RETHINKING TRIBAL RIGHTS: INDIA AND SOUTH AFRICA AT THE CROSSROADS OF CUSTOM AND CONSTITUTIONAL MORALITY

by

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Abstract

Tribal rights hold a unique position in constitutional law, as they call for social rehabilitation, cultural autonomy, and a balance between universality and constitutional norms. Due to colonial exploitation, both South Africa and India have to establish constitutional provisions that protect indigenous people by allowing them to participate in the democratic process. This research examines constitutional morality and legal security measures in relation to the recognition of tribal rights by these two administrations. It examines how the legal and constitutional systems of India and South Africa preserve equality and dignity, respect indigenous peoples' right to self-determination, and draw conclusions from their common experiences. The paper will analyse both the courts and assess how constitutionalism allows for the adaptation of modern issues and the development of security measures using constitutional morality, as well as the constitutional and legislative grounds for tribal rights. The paper employs a doctrinal approach and legal analysis grounded in the Constitutional provisions as well as the Forest Rights Act of 2006 in India and the Traditional Leadership and Governance Framework Act of South Africa. Additionally, the study employs comparison as a method to highlight both likeness and contrast. First, courts use constitutional ethics to resolve conflicts between customary and constitutional standards; second, the constitutional and statutory frameworks recognize the tribe's sovereignty; Thirdly, these rights are implemented along three axes, and many comparisons have been made between them. Even though both South Africa and India uphold their constitutional duties to safeguard tribal rights, the paper contends that comparing these disparate experiences makes it clear that a drastic approach grounded in constitutional morality is required. By placing

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indigenous people's rights at the core of the law, this approach promotes equality, dignity, and cultural preservation.

Keywords: *India, South Africa, Constitutional Morality, Tribal Rights, Living Constitution*

INTRODUCTION

For many years, the rights of tribal people have played a significant role in the growth of constitutional democracy, particularly in areas where colonialism, cultural diversity, and injustice have long existed. Due to their long-standing appropriation by developed nations, institutionalized marginalization, and traditional government systems, indigenous groups have become socioeconomically vulnerable and have lost their sense of cultural identity. The virtues of democracy, equality, and decency have been balanced with the injustices of the past in today's creation. In the area, South Africa and India are two particularly intriguing examples. Both nations have a mechanism to identify indigenous people and ensure their safety that is mandated by the constitution due to their history of colonization and isolation. Additionally, they faced the continuous struggle between upholding ancient practices and wider constitutional values. This study examines the relationship between constitutional ethics, statutes, and customs, as well as how these two constitutional democracies manage power and safeguard indigenous populations.

A few provisions of the Indian Constitution that acknowledge the distinct character and sovereignty of the tribal community include the fifth and sixth schedules, fundamental rights, and directive principles of state policy. Self-government, resources, land protection, and the advancement of cultural and educational rights are all supported in these parts. By granting legal recognition to traditional governance structures and social requirements on land and resources, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and the Panchayats (Extension to Scheduled Areas) Act, 1996, carry out constitutional interventions and obligations. The enforcement and application of tribal rights are sometimes hindered by bureaucracy, a lack of institutional capacity, and conflicts between local autonomy and development aspirations, notwithstanding these legal frameworks. The living constitution and constitutional morality are becoming more and more important in the complex Indian environment, which seeks to explain and defend the rights in line with the principles of justice, equality, and dignity.

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South Africa offers an equally instructive comparative perspective. The post-apartheid Constitution of 1996, which incorporates the concepts of equality, dignity, and Ubuntu, a concept that stresses moral responsibility and social interpretation in the natural and constitutional structure, clearly acknowledges the rights of indigenous peoples and customary law. Traditional Leadership and Governance Framework Act, 2003, the Communal Land Rights Act, 2004, and the governance framework all seek to strike a balance between traditional rights and the democratic state. By applying the constitutional morality concept to settle disputes between traditions and ensure constitutional equality, South African courts have frequently created laws that are in line with contemporary human rights standards. This link demonstrates how constitutional ethics examines cultural variations, regulates the legal interpretation of basic rights, and functions as a standard and useful instrument.

The objective of this paper is to compare the recognition of fundamental rights in South Africa and India, focusing on how constitutional morality serves as a guiding principle. How are tribal rights and South African and Indian structures acknowledged? In what ways are the customs interpreted and used by the courts of each jurisdiction to ensure equality and dignity? From their similar experiences, what comparative lessons may be learned that can guide the broad parameters of legality and indigenous rights protection? These are the primary research questions that guide the study and provide light on the advantages and drawbacks of the legal system and its procedures while examining it within broad theoretical frameworks of constitutional morality and living constitution.

This research aims to accomplish three goals. With a focus on both the similarities and contrasts between the two nations' approaches, the main goal is to give a comprehensive explanation of the constitutional and legal security measures afforded to tribal tribes in South Africa and India. Second, it looks closely at how constitutional morality is used in court decisions to maintain a balance between constitutional norms and traditions, highlighting the courts' active involvement in defending basic rights.. Third, the research aims to gain knowledge from comparative analysis by putting up a plan and method that may enhance the attainment of tribal rights in both courts, and include constitutionality and the rights of indigenous people in international talks.

When it comes to how the court operates, the study employs a doctrinal approach that examines how its establishment, regulations, and rulings impact the legal landscape of Indian and South African tribes. It employs comparative analysis to identify legal frameworks, legal logic, and

constitutional architecture's similarities and variances. Through an investigation of both courts, the paper offers theoretical and practical ideas to raise the security of tribal rights. This further demonstrates how the context affects how ideas like living constitution and constitutional morality are interpreted.

The study is especially important because it demonstrates how many constitutional arrangements strike a compromise between competing demands such as equality, dignity, and democratic advancement on the one hand, and cultural identity and the maintenance of conventional authority on the other. Unlike India, where a federal system frequently places greater emphasis on legislative growth and the preservation of tribal autonomy, South Africa bases its legal involvement on constitutional ethics and the constitutional acceptance of customary or more conventional prospects. Nonetheless, constitutional morality and living constitution must be studied since it is still difficult to enforce rights in both cases. to comprehend how the stem's rights may be successfully safeguarded in practical circumstances.

By comparing the experiences of South Africa and India on the Custom and Constitutional Ethics cross, this paper aims to provide insight into how constitutionalism may address historical injustice, promote justice for indigenous people, and accommodate cultural variety. It concludes by addressing the common principles that underpin the constitutional order and arguing that the preservation of tribal rights has to be further developed in comparison to official legal recognition. Through a thorough examination of legislation, constitutional provisions, and court rulings, this study aims to demonstrate how constitutional morality may serve as a significant remedy in ensuring that indigenous populations are treated with equality, respect, and a genuine commitment to democratic life.

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THE INDIAN STANCE

It is sometimes said that the Indian constitutional system is transformative. By addressing past injustices and preserving variety, it seeks to change society rather than only constructing governance. Tribal groups are the main beneficiaries of this important goal, as there are more than 700 different tribes and Scheduled Tribes under Article 342 of the Constitution[1]. The drafters of the Indian Constitution added additional protections for the tribals because of their history of being uprooted, being marginalized culturally, and having their property taken away. However, to build the nation, they must also be included in the broader democratic structure.

[1] Constitution of India 1950, art 342.

This leads to an ongoing conflict that is central to the tribal rights discussion. This dichotomy is demonstrated by the constitutional, legal, and regulatory safeguards for indigenous people, which encourage integration while preserving autonomy.

A tiered framework is established by the Constitution, which blends common rights with particular safeguards for every community. Basic protections against discrimination are provided by fundamental rights such as nondiscrimination under Article 15[2] and equality under Article 14[3]. The Supreme Court's expansive reading of Article 21[4] has been crucial in acknowledging the rights to cultural survival, the environment, and livelihood. Cultural and educational rights are protected under Articles 29[5] and 30[6], which say that the unique languages, scripts, and customs cannot be eradicated by majority groups. In addition to these legal rights, the Directive Principles of State Policy encourage the state to safeguard the environment under Article 48A[7] and to defend the economic and educational interests of Scheduled Tribes under Article 46[8]. These considerations are especially important for communities that rely heavily on land and forests. Furthermore, Article 51A[9], which lays forth the fundamental duty to maintain and protect cultural assets, acknowledges the importance of tribal practices in India's distinctive identity.

The constitutional provisions that are most distinctive are perhaps found in the Fifth and Sixth Schedules. Councils for Tribes must be established in accordance with the Fifth Schedule[10]. Governors are also granted authority over land transactions and the preservation of tribal resources, and they regulate the administration of Scheduled Areas. The Sixth Schedule[11] creates Autonomous District Councils with legislative, judicial, and administrative authority over local matters; it only applies to the northeastern states. Within the federal system, these regulations provide options for tribal self-governance, even though their practical efficacy varies. Regrettably, political expediency and administrative meddling have frequently compromised the autonomy that these clauses were intended to safeguard.

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[2] Constitution of India 1950, art 15.
[3] Constitution of India 1950, art 14.
[4] Constitution of India 1950, art 21.
[5] Constitution of India 1950, art 29.
[6] Constitution of India 1950, art 30.
[7] Constitution of India 1950, art 48A.
[8] Constitution of India 1950, art 46.
[9] Constitution of India 1950, art 51A.
[10] Constitution of India 1950, Fifth Sch.
[11] Constitution of India 1950, Sixth Sch.

These protections are based on constitutional principles, but legislations have been passed to enact them. The most important legislation is the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter FRA)[12]. It acknowledged for the first time the historical injustices that forest dwellers had to endure. Forest laws from colonial and postcolonial times viewed tribes as trespassers on their own territory for many years. By establishing the rights of people and communities to land and forest resources, the FRA altered this. Living space, agriculture, and sustainable management were all incorporated under the FRA. Giving Gram Sabhas the authority to manage forest resources led to an approach that was consistent with the constitutional objectives of self-determination and dignity. Notwithstanding its promise for change, the Act has been implemented unevenly, with delays, administrative roadblocks, and continued opposition from forest authorities that continue to doubt indigenous communities.

Another important statute, the Panchayats (Extension to Scheduled Territories) Act, 1996 (hereinafter PESA)[13], introduced the 73rd Amendment's ideas to tribal regions that were part of the Fifth Schedule. Gram Sabhas were given significant authority over finances, land, and development choices under PESA, which acknowledged the importance of traditional institutions. In order to represent the moral principles of the constitution, it sought to establish a system that upholds both contemporary democratic government and tribal self-rule while upholding participatory rights and honoring cultural diversity. States have, however, implemented this differently, with many being hesitant to give Gram Sabhas the actual power. Hence, PESA has frequently proven to be more symbolic than revolutionary.

These ancient statutes are supported by a number of other legislation that promote the protection of indigenous rights. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter SCSTA)[14], outlaws exploitation and violence against vulnerable groups, laying the groundwork for criminal liability. The Biological Diversity Act of 2002 (hereinafter BDA)[15] grants community rights over biological resources and associated traditional knowledge, acknowledging the relationship between tribal people and their natural surroundings. Even while the Protection of Plant Varieties and Farmers' Rights Act of 2001(hereinafter PVFRA)[16]

[12] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006
[13] Panchayats (Extension to Scheduled Territories) Act 1996
[14] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989
[15] Biological Diversity Act 2002
[16] Protection of Plant Varieties and Farmers' Rights Act of 2001

primarily focuses on agriculture, it also protects community rights to traditional seed types and knowledge. These laws demonstrate the state's attempt to provide a comprehensive framework for defending indigenous rights, despite the fact that each is still constrained by inconsistent enforcement and divergent development strategies.

In judicial interpretation, the concept of constitutional morality has grown in importance and strengthened the defense of tribal rights. The Supreme Court emphasized in Samatha v. State of Andhra Pradesh (1997)[17] that the constitutional need to safeguard tribes cannot be superseded by economic considerations. The transfer of tribal lands in Scheduled Areas to non-tribals, including for mining interests, was prohibited by this ruling. This ruling demonstrated the court's readiness to put the spirit of the Constitution ahead of particular development reasons. In the Niyamgiri case (Orissa Mining Corporation v. Ministry of Environment, 2013)[18], the Court acknowledged the Gram Sabha's authority to determine whether or not trees revered by the Dongria Kondh tribe may be used for bauxite mining. By connecting PESA's legal rights and the FRA to more general constitutional ideas of self-determination and cultural preservation, the Court gave constitutional ideals life.

These concepts have been treated differently by the judges, nevertheless. The state's argument of "greater public interest" in large-scale industrial and infrastructural projects is frequently upheld by courts, which put economic objectives ahead of tribal rights. The boundaries of legal protection and the significance of basing interpretations on constitutional principles rather than pragmatic considerations are made clear by this circumstance.

Tribal rights in India are ambiguous. The nation boasts some of the most comprehensive legal and constitutional safeguards, but its implementation mechanisms are also among the least successful. Protecting cultural sovereignty and redressing past wrongs were the goals of the legislation's drafters. However, these objectives are frequently undermined by development demands, political resistance, and lengthy bureaucratic procedures. Although legislation such as the FRA and PESA demonstrates the possibility of an ethical and participatory government, many communities have yet to reap the rewards of these laws. The court has oscillated between providing robust protection and caving in to governmental authority due to an unresolved contradiction between political realities and constitutional aspirations.

[17] *Samatha v. State of Andhra Pradesh* AIR 1997 SC 3297

[18] *Orissa Mining Corporation v. Ministry of Environment* (2013) 6 SCC 476

Tribal rights in India highlight the advantages and disadvantages of a revolutionary constitution. Aiming to safeguard autonomy, culture, and resource rights, the framework seems comprehensive and forward-thinking. Nevertheless, there are still discrepancies between what is acknowledged and what is really accomplished. This demonstrates how flimsy legal safeguards may be when they are not grounded in constitutionally required moral principles. According to the Indian experience, defending tribal rights necessitates both legal protections and a dedication to equality, decency, and participatory justice. Only by incorporating these principles into legislation and judicial reasoning can the objectives of the Constitution truly benefit indigenous people.

THE SOUTH AFRICAN STANCE

Many people consider the 1996 South African Constitution[19] to be among the most progressive in the world. It consciously distanced itself from apartheid's excesses and pledged to uphold a daring vision of equality, respect, and peacemaking. In this context, acknowledging tribal or traditional organizations is a contentious and complicated issue. In contrast to India, where the primary goal has been to prevent the absorption and displacement of tribal people, South Africa has had difficulty striking a balance between traditional authority and indigenous practices and a new constitution that prioritizes democracy, gender equality, and human rights. Although constitutional morality and supremacy govern customary law, the Constitution also protects it as a component of cultural rights, which leads to conflict. This continuous and occasionally difficult balance between tradition and modernity influences statutory legislation, court interpretations, and governing organizations.

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According to its constitution, South Africa places a high importance on cultural acknowledgment. The rights of linguistic, religious, and cultural groups to preserve and exercise their customs collectively are safeguarded under Section 31[20]. Everyone's right to engage in their preferred cultural life is ensured under Section 30[21]. As long as traditional leadership adheres to the Constitution, Section 211[22] acknowledges its position and function in accordance with customary law. By allowing national legislation to establish rules for customary law and traditional leadership, Section 212[23] integrates indigenous institutions into the larger

[19] Constitution of the Republic of South Africa 1996.
[20] Constitution of the Republic of South Africa 1996, s. 31.
[21] Constitution of the Republic of South Africa 1996, s. 30.
[22] Constitution of the Republic of South Africa 1996, s. 211.
[23] Constitution of the Republic of South Africa 1996, s. 212.

constitutional framework. When taken as a whole, these parts demonstrate a daring attempt to include indigenous rituals in the Constitution while upholding the values of equality, decency, and nondiscrimination. The Bill of Rights, particularly Sections 9[24] on equality and 10[25] on dignity, consistently underlines the need to assess customs in light of the constitution.

It has implemented the revolutionary meaning of the Constitution through a number of legislative frameworks that deal with traditional leadership, land rights, and cultural preservation. One of the most crucial is the Traditional Leadership and Government Framework Act of 2003 (hereinafter TLGFA)[26]. It sought to strike a balance between popular government and established authority. In order for traditional councils to uphold the Constitution's values of democracy and gender equality, the Act mandated that they include a minimum number of elected members, including women. It demonstrated that the legitimacy of traditional leaders in the post-apartheid state was contingent, even if it provided them with validity. Recognition of indigenous authority would be contingent upon its alignment with constitutional ideals. Because the TLGFA strengthened the boundaries of tribal power established during apartheid, its detractors claimed it undermined participatory democracy. Chiefs were frequently given additional authority, which harmed common community members.

The Communal Land Rights Act of 2004 (hereinafter CLRA)[27] and the Restitution of Land Rights Act of 1994 (hereinafter RLRA)[28] sought to remedy the past land loss that Black South Africans, particularly tribal communities, had to deal with. Following 1913, the RLRA made it possible for people and communities who had lost their land to pursue compensation, leading to a number of landmark settlements. The CLRA, however, was overturned by the Constitutional Court in Tongoane v. Minister of Agriculture and Land Affairs (2010)[29] because it impeded democratic participation and offered insufficient safeguards against the capricious authority of traditional authorities. The Court's view that community land governance must be in accordance with equality, dignity, and participatory rights in order to be deemed morally acceptable under the constitution was represented in this decision. Since then, legislators have continued land

[24] Constitution of the Republic of South Africa 1996, s. 9.
[25] Constitution of the Republic of South Africa 1996, s. 10.
[26] Traditional Leadership and Government Framework Act 2003
[27] Communal Land Rights Act 2004
[28] Restitution of Land Rights Act 1994
[29] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

reform through fragmented legislation, but striking a balance between customary authority and constitutional rights is still difficult.

Customary law itself has been called into question as the Constitutional Court has been required to strike a balance between tradition and constitutional rights on several occasions. According to the Court's ruling in Bhe v. Magistrate Khayelitsha (2004)[30], the traditional male primogeniture succession law was unconstitutional since it infringed upon the equality and dignity of women and children. Despite the recognition of customary law, the judgment stressed that it must be altered in accordance with constitutional principles and have a "living" nature that adapts to societal changes. By designating a woman as chief rather than adhering to a male-only succession system, the Court supported a traditional community's freedom to establish its own customs in Shilubana v. Nwamitwa (2008)[31]. Customary law is not fixed and can change in accordance with the Constitution, the Court said. These rulings demonstrate how morality under the Constitution works to prevent the loss of fundamental rights in the sake of tradition.

The judiciary handles matters pertaining to land and government in addition to family and succession law. According to customary law, the court acknowledged indigenous land rights in the 2003 case Alexkor Ltd. v. Richtersveld Community[32]. It was decided that both the use of natural resources and occupancy were covered by these rights. Because it affirmed that customary land rights are a component of the constitutional system and are not subservient to common law, this ruling was significant. The court did note that these rights must be consistent with constitutional norms, though. The decision upheld indigenous claims while emphasizing the necessity of striking a balance between traditional customs and the significance of the constitution.

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The policy of South Africa is different from the constitutional framework of India in that it explicitly acknowledges traditional leadership as a component of the democratic state. This acknowledgment highlights the significance of traditional authority in both culture and history. Nevertheless, it also brings up challenging topics like gender equality, accountability, and visibility. Traditional leaders' influence is attempted to be curtailed by laws like the Traditional and Khoi-San Leadership Act of 2019 (hereinafter TKSLA)[33]. These actions, according to critics, run the risk of imposing undemocratic institutions in the name of cultural acceptability. The

[30] *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC)
[31] *Shilubana v. Nwamitwa case is Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)
[32] *Alexkor Ltd. v. Richtersveld Community* 2003 (6) BCLR 583 (SCA)
[33] Traditional and Khoi-San Leadership Act 2019

Constitutional Court's activities are thus still essential in making sure that traditional power is used in a way that is consistent with constitutional principles rather than authoritarian or patriarchal customs.

Although South Africa has a progressive constitutional framework, the country's position demonstrates a continuous fight between change and acceptance. Indigenous customs are prioritized and their significance is emphasized in the Constitution. It also calls for these traditions to change in order to conform to democratic, egalitarian, and deferential ideals. This position presents opportunities as well as difficulties for indigenous populations. When customs conflict with constitutional rights, they must adapt, but they also acquire protection and validity for their traditions. One example of how this has created chances for constructive development in certain communities is the acknowledgment of women's leadership in Shilubana. Those who perceive government intervention in customary law as external meddling, on the other hand, feel alienated.

In the end, South Africa's tribal rights framework offers a unique example of constitutional pluralism, acknowledging indigenous customs but continuously negotiating them within the bounds of morality established by the constitution. In contrast to India, which has prioritized safeguards against exploitation and relocation, South Africa is focused on transforming traditional authority to conform to democratic and equitable principles. As the primary forum for this dialogue, the court makes sure that customary law develops into a dynamic system rather than a holdover from the past. In a contemporary constitutional democracy, the legislative framework, on the other hand, reflects the goals and constraints of institutionalizing indigenous power.

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Like India, South Africa takes a paradoxical stance. Although the constitution has a progressive vision, political competition causes inconsistent execution. The Constitution offers a comprehensive framework for cultural recognition. Power conflicts among communities, resistance from traditional leaders, and sluggish land reform, however, make it difficult to apply this approach in daily life. South Africa does emphasize how crucial constitutional morality is in directing this procedure. In a continuous conversation, it seeks to guarantee that tradition and modernity are viewed as complementary rather than antagonistic forces. Incorporating native traditions into a new constitutional framework that attempts to strike a balance between equality,

justice, and historical significance is both feasible and difficult. The acknowledgement of tribal rights in South Africa is indicative of this.

THE TWO AT THE CROSSROADS

The constitutional and legislative frameworks of South Africa and India demonstrate the disparate historical contexts and approaches taken by each country to recognize and protect the rights of tribal people. Both nations acknowledge the need to maintain indigenous customs, but the extent to which their legal systems incorporate customary laws into the larger framework of the constitution and grant authority to tribal organizations varies.

The Indian Constitution recognizes indigenous communities as Scheduled Tribes, and several laws safeguard their rights. Articles 15(4)[34] and 46 provide the state with the authority to design particular policies for these groups. The Fifth and Sixth Schedules specify how areas primarily populated by indigenous people are administered and regulated, and they grant exceptional autonomy in specific locations. Laws such as the PESA and FRA seek to empower tribal communities by acknowledging their rights to local governance and forest resources. However, there have been a number of difficulties in implementing these regulations, such as bureaucratic roadblocks, tribal groups' ignorance, and opposition from local officials.[35]

A fundamental component of South Africa's revolutionary constitution is the protection of tribal rights. As long as it complies with the Constitution, traditional leadership in accordance with customary law is recognized by the Republic of South Africa's 1996 Constitution. While Section 211 recognizes the value of traditional leadership, Section 212 grants national legislation the authority to provide a framework for it. The goal of the TLGFA was to align traditional authority with democratic rule. Nonetheless, the Act has come under fire for encouraging anti-democratic behaviors and failing to sufficiently empower communities.[36]

One major difference between the two nations is how they handle customary law. India acknowledges customs, although they frequently clash with the law, creating legal problems. Statutory laws have occasionally been upheld by the courts as superseding customary practices,

[34] Constitution of India 1950, art 15(4).

[35] Dr. Sakshi Pathak, 'Implementation of Indigenous and Tribal Law in India' (2025) 5 (6) IJLSI https://www.ijlsi.com/wp-content/uploads/Implementation-of-Indigenous-and-Tribal-Law-in-India.pdf accessed 20 September 2025

[36] Vijayashri Sripati, 'Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective' (2007) 16(1) Tulane Journal of International & Comparative Law https://journals.tulane.edu/jicl/article/view/3365 accessed 20 September 2025.

especially when they infringe basic rights. Contrarily, the South African Constitution expressly recognizes the value of customary law, provided that it conforms to constitutional standards. By applying constitutional principles to its interpretation, the Constitutional Court has been instrumental in ensuring that traditions that violate human rights are changed.[37]

Both nations struggle to uphold laws that safeguard indigenous rights. Tribal populations in India are frequently marginalized despite the existence of protective legislation due to social and political problems, lax enforcement, and a lack of knowledge. Although traditional leadership is recognized by the South African Constitution, it is difficult to put these rights into practice because of historical injustices, resource limitations, and tensions between traditional and democratic rule.[38]

In conclusion, the constitutional and legal frameworks of South Africa and India are designed to safeguard tribal rights, but they differ in their efficacy. Statutory and customary laws in India interact in intricate ways, which frequently result in disagreements and difficulties during implementation. Even though South Africa publicly acknowledges customary law, bringing traditional norms into line with constitutional principles has its own set of difficulties. The difficult balancing act between protecting fundamental human rights and maintaining indigenous customs is still being negotiated by both nations.

WHAT NEXT?

Important insights into the ways that constitutional ideals, legislative safeguards, and judicial interpretation interact to support or undermine tribal rights can be gained by contrasting South Africa with India. Strong enforcement and institutional competence are essential; constitutional design alone is insufficient, according to one important realization. The PESA and India's FRA establish strong legal foundations for community decision-making, local governance, and land and resource rights. Nonetheless, a lot of indigenous groups complain about obstacles in the process, delays, and opposition from state and forest officials. In addition to South Africa's constitutional recognition of customary law in Sections 211 and 212, the TLGFA and other legislation make it difficult to guarantee that community land rights and traditional leadership are applied in a way that is consistent with constitutional principles. The CLRA was declared illegal

[37] *Ibid*

[38] Shanaz and Naqeebullah Durani, 'Tribal Protection Laws: A Comparative Analysis of National and International Perspectives' (2023) 3(2) Trinity Law Review https://www.researchgate.net/publication/372215331_Tribal_Protection_Laws_A_Comparative_Analysis_of_National_and_International_Perspectives accessed 20 September 2025.

by the Constitutional Court in the 2010 case of Tongoane v. Minister of Agriculture and Land Affairs[39]. The court made clear that legislation that fails to adequately safeguard equality or establish limits on customary authority will be subject to judicial scrutiny.

Another significant lesson is the application of constitutional morality in the courts, particularly when relating the form and content of rights. Examples such as Samatha v. State of Andhra Pradesh (1997)[40] and Niyamgiri (Orissa Mining Corporation v. Ministry of Environment & Forests, 2013)[41] demonstrate how Indian courts have upheld tribal rights, environmental preservation, and participatory governance via constitutional morality. They have turned down development initiatives based solely on financial considerations. Court decisions such as Shilubana v. Nwamitwa (2008)[42] and Bhe v. Magistrate Khayelitsha (2004)[43] demonstrate the revolutionary impact of judicial review in South Africa. Traditional practices that go against the constitution's principles of equality and dignity, such as male primogeniture, are being challenged by this procedure. Research looks at South Africa's equality, Ubuntu, and human dignity to demonstrate how constitutional ideals are evolving from ideals to practical guidelines for interpretation.[44]

A third lesson emphasizes the tension that exists between upholding traditions and making sure that everyone is treated fairly and inclusively. Both countries struggle with traditional leadership and customary law, which are highly valued in their respective cultures. Certain traditions, particularly those about gender equality and individual freedom, conflict with constitutional principles. Though India's legal system has occasionally opposed altering customs, such as specific inheritance or succession rites, courts have started to embrace equality. The South African example, especially in Shilubana, demonstrates how courts can uphold constitutional norms to encourage inclusive leadership or change patriarchal practices, therefore fostering the evolution of customary law. In order to preserve legitimacy and prevent alienation, academics caution that this shift must be deliberate and led by communities rather than merely being enforced by court decisions.

[39] Tongoane v. Minister (n 29)
[40] Samatha v. State of Andhra Pradesh (n 17)
[41] Niyamgiri (n 18)
[42] Shilubana v. Nwamitwa (n 31)
[43] Bhe v. Magistrate Khayelitsha (n 30)
[44] CI Tshoose, 'The Role And Impact Of Constitutional Values Of Ubuntu, Equality, And Human Dignity In The Interpretation And Protection Of The Right To Have Access To Social Security In South Africa' (2023) 48(2) UFS https://journals.ufs.ac.za/index.php/jjs/article/view/7916 accessed Septemeber 20 2025

In conclusion, the comparative analysis demonstrates that both jurisdictions must embrace live constitutionalism. According to this method, we ought to interpret constitutional clauses in view of evolving social circumstances. Legislative and constitutional safeguards can become antiquated and divorced from the actual conditions of indigenous peoples in the absence of this flexibility. Legislative changes and the participatory approach taken during the constitution-making process in South Africa are examples of living constitutionalism. Constitutions that address past injustices, provide explicit definitions of property and land rights, and incorporate social and economic rights are more suited to sustain indigenous communities, as evidenced by India's developing legal system under Article 21.[45]

CONCLUSION

This research draws a striking comparison between India and South Africa. In constitutional democracies, upholding tribal rights necessitates a consistent application of constitutional morality. Along with constitutional recognition or legislative enactment, this also entails judicial interpretation, institutional responsibility, and participatory governance. Strong constitutions are important, but how tribal communities exercise these rights is what really counts. This covers cultural survival, self-governance, resource management, and land ownership. India and South Africa are two examples of this.

Some recommendations might improve the future legal and policy frameworks. First and foremost, laws should be amended to provide clarity and streamline the claims procedure. The implementation of the FRA and PESA in India should prioritize openness, prompt decision-making, Gram Sabha empowerment, and conflict resolution procedures that uphold both constitutional values and traditional authority. Laws about land and traditional leadership in South Africa ought to guarantee equitable participation, particularly for women, as well as accountability and safeguards against abuse of authority. Prosecutors or administrators might provide oversight to make sure traditional leaders' choices respect equality under the constitution and individual rights.

Second, the court ought to keep up its support for constitutional morality in both routine cases and important decisions. Living constitutionalism should be used by courts to interpret customary laws in a way that respects equality, dignity, and participatory justice. Male-only succession laws, for example, are presently banned in South Africa. Similar consideration should

[45] Vijayashri Sripati, Constitutionalism in India and South Africa (n 36)

be given to customary exclusions based on gender or other discriminatory grounds by Indian courts. According to legal academics, judicial activism is not excessive when it is grounded in constitutional ideas; rather, it is a crucial component of transformative constitutionalism.

Third, we must strengthen institutional and legislative accountability. Examples of local governing bodies are the traditional councils in South Africa and the Gram Sabhas in India. They ought to be given the tools, know-how, and legal power to make legally binding choices, particularly when it comes to the allocation of land, forests, and resources. Prior informed consent is required by law and practice for development initiatives that impact tribal lands. Traditional relationships and practices must be respected in compensation and restoration.

Lastly, it is beneficial to learn from other jurisdictions. Including traditional leadership and customary law explicitly in the constitution (Sections 211-212) and using judicial review to enforce constitutional morality in customary practices are two approaches that India may want to try. South Africa may gain from India's legal frameworks, such as the FRA and PESA, which provide procedural clarity and delineate certain rights and procedures. International constitutional theory has benefited from the impact of both nations' constitution-making and rights definitions, as emphasized by scholars such as Sripati.

In summary, the intersection between constitutional morality and custom is a site of creative potential rather than unresolvable conflict. When the moral compass of equality, dignity, and participation is aligned with constitutional texts, legislation, and jurisprudence, tribal rights can go from theoretical acknowledgment to significant fulfillment. Only by combining legislative clarity, judicial adherence to constitutional morality, and grassroots involvement can constitutionalism's revolutionary promises for South African and Indian indigenous peoples be realized.

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