

Centre State Relations in India

Prof. Uday Shankar

Rajiv Gandhi School of Intellectual Property Law

Indian Institute of Technology, Kharagpur

Week 02: Administrative Relations: Distribution of the Subjects; Obligation of the Centre and the States

Lecture 06: Administration and Control of Scheduled Areas and Scheduled Tribes

Greetings to the learners. In today's session, we are going to discuss the uniqueness of the Centre State relation in India. What we call it also as asymmetrical federalism, where we find that the relationship between the State is not based on the kind of understanding what we generally read between the federation and the units in ordinary sense. Basically, you would find this arrangement is there under the Indian Constitution with regard to the tribal areas, which are primarily in the North Eastern parts of the country. So, in today's lecture we would be discussing about the historical background and along with that we will also discuss that what has really debated upon on the matter of allowing them to have some kind of autonomy in the matter of governance. So, there is a provision under Article 244 and there is a schedule 5 in the constitution, which deals with the reasons which are known as Scheduled Areas, where the areas are populated by tribal people.

We will also discuss Tribal Advisory Council and how the relationship of the Union gets governed in the areas where Scheduled Tribes are staying and areas which are notified as Scheduled Areas as per the Constitution. And we will also look at the judgments of the Supreme Court in relation to Schedule V of the Constitution. So, to take you with regard to the governance of for the reasons where Scheduled Tribes are staying or residing, you find that under the Indian Constitution there are special provisions which are being made to administer and to control Scheduled Areas and Scheduled Tribes in North Eastern parts of the country and that is been given under Schedule 5 of the Constitution. And the way these provisions are being made it truly

signifies that how the relationship between the Centre and the States in relation to those areas are not patterned, not in a framework as it has been the case with Centre and other parts of this country.

Because of the very reason that their requirement is different, their cultural spirit is different and then the Constitution makes a mandate that this is something which needs to be protected through a very innovative way or indigenous way. And that is why Schedule V provides for administering and controlling these areas and that is been done in a very decentralized way, where the power has been interested with the Advisory Council which has got a responsibility to ensure that these areas are governed in such a way so that the culture remains intact, their socio economic positioning is also to be accordingly valued and accordingly to be looked upon so that they should not really lose their positioning vis-a-vis mainstreaming of the society and at the same time they should not be deprived of the benefits which they are eligible for under the constitutional scheme. So, when you look at the history of these regions what you find is that these regions were governed under the Government of India Act wherein there was nomenclature used as excluded areas or partially excluded areas under the Government of India Act 1935, Chapter V was dealing with the excluded areas or partially excluded areas. Now, this Sections 91 and 92 of the Act was dealing with this excluded areas and what it provided for is that that the government has got a power to declare that what shall be called as excluded or partially excluded area and then proportionately what it provided for is that that any law passed by the federal legislature or by the provincial legislature those laws shall not be applicable or they should be partially applicable in those excluded or partially excluded areas. They those laws are to be made applicable there has to be a specific notification in that regard by the Governor.

So, you can very well visualize the situation that the framework clearly provided that ordinary laws are not to be made applicable in these areas primarily because of their specific requirement primarily because of their kind of customized requirement to administer that area to preserve their culture and that is why Section 92 of Government of India Act categorically provided that it shall be the discretion of the Governor who shall decide that what law to be made applicable in those areas. Now, when you look at the debates which took place in a while framing the Constitution it was debated as a Draft Article 215B and which was initially included in Article 190 of the Draft Constitution. It was suggested that by one of the members that let the Centre has

got a kind of overarching power on this matter and that is why Mr. Bajeshwar Prasad suggested that let it be added that until Parliament by law otherwise provides in order to make Parliament all-powerful to bring in a change with regard to a special provision which is accorded to a special status which is accorded to the Scheduled Areas. However, this amendment was turned down primarily for the very reason that members over of the opinion that the Scheduled Areas require the special protection and unique arrangement with the Centre and therefore, those areas need not be considered to be or need not be given a status at par with the other States or other regions of the country.

What we find that there are constitutional amendments which have been done with regard to the areas which deals with the Scheduled Areas that is Article 244. One amendment is done in 1956 when States have got reorganized in 1956 when State Reorganization Act was passed in that during that time what has been done is that that Part A, Part B, Part C States all these were omitted the references of these were omitted what was there at the time of the commencement of the Constitution. So, Seventh Amendment Act omitted the phrase which is specified in Part A or Part B of the First Schedule that is what was important thing done and then another amendment which was done in the 1984 when Tripura was also added as one of the States where this special provision shall be made applicable where Schedule V was thought to be made applicable for governing and administering the Scheduled Areas. Now when you look at Article 244 read with Schedule V of the Constitution it is been generally said that the Schedule V gives a framework to govern these areas as per the requirement of that area as per the need of that area. So that is what Article 244 and Article 244A provides for it says that there shall be a Tribal Advisory Council which shall govern this area.

So Article 244(1) provides that the provisions of a Schedule V shall apply to the administration and control of Scheduled Areas and Scheduled Tribes and when you look at Schedule V it is divided into 4 parts where you have a general provision that which all areas would be notified as a Scheduled Areas then what shall be the administration and control of Scheduled Areas and Scheduled Tribes that is what is given there and then Part C talks about Scheduled Areas and Part D talks about amendment to the Schedule. Now Schedule V is applicable to all the State, but does not include the States of Assam, Meghalaya, Tripura and Mizoram they are being separately dealt which I will be discussing in the next session. Now when you look at what is the Tribes

Advisory Council it says that the executive power of the Scheduled Area is bestowed to the State and Schedule V provides for establishing a Tribes Advisory Council under Para 4 of the Schedule V where it says that in each State there shall be this Tribes Advisory Council to be made and they shall be made responsible for implementing the laws, they shall be responsible for governing the areas and further it says that this may be made applicable even in those areas which are otherwise not Scheduled, but it is been notified as Scheduled Areas. So there is a possibility of expanding the ambit of the power of the Advisory Council. So a Tribes Advisory Council consists of a 20 members which includes three-fourths of the representative from the Scheduled Tribes in the Legislative Assembly of the States and what is their responsibility they advise on matters pertaining to the welfare and advancement of Scheduled Tribes in the State as may be referred to them by the Governor.

So Governor comes in between and that is how we need to understand the linkage between the Centre and the State that Governor here as a representative of the Centre plays a very important role where you may say that the constitutional scheme suggest that let the Union play a kind of direct intervention on the matter of the well on the matter of the governance of the Scheduled Areas and that is why it says that it has to be referred by the Governor. So this Advisory Council they are being constituted in 10 states Andhra Pradesh, Telangana, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha and Rajasthan they are being constituted in those 10 States. State of West Bengal, Tamil Nadu and Uttarakhand not having any notified Scheduled Area, but they do also have a Tribes Advisory Council in these States. Now Part 6 of the Schedule V provides that the President have got a power to declare any part of the State as a Scheduled Areas. So you can very well find that here there is a direct role given to the Centre where Centre can notify an area as a Scheduled Area in order to again preserve and protect the culture, living of the tribal in that area at the same time to also cater the socio economic interest of the people inhabited in those areas.

So, the President has got all the power to notify, the power to increase the notified area or to alter the areas so declared under the notification. Now what is the relationship of the Union and States for Scheduled Areas? Part 3 of the Schedule V provides for continuous kind of interplay between the Governor and President because Governor here has to be understood as having a kind of responsibility of two kinds. One is kind of representative Centre and second also accountable to

the welfare of the tribal people, accountable to the people who are living in the Scheduled Areas. So, President may ask a report from the Governor regarding the administration of the Scheduled Areas in the State which Governor is bound to submit it and then executive power of the Union government also extends to giving directions to the State for administration of Scheduled Area.

So you can very well look at it that here how the Central government can directly pass the direction to the State on the matter of administration and that is why this is been called as an instance of asymmetrical federalism. It is not symmetrical federalism because otherwise when you look at the relationship between the Centre and other States you would find that such kind of instructions cannot be issued on the matter of administration unless and until it is a situation of emergency. So here you find that Union government has been given necessary power to give directions to the States for the administration. President as I said is empowered to declare any area as a Scheduled Area and Parliament has been bestowed with the necessary power to amend the Schedule by law as per Para 7 of the Schedule V of the Constitution and that law shall not be understood shall not be considered to be an amendment for the purpose of Article 368. So you can very well visualize and agree with this proposition that the kind of scheme with the framers of the Constitution have envisaged for ruling Scheduled Area it is a kind of mixture of flexible provision as well as it is given a sort of rigid structure rigid in a sense that where kind of direct intervention is possible from the Centre flexible in a sense where the reason which can cover under Scheduled Areas may be expanded and the same shall not be considered to be an amendment for the purpose of Article 368.

The Scheduled Areas are exempted from applying the laws made by the Parliament and the State Legislature. Here again is an instance of asymmetrical federalism where the Constitution categorically states that whatever laws were made by the Parliament or by the State Legislature the same may not be applicable in these areas. It is suggested that these areas are exempted from applicability of such laws and that is how Para 5 of Schedule V which starts with a non obstante clause and says that Governor may by public notification direct that any Act shall not apply to the Scheduled Areas or apply with such exception as specified. So, power has been given to the governor that to what extent the law made by the Parliament or made by the State Legislature shall be made applicable what shall be the extent of exemption or what shall be the modification which the Governor can undertake for applying that law in the Scheduled Areas. So, Governor

has been given necessary power to create exceptions and modifications as he may specify in the notification concerning the applicability of the parliamentary legislation or the laws passed by the Legislative Assembly. So, you may say that Constitution creates a situation where a valid law may not be made applicable in those areas if applicability of such laws are been seen not in alignment with the welfare of the people residing in that area and this is something which one can very well appreciate that their requirement may be different their need may be different and therefore or ordinary law may be not made applicable to those people who are living in that region.

Though one may argue that this may lead to non-integration this may lead to non-assimilation of these people with the mainstreaming, but the same time we need to also look at the balancing of two factors one is the preservation of their culture one is the development of these areas and the on the other hand we have to also see that how the main streaming laws are to be made applicable and therefore the necessary power has been given to the Governor to take a call depending upon the situation depending upon the need and the requirement of the reason the people of the Scheduled Areas as notified under a Schedule V. Additionally Governor is also been empowered to make regulations for peace and good government for Scheduled Area. So, enough provisions are been given in the Constitution where it has been provided that Governor can play a significant role a vital role in overall development of these areas. So, that they should not left behind from the developmental discourse they should not remain backward. So, this responsibility lies on the Governor. Governor has to be seen in dual capacity of representative Centre at the same time directly accountable to the people living in Scheduled Areas.

So, Governor can repeal or amend any Act of Parliament or laws passed by the State Legislature. There is a need to consult the Tribes Advisory Council before making any regulation under Para 5. So, look at it the way the Constitution provides for people's participation while bringing any modification or while deciding on the applicability of laws made by the Centre or the State. It says that the there is a requirement to consult the Tribes Advisory Council before making any such regulation. And it is also suggested that the regulations so, made are required to be presented before the President for the assent of the President.

So, you can come to this conclusion that there is a mechanism which is in place in all for the

very purpose that that reason must not be exploited, the people must not be exploited and there has to be a kind of absence of parochial approach on the matter of the development of the people residing in those areas development of the area which is notified as Scheduled Areas. Additionally it is been also suggested that the provisions pertaining to Panchayats and Municipalities are not to be made applicable in Scheduled Areas. So, even though the Constitution talks about local body administration, but for Scheduled Areas the scheme suggested is entirely different from other States different from Municipalities and Panchayats. Occasions have come where the Court has decided on the relationship the interpretation of Schedule V and in that regard Court has given the findings some are some findings are very prominent one. For example, in *Jatindra v. Province of Bihar*, which has come before the Court before the commencement of the Constitution where the Court has clarified that the power to frame regulation under Para 5 of Schedule V is to be seen a keen to legislative power and the power which is been given to the Governor is enough to change or modify the provisions of the Act or the Sections as it deemed fit by issuing a notification.

So, somewhere the Court has made a make a distinction that when the Governor is modifying the laws made by the Parliament, when the Governor is notifying the applicability of the Central Law or the State Law such exercise of the power needs to be understood as a legislative power and not the executive power. One important aspect when we read as a legislative power is in relation to the power to review with which is available with the court of law. If it is a legislative power then the reviewing power of the Court becomes limited in contrast with the executive power which the Executive exercises. So, that is something which is significant the moment we read that the nature of power is legislative power which Governor decides while excising the power under Para 5 of Schedule V. Other phenomenal and path breaking judgment *Samatha v. State of Andhra Pradesh*, wherein the Supreme Court has in detail talked about the constitutional significance of Schedule V and VI where the Supreme Court has talked about the right of the tribal people over the mines and minerals which is there on the land where they are residing and the and the Court has categorically said that there is no absolute power with the Centre or with the government to extract such mines and minerals. There is a prohibition it has it can be done only with the help of cooperatives to be established by the Centre where Schedule V and VI is to be honoured and people of that reason the tribal have to be made part of such cooperatives.

So, and then in *Samatha v. State of Andhra Pradesh*, the Court has also talked about constituting a fund we shall take care of the development of the people residing in those areas. So, this judgment is a phenomenal judgment, why because of the very reason that Court has let down a very valuable restriction for limiting the or for restricting the exploitation of tribal people because we know very well that tribals are residing in those areas which are mineral rich areas and they become subject matter of exploitation they are very vulnerable because they are being asked to migrate from that area, forcefully evicted from that area in order to extract mines and minerals. This judgment gives a very clear finding that that is something we shall not be done unless and until the spirit of Schedule V and VI is been honoured while extracting the mines and minerals while looking at the concern of the developmental agenda of the of the government. Another judgment which has come is *Chebrolu Leela Prasad v. State of Andhra Pradesh*. This is interesting case where with a reference of Schedule V a provision has been made to reserve 100% seats in the employment for the people residing in Scheduled Areas. Now the matter has gone to the Court with this very question that can there be 100% reservation in the under the guise of Schedule V whether the same arrangement can be allowed. One argument which was advanced was that that such classification is been done with reference to Article 16(1) and not Article 16(4). Therefore it must be said to be a valid one. Court rejected this idea and Court categorically said that any attempt to provide for 100% reservation in the name of the welfare of the tribal people in the name of administration of Scheduled Areas under Schedule V would amount to rewriting the Constitution and therefore that kind of power is not there.

So though it is true that Governor has got a power to modify the Central Law and the State Law but such modification of power must not be excised in such a way so that it amounts to rewriting the entire statute. So Court has rejected this very proposition where Governor has notified reserving 100% seats for the tribal people as notified in Scheduled Area. The Court has referred to *Indira Sawhney Case* and court has said that 50% is the ceiling which must be honored and Para 5 Schedule V must not be brought into play for making 100% reservation for the tribal people

Another important case where the Court has looked into the power of the Governor and the role of the Council of Ministers with regard to Schedule V. In this case *B.K. Manish v. State of Chhattisgarh*, there were Rules which are notified by the Council of Ministers after consulting

the Governor they have placed those rules to the Governor and therefore a question was raised that whether Governor needs to exercise the function independently or with the aid and advice of the Council of Ministers. In this case the Court has said that as far as Schedule V is concerned it does not say that Governor needs to frame the Rules in his own discretion. It says that if rules are being framed by the Council of Ministers and if it has been brought if the same Rules have been placed before the Governor then compliance or law has been ensured. So Court categorically said that we need to understand that there is a parliamentary democracy and in parliamentary democracy we need to value the representatives of the people. So Court in this case has come up with this understanding that it would be not very appropriate to say that Schedule V is a kind of arrangement where you say that it is a Constitution within a Constitution one has to go for a harmonious interpretation and construction and therefore the Court in this case says that if the Council of Ministers has framed the rules and if such rules are being placed before the Governor then such rules satisfies the requirement of constitutional scheme of framing the rules by the Governor and Governor need not make the rules independently and by exercising his discretion.

Another case which is kind of reiteration of the law let down on the matter of Schedule V in *Satyajit Kumar v. State of Jharkhand*, where the Supreme Court has said that the power of Governor under Schedule V is to be seen as a legislative power of Parliament and the State and such power must be exercised subject to the provisions of Part III of the Constitution. So this is again what you need to look at is that how powers are being exercised by invoking Schedule V and if such a size of power goes contrary to fundamental rights then that the same must not stand the scrutiny of the Court of law. That is what the Court says in this case. Thank you very much these are the references for Lecture 6.