. CONCLUSION

> *If liberty and equality, as is thought by some are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost*
>
> -Aristotle

A formalist understanding of democratic governance is restricted to equal representation in institutional machinery of democracy. The essence of democracy is different from its formal methodology. It lies not in periodic voting and referendums. It lies in the underlying values of liberty, equality and the ability to participate and deliberate. Democracy is not a status of affairs fixed in machineries of State and electoral politics. It is the negotiated value of consensus which flows from the free conscience of people participating in their government.

The management of tribal rights by the Indian State has lacked the essential characteristic features of democracy. It inherited the colonial methodology and transplanted it in the new nation state which was no more under coercive forces of one kingdom (colony). The misconception of the Tribal Panchsheel as an 'obligation' of the State to protect, conserve and develop the primitive community borrowed the undertones of the White man's burden. The primitive population of the country continued to lack any real power to participate and deliberate. A new approach would essentially require the decentralization of power in the

Vol. 39, No. 4 (Apr., 1987), pp. 825-849] The State Governments now short circuit the Samata decision by signing Memorandums of Understanding with Companies to take up mining concessions and technically defeating the judgment.

hands of these communities to determine their lived realities and set their claims forward in the communicative narrative of the nation state, 'Bottom-up approach' of governance which is determined and established by them, constituted of them, for their governance.

The researcher does not undermine the Indian identity or make a claim against the identity of an Indian nation state. It only recognizes the massive diversity which contributes to this identity and suggests a communicative approach to manage this diversity.