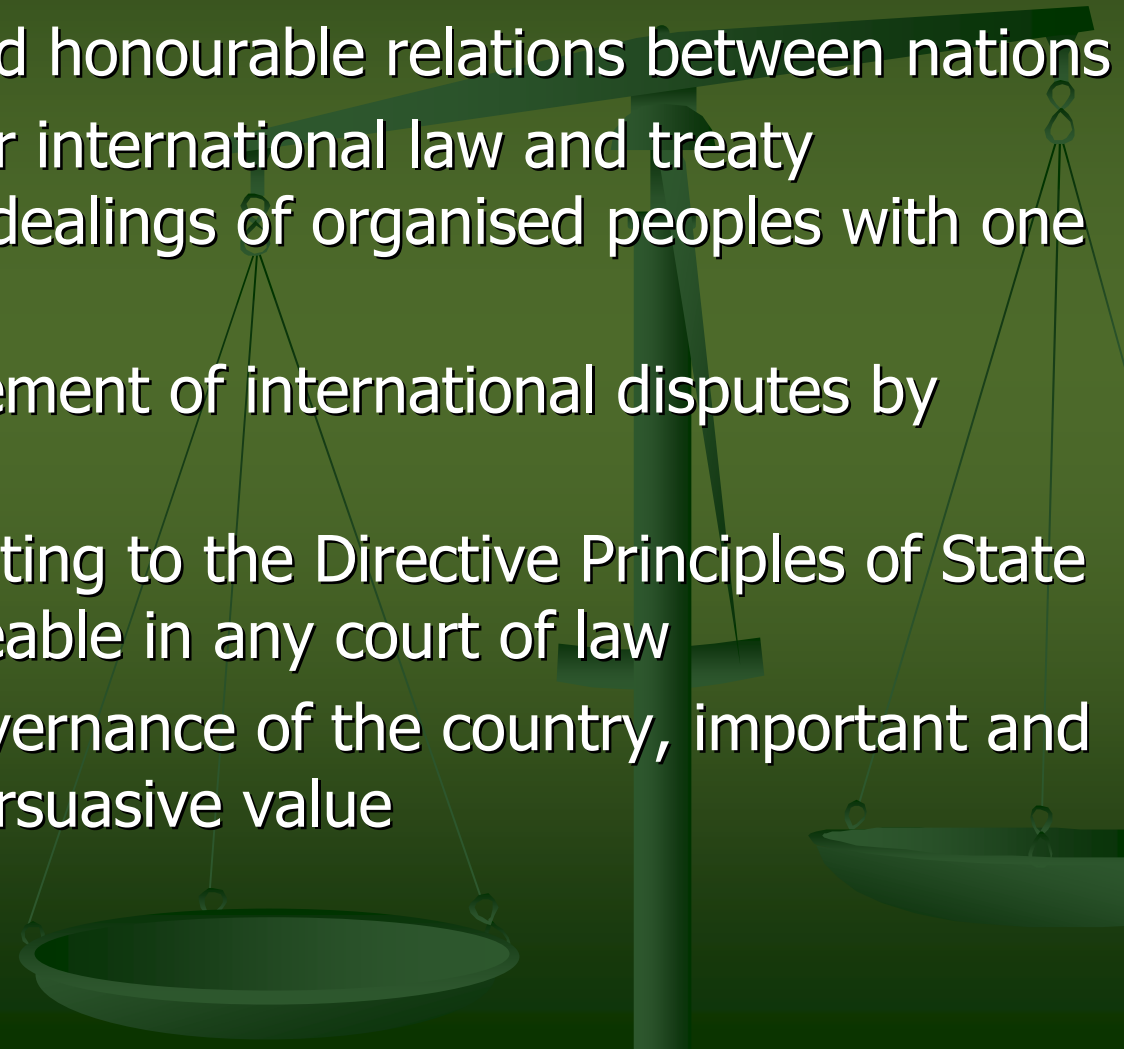


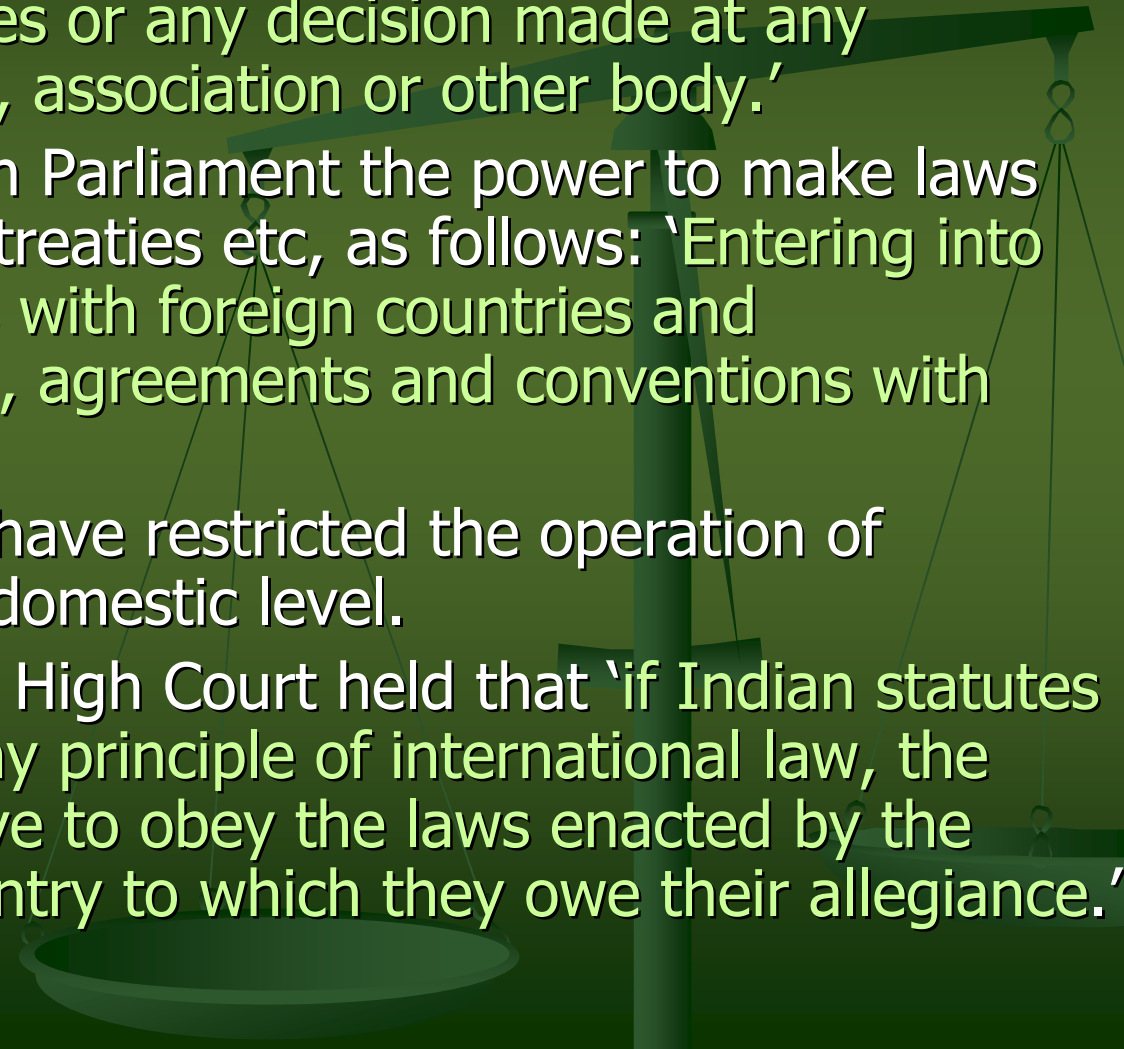
International Laws Concerning Indigenous and Tribal Peoples in India

C.R Bijoy

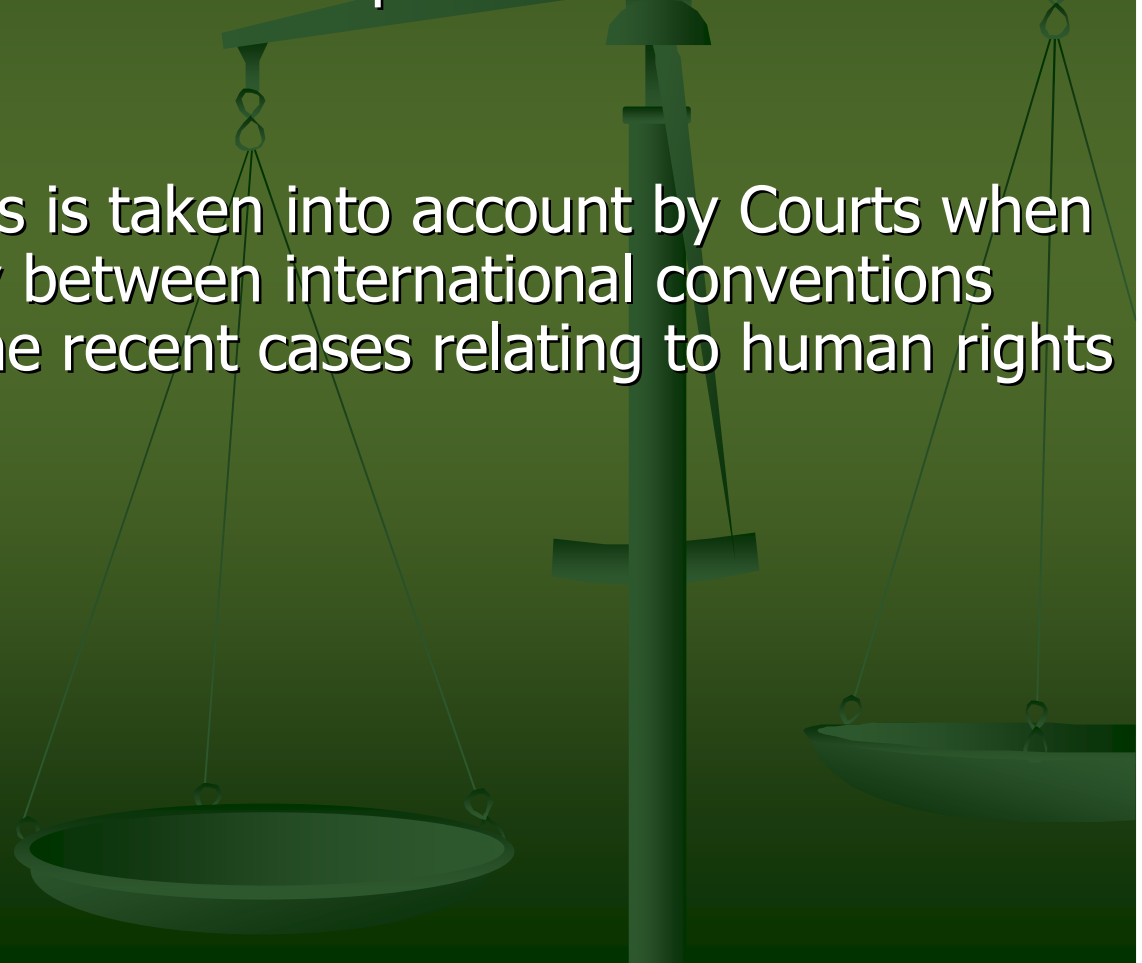


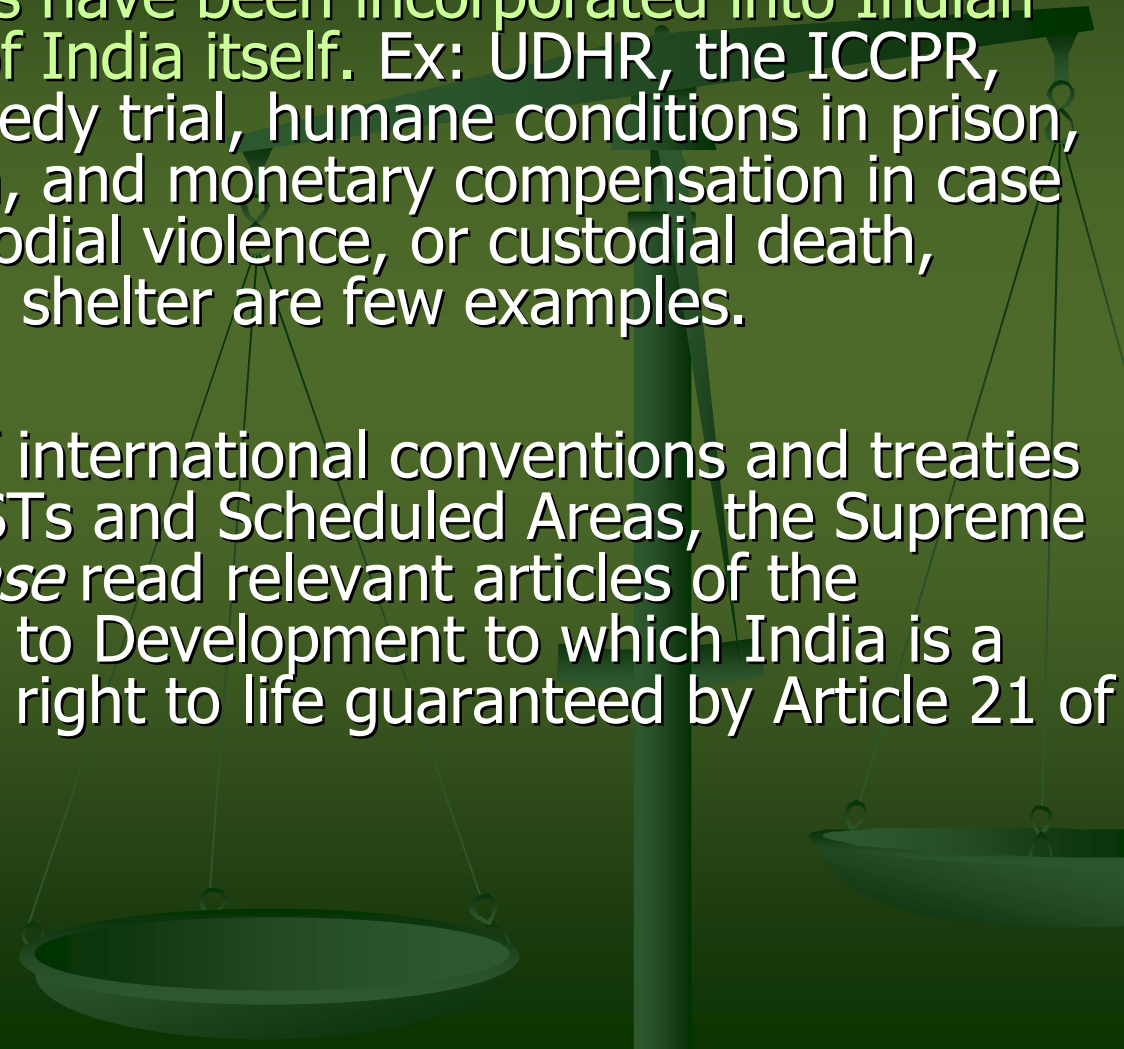
Status of international law

- Article 51 of the Constitution: 'The State shall endeavor to
 - (a) promote international peace and security
 - (b) maintain just and honourable relations between nations
 - (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another
 - (d) encourage settlement of international disputes by arbitration'
 - Part of Part IV of relating to the Directive Principles of State Policy; so not enforceable in any court of law
 - But central to the governance of the country, important and have considerable persuasive value
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- Article 253 on legislation for giving effect to international agreements: 'Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.'
 - The 7th Schedule vests in Parliament the power to make laws relating to international treaties etc, as follows: 'Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.'
 - The Courts of India too have restricted the operation of international law at the domestic level.
 - In 1954, the Calcutta High Court held that 'if Indian statutes are in conflict with any principle of international law, the Indian Courts will have to obey the laws enacted by the legislature of the country to which they owe their allegiance.'

- 'National courts cannot say 'yes' if Parliament has said 'no' to a principle of International Law.'
- International treaties are not binding on Indian Courts or Indian nationals unless they have been incorporated into domestic law through legislation.
- International conventions is taken into account by Courts when there is no inconsistency between international conventions and domestic law in some recent cases relating to human rights violations.



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- A number of key human rights articulated in several international conventions have been incorporated into Indian law in the Constitution of India itself. Ex: UDHR, the ICCPR, ICESCR, the right to speedy trial, humane conditions in prison, free legal representation, and monetary compensation in case of illegal detention, custodial violence, or custodial death, means of livelihood, and shelter are few examples.
 - Regarding application of international conventions and treaties on the rights of IPs to STs and Scheduled Areas, the Supreme Court in the *Samatha case* read relevant articles of the Convention on the Right to Development to which India is a signatory along with the right to life guaranteed by Article 21 of the Constitution of India

Ratification of UN, ILO and regional instruments

- Though supportive of international law and institutions, India always adopted a firm stand against joining any international arrangement that it sees as infringing on its internal policies and institutions, particularly relating to individual rights (the World Trade Organisation being a significant exception to this rule)
- The Government refused to sign the Optional Protocols to the ICCPR, the ICESCR, the Rome Statute of the International Criminal Court.
- This is consistent with the Constitutional position whereby international agreements only apply in India when they have been implemented through a domestic legislation.
- Therefore India is reluctant to join most international agreements on rights issues, such as ILO Convention 169, the Convention Against Torture
- India, a member of the International Labour Organization (ILO) since 1919.
 - So far ratified 41 out of 188 conventions of the ILO

- The government's responses is that its policies are in accordance with the provisions of the Convention and benefit both non-Adivasis and Adivasis
- The forced displacement of millions of Adivasis dismissed as 'general allegations'
- A typical response was that 'the exploitation of natural resources was unavoidable for the economic and industrial development of the country'; adequate compensation provided; no discriminatory policy'

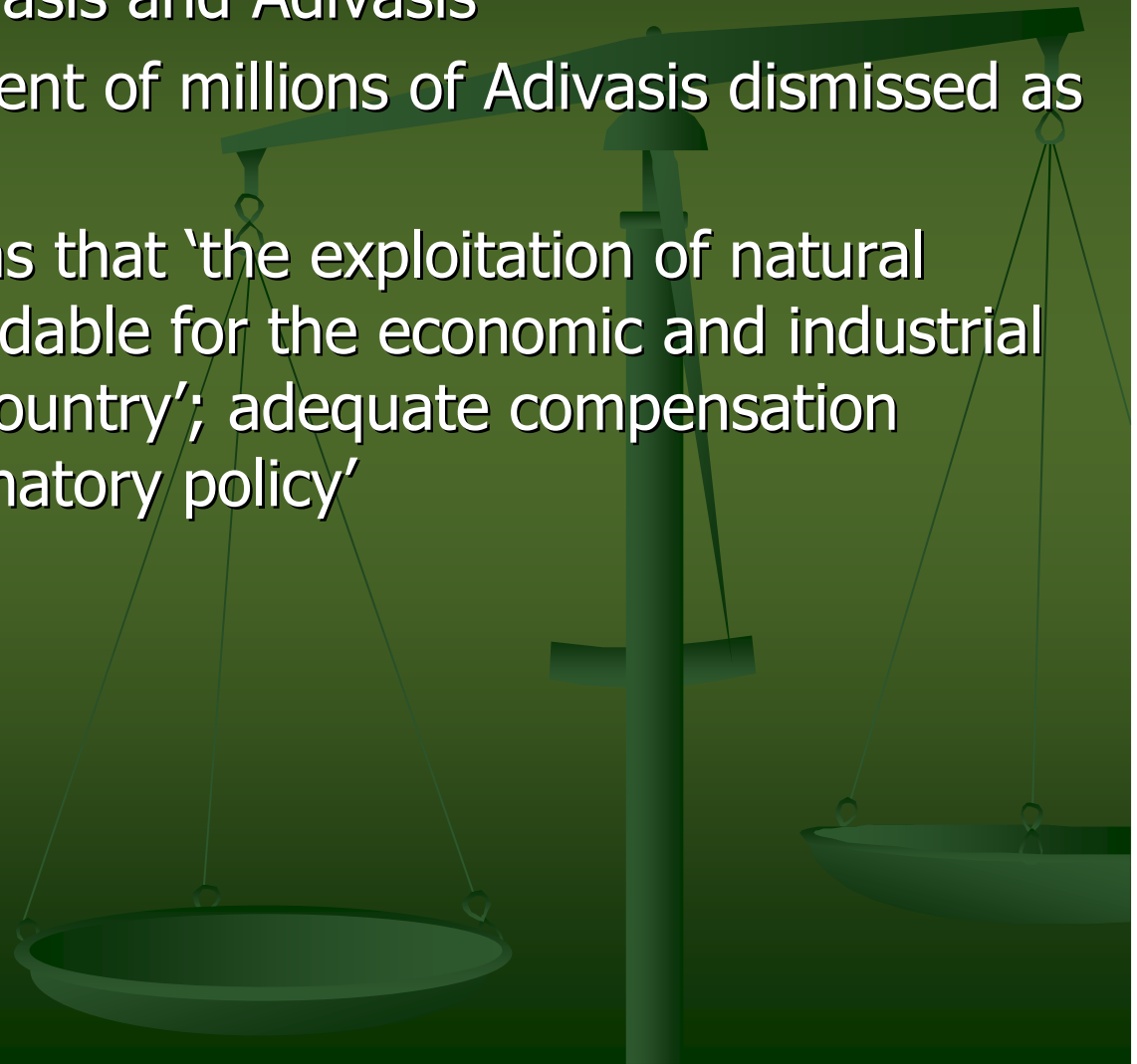


TABLE 1: Status of ratification/accession of important international instruments

Instrument	Date of deposit of ratification/accession
ICCPR	10/04/1979
ICESCR	10/04/1979
Optional Protocol to ICCPR	Not ratified
CERD	03/12/1968
Art 14 of CERD	
CEDAW	09/07/1993
Protocol to CEDAW	Not ratified
CRC	11/12/1992
Protocol to CRC- Armed Conflict	30/11/2005
Protocol to CRC - Sexual Exploitation	16/08/2005
Genocide Convention	27/08/1959
Slavery Convention 1927	18/07/1927
Supplementary Slavery Convention 1956	23/07/1960
CAT	Signed on 08/10/1997 but yet to ratify.
Art 22 of CAT	
CMW	Not ratified.
Art 77 of CMW	Not ratified.
Convention on Biological Diversity	18/02/1994



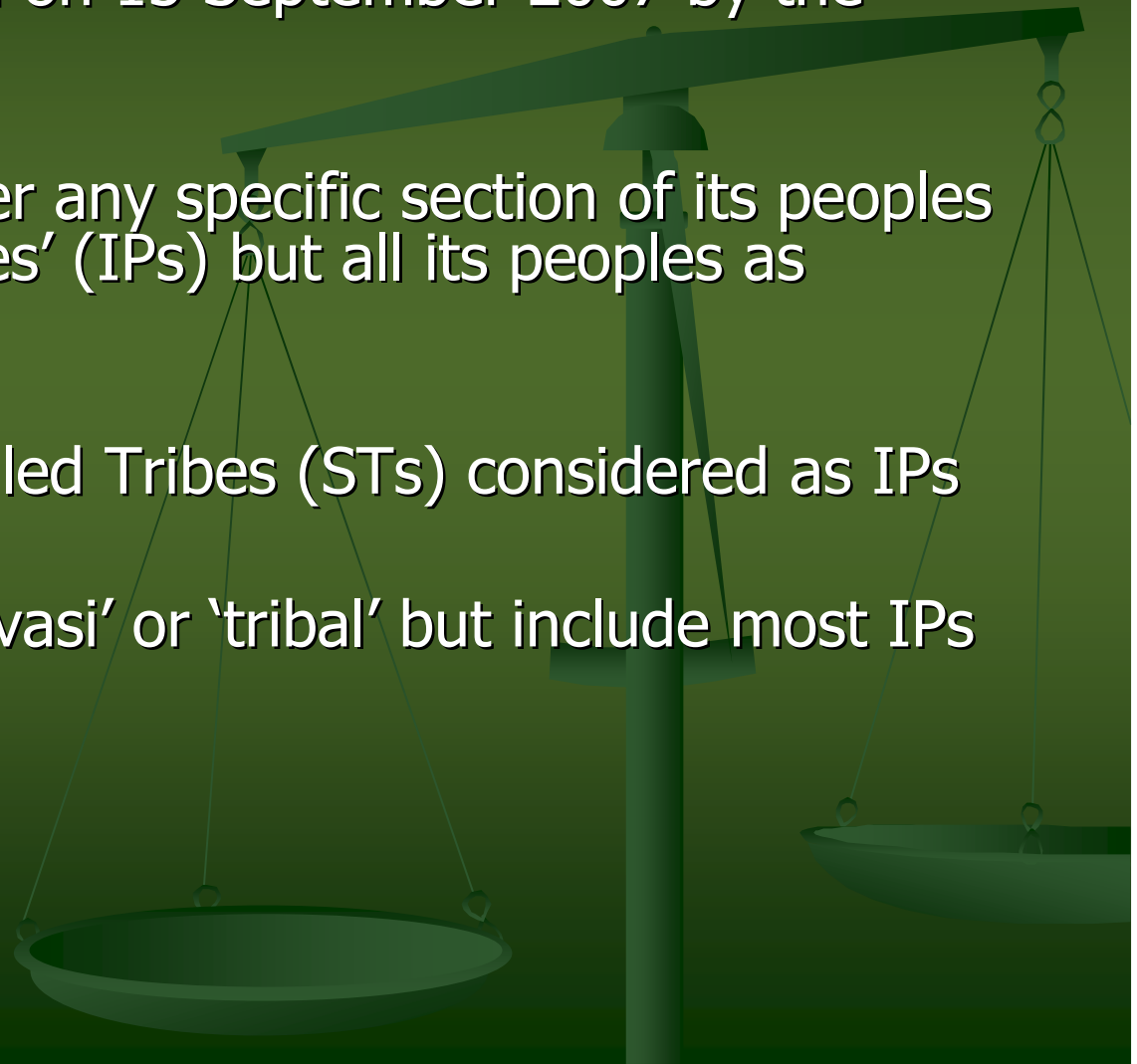
Convention	Date of ratification
ILO 29 (Forced Labour)	30/11/1954
ILO 105 (Abolition of Forced Labour)	18/05/2000
ILO 100 (equal remuneration)	25/09/1958
ILO 111 (discrimination in employment and occupation)	03/06/1960
ILO 107 (indigenous and tribal populations)	29/09/1958
ILO 169 (Indigenous Peoples)	Not ratified.
ILO 138 (minimum age)	Not ratified.
ILO 182 (Worst Forms of Child Labour)	Not ratified.

Status of communications and state reporting

- Ratified ILO C107; ILO C169 yet to be ratified
- Submitted reports to the ILO on issues related to ILO C107, and both the Committee of Experts and the Conference Committee have made observations on the same
- Not submitted reports regularly and has frequently failed to respond to queries. In 1993, 1995 and 2005, the Committee of Experts observed that no report had been submitted at all, while in 1991, 2001 and 2004, the government's reports were either submitted very late or were too brief for the Committee to consider
- The government does not consider the ILO Convention process to be important
- Where reports have been submitted, the Committee of Experts has made observations only on a few very specific issues as the Sardar Sarovar dam project on the Narmada river, and the displacement of tens of thousands of Adivasi families
 - The Committee of Experts made observations in every sitting since 1990

Indigenous peoples in India

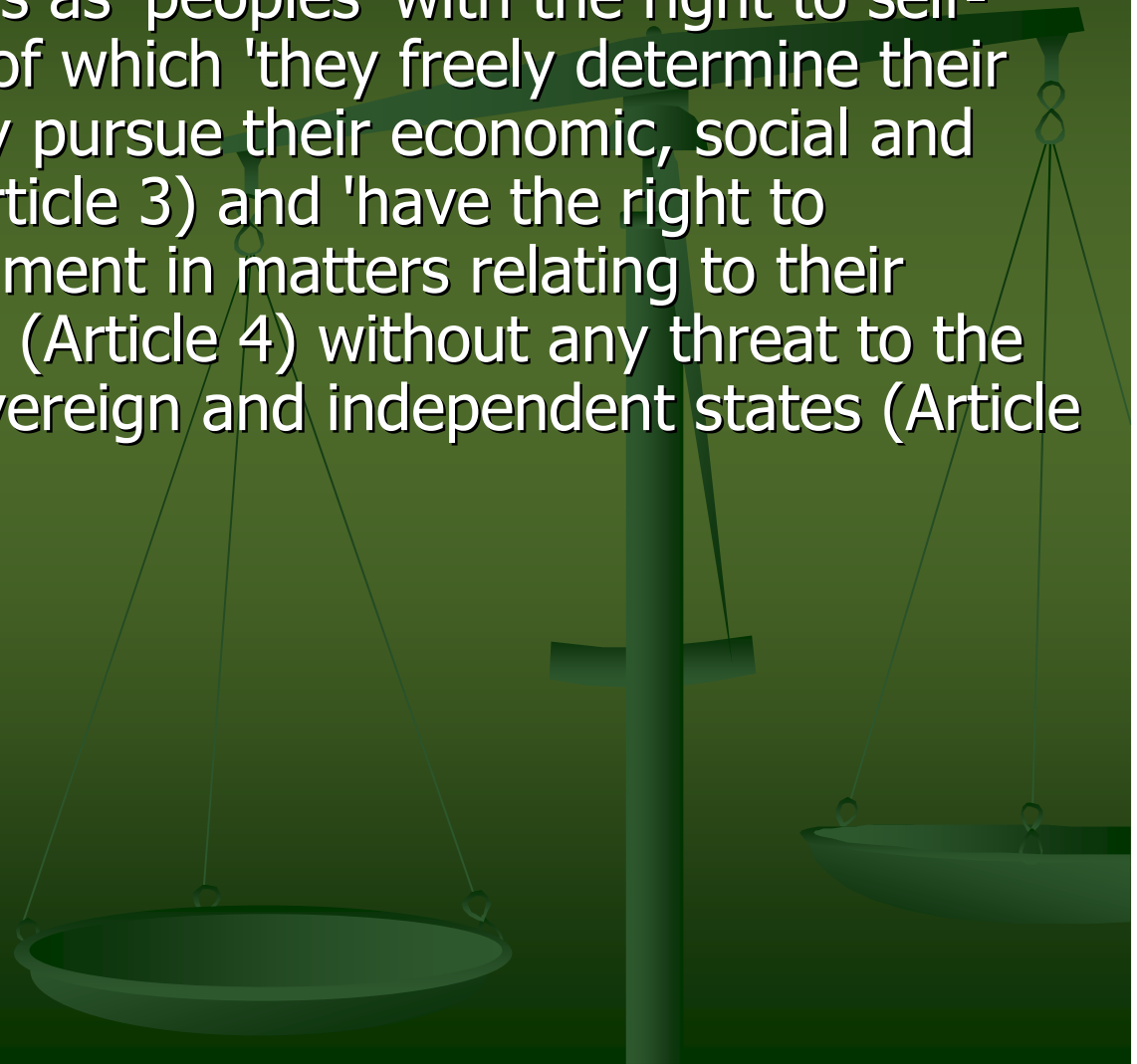
- ❑ UNDRIP was **passed** on 13 September 2007 by the General Assembly
- GOI does not consider any specific section of its peoples as 'indigenous peoples' (IPs) but all its peoples as indigenous.
- Operationally Scheduled Tribes (STs) considered as IPs
- STs not same as 'Adivasi' or 'tribal' but include most IPs

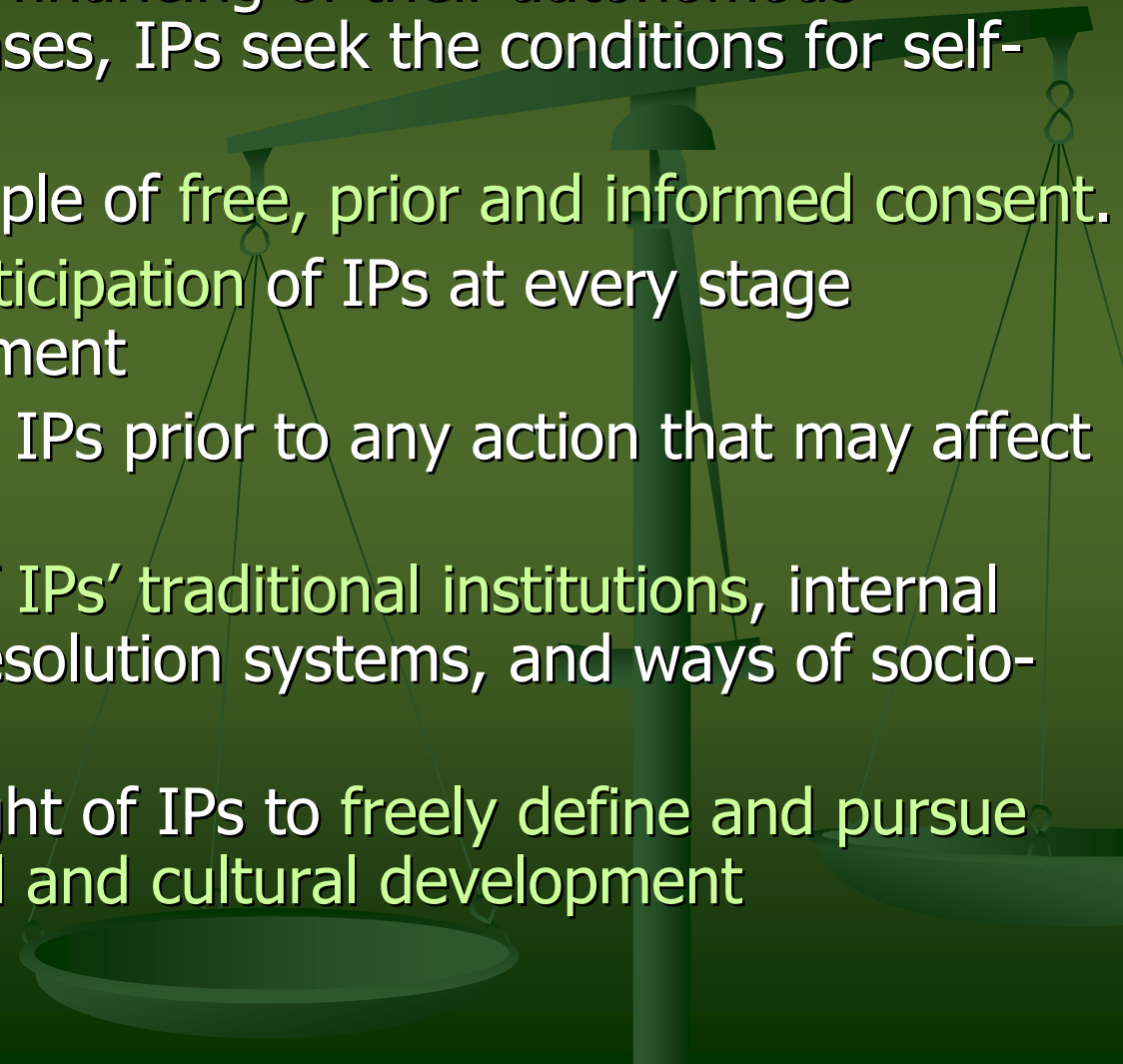


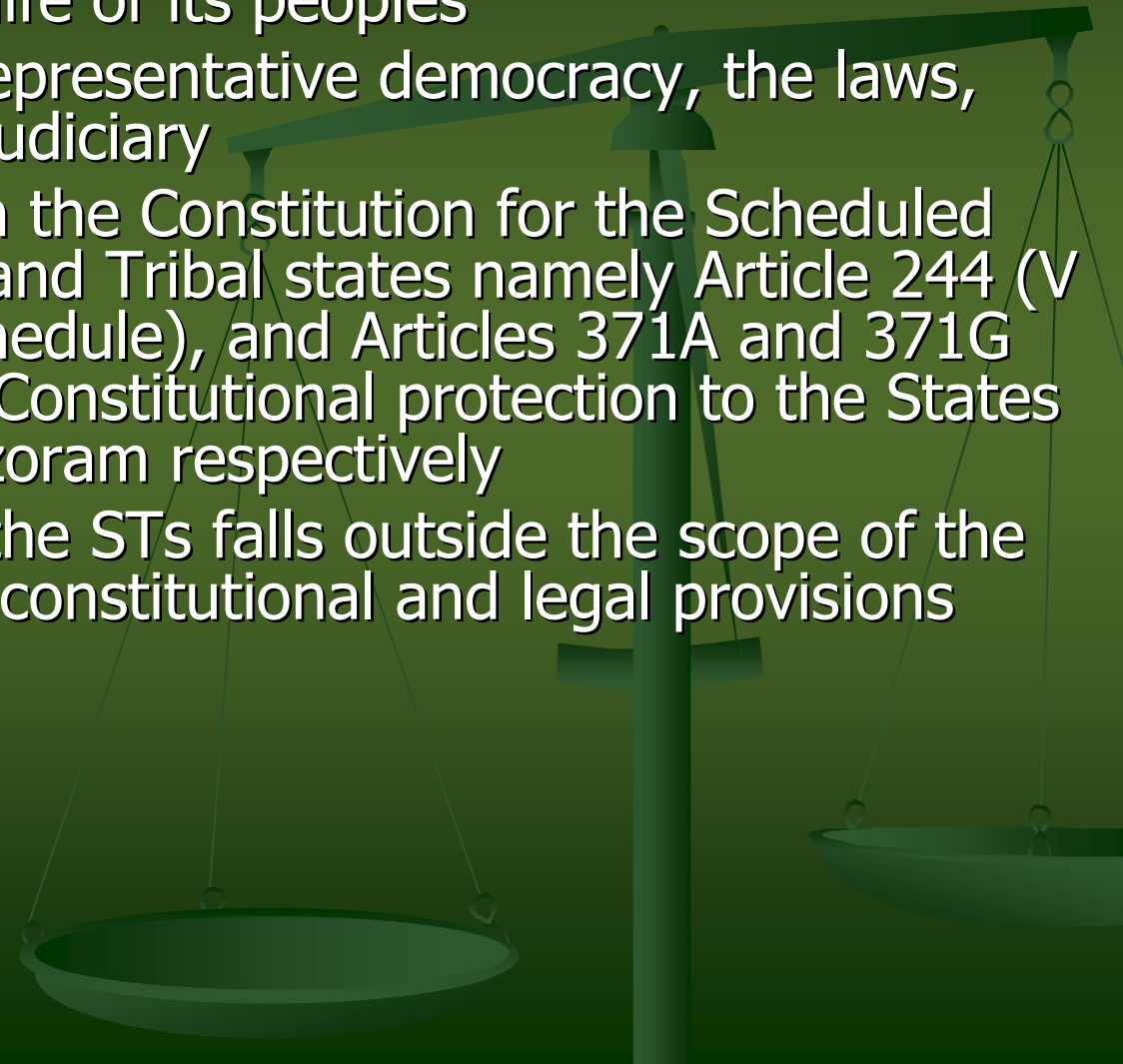
Self-Governance

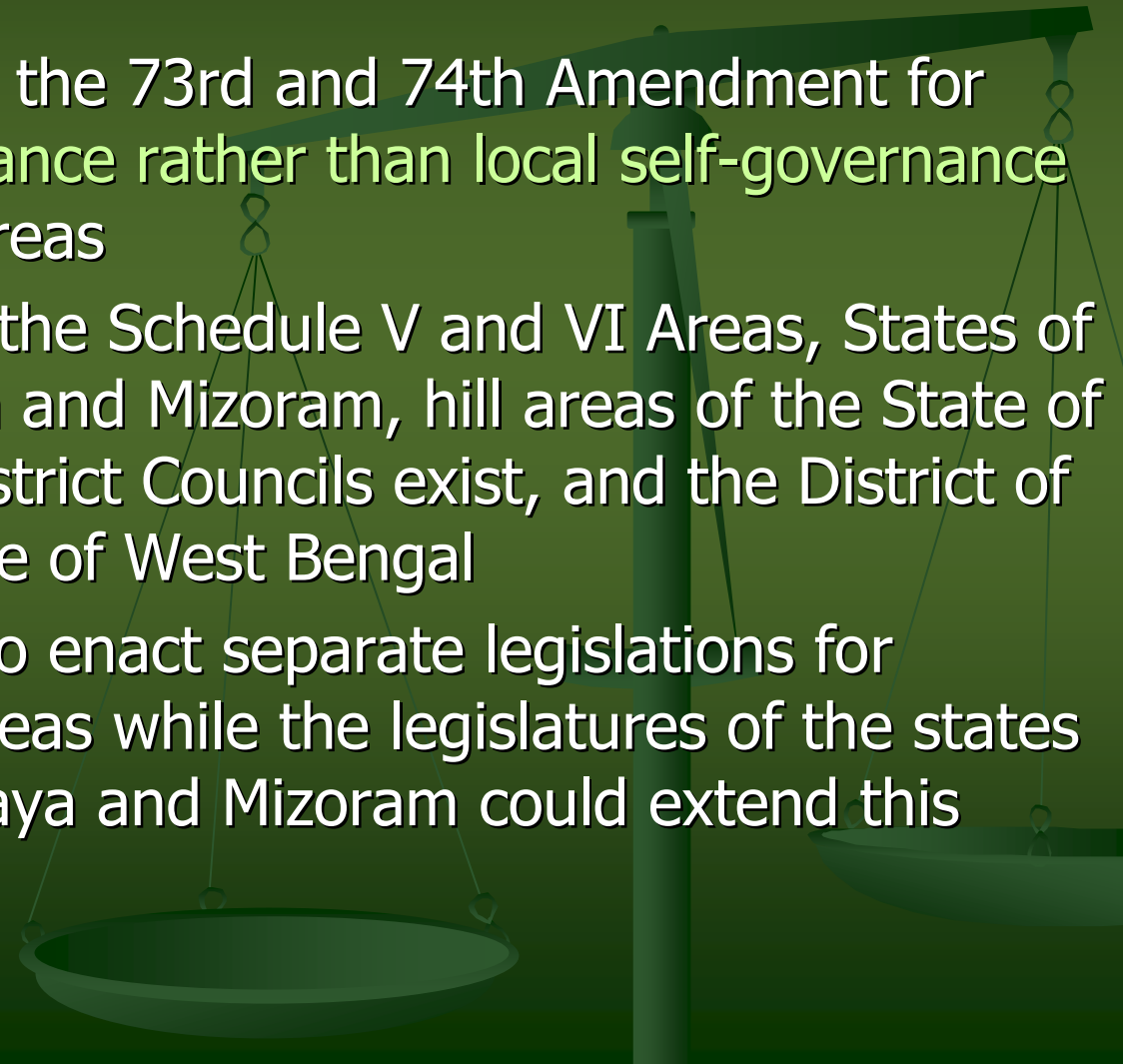
- Self-governance flows from the right to self-determination.
- ILO C107 refers to 'indigenous and tribal populations', ILO C169 modifies this to 'indigenous and tribal peoples'.
- The concept of 'peoples' implies recognition of the right to self-determination of 'all peoples' under Article 1 of the ICCPR and ICECSR
- The right to self-determination means the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.
- Article 1(3) of ILO C169: 'The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.'
- Neither ILO C107 nor 169 refer to right to self-determination per se, but C169 does provide for participation and consultation, self management and the right to decide their own priorities – all of them components of the right to self-determination

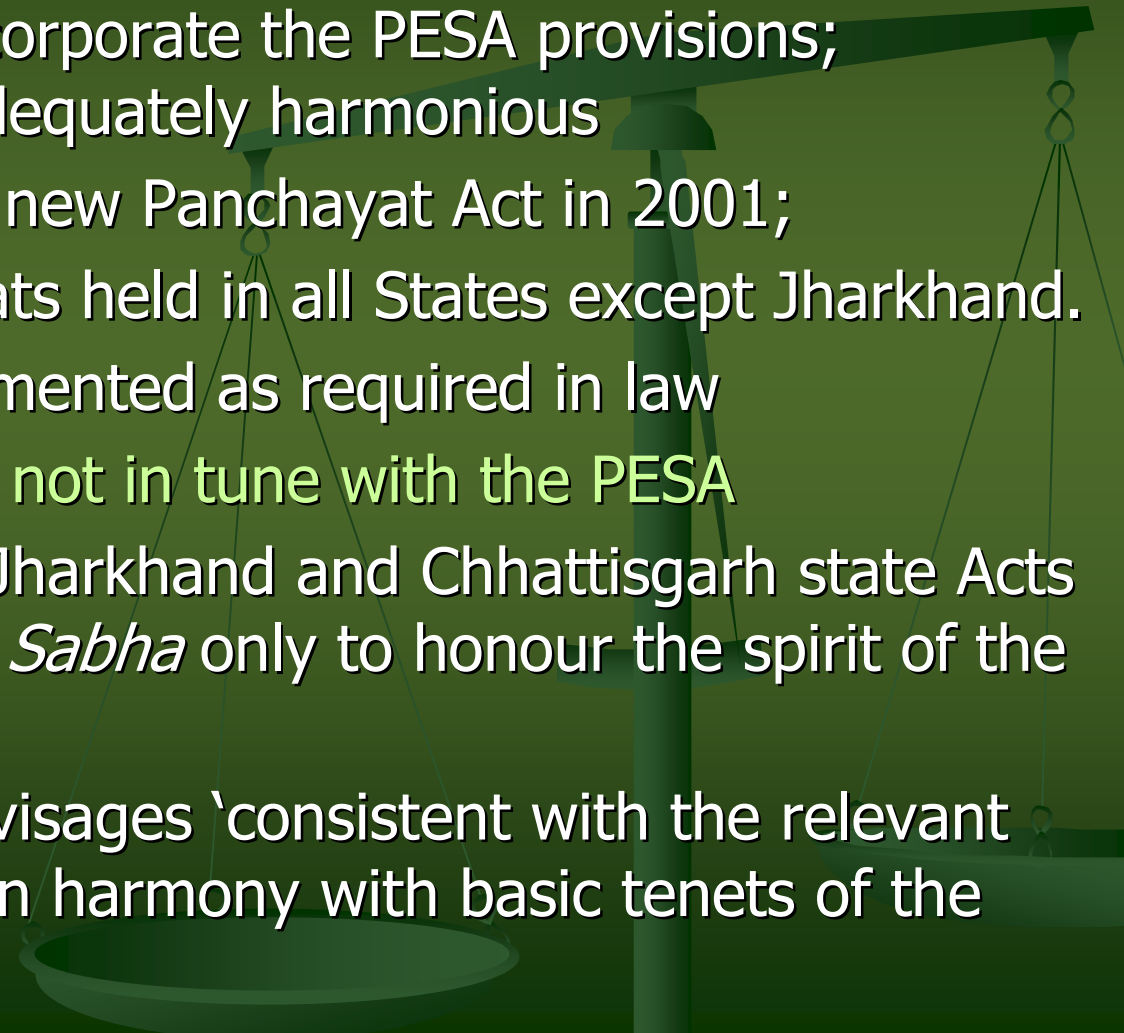
- But UNDRIP identifies IPs as 'peoples' with the right to self-determination by virtue of which 'they freely determine their political status and freely pursue their economic, social and cultural development (Article 3) and 'have the right to autonomy or self-government in matters relating to their internal and local affairs' (Article 4) without any threat to the territorial integrity of sovereign and independent states (Article 46).

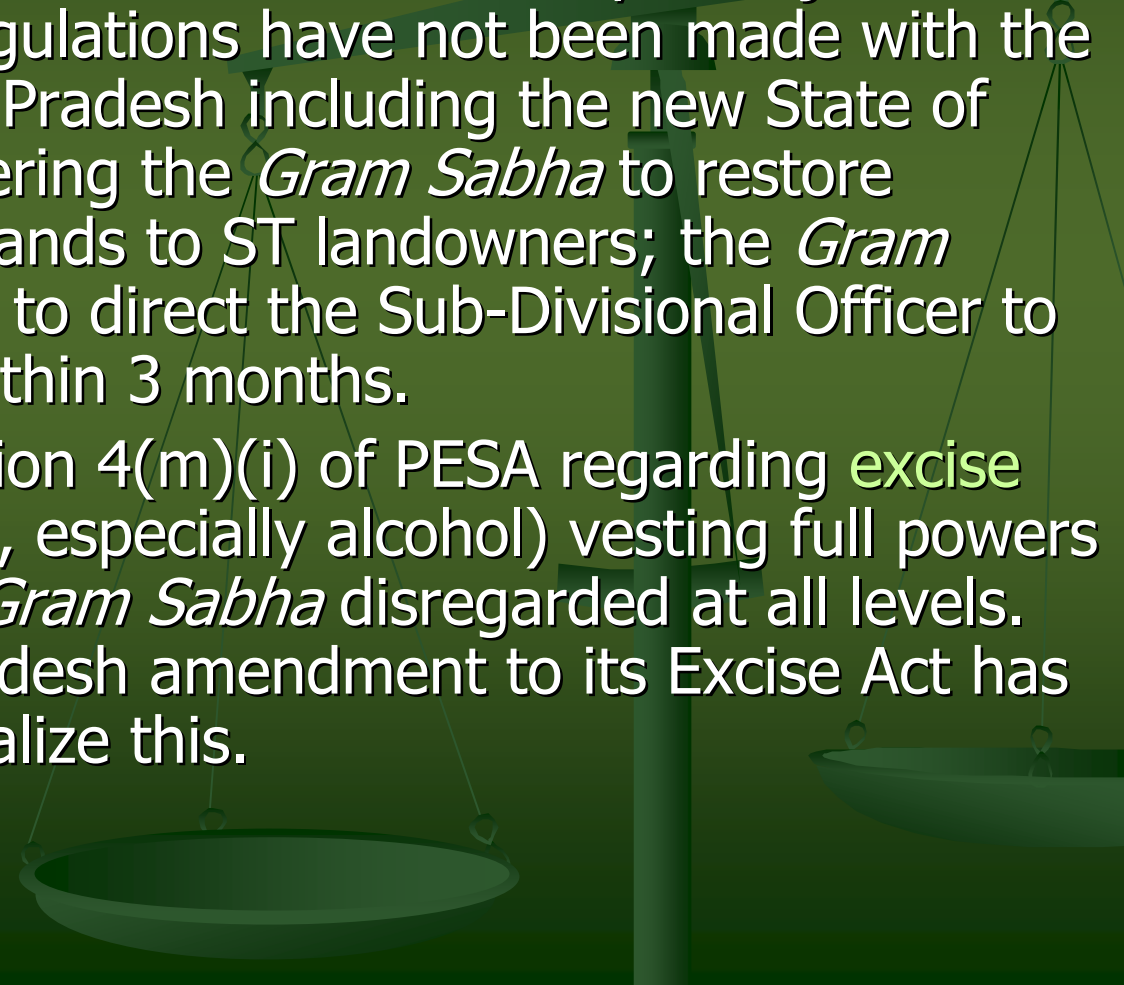


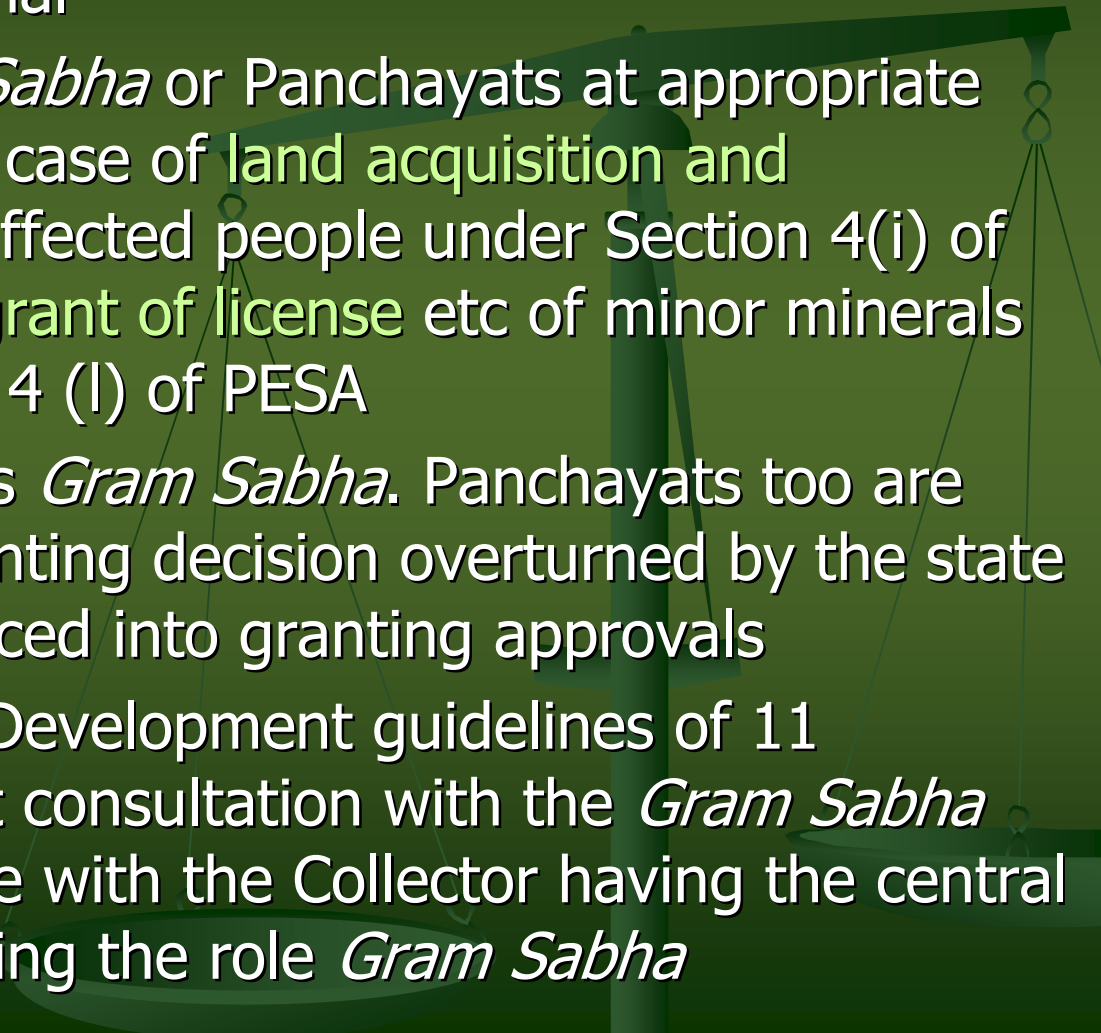
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- The principle of self-determination (Articles 18, 19, 23, 32 and 38 of UN DRIP) may be expressed through:
 - **Autonomy or self-government** relating to their internal and local affairs including financing of their autonomous functions. In other cases, IPs seek the conditions for self-management
 - Respect for the principle of **free, prior and informed consent**.
 - **Full and effective participation** of IPs at every stage including co-management
 - **Consultation** with the IPs prior to any action that may affect them
 - Formal **recognition of IPs' traditional institutions**, internal justice and conflict-resolution systems, and ways of socio-political organization
 - Recognition of the right of IPs to **freely define and pursue their economic, social and cultural development**

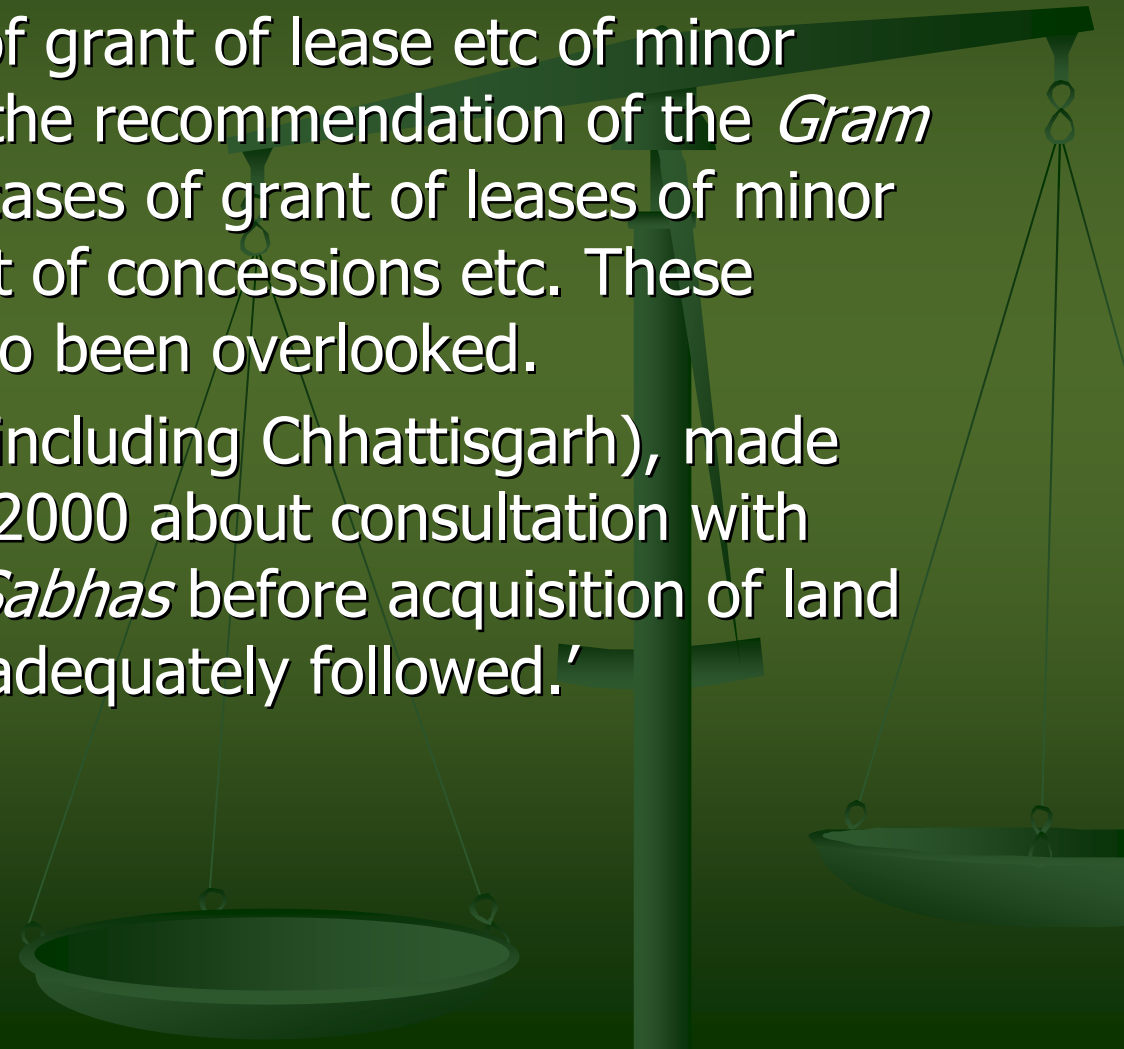
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- India's general frame and provisions provides for the **pre-eminence of the state in all matters** that governs the social, economic and political life of its peoples
 - Exercised through representative democracy, the laws, administration and judiciary
 - Various provisions in the Constitution for the Scheduled Areas, Tribal Areas and Tribal states namely Article 244 (V Schedule and VI Schedule), and Articles 371A and 371G which grant special Constitutional protection to the States of Nagaland and Mizoram respectively
 - But the majority of the STs falls outside the scope of the application of these constitutional and legal provisions

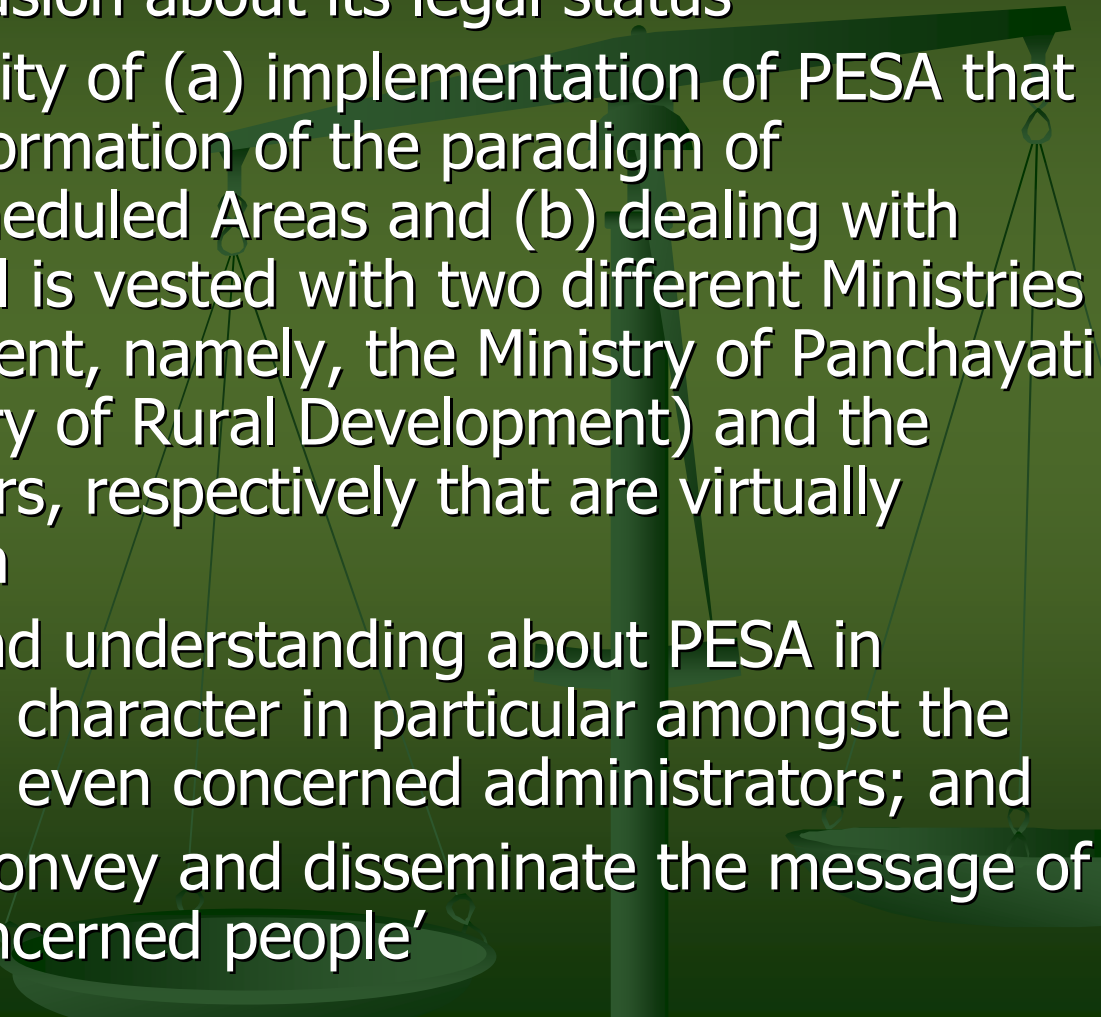
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- Article 40: 'the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government'
 - Only in 1993 through the 73rd and 74th Amendment for decentralized governance rather than local self-governance for rural and urban areas
 - This did not apply to the Schedule V and VI Areas, States of Nagaland, Meghalaya and Mizoram, hill areas of the State of Manipur for which District Councils exist, and the District of Darjeeling in the State of West Bengal
 - The Parliament was to enact separate legislations for Schedule V and VI Areas while the legislatures of the states of Nagaland, Meghalaya and Mizoram could extend this provision

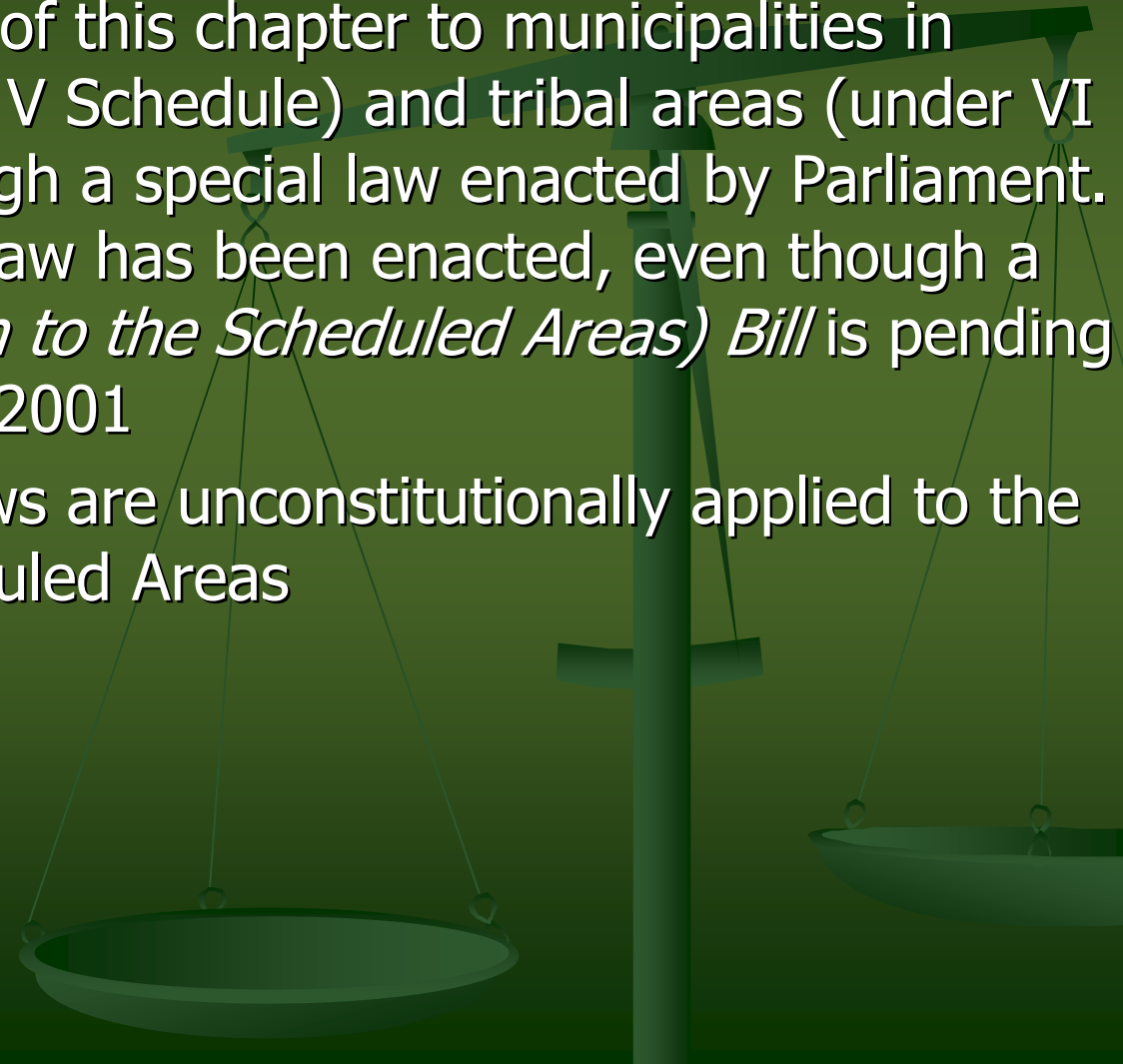
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- *The Panchayats (Extension to Scheduled Areas) Act 1996*
 - Eight of the nine States namely, Andhra Pradesh., Gujarat, Himachal Pradesh, Madhya Pradesh, Chhattisgarh, Maharashtra, Odisha and Rajasthan amended their existing Panchayat Acts to incorporate the PESA provisions; inconsistent or not adequately harmonious
 - Jharkhand enacted a new Panchayat Act in 2001;
 - Elections to Panchayats held in all States except Jharkhand.
 - PESA not been implemented as required in law
 - The **state legislations not in tune with the PESA**
 - Madhya Pradesh, Jharkhand and Chhattisgarh state Acts enabled the *Gram Sabha* only to honour the spirit of the law
 - The Orissa law envisages 'consistent with the relevant laws in force and in harmony with basic tenets of the Constitution'

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- **Dispute resolution** according to customs and tradition of the community' ignored
 - Power granted to the *gram sabha* in respect of '**prevention of land alienation as also restoration of illegally alienated land**'. But suitable provisions in the Panchayati Raj Acts or the relevant Land Regulations have not been made with the exception of Madhya Pradesh including the new State of Chhattisgarh empowering the *Gram Sabha* to restore unlawfully alienated lands to ST landowners; the *Gram Sabha* has the power to direct the Sub-Divisional Officer to restore possession within 3 months.
 - The provision of Section 4(m)(i) of PESA regarding **excise** (taxes on local goods, especially alcohol) vesting full powers in this regard in the *Gram Sabha* disregarded at all levels. Even the Madhya Pradesh amendment to its Excise Act has no rules to operationalize this.

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- Section 4(d) and 4(m)(ii) make STs the owners of **Minor Forest Produce**
 - But no State has yet taken necessary steps to make this premise fully operational
 - Consultation with *Gram Sabha* or Panchayats at appropriate level is mandatory in the case of **land acquisition and rehabilitation** of project affected people under Section 4(i) of PESA, and in respect of **grant of license** etc of minor minerals under Sections 4 (k) and 4 (l) of PESA
 - The State laws ignores *Gram Sabha*. Panchayats too are often ignored or dissenting decision overturned by the state government or is coerced into granting approvals
 - The Ministry of Rural Development guidelines of 11 November 1998 about consultation with the *Gram Sabha* prescribed a procedure with the Collector having the central role, effectively nullifying the role *Gram Sabha*

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- The Ministry of Mines issued guidelines on 28 December 1997 about consultation with the *Gram Sabha* in respect of grant of lease etc of minor minerals, making the recommendation of the *Gram Sabha* binding in cases of grant of leases of minor minerals and grant of concessions etc. These directives have also been overlooked.
 - Madhya Pradesh (including Chhattisgarh), made elaborate rules in 2000 about consultation with concerned *Gram Sabhas* before acquisition of land but has not been adequately followed.'

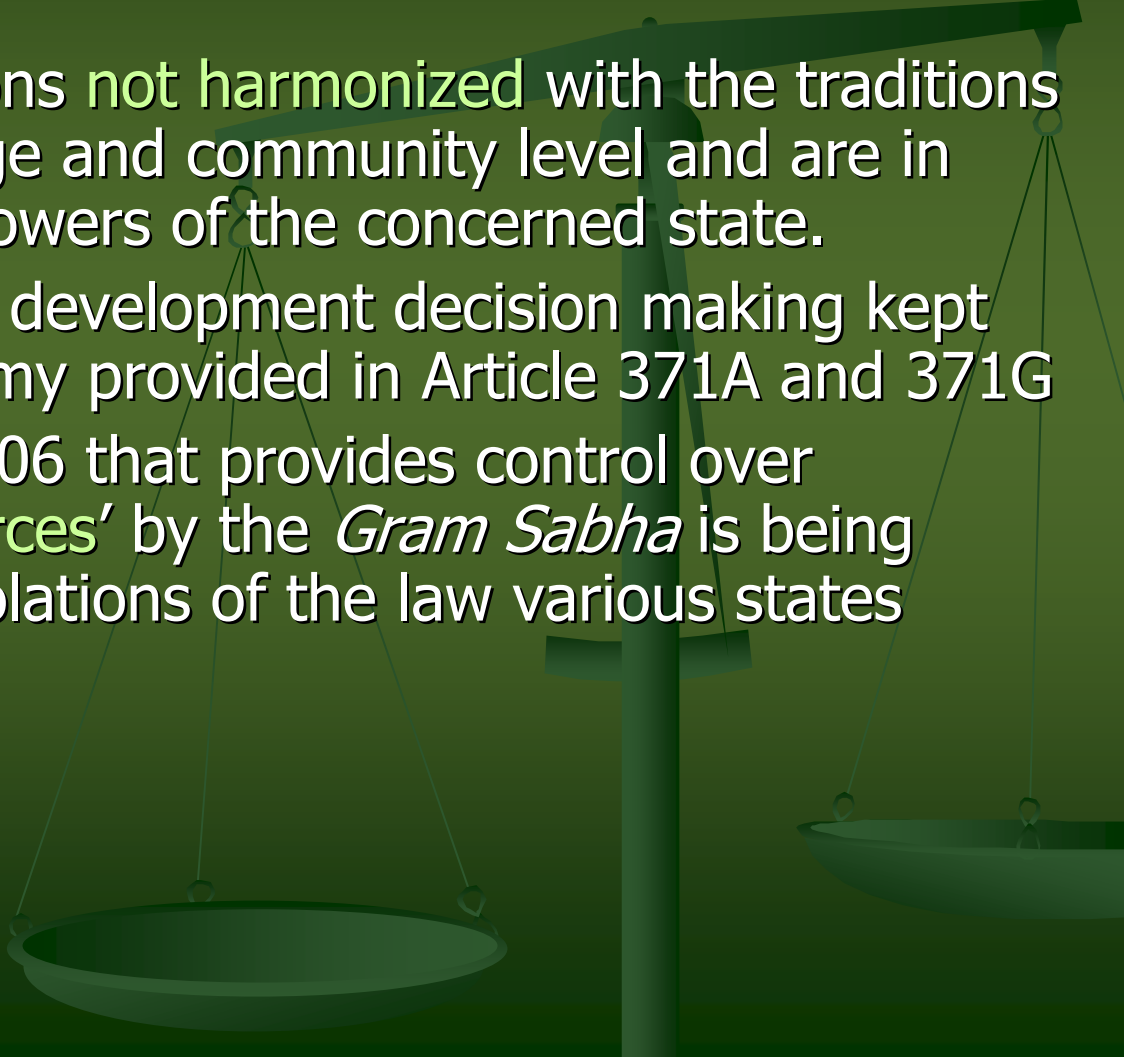
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- The main reasons for the non-implementation of PESA in the concerned States are:
 - Lack of appreciation about V Schedule read with PESA in tribal affairs and confusion about its legal status
 - The formal responsibility of (a) implementation of PESA that stands for total transformation of the paradigm of governance in the Scheduled Areas and (b) dealing with tribal affairs in general is vested with two different Ministries in the Union Government, namely, the Ministry of Panchayati Raj (earlier the Ministry of Rural Development) and the Ministry of Tribal Affairs, respectively that are virtually functioning in isolation
 - Lack of information and understanding about PESA in general and its radical character in particular amongst the political executive and even concerned administrators; and
 - Virtually no effort to convey and disseminate the message of PESA amongst the concerned people'

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- 74th Amendment on Municipalities for urban areas of Scheduled Areas very similar to the amendment on Panchayats. However, the extension of this chapter to municipalities in Scheduled Areas (under V Schedule) and tribal areas (under VI Schedule) is to be through a special law enacted by Parliament. 16 years later, no such law has been enacted, even though a *Municipalities (Extension to the Scheduled Areas) Bill* is pending before Parliament since 2001
 - Existing municipal laws are unconstitutionally applied to the urban areas in Scheduled Areas

■ *Constitutional Provisions Relating to the Northeast*

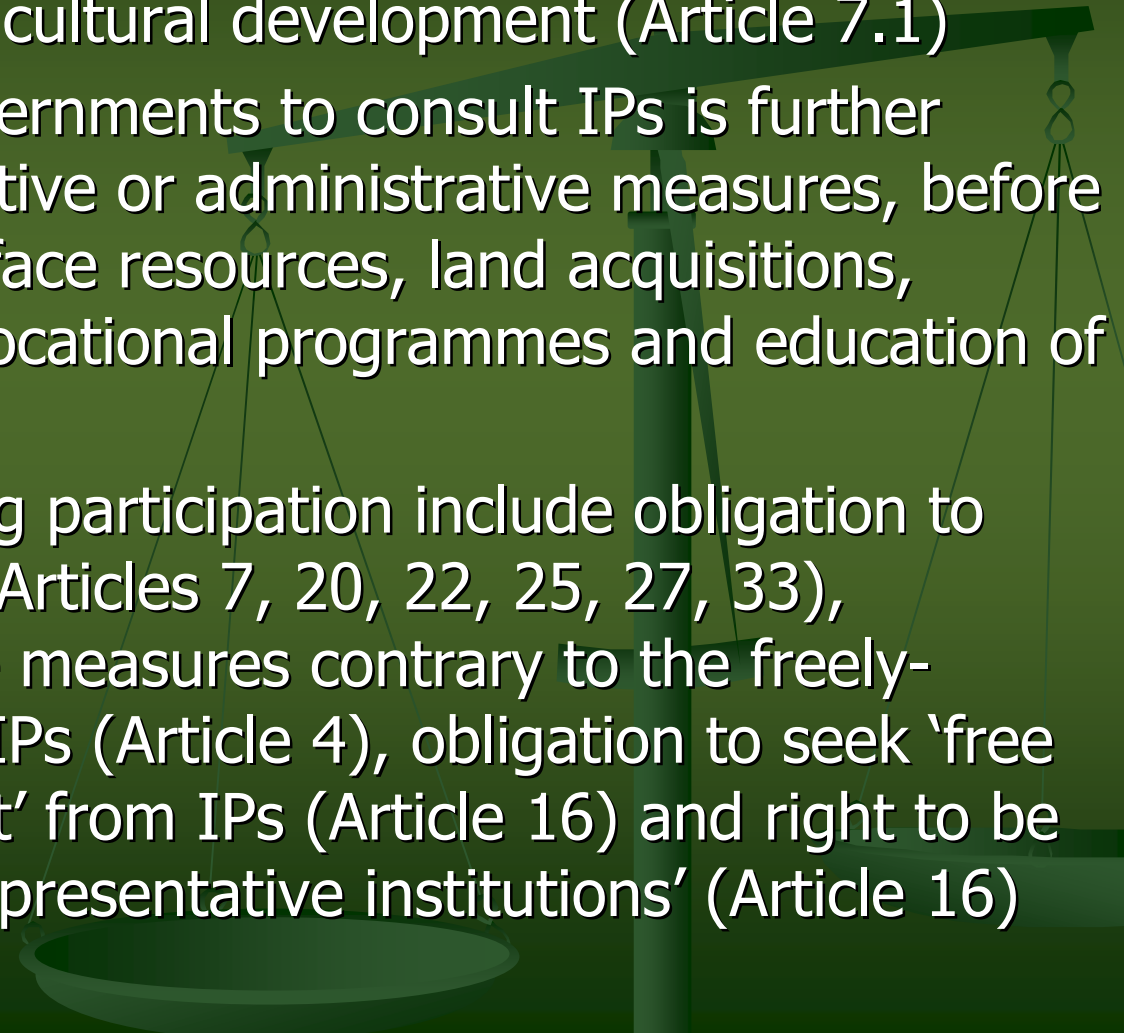
- Schedule VI for the Tribal Areas at the district and regional levels through autonomous councils and Articles 371A and 371G for the States of Nagaland and Mizoram
- Declaration of areas as 'disturbed areas', the deployment of the armed forces and their operations with impunity under AFSPA has severely curtailed democratic space
- Armed forces are also entrusted with development functions such as 'to influence every aspect of the lives of the people of the region, be it education, health, constructional activity, agricultural assistance, veterinary assistance, or assistance during natural calamities'. This is an infringement into the responsibilities of the communities as well as of the state.
- These, in effect, deny the right to self-governance

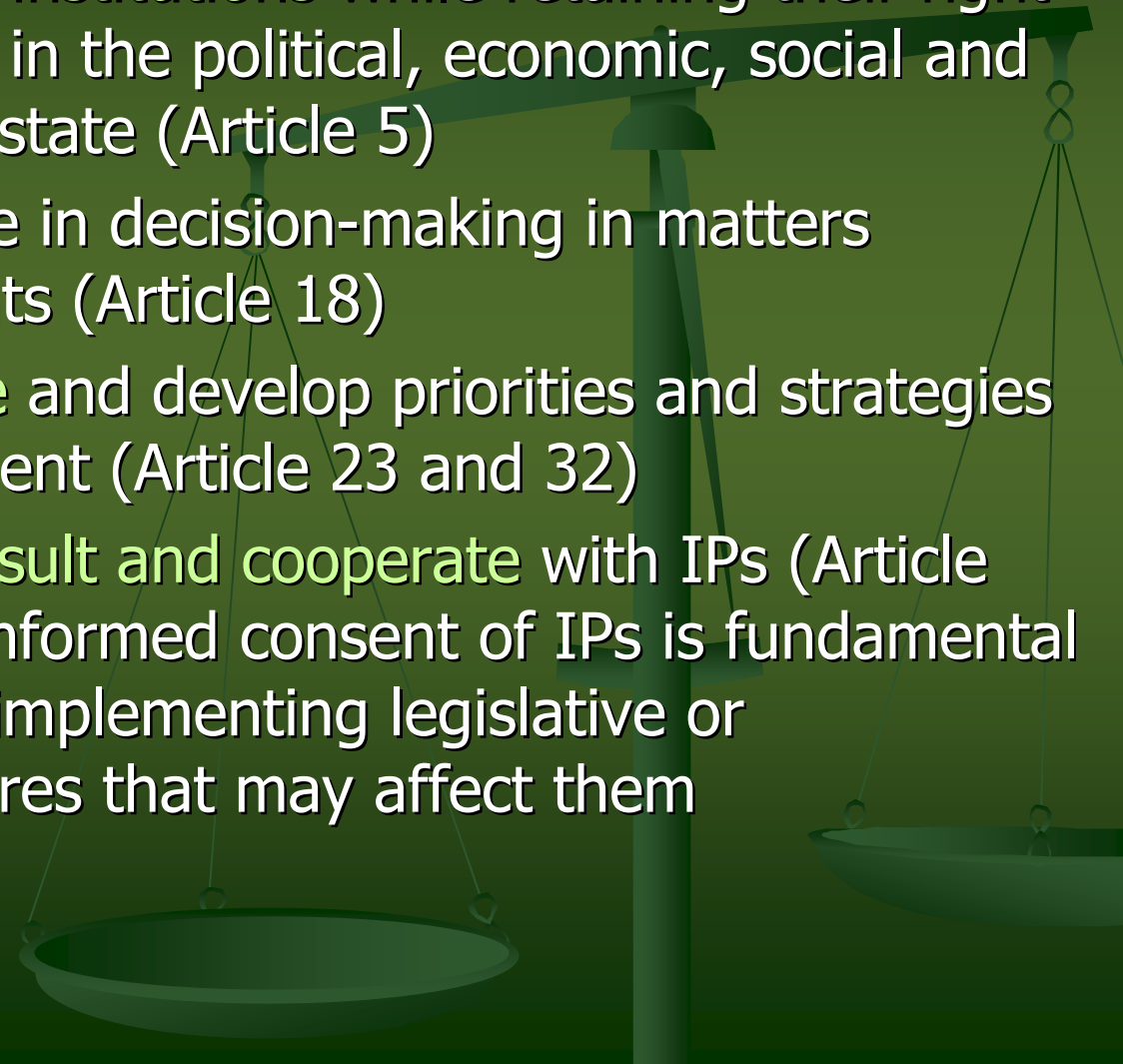
Compliance with Law

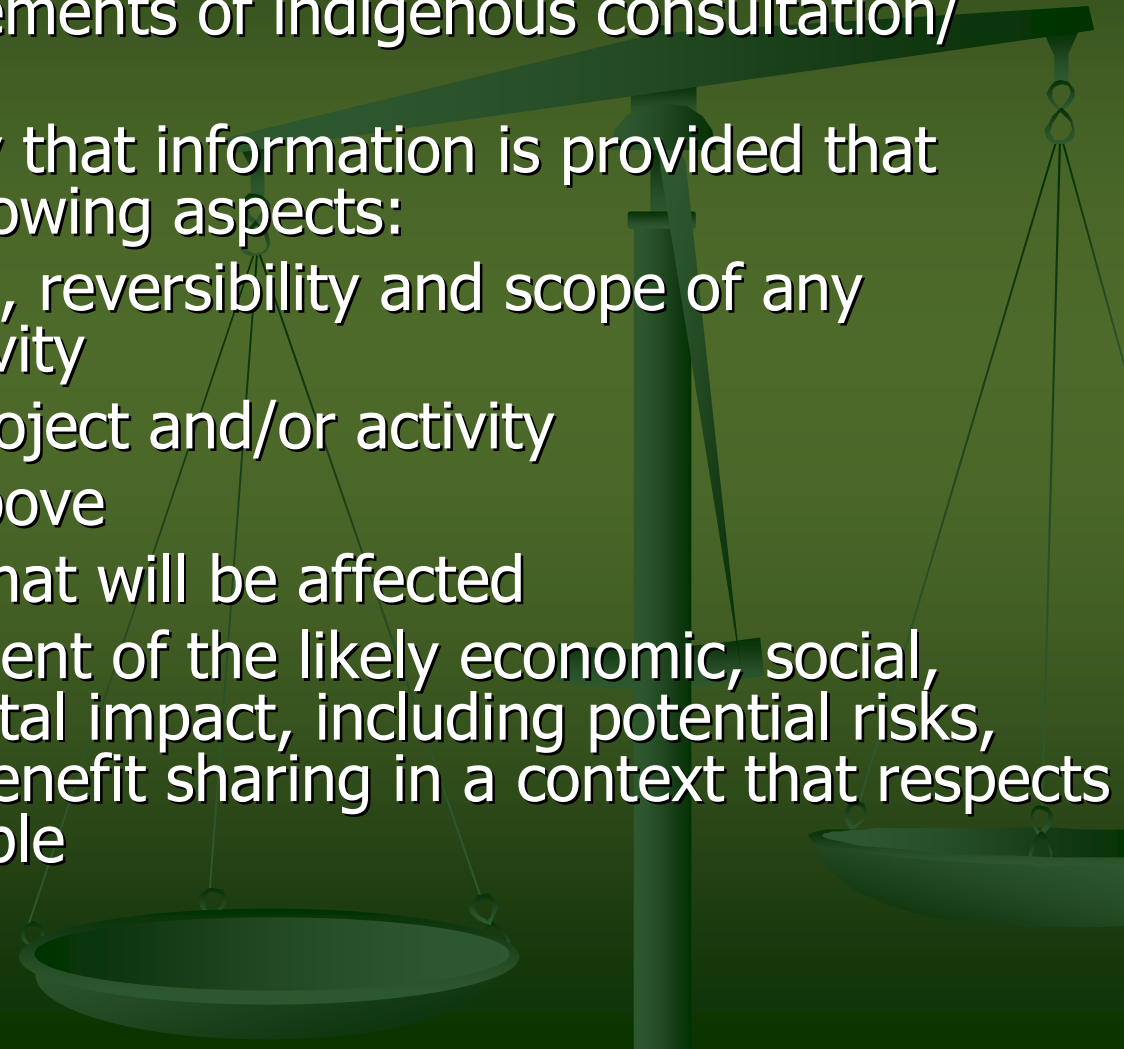
- The implementation of PESA and V Schedule grossly inadequate.
 - The Schedule VI provisions **not harmonized** with the traditions and customs at the village and community level and are in direct conflict with the powers of the concerned state.
 - Domain of economy and development decision making kept outside the wide autonomy provided in Article 371A and 371G
 - The Forest Rights Act 2006 that provides control over **'community forest resources'** by the *Gram Sabha* is being implemented in gross violations of the law various states
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Participation and consultation

- Participation and consultation are integral to self-determination
- ILO C107 only requires the government to 'seek the collaboration'; 'provide opportunities for full development' and 'stimulate...the development among these populations of civil liberties and the establishment of participation in elective institutions' (Article 5)
- ILO C169 requires the governments to ensure participation of the peoples concerned on an equal footing with the rest of the population for promoting the full realisation of the social, economic and cultural rights to attain equality with the rest of the national society (Article 2)
 - Article 6 and 7 are the key provisions on consultation and participation 'at all levels of decision-making in political, legislative and administrative bodies and processes which affect them directly'

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- The governments **to hold** appropriate consultations using mechanisms which ensure the free participation through peoples' own institutions and initiatives (Article 6), whereby IPs have the right to make their own decisions on their economic, social and cultural development (Article 7.1)
 - The obligation of governments to consult IPs is further emphasised in legislative or administrative measures, before extraction of sub-surface resources, land acquisitions, relocations, special vocational programmes and education of children
 - Other terms indicating participation include obligation to 'cooperate' with IPs (Articles 7, 20, 22, 25, 27, 33), obligation not to take measures contrary to the freely-expressed wishes of IPs (Article 4), obligation to seek 'free and informed consent' from IPs (Article 16) and right to be consulted through 'representative institutions' (Article 16)

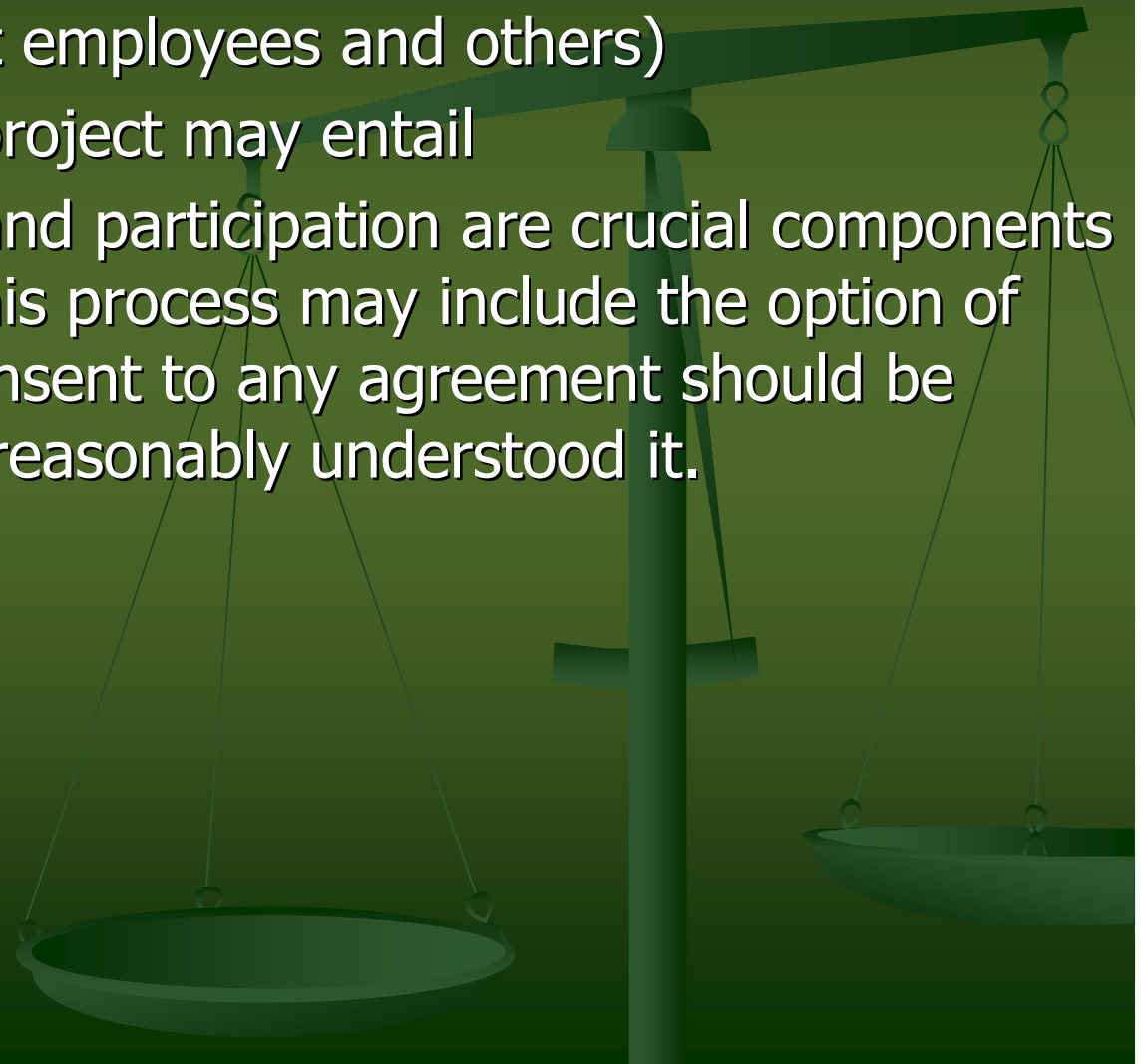
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- UNDRIP recognizes that IPs have a
 - Right to **maintain their distinct political, legal, economic, social and cultural institutions** while retaining their right to **participate** fully in the political, economic, social and cultural life of the state (Article 5)
 - Right to participate in decision-making in matters affecting their rights (Article 18)
 - Right to **determine** and develop priorities and strategies for their development (Article 23 and 32)
 - The states are to **consult and cooperate** with IPs (Article 19). Free, prior and informed consent of IPs is fundamental before adopting and implementing legislative or administrative measures that may affect them

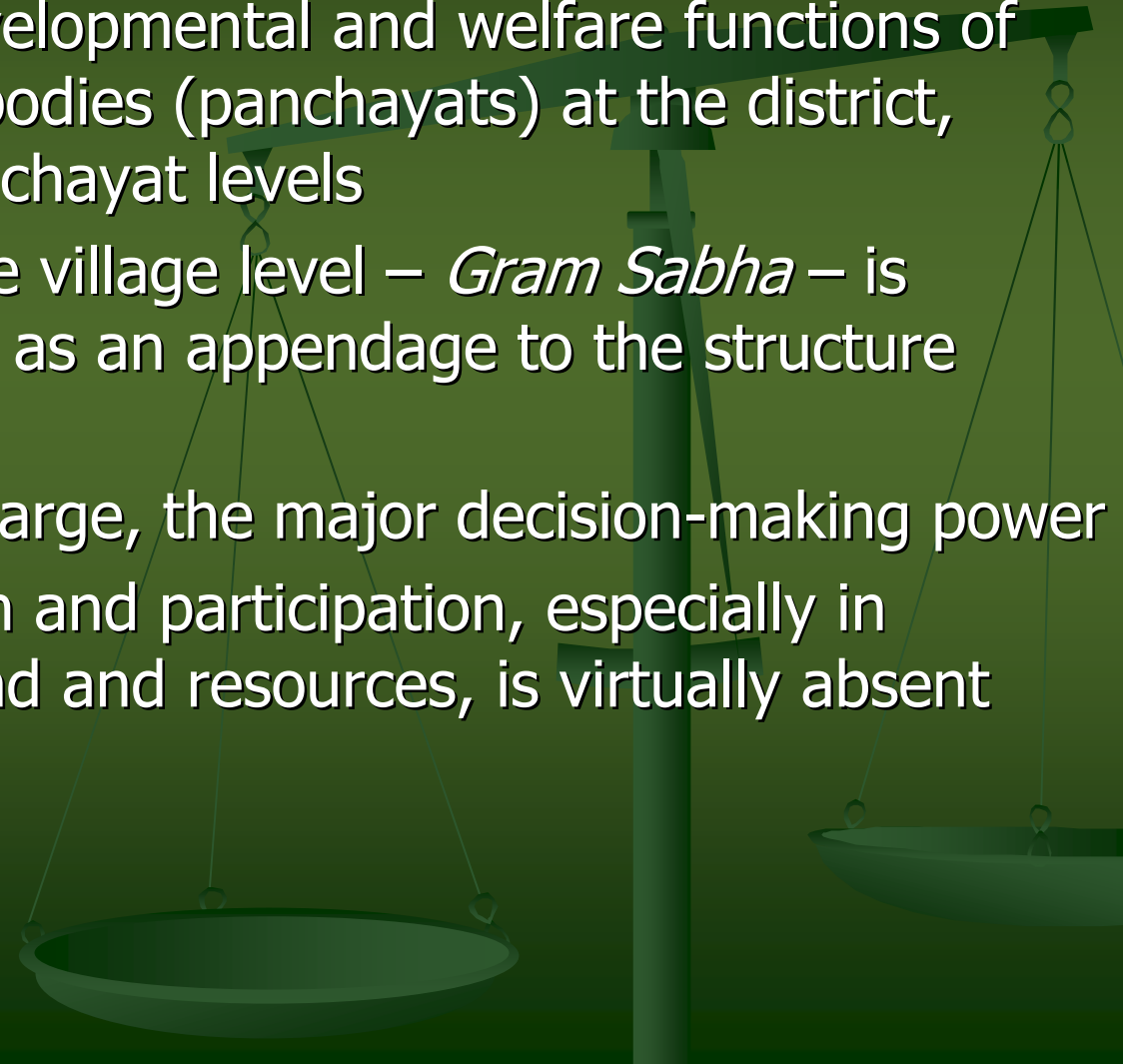
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- *Free* should imply no coercion, intimidation or manipulation
 - *Prior* should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes
 - *Informed* – should imply that information is provided that covers (at least) the following aspects:
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity
 - b. The purpose of the project and/or activity
 - c. The duration of the above
 - d. The locality of areas that will be affected
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks, and fair and equitable benefit sharing in a context that respects the precautionary principle

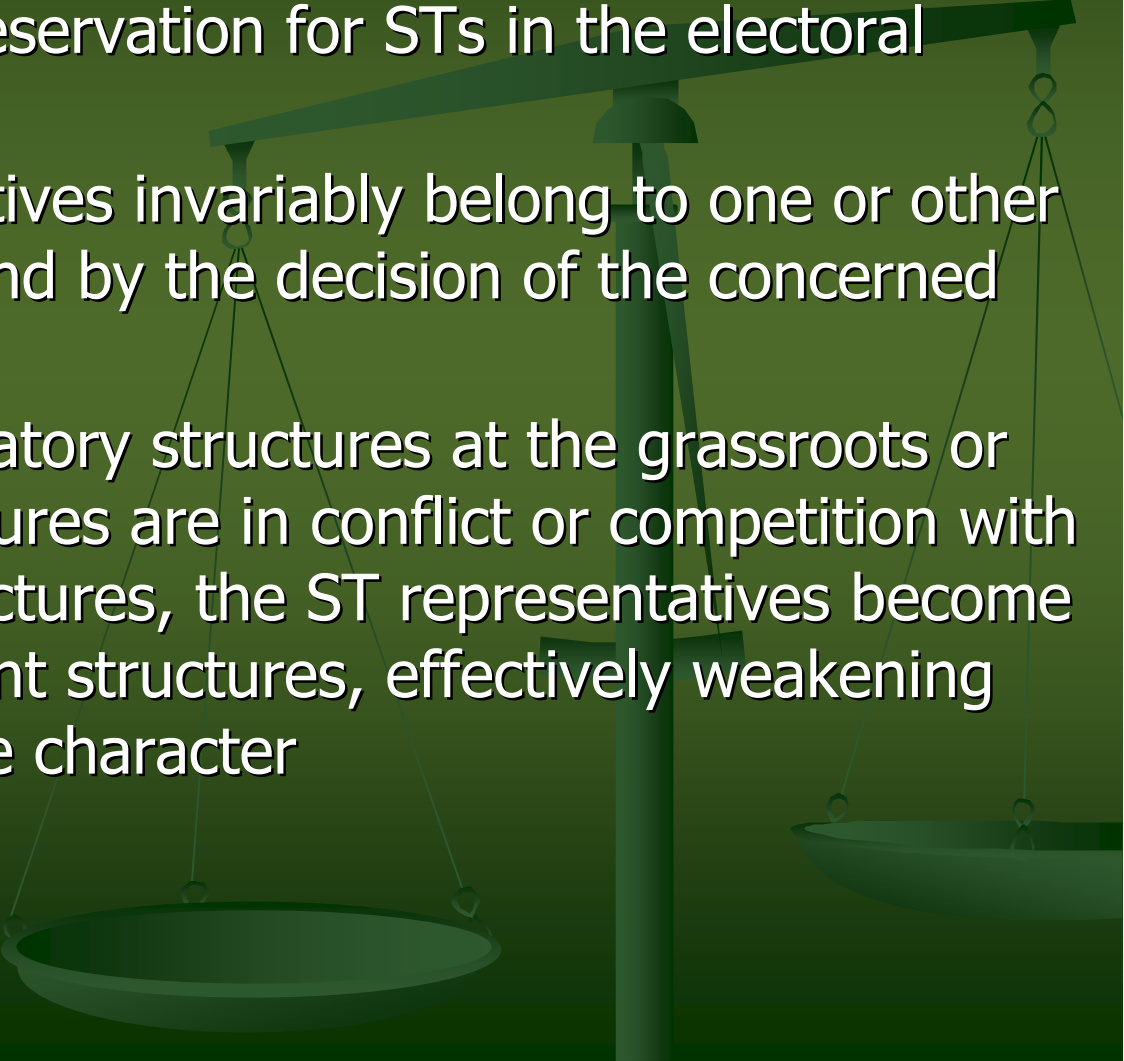
f. Personnel likely to be involved in the execution of the proposed project (including IPs, private sector staff, research institutions, government employees and others)

g. Procedures that the project may entail

- *Consent* - Consultation and participation are crucial components of a consent process. This process may include the option of withholding consent. Consent to any agreement should be interpreted as IPs have reasonably understood it.



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- The Panchayat Raj Act for the general population applies to the majority of the STs
 - Decentralizes the developmental and welfare functions of the State to elected bodies (panchayats) at the district, intermediate and panchayat levels
 - The community at the village level – *Gram Sabha* – is nominal, acting more as an appendage to the structure above
 - The State is, by and large, the major decision-making power
 - In effect, consultation and participation, especially in matters related to land and resources, is virtually absent

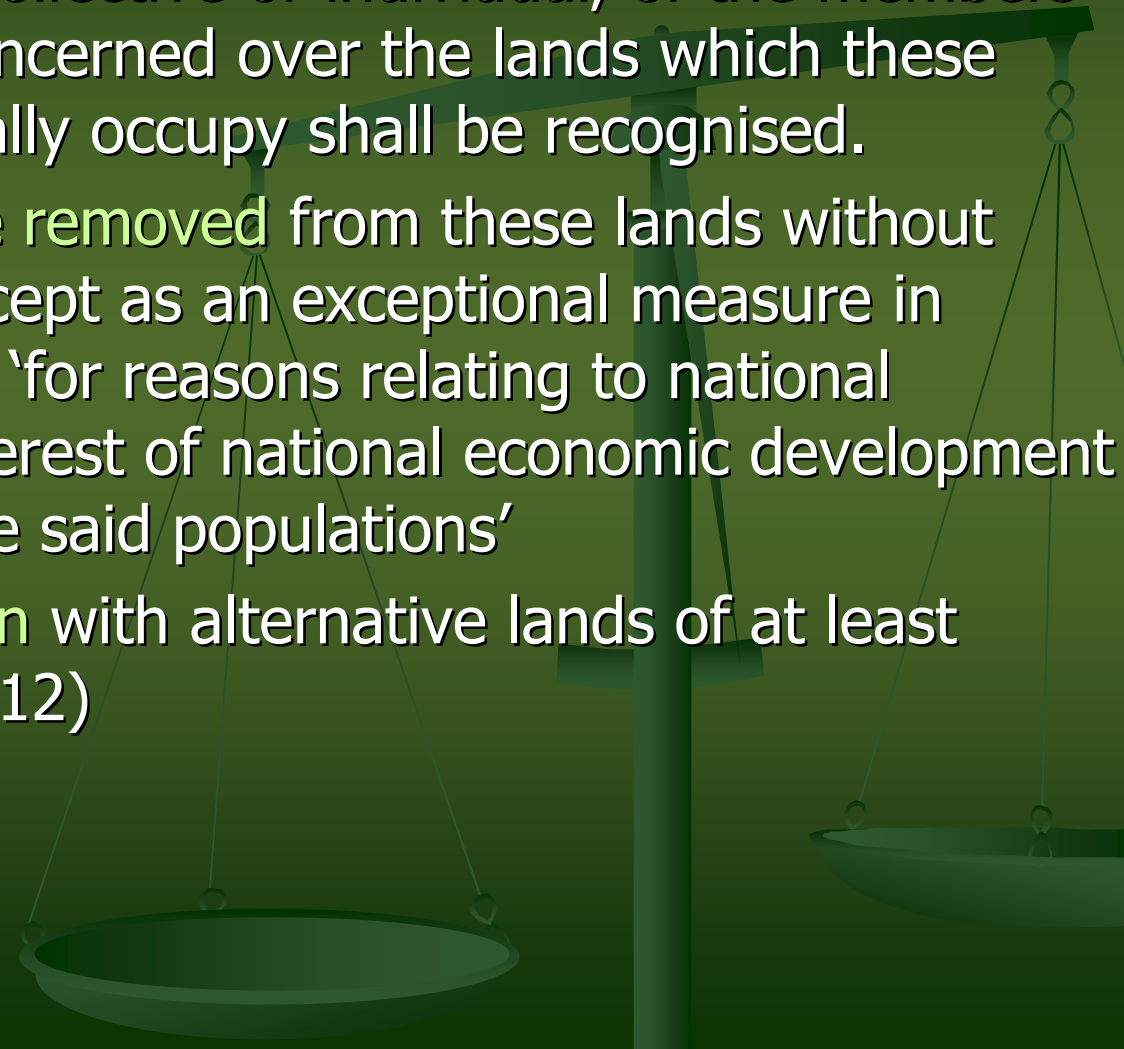
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- ST representation in the political structure of the state is
 - Largely proportional to their population; Where ST is minority, their representation is insignificant
 - Ensured through reservation for STs in the electoral bodies
 - The ST representatives invariably belong to one or other political party, bound by the decision of the concerned party
 - With weak participatory structures at the grassroots or where lower structures are in conflict or competition with the traditional structures, the ST representatives become part of the dominant structures, effectively weakening their representative character

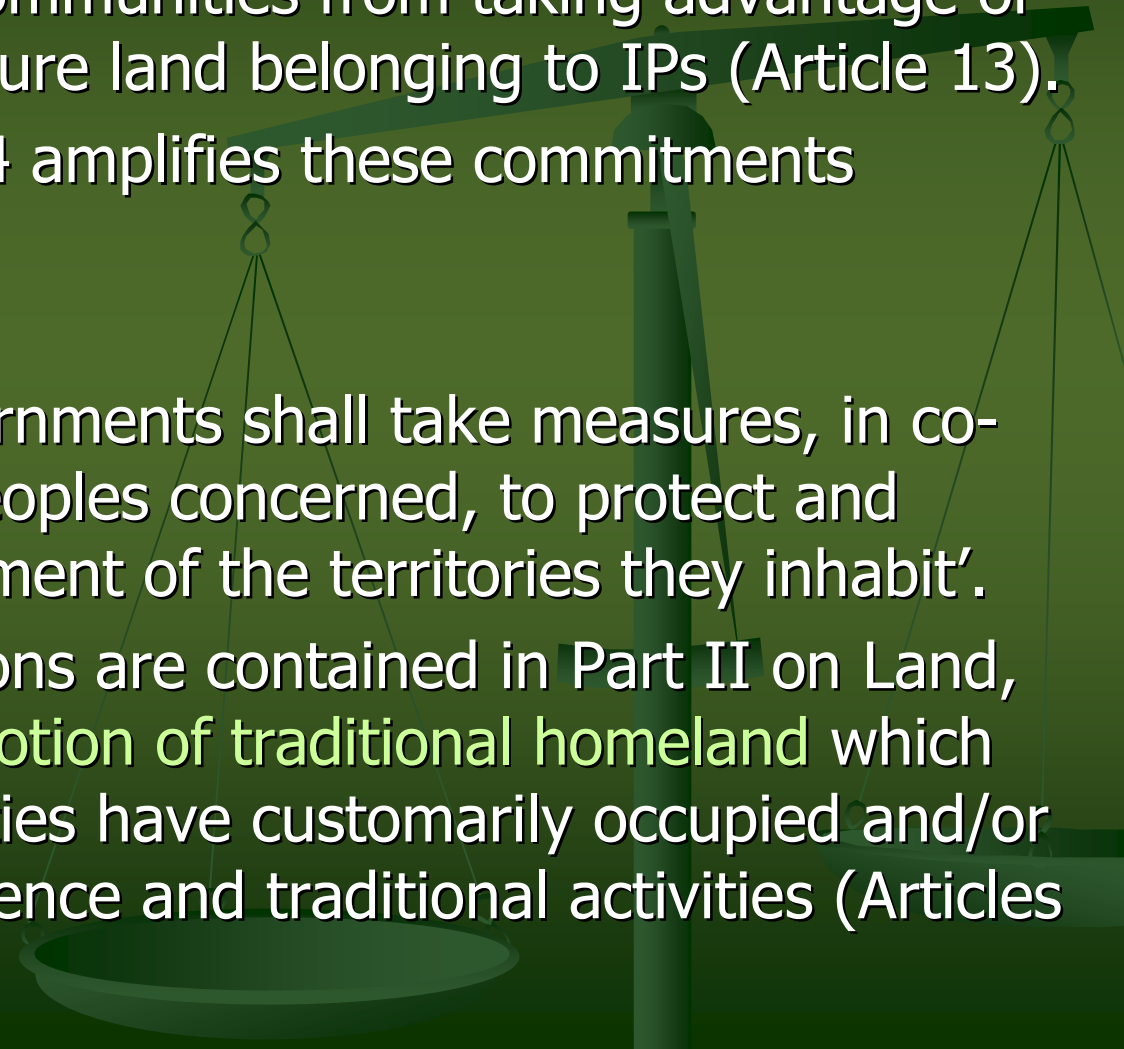
The *Panchayats (Extension to Scheduled Areas) Act, 1996*

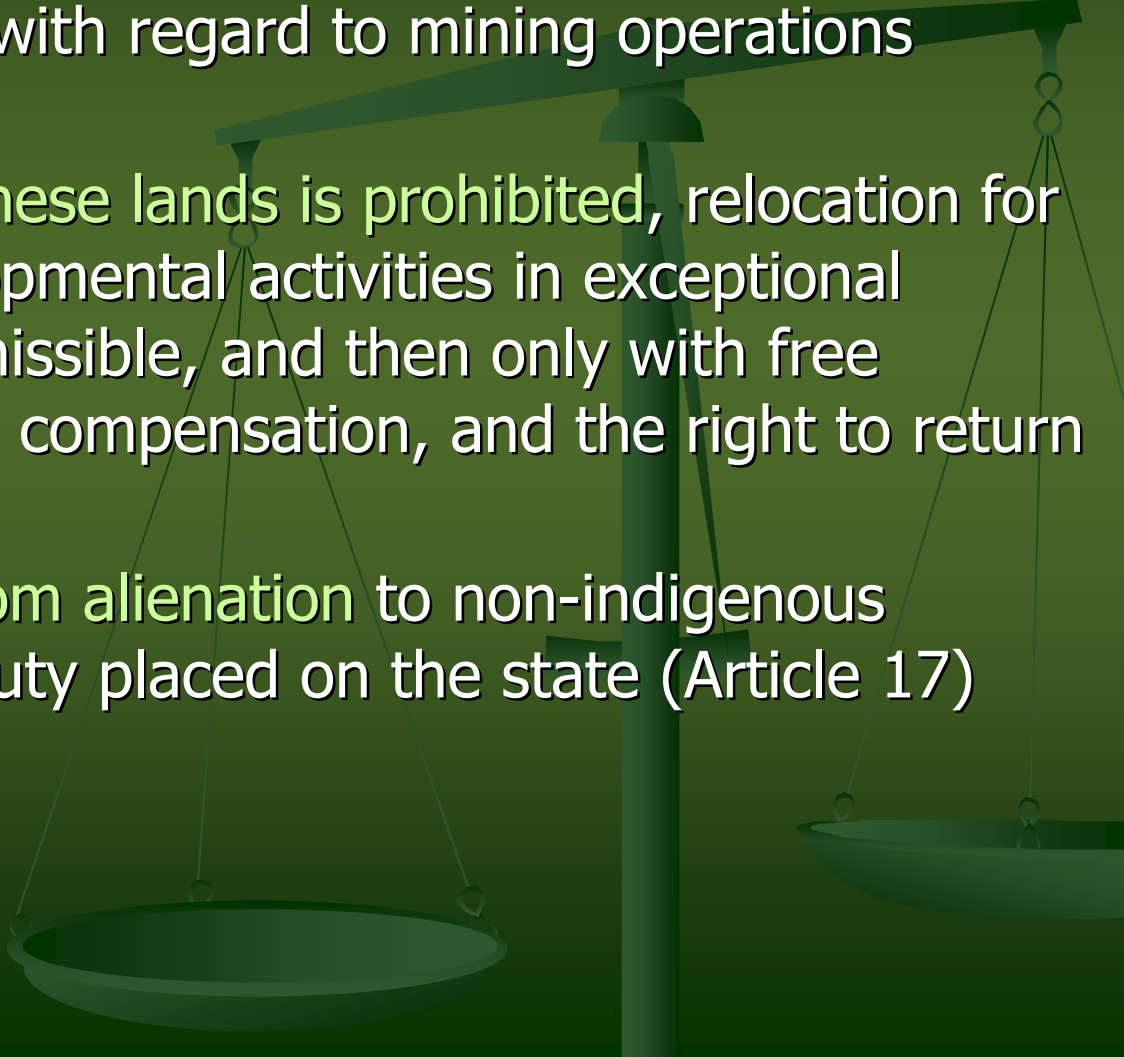
- Confers substantial powers to the community at the village level – to the *Gram Sabha* – particularly over land and a substantial portion of resources
- The *Gram Sabha* is to approve 'the plans, programmes and projects for social and economic development'
- Consultation mandated for acquisition of lands, resettlement or rehabilitation and for prospecting licenses or mining leases for minor minerals
- Goes beyond consultation and participation, requiring self-governance
- Schedule VI provisions in the Tribal Areas in the north-east
 - Have the potential to act with a high degree of autonomy
 - But rendered ineffective with a multiplicity of competing and conflicting state structures
 - Fail to harmonise with the traditional structures

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- Nagaland has partly elected village level institutions
 - Brought community participation in the delivery of services through a highly successful 'Nagaland Communitisation of Public Institutions and Services Act 2002'
 - Mizoram abolished the hereditary village 'chieftains' and replaced them with elected Village Councils.
 - The Forest Rights Act
 - Confers the *Gram Sabha* the right to determine the forest rights
 - Requires 'free, informed consent' in case of resettlement and also requires consent for any handover of forest land by the government
 - However, these important components are often not adhered to in the implementation of this Act

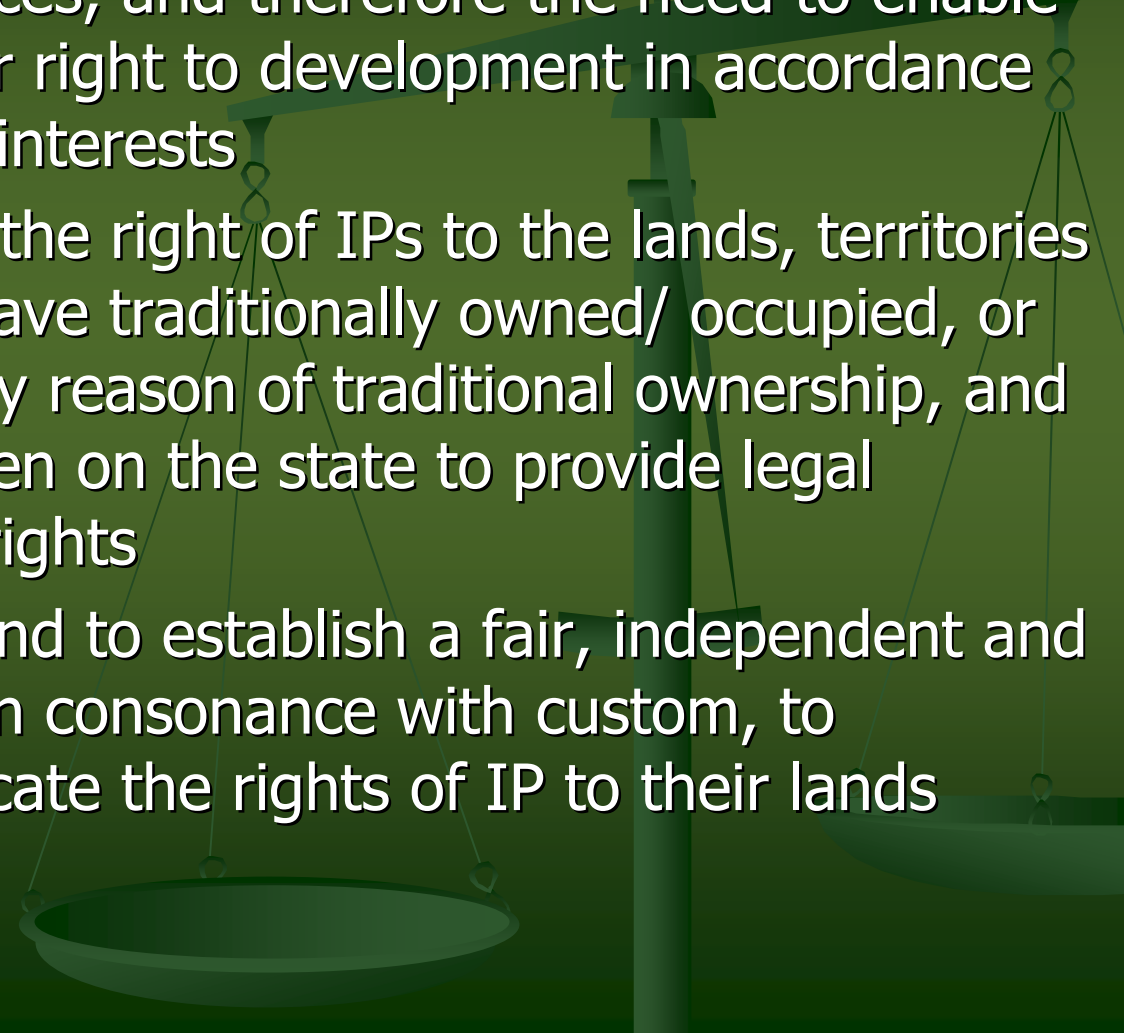
Land, natural resources and environment

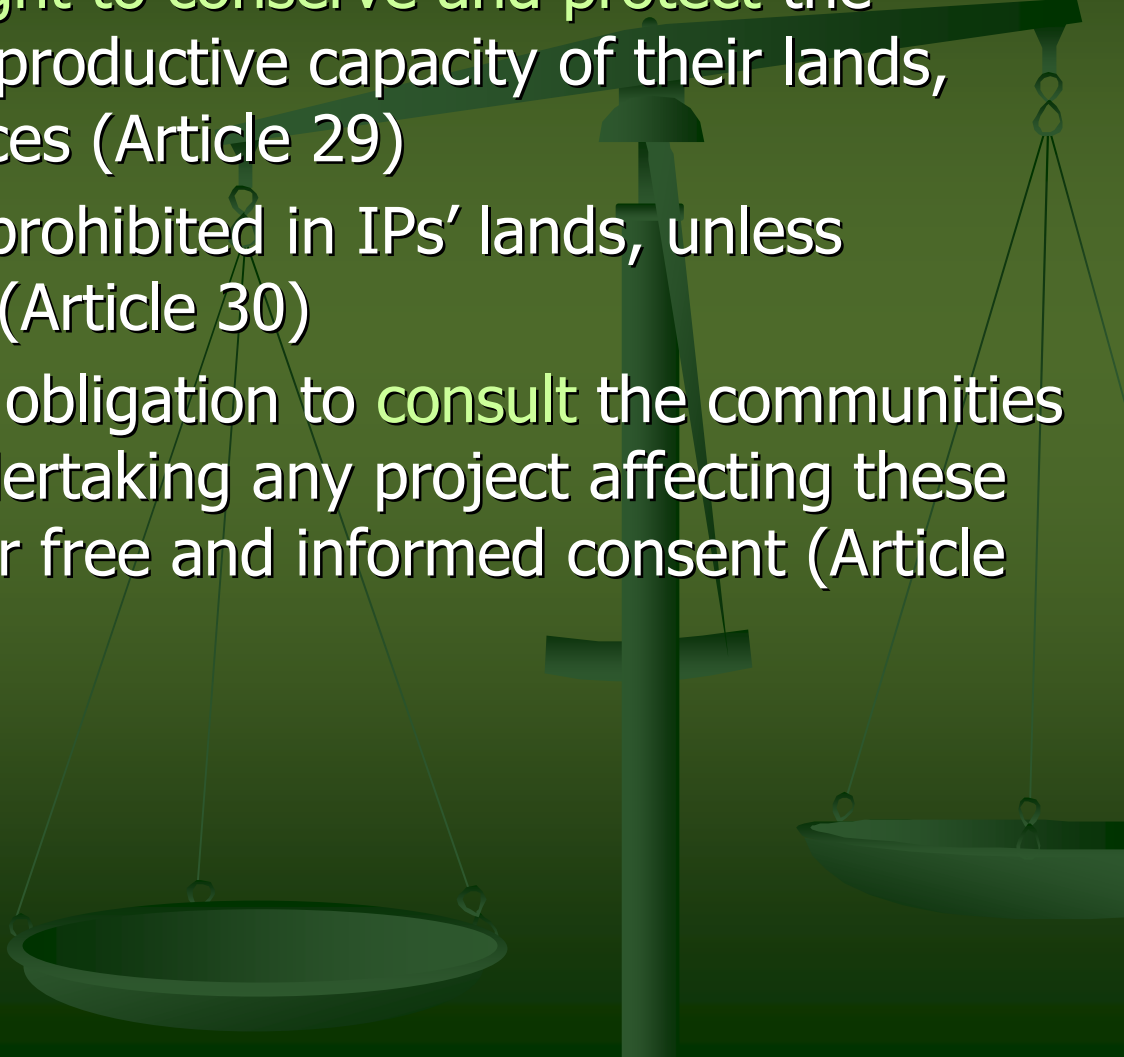
- ILO C107 in Article 11
 - Right of **ownership, collective or individual**, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.
 - Right of IPs **not to be removed** from these lands without their free consent except as an exceptional measure in accordance with law, 'for reasons relating to national security, or in the interest of national economic development or of the health of the said populations'
 - Right to **compensation** with alternative lands of at least equal quality (Article 12)
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- The **customs** of the indigenous populations with respect to transmission of rights and use of land shall be respected, and places a burden on the state to prevent persons who do not belong to such communities from taking advantage of such customs to procure land belonging to IPs (Article 13).
 - Recommendation 104 amplifies these commitments considerably.
 - ILO C 169
 - Article 7 states 'Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit'.
 - Various other provisions are contained in Part II on Land, which reinforce the **notion of traditional homeland** which indigenous communities have customarily occupied and/or used for their subsistence and traditional activities (Articles 13, 14).

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- **Participation in decision-making** on the use, management and conservation of the resources these lands represent, is specifically recognised; particular mention is made of the right to be consulted with regard to mining operations (Article 15)
 - While **removal from these lands is prohibited**, relocation for the purpose of developmental activities in exceptional circumstances is permissible, and then only with free informed consent and compensation, and the right to return (Article 16)
 - **Protection of lands from alienation** to non-indigenous persons is a further duty placed on the state (Article 17)

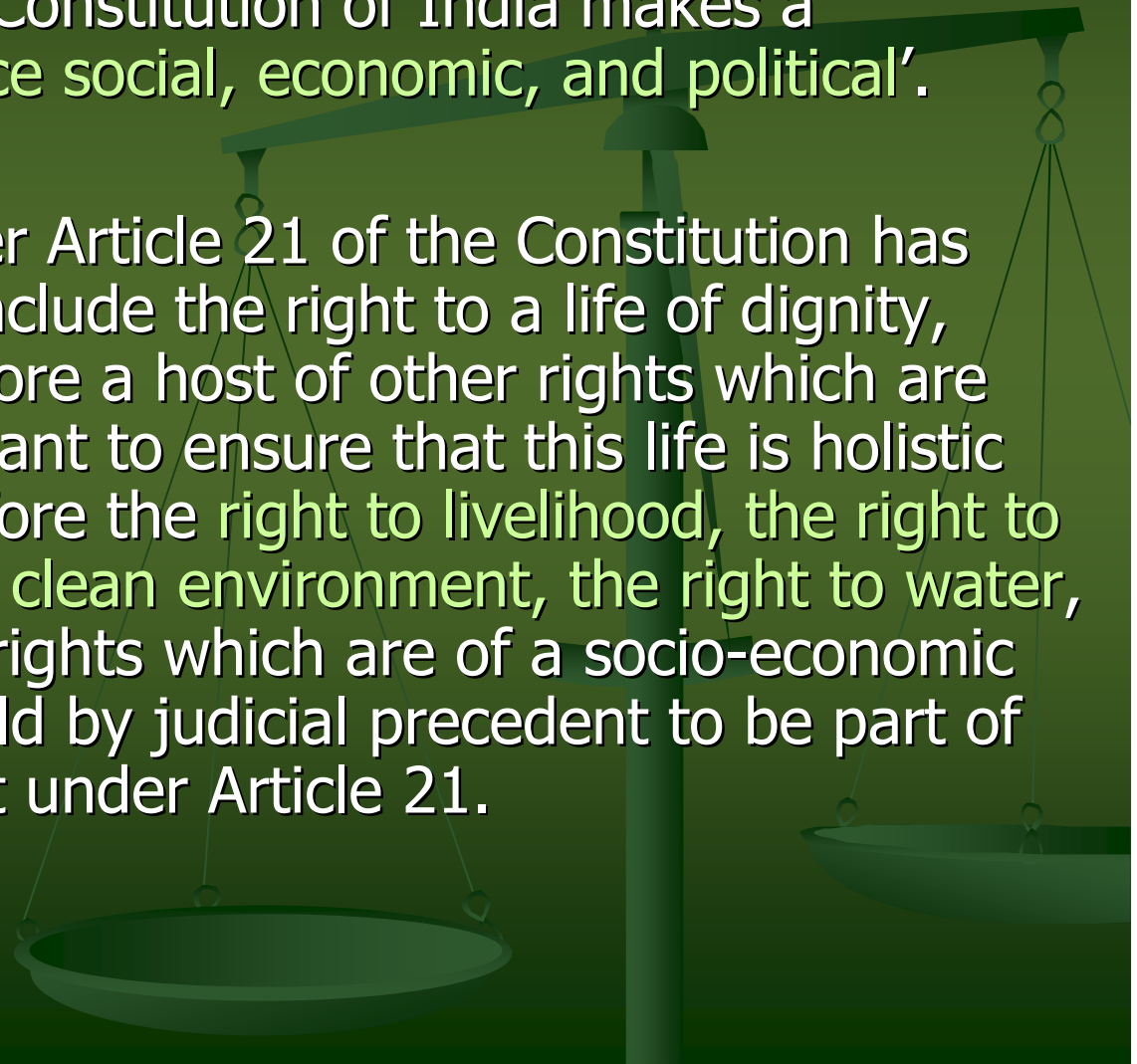
■ The UNDRIP

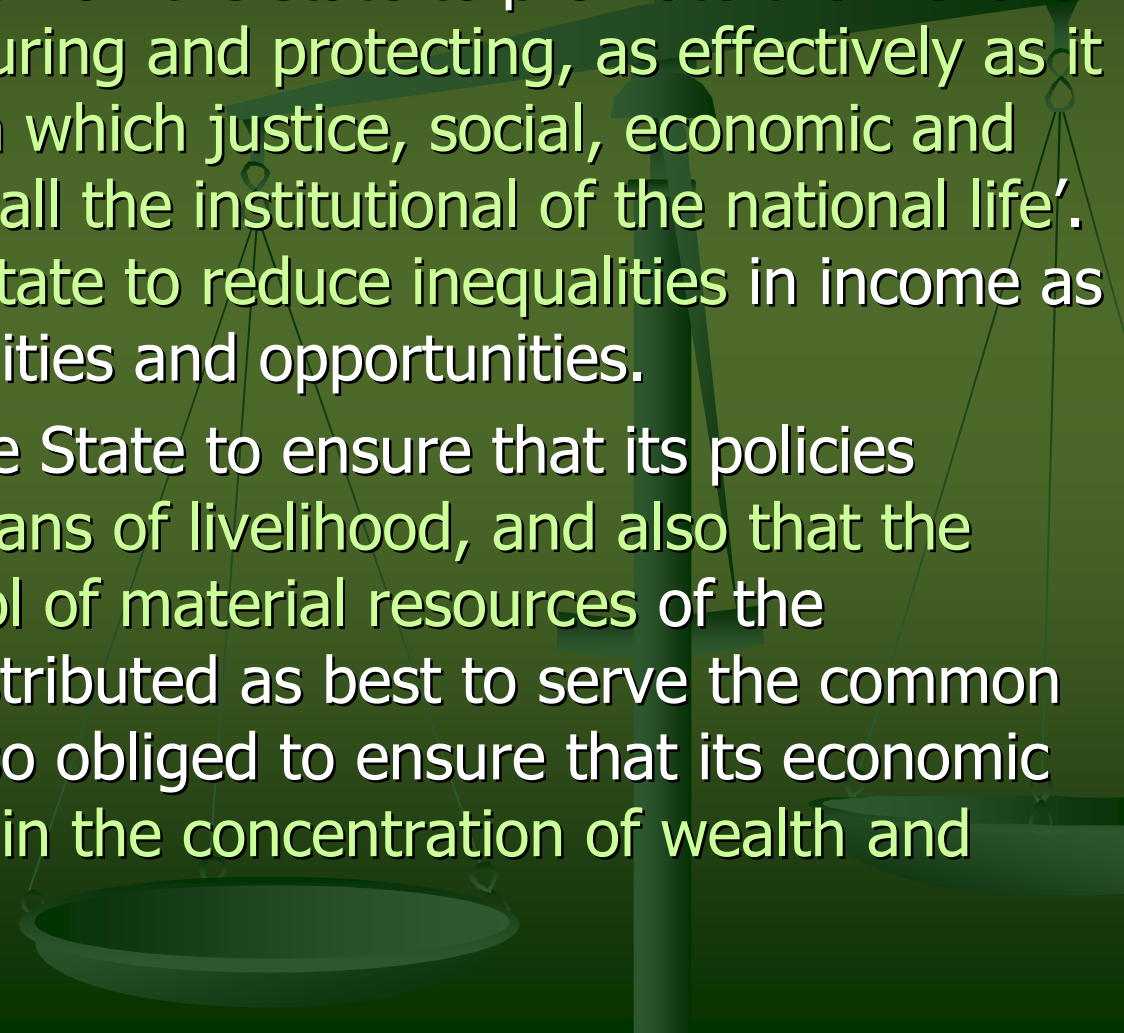
- Its preamble recognises the historical fact that IPs have suffered injustices as a result of colonisation of their lands, territories and resources, and therefore the need to enable them to exercise their right to development in accordance with their needs and interests
 - Article 26 recognises the right of IPs to the lands, territories and resources they have traditionally owned/ occupied, or which they possess by reason of traditional ownership, and further places a burden on the state to provide legal recognition to these rights
 - The state is duty bound to establish a fair, independent and transparent process in consonance with custom, to recognise and adjudicate the rights of IP to their lands (Article 27)
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- Where lands have been unjustly taken away or damage, the IPs have **right to restitution** (Article 28)
 - They also have the **right to conserve and protect** the environment and the productive capacity of their lands, territories and resources (Article 29)
 - Military activities are prohibited in IPs' lands, unless specifically agreed to (Article 30)
 - The state is under an obligation to **consult** the communities concerned before undertaking any project affecting these lands, and obtain their free and informed consent (Article 31)

Constitution of India

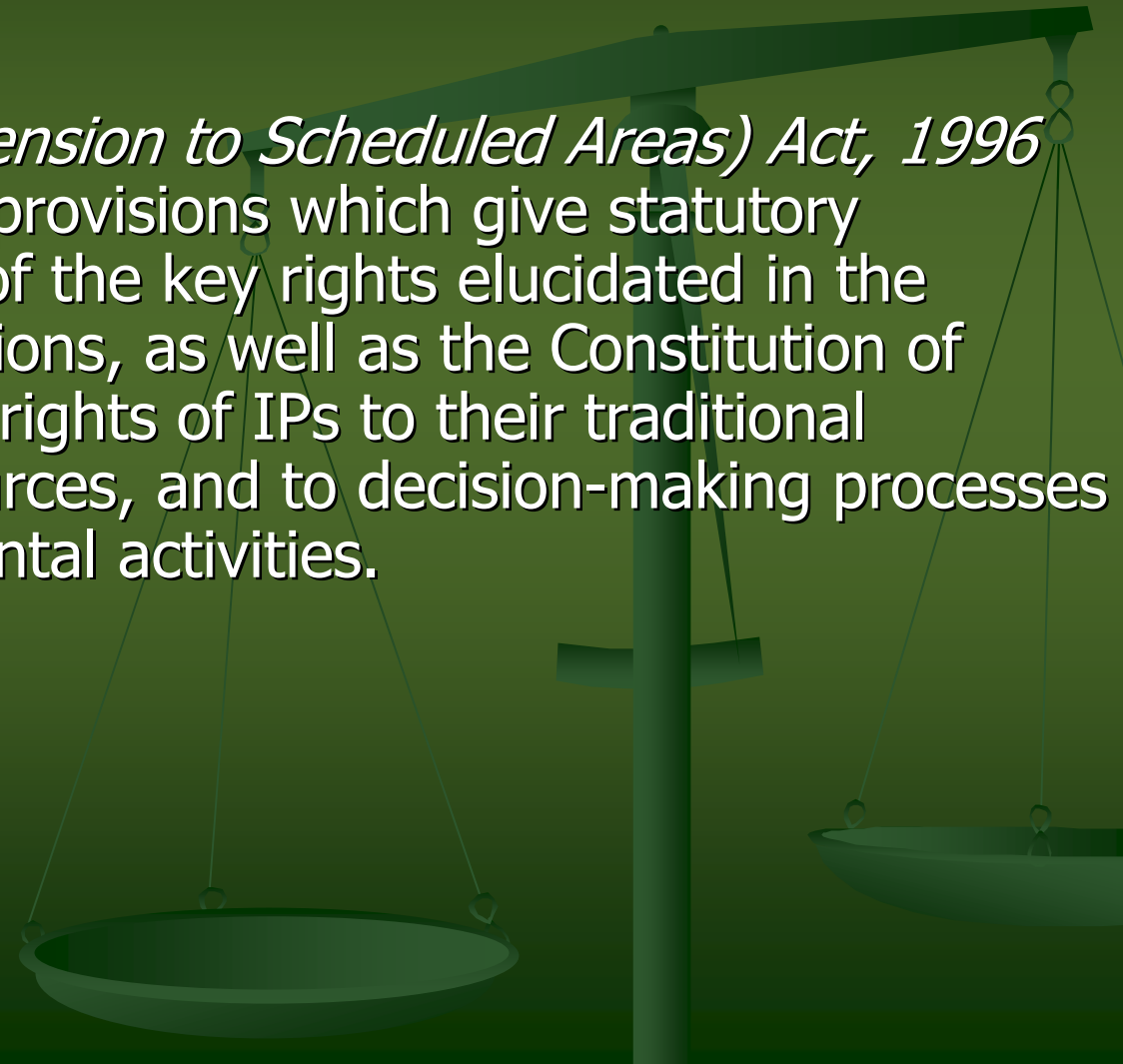
- The Preamble to the Constitution of India makes a commitment to 'Justice social, economic, and political'.
- The **Right to life** under Article 21 of the Constitution has been interpreted to include the right to a life of dignity, which includes therefore a host of other rights which are necessary and important to ensure that this life is holistic and complete. Therefore the **right to livelihood, the right to shelter, the right to a clean environment, the right to water,** and numerous other rights which are of a socio-economic nature, have been held by judicial precedent to be part of the fundamental right under Article 21.



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- The Directive Principles of State Policy include numerous commitments to a polity and an economic structure which respects equality and distributive justice. Therefore, Article 38 places an obligation on the state to promote the welfare of the people by 'securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutional of the national life'. It is the duty of the state to reduce inequalities in income as well as in status, facilities and opportunities.
 - Article 39 requires the State to ensure that its policies provide adequate means of livelihood, and also that the ownership and control of material resources of the community are so distributed as best to serve the common good. The state is also obliged to ensure that its economic policies do not result in the concentration of wealth and means of production.

Scheduled Areas and Tribal Areas

- Article 244 of the Constitution, therefore, provides that administration and control of Scheduled Areas and STs in any State other than Assam, Meghalaya, Tripura and Mizoram, shall be governed by the V Schedule, and that tribal areas in Assam, Meghalaya, Tripura and Mizoram (all in North East India) shall be governed by the VI Schedule
- Article 244-A relates to the creation of an autonomous region within the State of Assam comprising certain tribal areas, and the creation of a separate Legislature for it

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- Special dispensation for the States of Nagaland (Article 371-A), Sikkim (371-F), Mizoram (371-G), and Arunachal Pradesh (371-H).
 - The *Panchayats (Extension to Scheduled Areas) Act, 1996* contains several key provisions which give statutory recognition to some of the key rights elucidated in the international conventions, as well as the Constitution of India, with regard to rights of IPs to their traditional homelands and resources, and to decision-making processes regarding developmental activities.

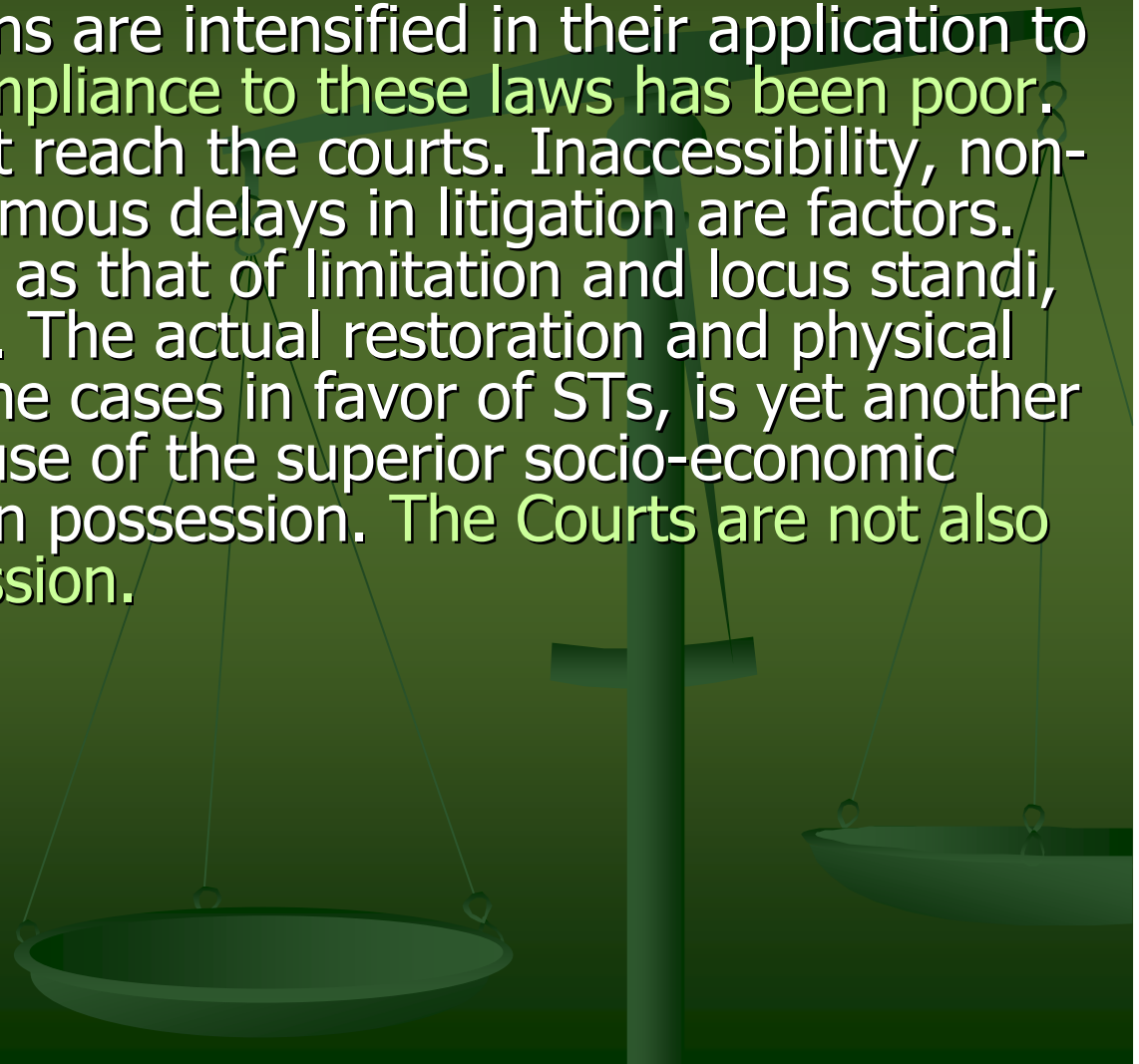
Land Alienation and Acquisition

- Loss of land remains the single biggest cause of deprivation of the livelihoods, lives and homelands of STs
 - The mechanisms for such expropriation of land vary, but include
 - The forest laws including JFM
 - Major development projects
 - The power of the Indian state to forcibly acquire private property (and to divert common property to any use it sees as appropriate) used with particular ferocity against Adivasi communities, who have suffered disproportionate displacement and loss of livelihoods as a result of repeated seizure of their resources in this manner
 - Indian law provides **very few institutional or statutory protections for common resources and homelands**
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- Right to property removed from the Constitution in 1951 from the list of fundamental rights in order to ease land reform. Ironically, this is now being used by the state to ease takeovers of lands of marginal communities.
- Eleventh Five Year Plan states: 'Ancestral land, villages, habitations and environs belonging to the tribal people have been made available for various development projects as tribal areas possess 60–70% of the natural resources of the country. In such cases, though primary displacement appears small due to low population density, secondary displacement has been extensive, encompassing common property resources that provided supplemental livelihoods, particularly to those with low or no dependence on farming. Estimates of STs displaced on account of acquisition over the past six decades vary between 8.5 and 10 million (roughly about 40% of all oustees) from 1951 to 1990. Of them, only 21.20 lakh ST persons have been rehabilitated during the period. The widespread secondary displacement in the zone of influence has neither been measured nor was provided for'.

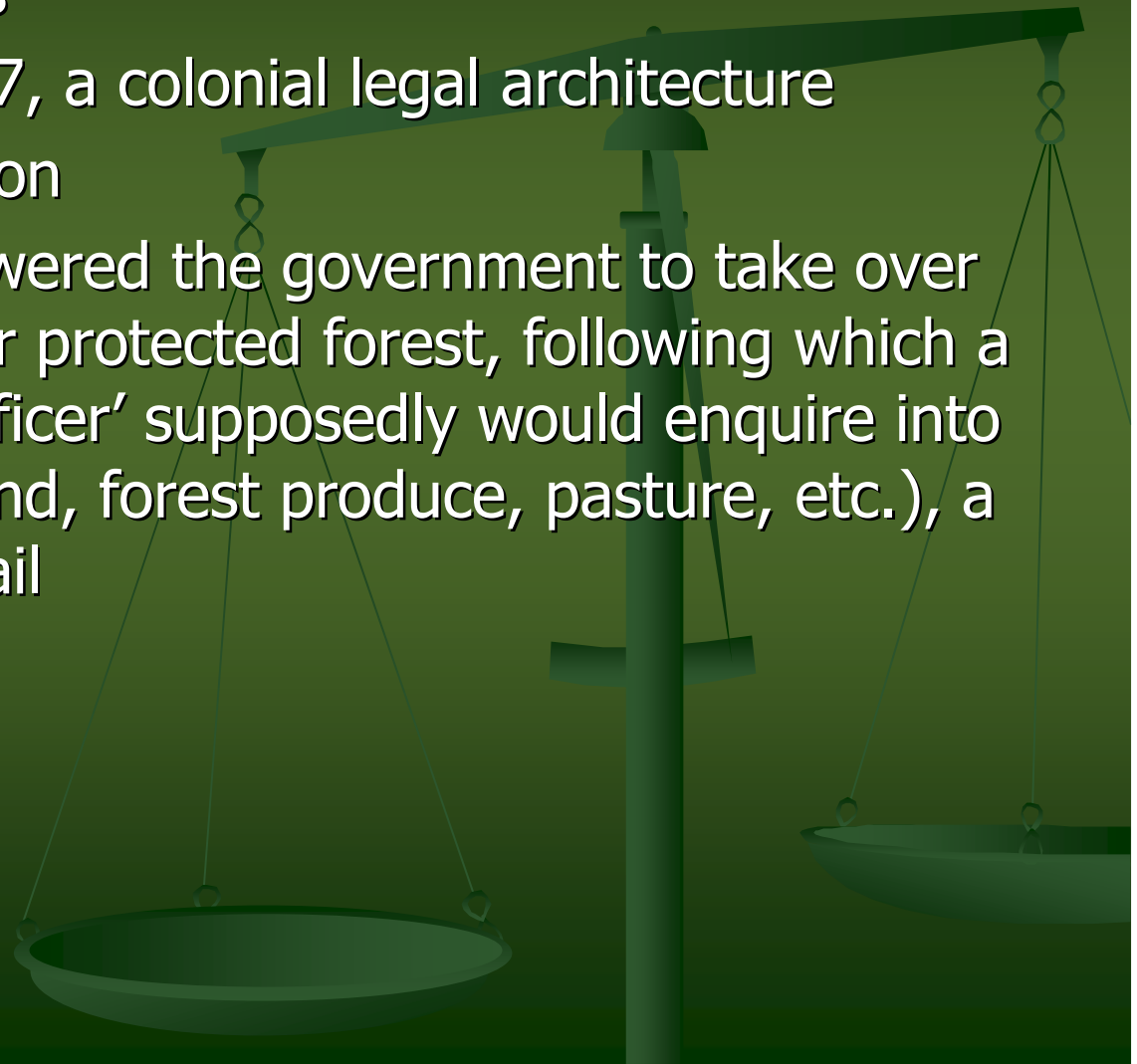
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- The courts largely failed to provide any relief in this regard
 - Courts used Article 16 of ILO C 169 to conclude that displacement of tribals for the purpose of 'development' is **unavoidable** and therefore cannot be held to be in violation of the obligations of the Indian State under the said Convention.
 - The process of recognition of traditional rights of STs to land is **significantly uneven and incomplete** (the process of recording their rights in the forest areas has just commenced).
 - The state and non-tribals have deprived them their access of their lands by appropriation of these lands
 - Of the recorded land rights, despite the constitutional and legislative safeguards at the central and state level, land alienation has been widespread

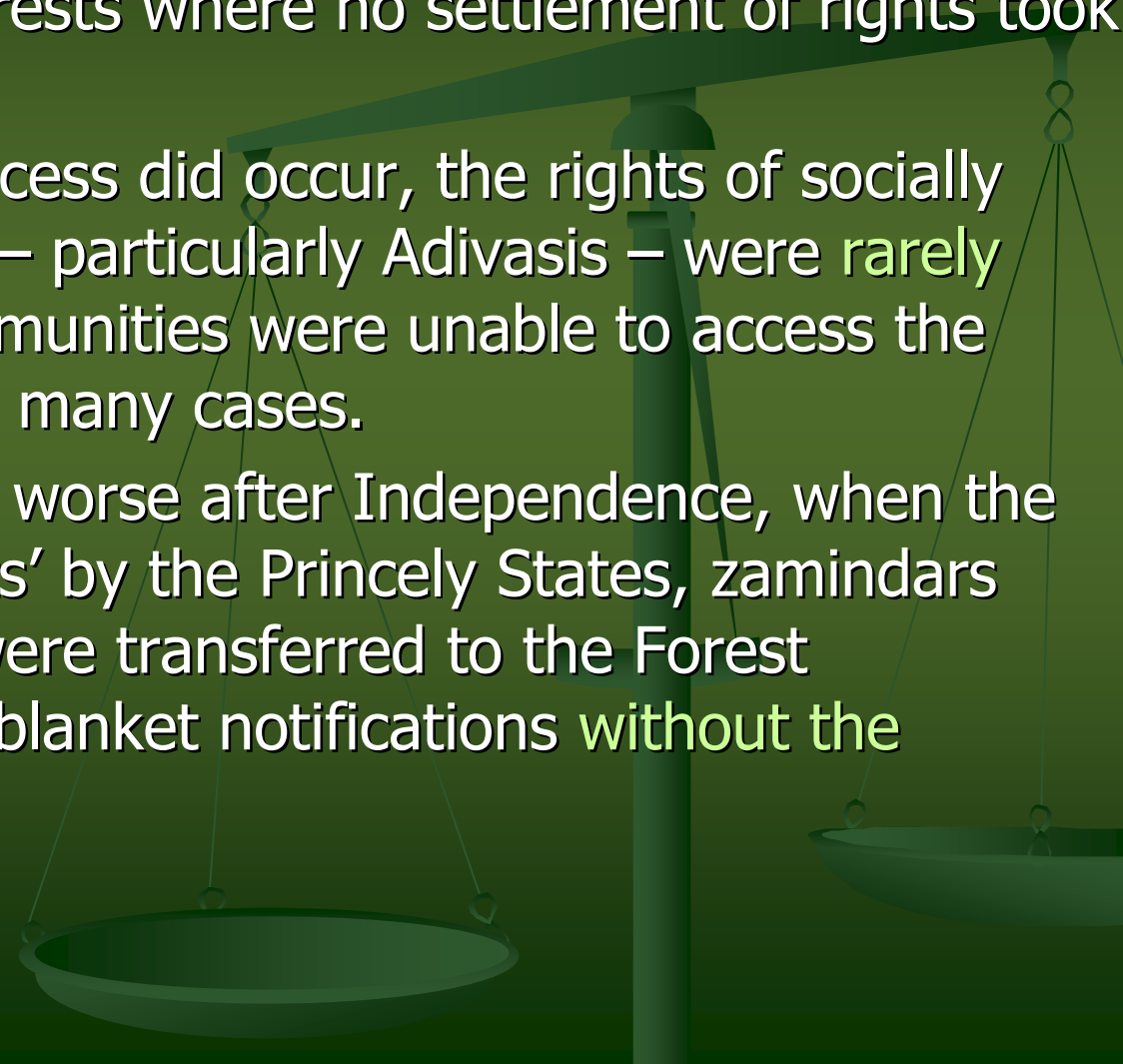
- In compliance of Paragraph 5(2)(a) of the V Schedule, most States have enacted legislations restricting/prohibiting the transfer of land from tribals to non-tribals. The restrictions/prohibitions are intensified in their application to Scheduled Areas. **Compliance to these laws has been poor.** Most violations do not reach the courts. Inaccessibility, non-affordability and enormous delays in litigation are factors. Procedural rules such as that of limitation and locus standi, has been detrimental. The actual restoration and physical possession, even in the cases in favor of STs, is yet another problem simply because of the superior socio-economic status of the person in possession. **The Courts are not also able to ensure possession.**

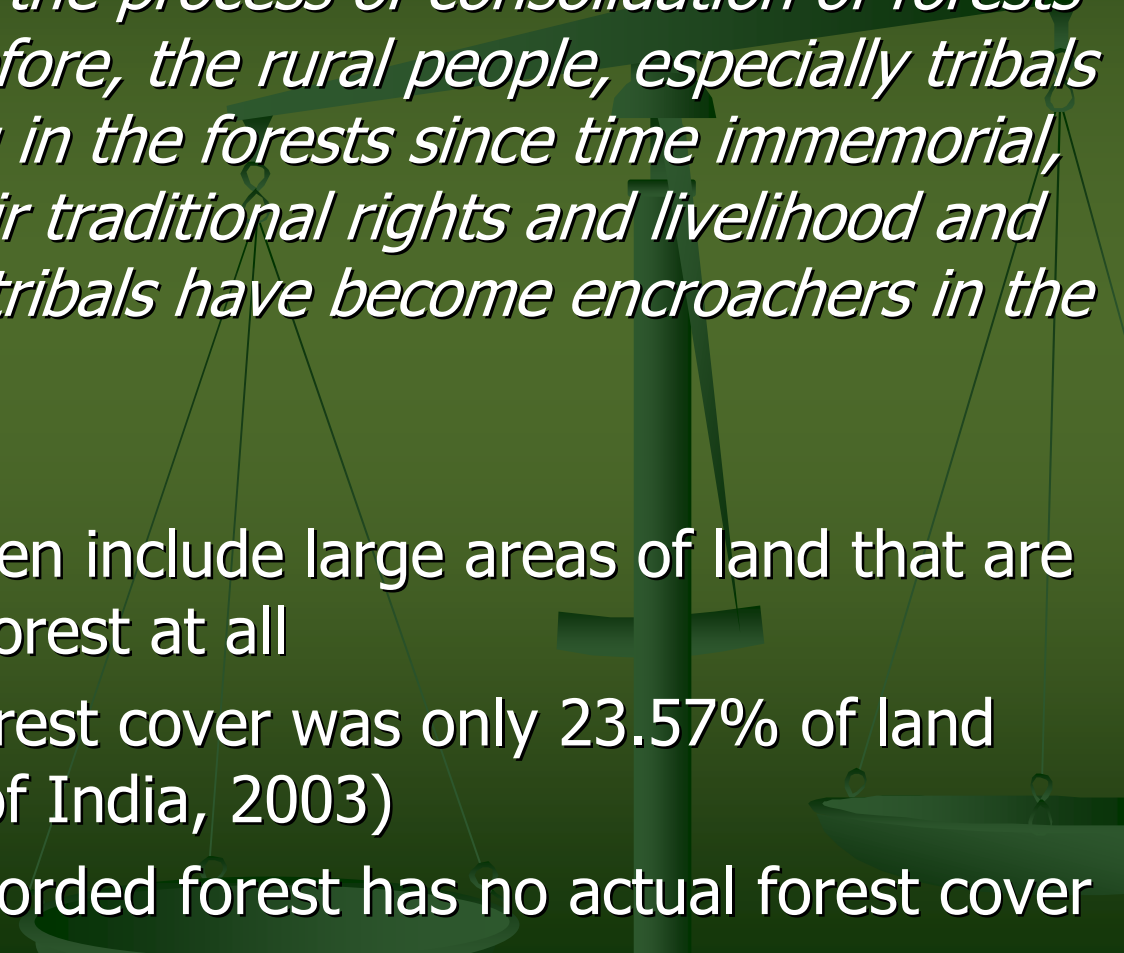


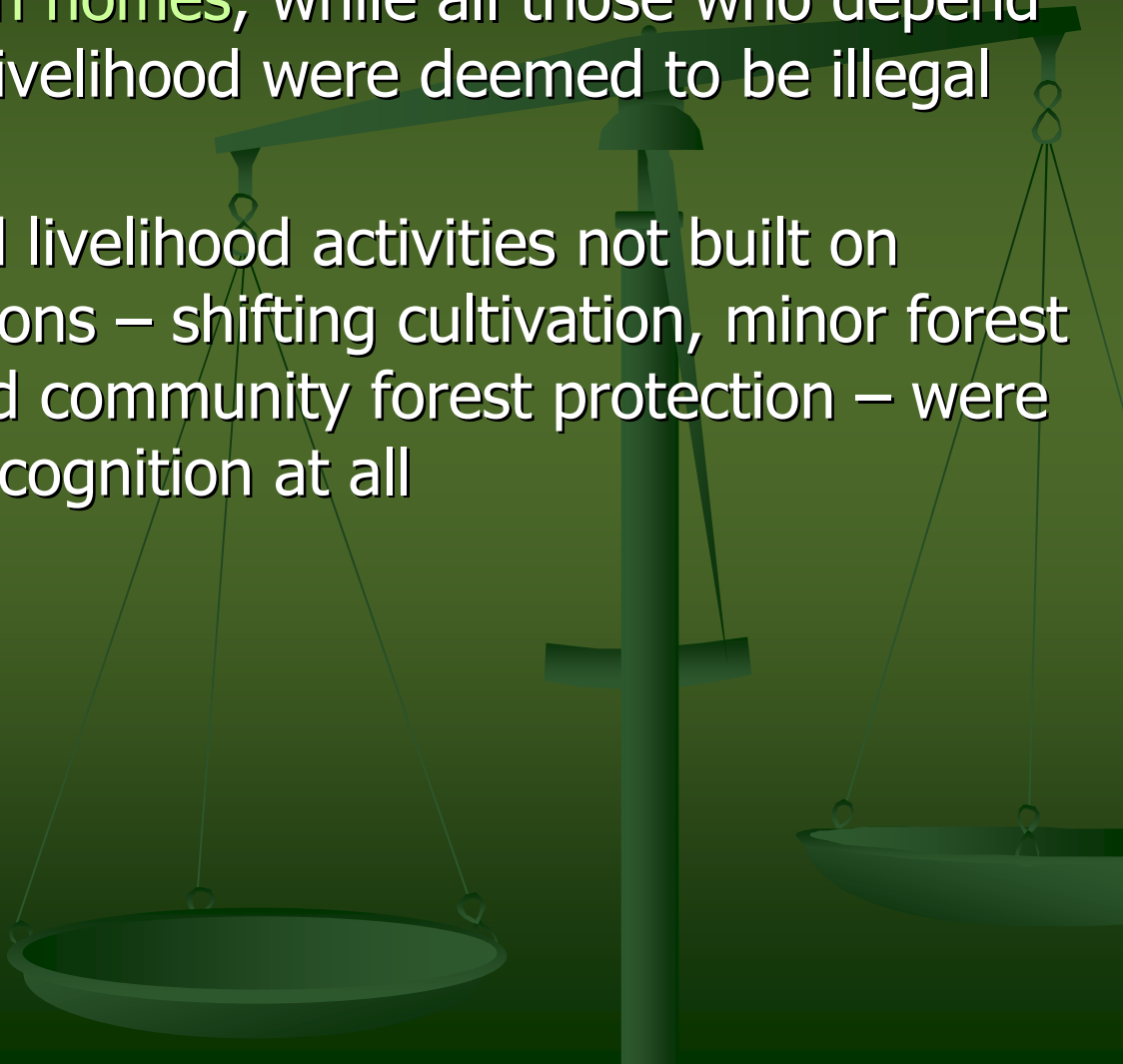
Forests

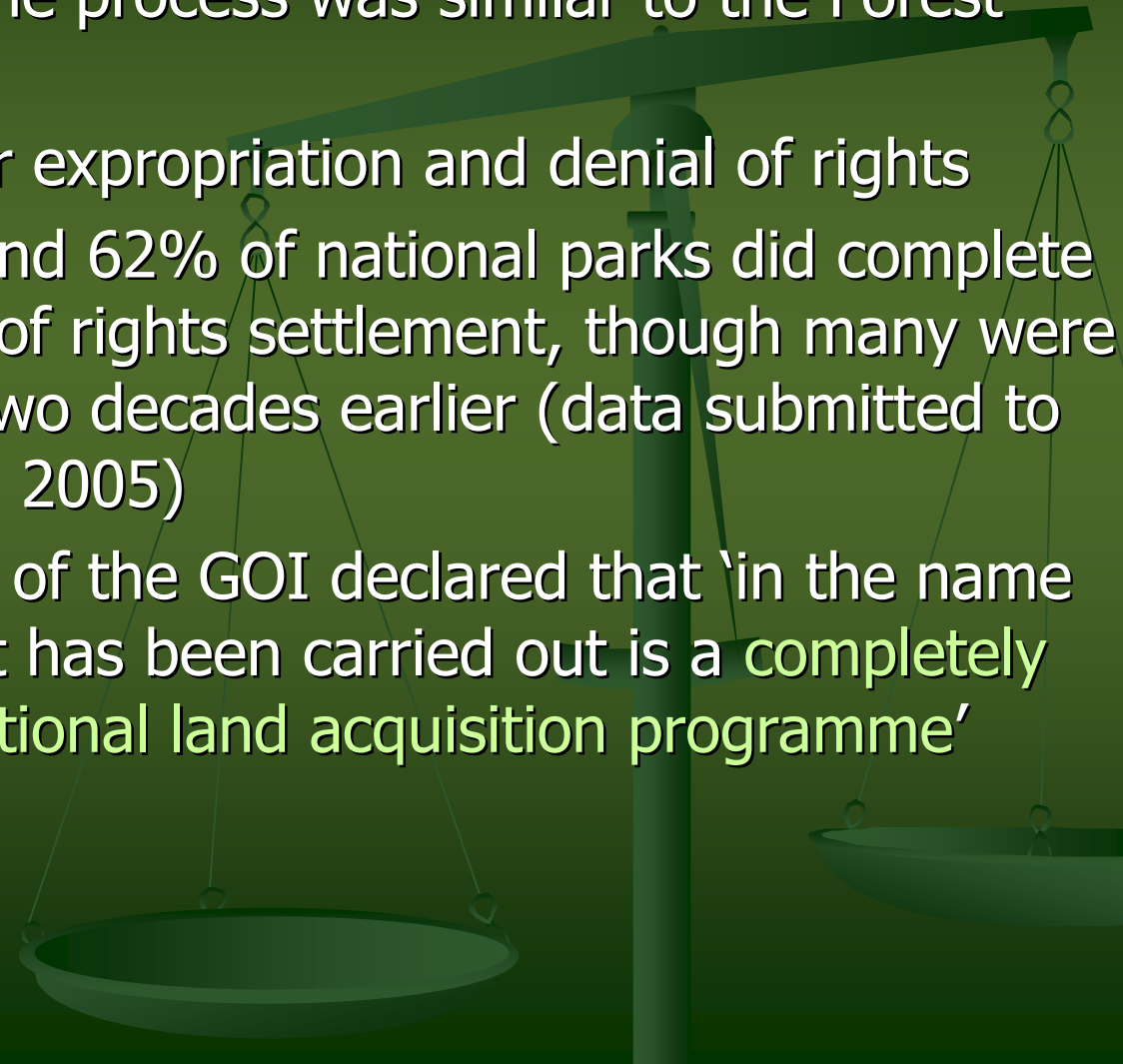
- The largest expropriation of Adivasi resources that has taken place in India after independence has occurred in forest areas classified as 'forest lands'
- Indian Forest Act of 1927, a colonial legal architecture
 - Unhindered exploitation
 - The Forest Act empowered the government to take over lands as a reserved or protected forest, following which a 'Forest Settlement Officer' supposedly would enquire into claims of rights (to land, forest produce, pasture, etc.), a process destined to fail

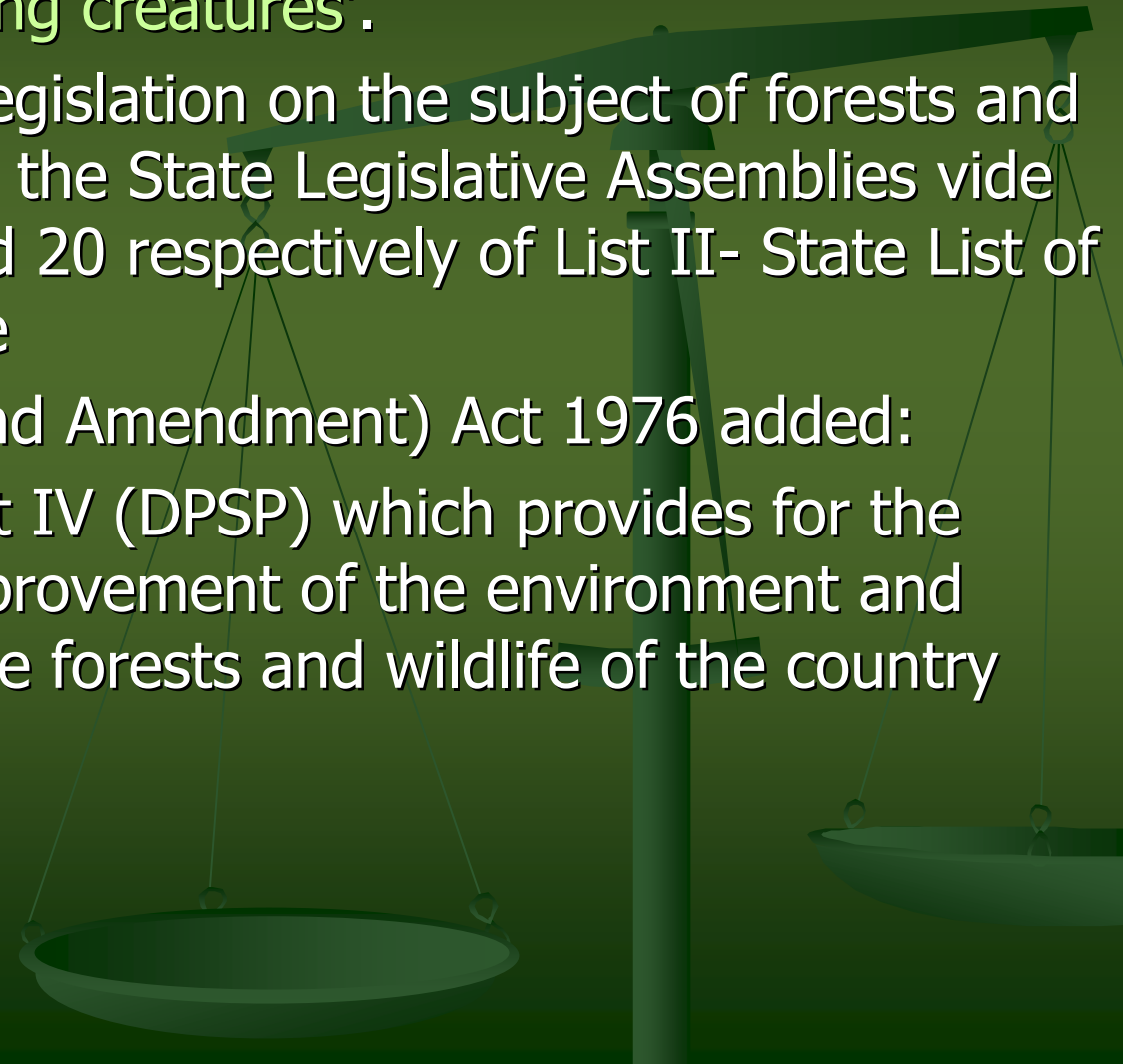


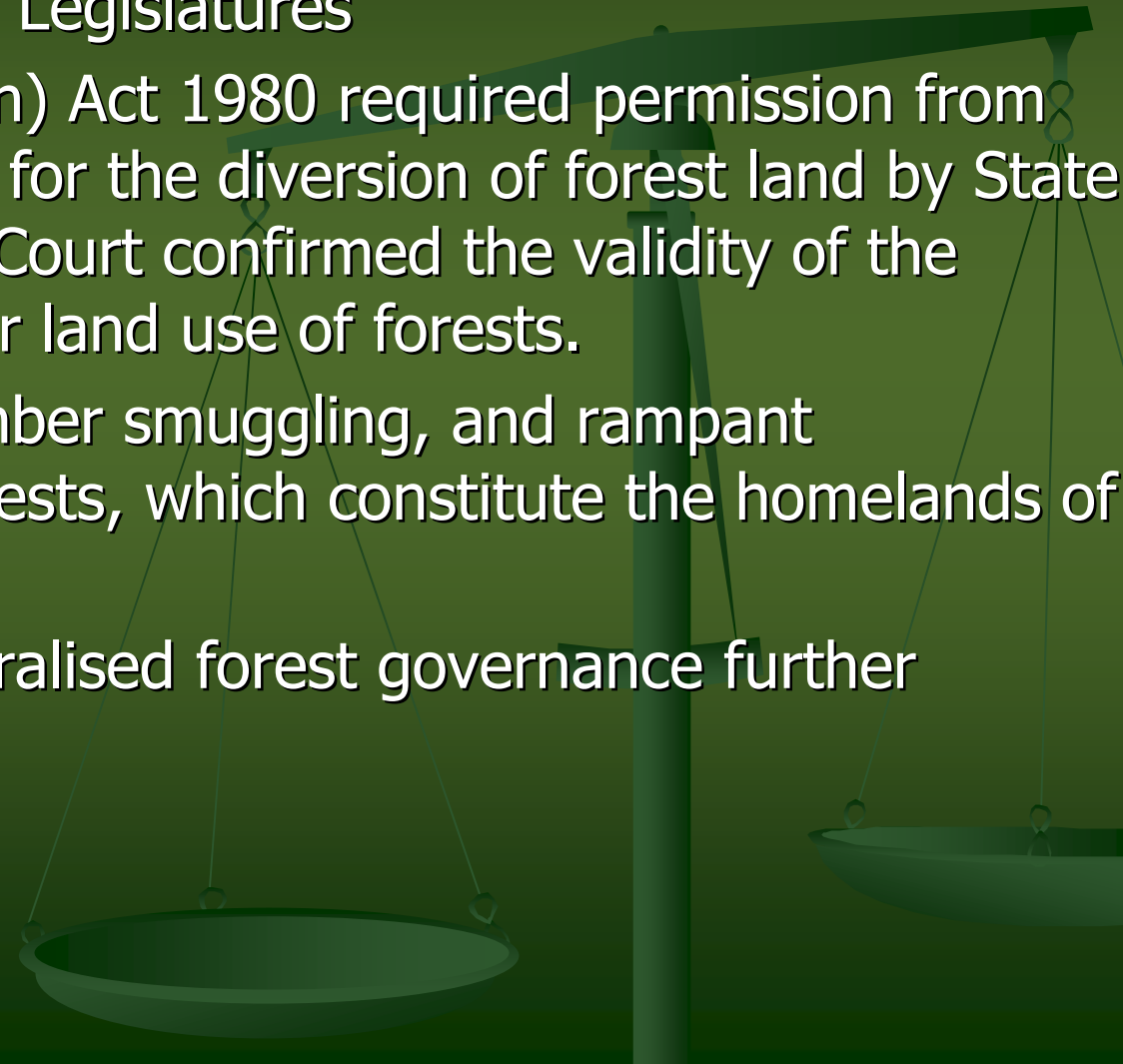
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- **Surveys were often incomplete or not done** (82.9% of Madhya Pradesh's forest blocks had not been surveyed as on 2003, while in Orissa more than 40% of state forests are 'deemed' reserved forests where no settlement of rights took place).
 - Where the claims process did occur, the rights of socially weaker communities – particularly Adivasis – were **rarely recorded**. These communities were unable to access the settlement process in many cases.
 - The problem became worse after Independence, when the lands declared 'forests' by the Princely States, zamindars and private owners were transferred to the Forest Department through blanket notifications **without the settlement process**.

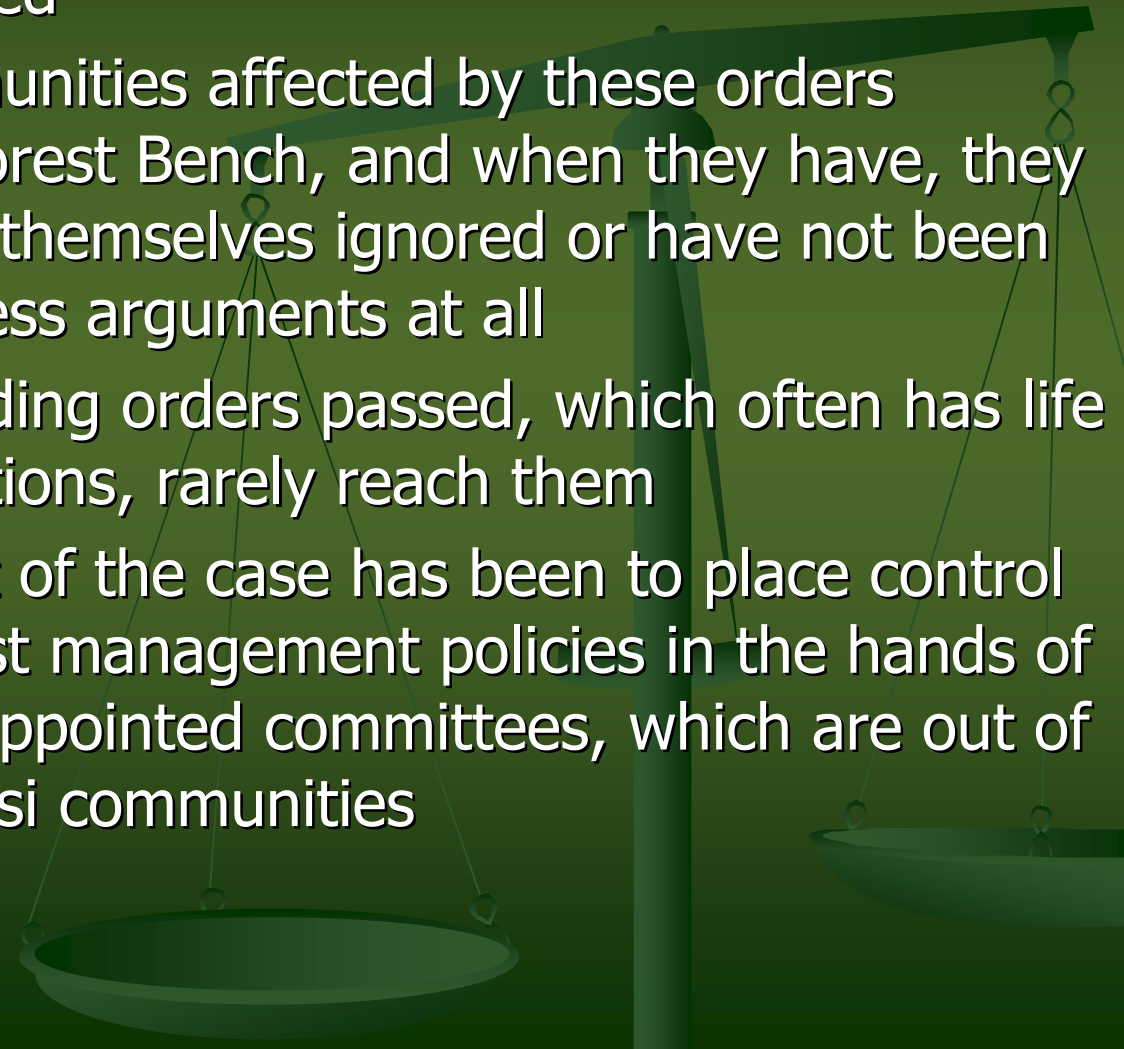
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- Ministry of Environment and Forests in an affidavit filed before the Supreme Court in July 2004 states:
 - *'For most areas in India, especially the tribal areas, record of rights did not exist due to which rights of the tribals could not be settled during the process of consolidation of forests in the country. Therefore, the rural people, especially tribals who have been living in the forests since time immemorial, were deprived of their traditional rights and livelihood and consequently, these tribals have become encroachers in the eyes of law.'*
 - **State of forests**
 - Recorded 'forests' often include large areas of land that are not and never were forest at all
 - The total recorded forest cover was only 23.57% of land area (Forest Survey of India, 2003)
 - At least 12.4% of recorded forest has no actual forest cover
 - Those areas that are in fact forest include Adivasi homelands


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- Overnight all those who live in these lands became 'encroachers' in their own homes, while all those who depend on these lands for their livelihood were deemed to be illegal trespassers
 - Community rights and livelihood activities not built on private property relations – shifting cultivation, minor forest produce collection and community forest protection – were not given any legal recognition at all

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- The Wildlife (Protection) Act 1972 provided for the creation of national parks, sanctuaries and other forms of protected areas for wildlife protection. The process was similar to the Forest Act.
 - The result was similar expropriation and denial of rights
 - 60% of sanctuaries and 62% of national parks did complete the required process of rights settlement, though many were declared more than two decades earlier (data submitted to the Supreme Court in 2005)
 - The Tiger Task Force of the GOI declared that 'in the name of conservation, what has been carried out is a **completely illegal and unconstitutional land acquisition programme**'

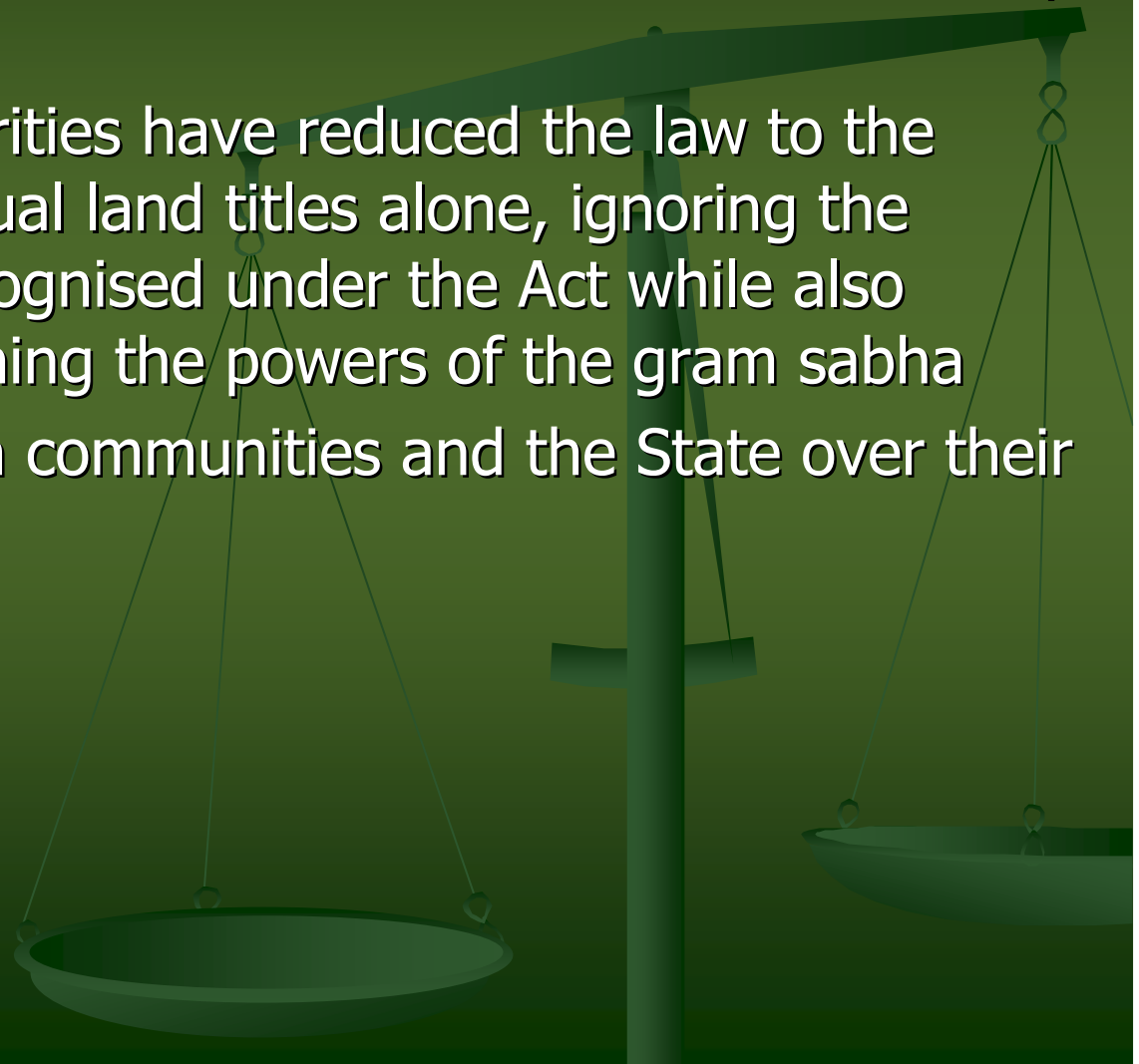
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- The Chapter on fundamental duties in Article 51-A (g) places a duty on the citizens to 'Protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures'.
 - The power to make legislation on the subject of forests and wildlife was vested in the State Legislative Assemblies vide the then Entry 19 and 20 respectively of List II- State List of the Seventh Schedule
 - The Constitution (42nd Amendment) Act 1976 added:
 - Article 48-A in Part IV (DPSP) which provides for the protection and improvement of the environment and safeguarding of the forests and wildlife of the country

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- The legislative power to make laws relating to forests and wildlife was removed from the State list, and added to List III- Concurrent List, thereby vesting power in both the Central and the State Legislatures
 - The Forest (Conservation) Act 1980 required permission from the Central Government for the diversion of forest land by State governments. Supreme Court confirmed the validity of the power of the Centre over land use of forests.
 - But illegal mining, timber smuggling, and rampant destruction of the forests, which constitute the homelands of the tribals, continue
 - The Forest Case centralised forest governance further

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- While various issues relating to the diversion of forest land for all manner of non-forest activity, such as mining, industries, large dams and so on are taken up, the voices of the local tribals ignored
 - Rarely have communities affected by these orders approached the Forest Bench, and when they have, they have either found themselves ignored or have not been permitted to address arguments at all
 - Information regarding orders passed, which often has life and death implications, rarely reach them
 - The primary result of the case has been to place control over national forest management policies in the hands of the court and its appointed committees, which are out of the reach of Adivasi communities

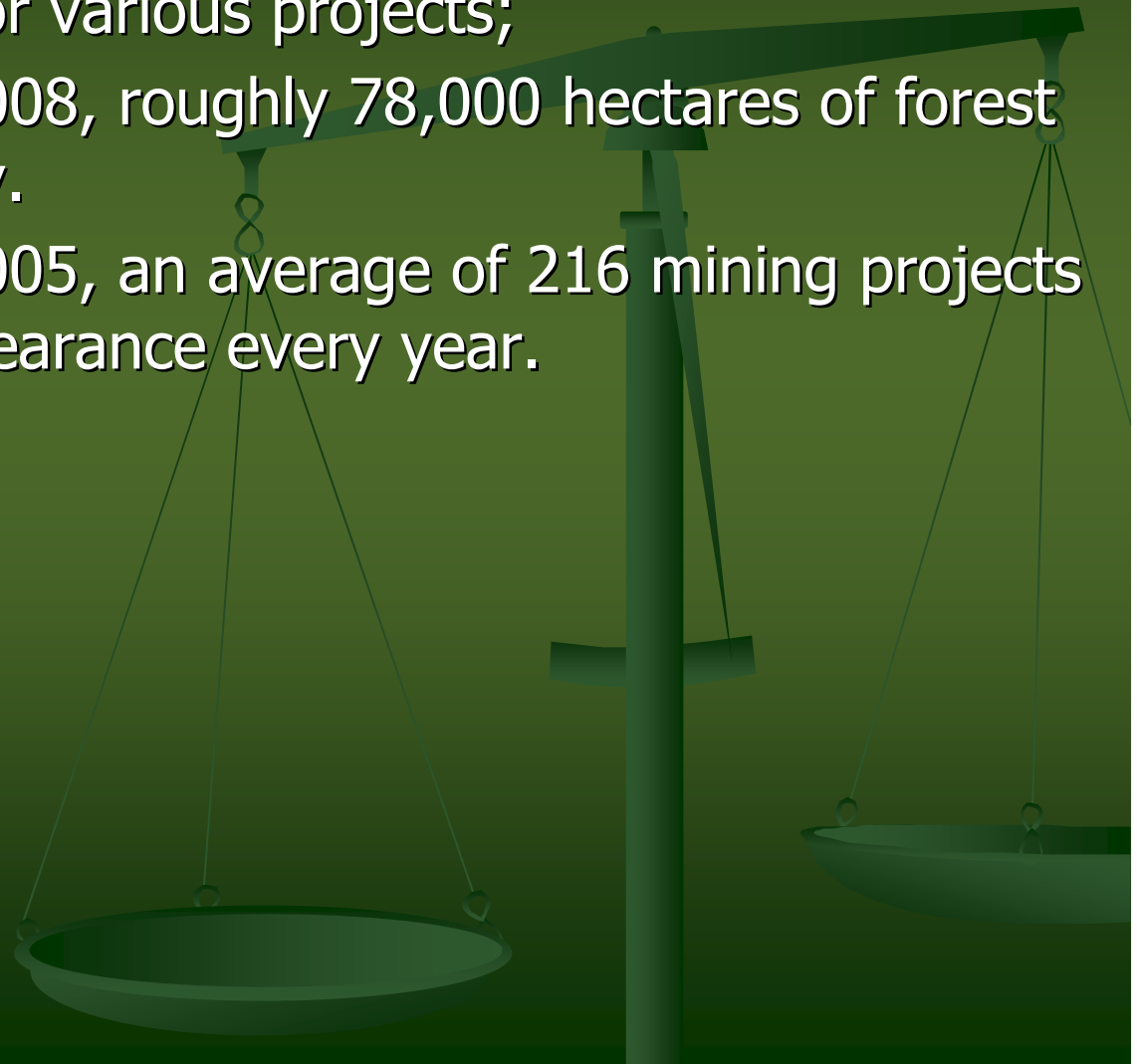
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- In 2006, following intense mobilisation after a national eviction drive targeting Adivasis, Parliament passed India's first law on forest rights – the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act. The key elements of this law are:
 - A **comprehensive list of forest rights**, including rights to land under occupation, minor forest produce, grazing rights, water bodies, habitat for pre-agricultural communities, etc.
 - Laying down who is **eligible for status as a 'forest dweller'** entitled to these rights, namely STs and 'other traditional forest dwellers' (those living in and dependent on forests for 75 years)
 - Creating the foundations of a **democratic framework** for, firstly, recognising rights; secondly, deciding on inviolate areas for wildlife conservation; and, most importantly, for conservation and forest / wildlife protection

- The most politically significant part of the law is the **authority of the *gram sabha*** in determining rights and the power to issue directions for forest, wildlife and biodiversity protection
- However State authorities have reduced the law to the recognition of individual land titles alone, ignoring the community rights recognised under the Act while also consistently undermining the powers of the gram sabha
- The struggle between communities and the State over their legal rights continues

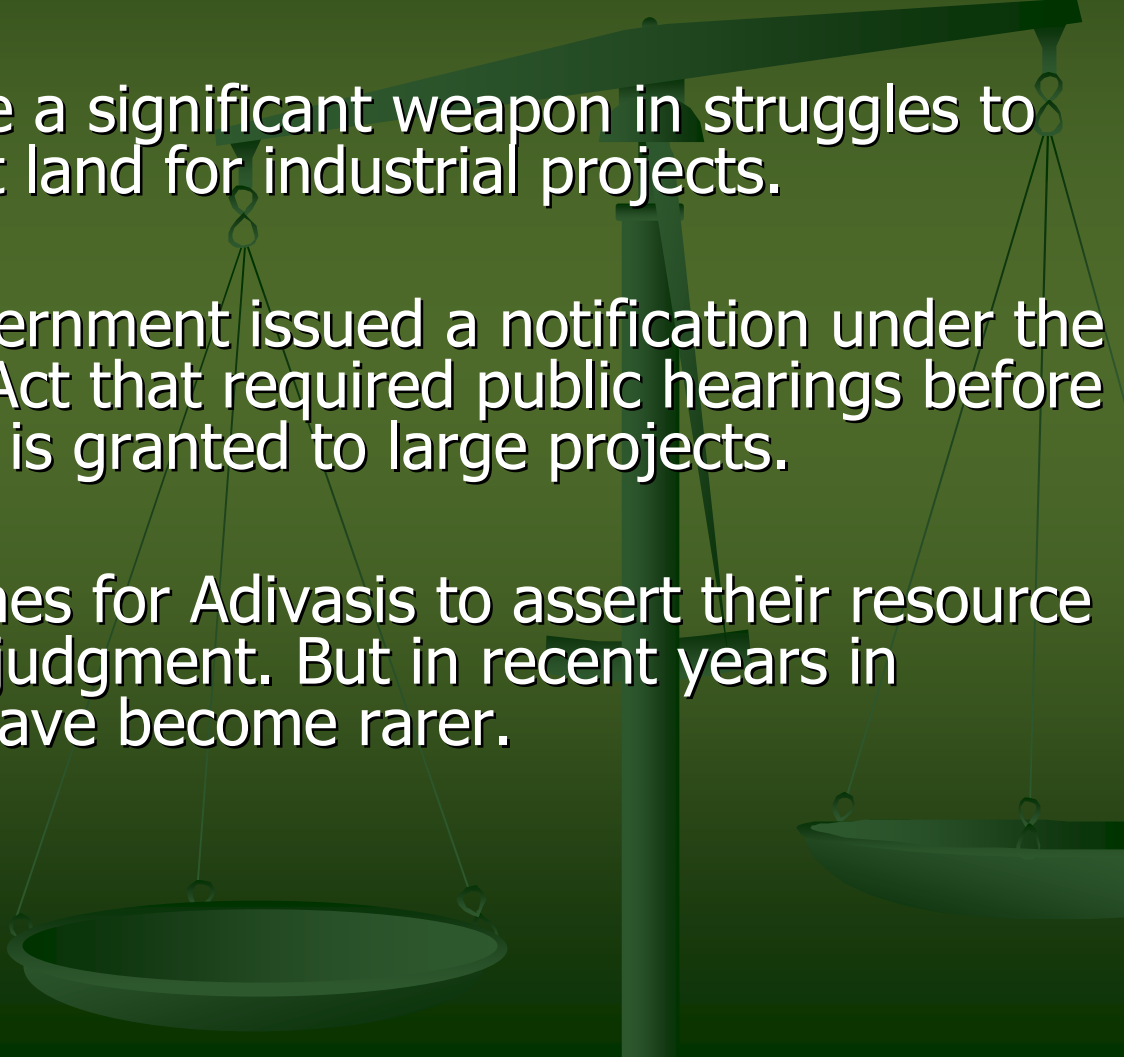


■ Deforestation

- Between 1980 and 2005, around 1.3 million hectares of forest was diverted for various projects;
- Between 2002 and 2008, roughly 78,000 hectares of forest was diverted annually.
- Between 1998 and 2005, an average of 216 mining projects was granted forest clearance every year.



Policy Spaces for Resource Control

- Laws – the Panchayats (Extension to Scheduled Areas) Act 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006
 - FRA has recently become a significant weapon in struggles to stop the seizure of forest land for industrial projects.
 - In 1994, the Central government issued a notification under the Environment Protection Act that required public hearings before environmental clearance is granted to large projects.
 - Courts - PIL useful at times for Adivasis to assert their resource rights. Ex: the *Samatha* judgment. But in recent years in particular, such rulings have become rarer.
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- Legal interpretation running counter to the rights of tribals
 - The Supreme Court in a judgment relating to the Sardar Sarovar Project read right to life under Art. 21 of the Constitution with Article 12 of ILO C107 dismissing the contention of the petitioners regarding specific violation of Article 12 as follows:

...removal of the tribal population is necessary as an exceptional measure.... rehabilitation package contained in the award of the Tribunal as improved further by the State of Gujarat and the other States prima facie shows that the land required to be allotted to the tribals is likely to be equal, if not better than what they had owned.

- The Supreme Court, in a judgment in a litigation arising out of the failure of the State of Kerala to implement its own commitments to restore lands to tribals which had been alienated through sale to non-tribals, examined Article 21 of the Constitution, the ILO conventions 107 and 169 and the UNDRIP, and arrived at the following finding:

'It is now accepted that the Panchsheel doctrine which provided that the tribes could flourish only if the State interfered minimally and functioned chiefly as a support system in view of passage of time is no longer valid. Even the notion of autonomy contained in the 1989 convention has been rejected by India.'

- The process of usurpation of the rights contained in the Constitution and the various protective legislations enacted by the state, has gained momentum over the last few years.