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editorijless@gmail.com

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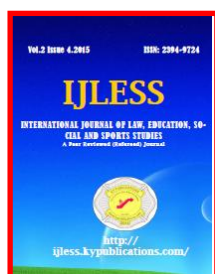
## TRIBAL PROTECTING LAWS IN INDIA: AN OVERVIEW

Dr. CHANDRAKANTHI.L

Assistant Professor

P.G. Department of Law and University Law College, Bangalore University, Bangalore

REVIEW ARTICLE



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**ABSTRACT**

Tribals are a separate group of people with their own traditional practices and customary practices. As they contribute significant portion of Indian population, they development matters a lot for the nation growth and development. There two Schedules and more than twenty Articles of the Constitution speak about them along with statutory provisions such as Forest Rights, Act, Wildlife Protection Act, Forest Act, Panchayat (Extension to Scheduled Areas) Act ,1996, etc. for them to protect their rights and interest. Achievement is there with all of above cited legal provisions but not in expected or recognizable level. Reasons might be from both the side's tribals (no education, lack of awareness) and governance (technical and procedural defect or limitations).

**INTRODUCTION**

India is the second largest tribal country in the world after Africa. The two main regions of tribal settlement are the country's northeastern states bordering China and Burma, and the highlands and plains of its central and southern regions.<sup>1</sup> About two third of the total tribal population in India are found in the Madhya Pradesh, Orissa, Bihar, Gujarat and Maharashtra. Apart from that Mizoram, Nagaland Meghalaya, Arunanchal Pradesh and Tripura constitute 70 to 95 percent of the population. Despite some regional variation, the tribes share many traits, including living "in relative geographical isolation, " and being "relatively more homogeneous" and "more self-contained than the non-tribal social groups."<sup>2</sup> Generally who live away from the civilized society are tribal. They have important significance across the world that they live in inaccessible parts like dense forests, deep valley, hill regions etc.

Tribe is "socially cohesive unit, associated with a territory, the members of which regard them as politically autonomous".<sup>3</sup> It means that tribals are yet to be developed and to be civilized or a transformation from pre-state to state society, from simple to complex society. In other words they are an ideal type characterized as a socially homogenous unit having its own dialect, political and cultural institutions and territory which isolate it from the outside influences.

<sup>1</sup> Grigson, W.V., The Aboriginal in the Future India, (1994), J. Royal Anthropological Inst. Gr. Brit. & Ir. 74:33.

<sup>2</sup> Virginius Xaxa, (2001) "Empowerment of Tribes" in Debal K. Singha Roy, ed., *Social Development and the Empowerment of Marginalised Groups: Perspectives and Strategies*, Thousand Oaks, CA: Sage Publications, p. 203.

<sup>3</sup> Joshi Vidyut, (1998), *Tribal Situation in India Issues in Development*, New Delhi: Rawat publications, p.15.

Tribals can be grouped into two categories.

- ❖ Isolated and living in remote inaccessible area such as Bonda of Orissa, Birhor of Bihar. They are hunters, gathers usually grouped in bands or clans. They are nomads having intimate association with plants and animals and adopt the exchange system of distributing products. They are self-sufficient and work for home consumption.
- ❖ Little advanced, practicing shifting cultivation, having some contact with outside. Example Khand of Orissa They choose deliberately hilly and forest areas for their habitats. Family solidarity is strong but village solidarity is tenuous. Land is distributed among village or clan and every year renewed in strictly equal shares.<sup>4</sup>

These poorest people were living in the areas of richest natural resources but now they are exposed to many forces of change and social construction like settlement of non-tribals on tribal lands, land alienation, oppression, enhancement of rent, encroachment of forests traditionally held by them, compulsory bonded labour, exploitation of tribals, poverty, illiteracy and unemployment. They are considered backward in almost all walks of life. Tribal backwardness is 'primitive' in nature as they are in lower state of development. Hence India has taken many policy measures through the Supreme law of the land i.e. Constitution of India and also Statutory laws. Further, International Community is also made many conventions to protect their rights at global level. As a consequent of it, several tensions pervade relations between tribals and non-tribals, and the tribes and the State. Hence, a new and balanced solution known as development-deference dichotomy started to enforce, which would allow them to preserve their traditions without compromising development.<sup>5</sup>

#### **Constitutional Law Provisions to protect tribals**

Under the Constitution of India certain tribes have been specified as Scheduled tribes means when a community has a traditional occupation of a definite geographical area, distinctive culture which includes language, customs, traditions, religious belief, arts and crafts, primitive trades depicting occupational patters, economy etc., and lack of techno-economic development.

There are more than twenty Articles and two Schedules in the Constitution of India which elaborately explain the protective privileges of the tribal. The founding father of our Constitution felt that the inequitable forces in the socio-economic system and political organizations had created an imbalance in society and placed SC/STs in a disadvantageous position along with other backward classes.

The Constitution provides to all citizens, social, economic and political justice and equality of status and opportunity. Let us understand with various provisions of Articles of the Constitution.

**Article 15** prohibits any form of discrimination on grounds of religion, race, caste, sex, place of birth by the State. However, clause (4) of the Article empowers the State to make special provision for the advancement of any socially and educationally backward classes of citizens including SC/STs. So seats are reserved in medical, engineering and professional colleges.

**Article 16(4)** provides the State to make reservation for backward classes including SC/STs in public employment. It is an exception to the right of equality of opportunity in the matters of public employment. The State can make provisions for the reservation of appointment in favour of backward classes if not represented adequately.

**Article 17** abolishes the concept of untouchability, as a result of it the Protection of Civil Rights Act, 1955 and SC/STs (Prevention of Atrocities) Act, 1989 are come. State has been authorized to make reasonable restrictions on the exercise on any of the rights relating to movement, acquisition of land, and settlement for the protection of the interest of the Scheduled Tribes.

**Article 19(5)** reserves the right to the State to protect the interests of the members of Scheduled Tribes by arresting the transfer of property particularly from tribal communities to non-tribal. In order to check the alienation of tribals from their age-old land and land based resources.

<sup>4</sup> Ibid, p.109.

<sup>5</sup> Shubhankar Dam, (2006) "Legal Systems As Cultural Rights: A Rights Based Approach To Traditional Legal Systems Under The Indian Constitution, Ind. Int'l & Comp. L. Rev. 16:295.

**Article 21A** empowers the State to provide free and compulsory education for all children until they complete the age of fourteen years. It is a new amended provision i.e., it has been converted as justiceable right from nonjusticeable right. It is for Scheduled Tribe children also.

**Article 23** prohibits traffic in human beings and *begaar*, and similar other forms of forced labour, it resulted in that the Bonded Labour System (Abolition) Act 1976 was enacted. It eliminates the system of serfdom, bondage and other forms of forced labour and provides that any contravention of this provision shall be an offence.

**Article 24** Prohibits the Child labour below fourteen years including SC/STs whose children are engaged in hazardous occupations, being poor. As a result of it Child Labour (Prohibition and Control) Act, 1986 has been made.

**Articles 29 and 30** guarantee the minorities the right to establish educational institutions of their choice and to continue. It is cultural and Educational Rights to ensure the minority groups to preserve their language, dialect and cultures. State will not enforce any other culture or language but when they are under direct control or receiving grant –in –aid should follow the reservation policy of for SC/STs in the matter of admission.

**Article 39** gives the power to the State to make policy towards securing adequate means of livelihood for all. It means the operation of the economic system does not result on the concentration of wealth and means of production to the common detriment.

**Article 46** empowers the State to promote the educational and economic interest of the SC/STs to protect them from social injustice and all forms of exploitation which seems to have been given due importance over the years. The Directive Principles of State policy has mentioned the guidelines for the State to work under the Constitution.<sup>6</sup>

**Article 48** states that the State should endeavour to protect and improve the environment and safeguard the forests and wildlife of the country.

Tribes judged based on two important criteria: whether the tribe had the ability to manage its own affairs;<sup>7</sup> and whether the tribal region in question had a significant non-tribal population. Therefore, the northeastern tribes as they are isolated they have been given considerable autonomy under the Constitution (Sixth Schedule). Even they appear as more socially advanced, while rest of the tribes have been placed under the aegis of respective governors of the states (Fifth Schedule)<sup>8</sup>.

**Article 244** contains the provisions of the administration and control of Scheduled Areas and Scheduled Tribes within the **Schedule V**. The Jurisdiction consists of eight sister states Andhra Pradesh, Bihar, Himachal Pradesh, Gujarat, Maharashtra, Madhya Pradesh, Orissa and Rajasthan. The Schedule V is divided into four parts.

**Part A:** Provides a general picture that the executive powers of a Governor extend to the Scheduled Areas. The Governor of a State annually, or whenever required submit a report to the President regarding the administration of the Scheduled Areas. The Executive power of the Union shall extend in giving directions to the States as regards the administration of the said areas.

**Part B:** Describes the administration and control of Scheduled Areas and Scheduled Tribes.

**Tribes Advisory Council**<sup>9</sup> shall be established in each State having Scheduled Areas therein and, if the President of India so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein. The Council is consisted of not more than twenty members and three third shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State. Suppose Legislative Assembly is not having sufficient number of members then remaining seats shall be filled by other members of those tribes.

<sup>6</sup> Behura N.K. and Panigrahi Nilakantha, (2006) "Tribals and the Indian Constitution", New Delhi: Rawat Publications, Chapter 2.

<sup>7</sup> Amit Prakash, (1999) Decolonization and Tribal Policy in Jharkhand: Continuities with Colonial Discourse, Soc. Scientist, 27:113.

<sup>8</sup> Ibid.

<sup>9</sup> Narwani, G.S.,( 2004), Tribal Law in India, New Delhi: Rawat Publications, p. 91.

The duty of the Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes, whichever is referred to it by the Governor of the State. The council shall meet every three months.

**Governor:** He may direct through the notification that any particular Act shall not apply to a Scheduled Area or any part thereof subject to certain exceptions and modifications as he may specify. He exercises discretionary power to make rules as his decision is final even he takes the advice of the council. But for the implementation the rules made by the Governor should get the assent of the President of India. He can make regulations to prohibit or restrict the transfer of land by or among members of the Scheduled Tribes, to regulate the allotment of land and carrying of business on money lending by money lenders.

**Part C:** Deals with creation of Scheduled Areas. The President may at any time by order direct either to cease or to increase the size of any Scheduled area in consultation with the Governor.

**Part D:** says about the amendment of the Schedule. The Parliament may from time to time by law amend any of the provisions of this Schedule.

Similarly the **Schedule VI** jurisdiction is of Assam, Meghalaya, Tripura, Manipur, Nagaland, Arunachal Pradesh, Mizoram and north east.

**Article 275** says that policies and programmes of the welfare need money for enforcement, it should bear out of the consolidated fund of India as Grants-in-Aid of the revenue of State. In short, it provides grants from the Union to certain States for tribal development.

**Article 330, 332, 334** provide reservation of SC/STs in the Lok Sabha and the Legislative Assemblies to the proportion of their population in the State. The original provisions were for a period of 10 years but through amendment it has been extended up to 2010.

**Article 335** provides reservation of posts for SC/STs in connection with the affairs of the Union and the States affairs as far as may be consistent with the maintenance of efficiency of administration. There is a great difficulty in finding right candidate to maintain reservation policy. Hence State has been making attempt to give qualitative education to this section of people.

**Article 340** says that the President may appoint a commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes with the territory of India. The National Commission for Backward Classes Act 1993 has been made to set up a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints over or under inclusion in the list of OBCs.<sup>10</sup>

**Articles 341-342** empower the President to draw up a list of the castes i.e. SC/STs.

**Article 350** provides adequate facilities for instructions in mother tongue at the primary stage of education to children belonging to linguistic minority groups.

Here it needs to focus on the Fifth Schedule areas as very recently decentralization introduced under the Panchayat (Extension to Scheduled Areas) Act, 1996 by the Parliament exclusively for these areas. The Act mandated the states to devolve certain political, administrative and fiscal powers to local governments elected by the communities (both tribal or non-tribal).<sup>11</sup> As there was no amendment to the Fifth Schedule, the Act sought the tribal communities participation in the belief of the arrangement would serve better for them. After a decade there is blatant violation of tribal interests. As a result of it, tribes in the Fifth Schedule areas are forced to reassert their rights rigorously.<sup>12</sup> However, 73<sup>rd</sup> Constitutional Amendment, 1992 with Panchayat (Extension to Scheduled Areas) Act 1996, was extended to the Fifth Schedule tribal areas. Without any amendment to Fifth Schedule somehow foster tribal self-government, and

<sup>10</sup> Note,6.

<sup>11</sup> Das Vidhya, Panchayat (Extension to Scheduled Areas) Act, A Reality Check (Aragamee, 2005), online: Aragamee <[http://www.agragamee.org/newinitiatives\\_pesa.htm](http://www.agragamee.org/newinitiatives_pesa.htm)>.

<sup>12</sup> Corbridge, Stuart, (2002), The Continuing Struggle for India's Jharkhand: Democracy, Decentralization and the Politics of Names and Numbers Commonwealth & Comp. Pol. 40:55

continued to perpetuate state government control in tribal affairs (as 73<sup>rd</sup> amendment intended to introduce only to nontribal areas development). Hence, the resultant legal system how extend can achieve better or work better.

#### **Statutory Provisions for tribal protection in India**

Historical facts reveal that the adivasis or indigenous people enjoyed the customary right over access, control and management of forest land and forest resources for centuries. Indigenous people are worst affected by large-scale deforestation as they have been living in the vicinity of forest since millennium. The government is the cause for deforestation with an 'anti-people forest policy and exploiting forest resources for commercial purposes paying any heed to the problems of the forest dwellers. Hence most of the forest based indigenous communities continue to suffer without an alternate life supporting activity. Forest policy first came into force in 1894. The government gradually increased its control over the forests and the forest department was strengthened with a view to regulating people's rights over forest lands and produce in the India Forests. After independence, the new National Forest Policy was issued as a Government of India Resolution in 1952.<sup>13</sup> The rights and privileges have been converted into mere concessions like take the small timbers for making their agricultural implements, hunting for small game which are normally food of the tribals. Centuries of living in the forest institutionalized the relationship between the adivasis and their forest through various cultural and social linkages that ensured uninterrupted habitation of the indigenous people in their forest abode.

The prolonged material and emotional relationship between adivasis and the forest, underpinned by the symbolic significance attached to plant and animal species, religions duties and obligations, not only legitimized adivasis access to forest, but also them to feel morally responsible for managing the forest resources most judiciously. Adivasis continued to live and protect their forest habitat, cleaning of the forest continued unabated till the end of the eighteen century by the contractors appointed by the colonial government.

**The Indian Forest Act, 1927** consolidated the laws relating to forests, transit of forest produce and the duty to leviable on timber and other forest produce etc. the provisions of this enactment reduced the status of the adivasis into a 'domiciled community in their own homeland, not to speak about their customary right over forest. Section 26 prohibits clearing, setting fire, trespassing, grazing, tree felling, collecting barks and leaves, quarrying, cultivating, hunting, shooting, fishing, killing or catching elephants etc., in Reserved Forest, the violating of which invited strict punishment. It clearly shows that all the life sustaining activities of the adivasis have been indulging.<sup>14</sup>

During the last couple of decade there has been a spate of legislations for the conservation of forest including the **Forest (Conservation) Act, 1980** which was amended in the year 1988. However, in the 42<sup>nd</sup> Amendment of the Constitution in 1976 forests were shifted to the concurrent list from the state list which consolidated direct control of the central government over the affairs of the forest. In 1994, a draft Forest Bill was circulated by the Ministry of Environment and Forests which is yet to be placed before the Parliament. This Act suggests new measures which would increase the power of the forest officials (withdrawing any right the forest much easier). It has given power to the officials to detain and arrest without warrant anybody suspected of forest offences and may break into any place at any time, by day or by night, and court does not have the power to take cognizance of an offence without a written report against any officer by a competent authority to remove him from office. This provision will act as a protective shield for the officials and may encourage them to do unfair practices. The generations of forest policy have systematically eroded the traditional rights of the ST over the Minor Forest Produces (MFPs) on which they largely depend. The MFPs include both edible and non-edible produces like roots, fruits, tubers, gums, resins etc.

**The Wild Life (Protection) Act, 1972** amended in 1991 has enacted to protect the endangered wild animals and to promote tourism. Protected Areas have been demarcated for establishing National Parks, Wild Life Sanctuaries and Game Reserves, adivasis in this protected areas have been leading a miserable life with poverty and alienation.<sup>15</sup> Their basic survival is

<sup>13</sup> Joshi Vidyut, (1998), Tribal Situation in India Issues in Development, New Delhi: Rawat Publications, p.115

<sup>14</sup> Patel, M.L., (2002), Global Perception of Tribal Research in India, New Delhi: Atlantic Publishers, p.147.

<sup>15</sup> Ibid, p151.



presently at stake, not to speak of their claim over the profits accrued to the government from the tourism revenue. It made them feel that the life of the wild animals is far more valuable today than the life of them. All forest policies have cut the traditional rights and freedom of movement of the forest communities. Many of them have migrated to urban and industrial centres to save them from starving and again there they are becoming easy victims of exploitation. They are often suspected as forest criminals by the forest officials for whom they are demoralized lot. It is ironical that the poorest people of India are living in the areas of richest natural resources. When the tribals are exposed to important forces of change and social reconstruction, the grievances and protests are reflected on the factors such as settlement of non-tribals on tribal lands, land alienation, oppression, enhancement of rent, encroachment of forests traditionally held by them. Compulsory bonded labor, exploitation of tribals, poverty, illiteracy and unemployment.

The government has banned shifting cultivation or it could be done with the permission of the Forest Department. The Forest Department tends to view the tribals as intruders and encroachers while the tribals see the Forest Department as 'exploiters' of their forest. They should be given tenancy /ownership rights at least on the trees which they help to grow. Their employment is seasonal casual in character. Because, massive mining operations and deforestation for the raw materials of the industrial complexes, the ecological imbalance is there in the tribal land and they are uprooted or displaced from their own lands. The governmental measure to rehabilitate them was resettlement rather than rehabilitation. Development projects are handed down without any concern for the cultural and ecological complexities prevailing in the tribal regions. The tribal policy in forest policy has to be integrated as they are two co-equal goals and fully consistent. The Socio-economic conditions of tribal communities must be accepted as an important condition for determining the levels of technology and intensity of operations in an area. Forest is the home of tribals, a livelihood, the very existence which is shaped their life and economy. From time immemorial the tribal people have enjoyed freedom to use the forest and hunt its animals. They are remained even today deep in their hearts, that forest belongs to them. Forest supports not only tribals but also their cattle. Without forest and grazing lands it is not possible for them to main cattle. Now with the emergence of modern economics forests became an important source of revenue and wealth to the state.

Non-timber forest products (NTFPs) provide substantial sustenance to the tribals living on the fringe of standing forests. The tribals are daily collecting grasses. Fruits, fibers, gums medicinal plants, seeds etc. for their own and commercial consumption. Gradually, some forest products acquired commercial value due to nationalization of NTFPs. NTFPs are important raw materials for cottage, small and village industries and contribute to the national income through export and import substitution. Collection of NTFPs is now made through contractors, co-operatives and government. Nationalization affected the tribals to get fair market price.<sup>16</sup>

#### **Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006**

The Act is good sign to undo 'historical justice 'and very good piece of legislation to recognize the customary rights of forest dependent scheduled tribe and forest dwellers who have been residing in such forests for generations without having maintained any records for their dwelling. It means the Act started with recognition of forest dwellers rights in the forests as flora and fauna and considering them as important integral part of the forests. Further, it enshrines that forest dwellers should be involved in sustainable development, conservation of biodiversity and maintenance of the ecological balance as they have a vast traditional knowledge of such practices. Now, the forest dwellers are now seen as the protectors and conservators of the forests and not as encroachers anymore.

The FRA was amended in the year 2012 once again to rectify the procedural errors that had been made while implementing the forest rights rules in 2008. But, in accordance with the Act only few people tribals were recognized with title deeds (sections, 12, 68, 766) and were given till 31st July 2012. Furthermore, a wide range applicants were rejected and forcefully made them to evict. The complaints were still pending before respective union territories and state for necessary action.

All tribal development programmes have assumed that they have been developed tribals but it is true only to certain extent. The context of tribal society with the non-tribal society is different in India as both have been living

<sup>16</sup> Debashish Debnath, (1998), Tribal Situation in India Issues in Development, New Delhi: Rawat Publications.

side by side for centuries. Special policy and programmes are required to address and redress these differences. They can participate only if they are considered as equals. The command and obey relationship can take place between unequals only. Individual tribal is too weak to stand as equal against a non-tribal so they have to get organized it depends upon different programmes. However, the followings are shown the irreconcilable conflict between forest and tribal values:

- The customary right of the tribal over access, control and management of forest resources are completely denied, which they have been enjoying for immemorial.
- Their moral obligation of conserving and protecting forest as a sacred religious duty is not recognized. Instead of that they are suspected as forest criminals, whose premises could be raided at any time. This mistrust largely demoralized them and tarnished their self-esteem, which they value more than material assets.
- They have to do away with their traditional ritual hunting expeditions, as it attracts stringent punitive action by the government.
- Gradual alienation from the rich biological diversity is making them poor in their indigenous environmental knowledge, for which they were once looked at with high esteem. Their knowledge of herbal medicine is gradually on decline.
- Bureaucratization of administration and introduction of courts, rents, fees, stamps etc. contradict their practice of oath and ordeal.
- Their lives are considered to be less important than the lives of the wild animals in the protected areas, which humiliated them.
- They lost of opportunities and power because of their alienation from their home-land or were forcibly converted into paupers in their habitat. When outsider elites dictated terms over them.
- For their basic survival. They were forced either to indulge in bribing the forest officials or surreptitiously continue with illegal activities, as no other way.

General problems of consciously changing or modernizing are also applicable them but they form a special category. Hence it is a great challenge what is the place of tribal people in the framework of the nation and how they should be developed and brought to a level with the rest of the people socially, economically, culturally and politically. Apart from the constitutional provision tribal policy is considered the late P.M.Shri. **Jawaharlal Nehru's panchasheel**. They are

- People should develop along the lines of their own genius and we should avoid imposing anything on them. We should try to encourage in every way their own traditional arts and culture.
- Tribal rights in lands and forests should be respected.
- We should try to train and build up a team of their own people to do the work of administration and development. Some technical personal from outside the region will, no doubt, be needed especially in the beginning. But we should avoid introducing too many of them into tribal territory.
- We should not over-administer these areas or overwhelm with a multiplicity of schemes. We should rather work through their culture; not in rivalry with their own social and cultural institution.
- We should judge results not by statistics or the amount of money spent, but by the quality of human character that is evolved.<sup>17</sup>

But hardly a quarter of the tribals displaced have been given alternate dry and mostly in infertile lands in exchange of the loss of their private lands and at least 1/3<sup>rd</sup> of the total displaced tribals, did neither receive any compensation nor alternate employment. Some received meager cash compensations in several instalments, calculated on the basis of local market value of land, which incidentally happened to be the lowest due to the restrictions on land transfer in scheduled areas. If they are well informed about political issues and governmental affairs, they may participate more meaningfully in the political process and take enlightened political decisions. The communication system in tribal areas is not elaborated and

<sup>17</sup> Sen Padmaja, (2003), Changing Tribal Life, New Delhi: Concept Publishing Company, New Delhi, p. 126.



they are illiterates. Government efforts for the tribal development through welfare schemes can only be profitable, if the tribals are well known to the welfare schemes.<sup>18</sup>

India happens to be one of the worst countries with regard to the rehabilitation of the displaced. A comprehensive national policy on socio-economic and cultural rehabilitation of the displaced persons consists of prior to any large scale project assessment should be made free opinion of the entire potentially affected are ascertained, the cost of rehabilitation, environmental restoration and ecological sustainability of the region, the term public purpose under the Land Acquisition Act 1984 shall be amended with reasonable restrictions, a single rule to both public and private, national and multinational enterprises, the quantum of compensation is determined in the land of individual and corporate rights over land and land based survival resources and fair provision of royalty to the displaced on the value of surface and subsurface resources. They consider each as their mother, the trees the abode of their ancestors and river and mountains as their brothers. Governor does not have enough time to look into the problems of the tribal community. So, it is better to constitute separate subordinate authority to the governor in order to serve the purpose of our Constitution effectively and efficiently. It should be made by keeping in the mind that the said authority should be able to identify the accurate problems of the tribals and sincere in intimating the same to the Governor for the timely action.

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<sup>18</sup> Sisodia Yatindra S, (1999), Political Conscious among Tribals, New Delhi: Rawat Publications, chapter 5.