

## Analysis of the beneficial provisions of constitutional fifth schedule for tribal development

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### Abstract

The present paper makes a modest attempt to analyze the provisions of the fifth schedule of India constitution. It in fact a humble attempt to scrutinize the provision from the angle of land alienation, money lending, displacement and Industrial development projects which as sizably and adversely affected the tribal people in Goa.

The paper has outlined the provision of fifth scheduled, central act and samata judgment. The present paper makes efforts to bring into the notice that the failure of commitment for Non-implementation of fifth scheduled in the state of Goa. For this purpose, the secondary data from books, articles, journal, newspaper etc. have been used.

**Keyword:** fifth scheduled, scheduled areas, act, samata judgment, displacement

### 1. Introduction

The aboriginal inhabitants the tribal's of our country have been living an eco-friendly life. Basically, the term 'Scheduled tribe is an administrative and constitutional concept. The Constitution of India has provided many privileges and welfare development programmes to the scheduled tribes in India.

The ethnic tribal groups like "Gawda, Kunbi and Velip"<sup>[1]</sup> communities has notified as "Scheduled Tribes" in Goa. During the colonization period, many tribal peoples were taken shelter in the thick forest area, and also they protect their own Culture. The majority of tribal peoples were lived in the hilly and forest area. These communities were always isolated from society for many generations and they never liked to medley other Non-tribal's Communities.

Indeed, there are many regimes were planned to conquer over their lands and de facto rule was continued by various kings. In hence, their de jure rule was imposed on tribal peoples. During medieval period when the British Empire to take over the controlled their administration percolated to tribal area in some part of India. They were successes to find out the more disturbances occurred in tribal areas. Thereafter, they were decided to introduce a separate policy for administering the tribal area by notifying them as Scheduled Districts.

The Census of India was the first Comprehensive Census of India, which was conducted by British Government. According to census report "the commissioner for census of India included all tribal groups as Forest Tribes and kept the same under the Sub-heading of Agricultural and Pastoral Castes"<sup>[2]</sup> and latter it classified as "Animists"<sup>[3]</sup>, "Tribal Animists or peoples following tribal religion"<sup>[4]</sup>, "Hill and Forest Tribes"

<sup>[5]</sup>, later it came to be known as "Backward Tribes"<sup>[6]</sup> and over the time the term as "tribe"<sup>[7]</sup>.

After post-independence period, "members of the Constituent Assembly while framing the Indian Constitution made a Critical review of such Privileges and formulated prescriptive benefit for the tribal peoples"<sup>[8]</sup>. According to the Indian Constitution there have certain provision to notify as Scheduled areas.

The most important factor was the Social justice, Economic empowerment, Political empowerment, and cultural protection for scheduled tribes. Similarly, "the Sixth Schedule also gives the tribal Communities considerable autonomy state"<sup>[9]</sup>. The power of the important executive of the state like the Governor and the state Government has many limitations. These impediments may be removed by means of utilizing the powers assigned to the District and Regional Councils as per the provision of the sixth Schedule of the constitution of India. For it have the actual power of legislation on different subjects.

The constitution under article 275 stated for "grants from the Union to certain states"<sup>[10]</sup> and it provided that "there shall be paid out of the consolidated fund of India as grant-in-aid of the revenues of a state such capital and recurring sum as may be necessary to enable that state to meet the costs of such schemes of development as may be undertaken by the state with

<sup>1</sup> Explanation Note: (Goa, Daman and Diu) Scheduled Casts and Scheduled Tribes orders (Amendment) Act, 2002 (Central Act 10 of 2003 "notified list of Scheduled Tribes.

<sup>2</sup> Explanation Note: First comprehensive census of British India was reported by Baine Empire in the year of 1819.

<sup>3</sup>Explanation Note: Second comprehensive census of British India was reported by Rislely in the year of 1901.

<sup>4</sup> Explanation Note: Third comprehensive census of British India was reported by Gait in the year of 1911.

<sup>5</sup> Explanation Note: Fourth comprehensive census of British India was reported by Hutton in the year of 1921.

<sup>6</sup> Explanation Note: fifth comprehensive census report of British India in the year of 1931.

<sup>7</sup>Explanation Note: Sixth comprehensive census report of British India in the year of 1941

<sup>8</sup> N.K.Behura, Nilakantha Panigrahi,(2006),Tribal's and the Indian Constitution, functioning of fifth Scheduled in the state of Orissa, published by Rawat Publications, New Delhi.Pp.56

<sup>9</sup> Explanation Note: The autonomy state like a Assam, Tripura, Meghalaya, and Mizoram are autonomous regions under the sixth Schedule were notified by

<sup>10</sup> P.M.Bakshi, The Constitution of India, incorporating amendments up to the constitution, (fourteen Edition 2017), published by universal Law publishing of LexisNexis, Haryana, India. pp.313.

approval of the Government of India for the purpose of promoting the welfare of the schedule tribe in the state or raising the level of administration of the schedule Area therein to that of the administration of the rest of the area of the state”<sup>[11]</sup>. The formulation of policy from the angle of Devolution, divestment and decentralization will ensured the protection of tribal’s customs, better economic development, and most importantly ethnic security.

## 2. Constitutional Inclusive framework for Development of Tribal Areas.

The Constitution of India define the term of scheduled tribes in article 366(25) provided that such tribes or tribal communities or part of or group within such tribes or tribal communities as are deemed under article 342 to be scheduled tribes for the purposes of this Constitution”<sup>[12]</sup>. Similarly, according to article 342 (1) of the constitution, the president may with respect to any state or Union territory and where it is a state, after consultation with Governor thereof, by public notification, specify the tribes or tribal communities or part of or groups within tribal communities which shall for the purposes of this constitution be deemed to be scheduled Tribes in relation to that state or Union territory, as the case may be”<sup>[13]</sup>.

The constitution of Indian specified the essential characteristics of these communities are as a Scheduled Tribe Such as – “primitive traits, geographical isolation, and distinctive culture, shyness of contact with community at large and economically backward”<sup>[14]</sup>.

Similarly, “the constitution makes special provision for the Administration of certain areas called Scheduled Areas in states other than Assam, Meghalaya, Tripura and Mizoram even though such areas are situated within a state or Union Territory article 244(1)”<sup>[15]</sup>. The term schedule Areas has been defined in the Indian Constitution, and same as the president has power to declare any area as a Schedule Areas under fifth schedule. In paragraph 6, of the fifth schedule of the constitution has prescribes following procedure for scheduling, rescheduling and alteration of scheduled areas.

The Policy makers of the Constitution of India gave recognition to them as “Scheduled Tribes” in the fifth scheduled. While understanding the historical reasons for the backwardness of tribal groups in the country made constitutional provisions, several special plans and programmers for their welfare and their development and has been allocating funds for this purpose in the national and state budgets.

### 2.1 Important Feature of the Fifth Scheduled of the Indian Constitution

The basic thrust of the fifth of the constitution is the protection of cultural distinctiveness of Tribal’s. It also provides protection to the tribal’s on account of their economic

disadvantages so that they could maintain their tribal identity without any coercion or exploitation. The interests of Schedule Tribes outside the North east are protected by Fifth Schedule. The fifth schedule designates “Schedule areas”<sup>[16]</sup> in large parts of India in which the interests of the Scheduled Tribes are to be protected. The Scheduled area has more than 50 percent tribal population. The Fifth Schedule being a very important provision of the constitution deals with the control and administration of the Schedule Areas. There are some of the most important features of the fifth Schedule Area are as follow:

- To setup Tribes Advisory Council according to the provision of Indian constitution.
- The Governor has the power to adapt laws passed by Parliament and State legislature in such a way that it suits these areas according to the provision of Indian constitution.
- It deals the Governor has power to make regulation, and also maintain a good governance and peace in the scheduled area.
- It extend that Union gives certain direction to State for the administration of the Fifth Schedule Area.

Under Fifth Schedule, the most important body known as Tribes Advisory Council, “which it was proposed, should have a Strong representation of thee element”<sup>[17]</sup>. In the Tribes Advisory Council, Scheduled Tribe representatives were consists of its three-fourth membership. Since Tribes Advisory Council is formed by the provisions of the Fifth Schedule it has the status of a constitutional body.

The Fifth Schedule is aimed towards making the State responsible towards the promotion of educational and economic interests of Tribal’s. It also aims to provide social justice to the tribal’s and prevent them from exploitation of any kind. The Central Government also provides special financial assistance to the states under Article 275 for the implementation of schemes that would lead to the development of Schedule Tribes.

### 2.2 Power and Functions of the Governors of the State under the V Schedule

The Powers of Governor are important in the application of the provision of Fifth Schedule. He enjoys the power to modify, annul or limit the application of any law made by Parliament or State legislature in the areas designated as Schedule Areas. Similarly, “the Governor is empowered to make regulation for peace and good governance of any area in a state which is for the time being a Scheduled Area”<sup>[18]</sup>. In other word, for the peace and good governance of the Scheduled area under Para 5(2) to prohibit or restrict the transfer of land by to members of STs in such area sub-clauses (b) and to regulate the business of money lending to the members of Schedule tribes sub-clause (c).

<sup>11</sup> Ibid (n10) pp.313.

<sup>12</sup> Ibid (n11) pp.385

<sup>13</sup> Ibid (n12) pp.385

<sup>14</sup> John K. Thomas, Human Rights of Tribal’s (In 1Volumes)-(Status of Tribal’s in India), (2005), published by Isha books D-43, Delhi.p.1

<sup>15</sup> Durga Das Basu, Workbook on Constitution of India, published by LexisNexis(A Division of Reed Elsevier India Pvt Ltd) 14<sup>th</sup> floor, Building No.10,Tower-B,DLF Cyber city, Phase-II, Gurgaon-122002,Haryana,India.pp.305.

<sup>16</sup> Explanation Note: - In the constitutionally expression the term of “scheduled Areas” means such areas as the president may by order declare to be scheduled areas or president may at any time by order.

<sup>17</sup> Piarely Lal Mehata, first Edition (1991), Constitution Protection to Scheduled Tribes in India, published by H.K. Publishers & Distributors, Delhi. Pp.372

<sup>18</sup> Jagadish Swarup, Dr. L.M. Singhvi,(second Edition Reprint 2007) volume -3,Constitution of India, published by Morden Law Publication, New Delhi. pp2537

The Fifth Schedule makes the provision to setup Tribal Advisory Council. It deals with the provision to established Tribal Advisory Council comprising of maximum twenty members. Wherein, three-fourth of its representatives would consist belongs to Schedule tribes' members of State legislatively Assembly.

The Tribal Advisory council has a mandate relating to the matters of welfare and advancement of schedule tribes in the state the matter referred to the Governor.

The Governor has also power to make repeal or amend any Union or State law. The Governor can make such regulation only after consultation with the Tribes Advisory Council of the state. It is to be understood that all such regulation will have effect only after being submitted to and accepted by the President of India.

In order, the Schedule Areas are those areas which the President may direct to be Scheduled Areas with respect to the Fifth Schedule of Constitution. The President has the power by which he may ensure that the whole or any part of a Scheduled area has ceased to be a Scheduled area. He can after consultation with the governor of that state increase the area of any Scheduled area. In this way he possesses the power to alter the boundaries of any Schedule area.

The regulations made by the Governor come into effect only when they are accepted by the President. Governor is required to submit annually the reports regarding administration of the Scheduled areas to the President. Even the Parliament through a law can amend any of the provisions of this Schedule by way of addition, variation or repeal. Any such law is not deemed to be an amendment under Article 368 of the Constitution.

### **3. Panchayat Raj Extension to the Scheduled Areas Act, 1996**

The Central Government has enacted the new Act, which as popularly known as Panchayats (Extension to Scheduled areas) Act, 1996 was implemented in the fifth Scheduled areas. This Act was one of best piece of legislation and that is why it attracted many Social activists as they considered it as a symbol of grass root level democracy. It is a revolutionary Step towards tribal development and their administration. The fifth Schedule of the Constitution provides for certain guidelines for the development and administration of the Scheduled areas. It also flows of 'grants-in-aids out of the consolidated fund' of the India to the Scheduled areas for Promoting and Welfare of the Scheduled tribes.

The PESA Act promotes Self-rule of the tribal's in the Institutions like Panchayate and Grama Sabha. The 73<sup>rd</sup> and 74<sup>th</sup> amendment Act, 1992<sup>19</sup>, and going further, PESA Act, 1996 to stipulate that the state Government shall not make any law which is derogatory to the traditional, socio- cultural rights. The gram sabha under its power provide a safeguard to tribal's traditions, customs, and cultural identity. It provides for the mandatory approval of plans, programmes, projects for social and economic development by the gram sabha before they are taken up for implementation and mandatory consultation (albeit not consent) with them before the acquisition of land for development projects.

It necessary required the recommendation of the local bodies prior to grant of prospecting licenses, mining concessions or leases for minor minerals is mandatory. The PESA endows the local bodies with powers to prevent alienation of land in a

scheduled area, and to take the appropriate action to restore any unlawfully alienated land form tribal's.

The power of eminent domain contradicts the spirit of the body of legislation effecting signify can't local governance, and decentralization of power. But it is not to argue that all is well with the implementation of the Fifth and Sixth Schedules, the 73<sup>rd</sup> and 74<sup>th</sup> amendments or the PESA. Indeed, there is a mountain of evidence that discloses the weaknesses and failures in the implementation of these laws that allow vested interests within and outside local rural and urban communities to prevail. The implementation of the 74<sup>th</sup> amendment in urban areas is considered a failure in even constituting effective ward sabha's. Eminent domain holds sovereign over PESA areas and the rights of indigenous communities are flagrantly violated.

However, arbitration by the state and law is important to ensure social justice. It also needs constant reinforcement with political organization on the ground, a vibrant culture of activism unfettered by interest groups, conscientious media engagement, the judicial system and other avenues for justice like commissions for human rights, religious minorities, SCs/STs and women. In principle and in limited practice the Fifth and Sixth Schedules, under the 73<sup>rd</sup> and 74<sup>th</sup> Amendment Acts, and the PESA. The third tier of democracy needs to be explicitly enabled to effectively curtail eminent domain.

### **4. The Relevance of Samatha judgment**

The single most Act which has considerably ensured the tribal welfare and their development if at all than it is the Panchayats (Extension to Scheduled areas) Act (PESA). But this act has not been properly implemented in the state of Goa, resulting in denial of fundamental right to self-government to their communities'. However only protection to the tribal's living in the Scheduled Area is afforded by the fifth Schedule of the Indian Constitution.

The constitutional safeguard is imminent threat of being amended to effect transfer of tribal lands to non-tribal and corporate. The Samata was Social action group of Andhra Pradesh. They were doing advocacy on behalf of the tribal communities for protection their rights. Samta filed a petition in the Supreme Court which was "held that all lands were leased by the government to private agencies of the mining companies and apart from its instrumentalities in the scheduled areas are null and void. In addition the Apex court was also held that transfer of land by government to private agencies of the mining companies'. It's instrumentalities was entrustment of public property as the aim of public corporation is in public interest and hence such transfers stand upheld"<sup>19</sup>. The need of hour that the provision of fifth scheduled be immediately implemented in the state of Goa and in its true spirit, so that the authority in the samta judgment will be applicable in Goa.

### **5. Status of Tribal Population in Goa**

The state have three groups of Scheduled tribes namely Gawda, Kunbi and velip Community. Goa has total tribal population of 1, 49,000 which is 10.23 per cent of total population of Goa as per 2011 census. So far as the population strength of tribal's in the state is concerned the same may be seen from table given below:

<sup>19</sup> AIR 1997 Supreme Court 3297.

**Table 1:** Scheduled Tribe population per Census 2011.

State	Scheduled Tribe population per Census 2011		
	Total	Rural	Urban
Goa	1,49,275	90,372	58, 903

*Source:* Date collected from Directorate of tribal welfare, Government of Goa, Panji-Goa.

**Table 2:** Taluka wise Scheduled Tribes Population in North-District of Goa as per 2011 Census

Sr. No.	Name of the Taluka of North-District	Total Population of Scheduled tribes.	%
1.	Tiswadi	18,785	10.60
2.	Bardez	1654	0.70
3.	Pernem	46	0.06
4.	Bicholim	4492	4.59
5.	Sattari	4030	0.33
6.	Ponda	27599	16.64
7.	Total	56606	6.92

*Source:* Date collected from Directorate of tribal welfare, Government of Goa, Panji-Goa.

**Table 3:** Taluka wise Scheduled Tribes Population in South-District of Goa as per 2011 Census

Sr. No.	Taluka of North-District	Total Population of Scheduled tribes	%
1.	Salcete	29242	10.54
2.	Mormugao	10190	5.94
3.	Sangum	9261	23.82
4.	Quepem	25290	31.15
5.	Canacona	13657	30.23
6.	Dharbandora	5029	19.14
7.	Total	92669	14.47

*Source:* Date collected from Directorate of tribal welfare, Government of Goa, Panji-Goa.

### Budget Allocations under tribal Sub-plan 2015-16.

Against the above strength of tribal population in the Goa the Planning Commission of State Government of Goa has allotted 10.23% of the budget for implementation of tribal Sub-plan. This fund allotted in all Departments is as Follows.

**Table 4:** Budget Allocation under Tribal Sub Plan 2015-16

Sr. No.	Department	Rs. In Lakhs			
		Outlay	Expenditure	Balance	%
1.	2.	3.	4.	5.	6.
1.	Agriculture	1191.00	1120.63	70.37	94.09
2.	Animal Husbandry & Vet. Services	669.93	621.00	48.93	92.70
3.	Art & Culture	200.00	138.24	61.76	69.12
4.	Co operation	225.60	0.00	225.60	0.00
5.	Craftsmen's Training Centre	680.00	138.52	541.48	20.37
6.	District Rural Development Agency	350.00	205.05	144.95	58.59
7.	Education	500.00	168.04	331.96	33.61
8.	Electricity	4500.00	2022.14	2477.86	44.94
9.	Fisheries	52.00	51.77	0.23	99.56
10.	Forest	392.00	323.29	68.71	82.47
11.	Health	890.01	706.65	183.36	79.40
12.	Higher Education	60.00	2.49	57.51	4.15
13.	Directorate of Industries, Trade & Commerce	450.00	2.23	447.77	0.50
14.	Directorate of Information & Technology	50.00	50.53	-0.53	101.06
15.	Commissioner, Labour & Employment Department	81.00	4.61	76.39	5.69
16.	Municipal Administration	20.00	7.55	12.45	37.75
17.	Panchayats	550.00	242.74	307.26	44.13
18.	Public Works Department	5000.00	1344.37	3655.63	26.89
19.	Science, Technology & enviroment	247.96	30.62	217.34	12.35
20.	Social welfare	3877.00	3806.15	70.85	98.17
21.	Sport & youth Affairs	2550.00	656.09	1893.91	25.73
22.	Tourism	775.00	632.94	142.06	81.67
23.	Tribal Welfare	23560.00	13213.43	10346.57	56.08
24.	Water Resources	1707.10	643.33	1063.77	37.69
25.	Women & Child Development	423.61	349.79	73.82	82.57
	TOTAL	49002.21	26482.20	22520.01	54.04

*Source:* Date collected from Directorate of tribal welfare, Government of Goa, Panji-Goa.

The annual budget for the financial year 2015-2016 has created a Provision of Rs.200 cores from tribal development in Goa. This budget allocation is done for the total number of twenty five department of the state Government. Though some departments have utilized this fund to the extent of 94%, some departments have used 70 % to 80% fund. Unfortunately rest other department could not even utilized above 50 % of the funds as they have failed to tailor suitable Schemes and programmes for the development of tribal's in the state.

### 6. Problem of Tribal's Development in the State of Goa.

After post –liberation of Goa, the developmental Strategies such as roads, mining and Industrialization flowed on tribal lands. Consequently, large numbers of tribal's were displaced from their own lands. The state imposed pro-capitalist development projects in tribal areas including mining, dam and tourist hotels etc which had direct adverse impact on tribal people.

Most of these projects were very harmful for tribal people as it resulted in deprival of their livelihood and other resources on which they were depended on land. The Proper rehabilitation, compensation and job remain still unfulfilled. The rehabilitation led to the loss of tangible and intangible assets, including homes, communities, productive land, income-earning sources etc...

Besides displacement Scheduled tribes in the state which causes potential risks of joblessness, homelessness, marginalization, loss of common lands and resources increased health risks, loss of common land and resources that deeply threaten sustainability. The industrial development further added to the plight of tribal.

The central Government setup Parliamentary Standing Committee on the Welfare of Scheduled Castes and Scheduled Tribes which submitted its report to the Lok Sabha on October 23, 2008. This report states that, "Notwithstanding Act and regulations to Control alienation of tribal land, tribal people are being alienated from their land in the name of development and due to other places in Search of livelihood. It further stated that "tribal should not suffer in the name of development and it recommended that "the Ministry of Tribal Affairs should take immediate Su-moto action whenever it is reported that tribal people are agitating against displacement and endangerment to their lives" [20].

The different laws relating to tribal benefits like the PESA 1996, the Forest Rights Act, 2006 or even the fifth Schedule of the Constitution are yet to be implementing in the state of Goa to provide Protection to the tribal people. And that is why the Scheduled Tribes have become victims of lop-side development and the protection of law was ineffective. "Articles 46 of the Constitution place an obligation upon states to promote the interest of Scheduled Castes and Scheduled tribes and protect them from all forms of exploitation and social injustice" [21]. The inhuman displacement of tribal's from their ancestral and traditional lands led to violation of the fifth Schedule of the Constitution for it denied them the Control as well as ownership of natural resources.

## 7. Conclusions and Suggestions

In ancient time, the tribal communities were living in isolated areas and most of their life and livelihood was linked with the forests. Whereas in the medieval period of history the tribal's who came in contact with kings and various kingdoms searching for personal for their defense forces, began to interact with civilian and this how they were introduced to civilized life. However, until the contemporary period they were not living in city habitation and the said process commenced during the colonial period, but no specific policy was formulated by the Alien rulers either for the development these communities or to bring them into social mainstream.

At the time of European regimes in India both British and the Portuguese the tribal areas as well as their regions were thrown open for development mainly out of concern for the administration of revenue collection in whatever means it is possible to ensure the same. The said approach was also introduced in the agrarian policy which led the tribal lands to pass into the hands of non-tribal landlords and moneylenders.

In the post-independence period, the Government of India also followed a policy of limited assimilation through Nehru's Panchsheel approach which again restricted the planners to act on a limited way taking in to account their cultural and traditional life. The policy makers thus formulated policies without understanding the cultural and traditional life of tribal's. As a result, the situation wherein the new laws seeking to protect the tribes instead of accomplishing the so called objective had in fact turned into new tool for the enhance exploitation of tribal's in India.

Similarly, in the post-liberation of Goa, for many decades the Gawda, the Kunbi and the velip communities those were rightfully expected to be notified as scheduled tribes forthwith liberation for quit long they were not given their rightful place in the constitution of their own country.

That made the State Government to delay the process for implementing fifth Scheduled area in the state of Goa until the period the indigenous tribes of Goa were ultimately brought in the national mainstream vis-a-vis their inclusion in the scheduled list. As a result consequent, the state unfortunately deprived the tribal their traditional rights over their own land, including with forest rights and other Natural resources. Even till date their rights which are otherwise enumerated under some of the important laws relating to tribal's and enjoyed by them in other tribal regions of other states in the country are not protected for in case of tribal's of Goa.

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<sup>20</sup> [www.tribal Displacement in the Name of Development.com or https://socialissuesindia.wordpress.com/](http://www.tribal Displacement in the Name of Development.com or https://socialissuesindia.wordpress.com/) dated 21/06/2017.

<sup>21</sup> Bakshi, see supra Note13.

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