

TRIBAL LAW, POLICY AND JUSTICE

EDITORS

V.K. Ahuja

Debasis Poddar

Thangzakhup Tombing



National Law University and
Judicial Academy, Assam
2023

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Centre for Tribal Law, Policy and Justice
National Law University and Judicial Academy,
Assam

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SANDEEP MEHTA
Judge



SUPREME COURT OF INDIA
NEW DELHI

FOREWORD

The Adivasi population has long stood as an integral facet within the ethnographic tapestry of the Indian subcontinent. This assertion finds ample substantiation in venerable literary works such as the Mahabharata, an esteemed epic poem chronicling the historical narrative of *Bharatvarsha*, as well as in other antiquarian texts like the *Vedas*, *Brahmanas*, and *Puranas*. Each of these texts makes reference to the *Adivasis* of the subcontinent, thereby underscoring the symbiotic relationship between the *Adivasis* and *non-Adivasis*, significantly contributing to the composite culture of the region.

To go by the latest census report, eight percent of India's population comprises the tribal communities. It is interesting to note that in recent times, public interest in tribal customary practices and knowledge systems is gaining ground in order that modern practices could be adapted with traditional wisdom in view of holistic social development for the time ahead.

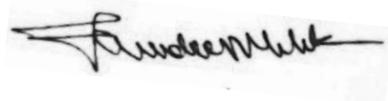
Notwithstanding the universal surge of liberalization-privatization-globalization, the connect with our civilizational roots ought not to be severed; traditional knowledge of the tribal communities, is inseparable from the wealth of knowledge that we have inherited from the yore and is an integral component of our shared heritage. The forthcoming book, titled "Tribal Law, Policy and Justice", edited by Prof. (Dr.) V. K. Ahuja, Prof. (Dr.) Debasis Poddar and Dr. Thangzakhup Tombing, published by National Law University and Judicial Academy, Assam, intends to facilitate a discursive inquiry to this end. All the three pillars, *viz law, policy and justice*- are critical qualifiers of good governance, whether in the context of modern or traditional societies. This book endeavours to explore these three pillars in the framework of tribal societies; further, enriched by cross-disciplinary inputs. The enduring appeal of the book, in my opinion, lies in the interface between legal perspectives and socio-anthropological insights brought forth by the authors from disparate academic backgrounds.

Last yet not least, I'm glad to witness this excellent effort getting incubated in North-East India; a *sui generis* tribal habitat. Despite its publication in Assam,

the book encompasses universal tribal concerns, pertinent to tribal communities posited elsewhere. The limits of temporality and territoriality are thereby transcended by the book.

It is with great delight that I contribute this foreword to the book, hoping that it will stimulate discussions and debates in the public domain regarding the exploration and preservation of indigenous practices, laws, and customs. Traditional wisdom can profoundly inform contemporary discourses on law, policy, and justice, infusing them with grounded insights. The repository of tribal law, policy, and justice represents a veritable treasure trove that could potentially enrich the canon of thoughts on good governance for modern civilizations globally. Thus, I extend my heartfelt appreciation to the authors for conceiving this idea and labouring toward its fruition.

I convey the best of my wishes for the success of the book!

A handwritten signature in black ink, appearing to read 'Sandeep Mehta', with a stylized flourish at the end.

(Sandeep Mehta)

December 11, 2023
New Delhi

PREFACE

This publication project was initiated as maiden book in the forthcoming series of a newly constituted inhouse research centre- named as Centre for Law, Tribal Policy and Justice- under the institutional aegis of National Law University and Judicial Academy, Assam; maiden institutional experiment of its kind in North-East India.

National Law University and Judicial Academy, Assam (NLUJA Assam) has been established by Government of Assam by way of enactment of the National Law School and Judicial Academy Assam Act, 2009 (Assam Act No. XXV of 2009). The word 'School' was replaced by the word 'University' by the National Law School and Judicial Academy, Assam (Amendment) Act, 2012. The Hon'ble Chief Justice of Gauhati High Court is the Chancellor of the University. NLUJA Assam promotes and makes available modern legal education and research facilities to students and scholars drawn from across the country, including the North East India, from different socio-economic, ethnic, religious and cultural backgrounds.

The Centre for Law, Tribal Policy and Justice (CLTPJ) has been a recent enterprise of the University with its statutory mandate to place emphasis upon the tribal and customary laws, of the North-East India in particular, under section 5(v) of the Act of 2009. Accordingly, the Centre is assigned to develop public awareness campaign and capacity-building programmes and publications on

contemporary tribal studies scholarship as a cross-disciplinary knowledge domain. This forthcoming volume is an ambitious venture for creation and dissemination of the relevant knowledge to public within one year of its establishment in 2022.

The title of this book deserves mention with historic reasoning behind. The tribal population in India is governed by their own respective customary laws with poles-apart legal reasoning since time immemorial; whatever suits to the soil and its folk. With implant of Anglo-Saxon jurisprudence in the South-Asia, followed by institutionalization of the common law tradition, tribal and customary laws went into oblivion and even outlawed as and whenever the same did not suit to the official laws in British India. The given foreign legacy continued after independence, followed by the waves of anti-establishment movements across the country. The Republic, however, initiated its policy response with political responsibility toward the *Adivasi Bharat* and, after seventy-five years of its independence, most of the issues of disaffection could be minimized through gradual percolation of the dividends to the grassroots of tribal population.

This goodwill apart, several unsettled questions of positivist law and public policy analysis remained unattended; something inimical to deliver social justice despite its constitutional commitments to this end. Here lies discursive connects among all three domains of the Centre and its book, *mutatis mutandis*, tribal law, policy and justice; mutually mutated to one another at critical crossroads *inter se*.

In this book, all the cross-disciplinary borderlines of independent yet interdependent social studies subjects were diluted as a matter of editorial choice. Therefore, law-policy-justice finds discursive space for all sundry domains with little linkage to the rest. Thus, besides typical black-letter-law contribution, readership ought to find contribution with little or no linkage to regular juridical studies. Also, at times, authors transcend collective territorial jurisdiction of law-policy-justice and grapple with an altogether newer ideation. Taken together, this book resembles a prism; thereby get the cluster of chapters dissected by readership to decipher ramblings with ramifications involved therein.

At the bottom, ideation lies in the contribution to the tribal studies scholarship by myriad means; something non-negotiable for chapters to get included. Keeping the focus on its broad ideation, several concerns across the board in mainstream tribal studies scholarship, and even beyond, contributed to bring in rainbow of the book; thereby reflect the classic ideation of unity in diversity between/ among differently-yet-similarly situated groupings of population in the South-Asian subcontinent.

All our editorial enterprises bloom into fruition if this book is well-taken by learned readership; followed by post-read feedback; inclusive constructive criticism, if any. Thus, a gradual gestation of public discussion, followed by debate, is intended by the editorial team toward public policy advocacy, followed by the pursuit of prudent policy choice by the democratic institutions in time ahead. The intended idea behind public debate is not dispute or conflict, but progressive development or caucus in time ahead.

The UN General Assembly, in one its resolutions (49/214 of 23 December 1994), decided three decades back that 'International Day of the World's Indigenous People' be observed every year on 9 August. Accordingly, the editorial team finds the ninth day of August 2023 as appropriate timeline to bring in this book to the public.

9 August 2023,
Guwahati.

Editors

ACKNOWLEDGEMENT

The editors extend sincere thanks to all learned contributors and reviewers for sparing precious hours from their otherwise occupied schedule; followed by all painstaking exercises endured toward compliance to editorial minutes to perfect this manuscript. Besides, editors place on records their appreciation for proactive administrative patronage provided by Dr. Nandarani Choudhury, the Registrar (I/C), NLUJA, Assam, for timebound publication of this book. Dr. Kankana Baishya and Dr. Jyotirekha Bhattacharyya, Assistant Librarians, extended logistic support as and whenever so requested. Mr. Satyajit Deb, Systems Operator, assisted the team with technical knowhow of professional format. Last yet not least, Ms. Deepannita Mazumder, student of NIFT, Shillong, volunteered to design cover page of this book.

DISCLAIMER

The authors carry whole and sole liability for statements written in their respective chapters. The Editors shall remain indemnified and be held not jointly and severally liable anyway.

INTRODUCTION

The credit for ideation of this edited book project is due to the first editor; sometime in December 2021. Afterwards, other editors were assigned to get the work initiated with immediate effect. By mid-February 2022, “Tribal Law, Policy and Justice” was taken as the title for this book- a choice by consensus in editorial team and the same was mentioned in our call for chapters afterwards accordingly. Early-March of 2022 onward, we initiated to solicit chapters from learned colleagues across the social studies discipline; also, even beyond.

We pledged for timely publication of this book with about one-and-half-year timeline while the same contains twenty chapters, authored by the contributors around India; including those with well-known merit to their credit in tribal studies scholarship since long back. The demography of our authors reminds us oft-quoted phrase “unity in diversity”; something speaks for the given inventory of who’s who in contents-pages. For our strong commitment to get this book published with punctuality, we could not afford to wait for more and thereby missed several veteran authors with stake in tribal studies scholarship; by courtesy, timeline due for publication. A solace to editors lies in follies of this mortal and morbid world; where human race is born and brought-up to date. The team is blessed with few chapters by surprise; received just before the closure of this project.

All these chapters exceeded an otherwise reasonable expectation from the team in terms of their diversity and variety of areas of concern; covered by themselves. Accordingly, a series of conventional and contemporary themes are covered, e.g., international jurisprudence on the indigenous issues, fourth-world approaches to international law, regional experience in the South-Asian subcontinent, major mass movements upon tribal issues in areas under the Fifth Schedule and the Sixth Schedule, conflict studies, policy analysis, regional autonomy, local self-governance, customary laws, personal laws, gender justice, matrilineal societal setting, natural rights, forest rights land rights and property rights, intellectual property rights in traditional knowledge, social justice, women education, domestic violence, cultural practice, witchcraft, witch hunt, food habits, language, livelihood pattern, to name few among major representative themes covered by authors in this book.

The plurality of these themes apart, also, these themes are polycentric in themselves, authors belong to diversified schools of thought vis-à-vis tribal studies scholarship. Besides, the authors from other subjects appurtenant to the social studies scholarship- juridical studies as one among them- offer sui generis glances from respective disciplinary context. Thus, readership will receive opportunity to get exposed to poles-apart perspectives in course of cross-disciplinary tribal studies discourse in India. For instance, two authors scribbled two separate chapters on language issues. Irrespective of thematic simile, respective authors applied dissimilar methods to grapple with language issues and challenges in tribal India. Besides, few avant-garde themes- like traditional food habits, matrilineal social setting, etc.- add academic value to the treasure-

trove of this book. Taken together, authors jointly and severally deserve appreciation from readership by means of contributions to contemporary tribal studies in India. A cross-disciplinary knowledge domain by default, tribal studies scholarship involves a series of otherwise diversified social studies disciplines; including juridical studies as one among them. Even technical law and public policy analysis apart, therefore, myriad authors with diversified academic background engage hermeneutics, linguistics, semiotics, cross-cultural studies, development studies, economic studies, ethnographic studies, environmental studies, historical studies, philosophical studies, political studies, anthropology, sociology, etc., to name few among them. Therefore, with *bona fide* intent to accommodate representative contributions from umpteen disciplines, editors undertook an inclusive approach and allowed functional plurality vis-à-vis citation style; with uniformity throughout the chapter as non-negotiable criterion for authorship to the book. Due to the absence of technical deterrence, authors from myriad disciplines contributed their ideas and opinions to complement and supplement tribal studies scholarship. Thus, accommodation of citation styles could add value to cross-disciplinary characteristics of this book; despite quite apparent technical differences. This editorial reasoning behind liberalization of citation style in larger academic interest of the tribal studies scholarship is left clarified to maintain transparency to the readership.

At bottom, editorial team intended that the dominance of discipline-specific technical citation mode with minute procedural nitty-gritty ought not to discourage the entry of substantive knowledge to this book project. Thus, despite being Law-School publication, majority of authors belong to other branches of social studies discipline. In a nutshell,

with optimal tribal presence within the editorial team, we preferred to get adhered to more inclusive editorial policy; thereby get the citation policy liberalized.

After the nomenclature of this book, due diligence was followed by editors to encourage contribution of chapters vis-à-vis tribal life-world in the North-East India; albeit, without compromise with quality of contribution. With a series of special drives, we could by and large achieve this object. Accordingly, we received chapters with foci upon state-specific and tribe-specific studies with special reference to North-East India, viz., Assam, Manipur, Meghalaya, Mizoram, Sikkim and Tripura; also, Bangladesh since- after 'Fourth World Approach to International Law'- tribes in proximity of borderline know little or no territorial jurisdiction; determined by so-called Westphalian nation-states in recent times. The editorial team received chapters on the given tribal lifeworld in areas under the Fifth Schedule to the Constitution. Last yet not least, there are chapters in macro context (for instance, the national tribal policy) also, in the international context (for instance, jurisprudence of the International Labour Organization of Geneva). Taken them together, all sundry colours of the tribal lifeworld in India contributed to plurality of *'the wonder that was India'*; to quote historian Basham.

The editors engaged conscious effort to bring in the authorship from tribes themselves and succeeded to receive chapters by authors with the tribal genealogy for lived experiences of tribal life-world on their own. Also, there are few others- without tribal genealogy yet known for contribution to tribal studies scholarship- who extended insights on the basis of case studies, or field studies, on the states or tribes they work with. Besides, the editorial team look forward to engage conversations

with learned readership, learn from the public wisdom out of post-read public feedback, even, constructive criticism, thereby develop discussion and debate toward generation of civilizational dialogues between and among diversified peoples for progressive development of the human society in time ahead.

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Chapter-1

TWO SPIRITS IN TRIBAL COMMUNITY: AN INDIAN EXPERIENCE OF DOUBLE PERSECUTION

*Yogesh Pratap Singh**

*Himanshu Muduli***

I. Introduction

There exists group of individuals with a distinct identity, occupation, way of living, and trait which they borrowed from their ancestors.¹ These groups of individuals were labelled as tribe as they remained isolated and rejected to be an entity of the nation state.² The term tribe was commonly used by the European rulers during the colonization process.³ India being a victim of the colonization process, the term tribe was used generally against Indians who criticized the colonial imperialism and wilfully abstained themselves to be a part of the colony.⁴ Amongst the tribes of

* Vice Chancellor, National Law University, Tripura, India.

** Advocate, High Court of Odisha.

¹ Robert J. Gregory, Tribes and Tribal: Origin, Use, and Future of the Concept, 1–5 (2003).

² *Id.*

³ Tribe | Cambridge Encyclopaedia of Anthropology, <https://www.anthroencyclopedia.com/entry/tribe> (last visited Dec 30, 2021).

⁴ K. S. Singh, Colonial Transformation of Tribal Society in Middle India, 13 Economic and Political Weekly 1221–1232 (1978).

India during the colonial period there is one tribe which is considered as the criminal tribe because of their distinctive sexual orientation and gender identity.⁵ This tribe consisted of the transgender persons or third gender persons and they were blamed for kidnapping and castration of children.⁶

From that very phase, the dignified life of transgender persons was tarnished with the black ink thrown by the British.⁷ The colonial era brought forward the nexus between the transgender community and tribal community. The social taboo and imputation which was thrown on transgender persons makes them criminal tribe and they were pushed into the darkness of marginalization and vulnerability. From that very moment, society consciously started ignoring the transgender and giving birth to a transgender is considered a curse because of the societal stigma attached to them. The transgender community remains the centre of abuse by society.⁸ The discrimination got reinforced and proliferated by the enactment of a draconian piece of legislation by the British Crown namely the Criminal Tribes Act of 1871.⁹ By virtue of this legislation they were stripped of their civil rights and were regarded as a tribe engaged in kidnapping and castration. They were kept under strict supervision of the

⁵ The long history of criminalising Hijras - Himal Southasian, <https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/> (last visited Dec 30, 2021).

⁶ How Britain tried to “erase” India’s third gender - BBC News, <https://www.bbc.com/news/world-asia-india-48442934> (last visited Dec 30, 2021).

⁷ *Id.*

⁸ Disgust: Prejudice, discrimination, and policy in India and the US, (Zoya Hasan et al. eds., first edition ed. 2018).

⁹ Aniruddha Dutta & Raina Roy, Decolonizing Transgender in India: Some Reflections, 1 TSQ: Transgender Studies Quarterly 320–337 (2014).

government with continuous surveillance. As a result of the enactment, they were treated as untouchables and were sidelined by society. Further, they became the subject matter of abuse, torture, inhuman behaviour, sexual assault, physical assault, and unequal treatment.¹⁰

Tribes within the territorial limit of India do not use any specific or universal term for members of tribal communities with distinctive gender identity and sexuality. However, the Native American and Alaskan Native indigenous individuals use a specific term “Two-Spirit” for individuals with both masculine and feminine traits.¹¹ Two-Spirit depicts a universal method of describing views of different indigenous tribe on gender identity and expression.¹² The term wraps within its folds individuals with varying degrees of gender identity and sexuality thereby acknowledging three gender roles namely Male, Female, Two-Spirit Male, Two-Spirit Female and transgendered.¹³ It’s a term which is commonly used by the Native Americans to “identify, reclaim, and revitalize very specific identities, histories, legacies, and power that goes far beyond just sexuality and gender identity for Indigenous peoples.”

In the absence any specific terms for indigenous individuals suffering from gender dysphoria or gender fluidity, the term Two-Spirit put forward a ray of hope for

¹⁰ Amisha R. Patel, India’s Hijras: The Case for Transgender Rights Note, 42 GEO. WASH. INT’L L. REV. 835–864 (2010).

¹¹ Walking in Two Worlds: Understanding the Two-Spirit & LGBT Community, <http://www.tribal-institute.org/2014/INCTwo-SpiritBooklet.pdf> (last visited Dec 21, 2021).

¹² Duane Brayboy, Two Spirits, One Heart, Five Genders, , India Country Today, <https://indiancountrytoday.com/archive/two-spirits-one-heart-five-genders> (last visited Jan 7, 2022).

¹³ *Id.*

recognizing their identity amongst the tribal societies. As far as India is concerned the term Two-Spirit can be used as an additional term for identifying and recognizing the rights of the LGBT members by the tribal communities. The recognition of the rights of LGBT members of tribal communities is essential and of utmost importance because of double marginalization faced by them due to their indigenous identity, gender identity and sexuality.

It's only after their rights being recognized as that of Two-Spirit individuals, the level of persecution and marginalization can be reduced substantially. It is very essential for India which provides habitat to more than 461 tribal communities to draw an inference from Native American Countries and create a conducive environment for indigenous individuals with varying degree of sexuality and gender identity.

India being a developing nation, the rights and interest of every community is required to be protected without any discrimination. But the rights of the members of LGBTQ+ community remain in a dicey situation. If we take into consideration the transgender persons alone, they are the forced migrant who were thrown out of their house and were not accepted by society because of their non-confirming gender identity. The National Crime Records Bureau reflects that there are 14 cases of murder and 36 missing cases of transgender in 2020.¹⁴ However, lots of offences against transgender persons remains unreported because of the fear of societal stigma, discrimination, and unfair treatment at the police station. The transgender persons often remain the centre of abuse in the education, employment, and health

¹⁴ National Crime Records Bureau Report-2020, <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf> (last visited Nov 5, 2021).

sector. The Census report of 2011 revealed that there are 4,87,803 transgenders in India out of which 33,293 belongs to the scheduled tribe.

The member of a scheduled tribe or tribal community remained vulnerable and marginalized from past and further being transgender within a tribal community increases the vulnerability. These double discrimination and persecution faced by the tribal transgender persons remained unexplored and unidentified. Unlike the term “Two-Spirit”¹⁵ used by Native Americans for tribal transgender persons, there is an absence of any specific connotation for tribal transgender persons in India.¹⁶ Even if the recent legislation i.e. Transgender Persons (Protection of Rights) Act, 2014 which was enacted in furtherance to the landmark decision of the Supreme Court in *National Legal Services Authority v. Union of India*¹⁷ fails to acknowledge the existence of tribal transgender persons and to provide them a separate protection mechanism for the dual persecution faced by them.

Also, the welfare schemes, policies and protection mechanism fail to provide protection to the tribal transgender persons by going beyond the realms of the separate welfare policies and schemes with regard tribal communities or transgender community. There is dearth of research and

¹⁵ “Two-Spirited” or “Two-Spirit” is usually used to indicate a person whose body simultaneously houses a masculine spirit and a feminine spirit. See also, Two-Spirit | Cultural Anthropology, <https://courses.lumenlearning.com/culturalanthropology/chapter/two-spirit/> (last visited Dec 21, 2021).

¹⁶ Walking in Two Worlds: Understanding the Two-Spirit & LGBT Community, <http://www.tribal-institute.org/2014/INCTwo-SpiritBooklet.pdf> (last visited Dec 21, 2021).

¹⁷ National Legal Services Authority v. Union of India, A.I.R. 2014 S.C. 1863 (India).

literature for identifying the discrimination and vulnerability of tribal transgender persons in India.

This paper borrows an inference from the Native American Two Spirit community about the recognition and protection of the rights of indigenous members of the LGBTQ+ community. It provides brief insights about tribes of India, and highlights the issues and discrimination of the tribal communities of North Eastern India because of their indigenous and gender identity. The nexus between the Two-Spirit community and the tribal community of India has been drawn in the paper to create a protective net for transgender members of tribal community. Lastly, the paper examines the Transgender Persons (Protection of Rights) Act, 2019 and suggests various changes as per the Native American tribal resolutions and codes for Two-Spirit and LGBTQ justice.

II. Two Spirit Community

The term Two-Spirit has its origin (1990) from the Ojibwe term “*niizhmanidoowag*” for describing third gender persons from indigenous cultures in North America.¹⁸ Individuals falling within the definition of Two-Spirit encapsulates indigenous individuals falling beyond the binary of gender with distinct gender identity and sexual orientation.¹⁹ Most of the indigenous culture considers Two-Spirit individuals as two identities captured inside single living body.²⁰ Two-Spirit is a conglomerate term which reflects both

¹⁸ Margaret Robinson, Two-Spirit Identity in a Time of Gender Fluidity, 67 *Null* 1675–1690 (2020).

¹⁹ Margaret Robinson, Two-Spirit and Bisexual People: Different Umbrella, Same Rain, 17 *JOURNAL OF BISEXUALITY* 7–29 (2017).

²⁰ What Is the Two Spirit Community? Very well Mind, <https://www.verywellmind.com/what-is-the-two-spirit-community-5089204> (last visited Jan 7, 2022).

masculinity and femininity amongst the members of indigenous community and it unifies its members across the indigenous nations.²¹ Sabine in her book “Men as Women, Women as Men: Changing Gender in Native American Cultures” discussed the term Two-Spirit as the “combination of masculinity and femininity which was attributed to males in a feminine role and females in a masculine role.”²²

As per Native Americans the term Two-Spirit engulfs within itself some people who born with two spirits of both man and woman. Native Indians consider the presence of two spirit within a single living body which makes that individual of the tribal community truly perfect and is a gift of the creator.²³ Also, they are considered as individuals with high intellect, artistic skills and exceptional capacity for compassion.²⁴ Activist Harlen Pruden draws the attention of LGBT community by tracing the healing process from discrimination within the traditional notion of Two-Spirit.²⁵ In one of his interviews he stated that “Gender dictates your role within the society. Women gathered, men hunted, and us, as Two-Spirit people, we did a unique thing that both the straight woman and the straight man could not do.”²⁶ Two-Spirit people were kept at a highest pedestal in past where

²¹ Robinson, *supra* note 19.

²² Two Spirit: The Story of a Movement Unfolds, KOSMOS JOURNAL, <https://www.kosmosjournal.org/news/two-spirit-the-story-of-a-movement-unfolds/> (last visited Jan 7, 2022).

²³ Brayboy, *supra* note 12.

²⁴ *Id.*

²⁵ The Early Edition · CBC News ·, LGBT First Nations people find healing in two-spirit traditions | CBC News, CBC (2015), <https://www.cbc.ca/news/canada/british-columbia/harlan-pruden-finds-healing-for-lgbt-first-nations-in-tradition-1.2894254> (last visited Jan 7, 2022).

²⁶ *Id.*

their rights were recognized in complete sense and they were vested with several duties. However, the traditional value of Two-Spirit people was somewhat diluted during the colonization process. Now, it gained momentum during the contemporary times with a prime objective of creating safe and supportive environment for Two-Spirit people.²⁷

Rather than consideration of individual physiology, indigenous members of Native American community focused on the spirit of the individual to ascertain their gender status.²⁸ The prime purpose behind this was not to force everyone into a single box rather than to proliferate diversity in sexual and gender identities in true sense.²⁹ Another reason for which Native Americans recognize diversity in gender identities and sexuality is the duality of work the Two- spirit individuals perform.³⁰ The term Two-Spirit has its presence and relevance in indigenous communities for countless generations. But, for several generations they kept their identity hidden to avoid discrimination and persecution.³¹ It's only after 1990 their presence got highlighted and rights got protected through various protective mechanisms.

²⁷ Brayboy, *supra* note 12.

²⁸ Samantha Vincenty, Two Spirit People Are Reclaiming a Lost Aspect of Indigenous Society, *OPRAH DAILY* (2021), <https://www.oprahdaily.com/life/a36744168/two-spirit-meaning/> (last visited Jan 7, 2022).

²⁹ Walter L. Williams, The “two-spirit” people of indigenous North Americans, *THE GUARDIAN*, October 11, 2010, <https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america> (last visited Jan 7, 2022).

³⁰ *Id.*

³¹ Tony Enos, 8 Things You Should Know About Two Spirit People, *INDIAN COUNTRY TODAY*, <https://indiancountrytoday.com/archive/8-misconceptions-things-know-two-spirit-people> (last visited Jan 7, 2022).

They were considered as an integral part of the tribal social strata and were vested with significant roles which evolved with the passage of time.³² The term is restricted to members of indigenous tribe (especially Native American or First Nations) who are gender queer, gender fluid and shows gender non-confirming behaviour.³³

Unlike Native American indigenous community, the tribal community of India did not provide any separate identity to the tribal individuals with gender fluidity. In India although the gender non-confirming members of the tribal communities face double persecution and marginalization because of their indigenous status and gender identity, they are kept outside the realms of separate recognition and protection mechanism. The LGBTQ+ members of the tribal communities of India are not covered under a universal term like Two-Spirit as a result of which the double persecution and marginalization continues till date.

III. Tribal Community: Indian Scenario

The term tribe is derived from the Latin term “*tribus*” which means “a group of persons forming and claiming descent from a common ancestor”.³⁴ These group of individuals are members of a community which strives to protect and preserve language, culture, traditional knowledge etc. which they derived from their ancestor. The word tribe was used in a general parlance for Indians by the British during the colonial period.³⁵ Subsequently, after Independence, certain group of persons with distinctive

³² *Id.*

³³ *Id.*

³⁴ Gregory, *supra* note 1.

³⁵ Virginius Xaxa, Transformation of Tribes in India: Terms of Discourse, 34 ECONOMIC AND POLITICAL WEEKLY 1519–1524 (1999).

socio-cultural identity were identified as tribe by some other members of the same community.³⁶ India being a nation with cultural diversity provides shelter to 461 tribal communities.³⁷ These tribal communities have their presence in different geographical locations of India which are categorized into three zones namely North-eastern, Central, and Southern Zone.³⁸

The Census Report of 2011 revealed the schedule tribe population of India as 1045.46 lakhs which constitutes 8.6 of the total population of India.³⁹ Despite being a numerically minority group, the tribal communities represent the socio-cultural diversity of the nation in a true sense.⁴⁰ They are known for their distinctive language, traditions, customs, culture and most importantly the traditional knowledge. As per their distinctive identity and characteristics they are identified as vanyajati, Adivasi, janjati etc.⁴¹ The members of tribal communities have also faced hardship, discrimination, verbal and physical abuse like the members of other communities during the colonial period.⁴² They were excluded from education, health, food and nutrition, employment and

³⁶ *Id.*

³⁷ Tribal People in India – Tribes India, <https://www.tribesindia.com/tribal-people-in-india/> (last visited Nov 12, 2021).

³⁸ *Id.*

³⁹ ST Population in India - Ministry of Tribal Affairs, <https://tribal.nic.in/ST/Statistics8518.pdf> (last visited Nov 12, 2021).

⁴⁰ Priyanka Nial, Analytical Study of the Impact of Globalisation on Tribals of India: A case study of Odisha with Special Reference to Kalahandi, Bolangir and Koraput (KBK), VOL. NO. 11 AGUIJPSR (2017).

⁴¹ *Id.*

⁴² Xaxa, *supra* note 35.

social security measures.⁴³ However, immediately after the independence they were further reclassified as the Schedule Tribes by virtue of Article 342 of the Constitution of India. The government strives towards two major aspects namely development and protection of tribal communities. However, till date the protective measures crafted for the tribal communities have not been effectively enforced by the government. As a result of which the tribal communities still hold marginalized strata of the society.

The members of the tribal communities remain vulnerable to the discrimination, exploitation and abuse. The government welfare schemes and policies have become inefficient as a result of which it blatantly failed in its purpose for which it was framed. Moreover, the absence of proper implementation mechanism adds to the ineffectiveness of the welfare schemes and policies framed for upliftment of members of tribal communities. To trace the hurdles lying in the path of implementation of tribal community's welfare measures and the rationale behind ineffectiveness of the welfare schemes and policy, the Prime Minister's Office constituted a High-Level Committee in August 2013.⁴⁴

The committee for the purpose of analysis have taken into consideration problems faced by the tribal communities in five major areas: (1) livelihood and employment (2) education (3) health (4) involuntary displacement and

⁴³ Nial, supra note 40.

⁴⁴ Report of the High-level Committee on Socio-Economic, Health and Educational Status of the tribals of India,(2014)
<https://ruralindiaonline.org/en/library/resource/report-of-the-high-level-committee-on-socio-economic-health-and-educational-status-of-the-tribals-of-india/> (last visited Nov 12, 2021).

migration and (5) legal and constitutional matters.⁴⁵ The report conclusively stated that the values and culture of the tribal communities are disregarded, also they are subjected to social deprivation. Further, one of the essential things which the report highlighted is that very often the laws which was designed for protection of rights of tribal communities are violated.⁴⁶

Individual showing traits of gender fluidity and non-conformity with binaries of gender were not accepted by the tribal communities of India. The members of tribal communities because of their indigenous status and closeness towards customs, tradition, and culture, they are completely against the persons with different gender dysphoric traits. Although there is absence of any data with regard to discrimination faced by the transgender persons being a member of tribal community, still the transgender persons and members of tribal community shares vulnerability and the vulnerability get multiplied when an individual is a tribal transgender person. A study on transgenderism in India revealed that most of the members of transgender community come under *Schedule Caste* and *Schedule Tribe*.⁴⁷

Members of tribal community and transgender community share an overlapping area of vulnerability and marginalization. This vulnerability of tribal transgender persons towards the every kinds of discrimination was rightly highlighted in a movie “*Udalazham*”.⁴⁸ The movie is premised

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Neethu Naik, Transgenderism in India: Insights from current census 4.

⁴⁸ K. Shaji, ‘Udalazham’: Exploring the life and struggles of a tribal transgender, THE HINDU, September 25, 2018,

upon the true story of a tribal transgender person who died before seven months of release of the movie.⁴⁹ The constant battle of a transgender person against the humiliation, torture, abuse and inhuman behaviour by the society was highlighted in the movie.⁵⁰ “*Udalazham*” rightly pointed out the discrimination and hardship faced by a tribal transgender person. And the persecution and discrimination get doubled for tribal transgender persons because of their conflicting gender identity and indigenous status. Being, a transgender and member of tribal community, transgender persons face double marginalization, as a result which they indulged themselves in odd jobs like sex work or prostitution and begging for their survival.

IV. Double Persecution of Tribal Transgender: North East Experience

North East India which consists of seven states namely Arunachal Pradesh, Nagaland, Tripura, Manipur, Mizoram, Meghalaya and Assam is considered as the hub of cultures, customs and faiths of various tribes.⁵¹ It provides shelter to more than 166 tribal communities of distinct cultures, traditions, faiths and customs.⁵² As per 2011 census, the majority of 8.6 per cent of the total population of India resides

<https://www.thehindu.com/entertainment/movies/udalazham-exploring-the-life-and-struggles-of-a-tribal-transgender/article25041067.ece> (last visited Dec 25, 2021).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ About North – East India: An Introduction | IGNCA, <https://ignca.gov.in/divisionss/janapada-sampada/northeastern-regional-centre/about-north-east-india-an-introduction/> (last visited Dec 9, 2021).

⁵² *Id.*

in North East India.⁵³ Some prominent tribal communities of North East India are “Garo, Khasi, Adi, Nyishi, Angami, Sumi, Bhutia, Rengma, Bodo and Deori.”⁵⁴ North East India provides conducive shelter to the tribal communities where they practice customs and traditions, and they tend to preserve the same.

Like any other state of India the transgender persons residing in North East India are also facing humiliation, discrimination and unequal treatment because of their gender identity and sexual orientation.⁵⁵ Even after enactment of laws and policies the discrimination and exclusion remained unattended.⁵⁶ They are being deprived and discriminated by the members of the society including the tribal communities as a result of which they actively involves themselves in the practice of begging and prostitution.⁵⁷ The Census Report of 2011, act as a stepping stone in including transgender persons as a separate category but failed to demarcate transgender persons belonging to tribal community. And in absence of any demarcation, the issues faced b transgender persons being a member of a tribal community remain unexplored.

The tribal communities of North East India are very much particular about their cultures, traditions, and

⁵³ Statistics8518.pdf, supra note 39.

⁵⁴ India-Northeast Admin, 10 Major Tribes of Northeast India – My CMS, <http://india-northeast.com/northeast/different-tribes-of-northeast-india/> (last visited Dec 19, 2021).

⁵⁵ Standing on a precipice: A peep into the plight of Northeast India transgender community, , EASTMOJO (2021), <http://www.eastmojo.com/news/2021/01/24/standing-on-a-precipice-a-peep-into-the-plight-of-northeast-indias-transgender-community/> (last visited Dec 20, 2021).

⁵⁶ *Id.*

⁵⁷ *Id.*

customary practices and they remain imbibed with the same as a result of which transgenderism is somewhat not acceptable by the tribal communities. Transgender persons because of their sexual orientation and gender identity continuously face socio-economic and legal exclusion.⁵⁸ The exclusion gets proliferated when tribal transgender individuals face double marginalization by virtue of their gender identity, sexual orientation, ethnicity, and indigenous status. A published interview with Santa Khurai, a representative of the transgender community of Manipur revealed the exclusion faced by transgender and queer people being a member of an indigenous community.⁵⁹ Although, there is legitimacy of their existence in the ancient texts but presently that has been overshadowed by the process of modernization. One of the important facts that Santa Khurai revealed that they are being treated as a specimen by the academicians for the purpose of their research.⁶⁰

The members of queer communities are being continuously excluded and side lined from education, health, and work by the social organizations and non-state actors of Manipur thereby derogating their existence and quality of life.⁶¹ Another transmen Kiran who belongs to Adivasi Community highlighted the difficulties faced by a transgender persons and the proliferation of those difficulties

⁵⁸ Understanding Gender Spectrum: Indian Experience, 1 EJMSS (2020), <https://ejmss.tiu.edu.iq/index.php/volume-1-issue-1-article-3/> (last visited Jul 16, 2021).

⁵⁹ Rescuing traditional queerness: An interview with Santa Khurai | Heinrich Böll Stiftung | India Office, HEINRICH-BÖLL-STIFTUNG, <https://in.boell.org/en/2020/08/31/rescuing-traditional-queerness-interview-santa-khurai> (last visited Dec 10, 2021).

⁶⁰ *Id.*

⁶¹ *Id.*

being a member of an indigenous tribe.⁶² She highlighted that because of their gender identity they have to leave home and do begging and sex work for their survival.⁶³ Further, he highlighted that she faced difficulties in renting house and getting job because of the social stigma annexed with her gender identity.⁶⁴ There are many other tribal transgender persons like Santa Khurai and Kiran whose stories remain hidden in the darkness of discrimination, inequality, transphobic violence and societal stigma.

Unlike the Two-Spirit community of Native America there is absence of any protective net for the tribal transgender persons and other tribal members of LGBTQ+ community for securing and recognizing their rights. There is absence of any universal term like Two-Spirit for identifying the gender fluid members of indigenous or tribal communities in India. Till today gender fluid behaviour is not being accepted by the members of tribal societies. The members of tribal communities of India in contrast to Two-Spirit individual do not open heartedly accept gender queer, gender fluid and non-conformity individuals. LGBTQ+ members of tribal or indigenous communities of India are not protected from persecution and discrimination like that of Native American Countries. However, to secure the rights of the transgender persons in general and to give them an identity the Supreme Court gave the landmark decision of *National Legal Services Authority v. Union of India* on 15th April 2014. However, the whole judgement was made

⁶² Pushpa Achanta December 11 & 2013, Trans Indians are making it easier to be themselves — despite the Supreme Court, WAGING NONVIOLENCE (2013), <https://wagingnonviolence.org/2013/12/trans-indians-making-easier/> (last visited Dec 10, 2021).

⁶³ *Id.*

⁶⁴ *Id.*

redundant by the virtue of an ineffective and toothless legislation namely the Transgender Persons (Protection of Rights) Act, 2019.

V. Trans Legislation and Rights of Tribal Transgender Persons

The Transgender Persons (Protection of Rights) Act, 2019, was introduced in Parliament in response to past crimes and prejudice against the transgender population. The legislation was devised to bring a gender parity between the transgender community and the binary of gender i.e., male and female. The Act is premised upon the landmark judgment given by the Supreme Court i.e., *National Legal Services Authority of India v. Union of India*, which specifically highlighted that “*right of self-identification or self-determination of gender identity is an integral part of the right to life guaranteed under Article 21 of the Constitution of India*”. The equality which the legislation wanted to achieve remains within the black letters of the legislation without any practical implication of the same. The community is still struggling to get the impact of equality in true spirit. Before, the Act got passed it was severely criticized by different jurists, trans-activists and members of transgender community as it was devoid of the inputs and suggestions of transgender persons.⁶⁵

The extent of criticism of this particular Bill was so high that, the day on which it was passed in Lok Sabha was called “Gender Justice Murder Day”.⁶⁶ The Trans activists

⁶⁵ Amid Protests, Lok Sabha Passes Transgender Persons Bill, , THE WIRE , <https://thewire.in/law/amid-protests-lok-sabha-passes-transgender-persons-bill> (last visited Jun 21, 2021).

⁶⁶ “Murder of gender justice” — activists urge President Kovind not to sign transgender bill, , <https://theprint.in/india/murder-of->

majorly criticized the Bill on several grounds which includes the issuance of gender identity certificate, punishment for offenses against a transgender, compulsory residence, reservation in employment and education, and many more.⁶⁷ Despite several protest and criticism the Transgender Persons (Protection of Rights) Act, 2019 was passed by the Legislature.

The Transgender Persons (Protection of Rights) Act, 2019 as well as the Transgender Persons (Protection of Rights) Rules, 2020 was passed in a hasty manner without taking into consideration the interest of its intended beneficiary.⁶⁸ The Act suffers from various defects in terms of recognition of gender identity of transgender persons, implementation of anti-discriminatory measures in the employment, education and health sector, punishment for offences committed against transgender persons, provisions for reservations and many more. Although the Act intended to prohibit discrimination against transgender persons, it failed an implementation mechanism of its anti-discriminatory provisions in employment, health, education, and other sectors. Though, the notion of “right to self-recognized gender identity” considered as the soul of the Trans Legislation but the same has been diluted by giving the

gender-justice-activists-urge-president-kovind-not-to-sign-transgender-bill/327360/ (last visited Jun 21, 2021).

⁶⁷ Chaitanya Mallapur, Why New Bill Meant To Benefit Transgender People Is Termed Regressive (2019), <https://www.indiaspend.com/why-new-bill-meant-to-benefit-transgender-people-is-termed-regressive/> (last visited Jun 21, 2021).

⁶⁸ Vijayta Lalwani, What next for transgender people, as India’s new law is denounced “murder of gender justice”?, QUARTZ , <https://qz.com/india/1756897/indias-transgender-rights-bill-disappoints-the-lgbtq-community/> (last visited Dec 26, 2021).

power to a third person for recognizing the gender identity of a transgender persons and issuing certificate to them.⁶⁹

Further, the legislation mandated sex-reassignment surgery for those transgender persons who wanted to be identified as male or female.⁷⁰ The Trans Act emphasized on prohibition of discrimination in employment, education, and health sector, however these provisions are devoid of any implementation mechanism and appears to be toothless provisions.⁷¹ Adequate representation of the members of the transgender community is another essential facet of the transgender person's rights regime. However, the National Council of Transgender Persons consist of only 5 representatives from the transgender community.⁷² This shows an inadequate representation of the intended beneficiaries of the legislation. The transgender persons even though they hold marginalized strata of the society, are excluded from the benefit of reservation and the Act nowhere mentions providing reservation for the transgender persons.

As per a 2017 study by Kerala Development Society on Human Rights of Transgender People as Third Gender, "52% transgender people have been harassed by police, 70.3 % transgender people lack the confidence to approach the police station to file a complaint, and 96 % transgender people have failed to raise complaint because of their gender identity."⁷³

⁶⁹ Transgender Person (Protection of Rights) Act, Section 5 & 6 (2019).

⁷⁰ Transgender Person (Protection of Rights) Act, Section 7 (2019).

⁷¹ Transgender Person (Protection of Rights) Act, Section 9 to 11, 13 & 15 (2019).

⁷² *Id.*

⁷³ Study on Human Rights of Transgender as a Third Gender, https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf (last visited Feb 17, 2021).

However, the punishment prescribed under section 18 of the Act is maximum 2 years of imprisonment for any offences committed against transgender persons despite of its grievousness and severity.⁷⁴ For instance, the Act prescribes imprisonment which extends to 2 years imprisonment for sexual abuse of a transgender person, however, under the Indian Penal Code, 1860⁷⁵ the punishment prescribed for the same offense against a woman is minimum imprisonment of 3 years and maximum is life imprisonment. The incongruity in penalty based on gender identification infringes transgender people's right to equality granted by Article 14 of the Indian Constitution. Therefore, the Act which was passed for securing the rights of the transgender persons makes them susceptible to discrimination.

The rights of the transgender person being a member of the tribal community were not considered separately in any laws including the Trans Act of 2019. The laws are silent about the sub-categorization of transgender persons on the basis of their caste or tribe. Despite of double persecution and plethora of discrimination the tribal transgender persons have not got their rights separately identified and recognized in the Transgender Persons (Protection of Rights) Act, 2019. Being the victim of dual marginalization and high vulnerability, the tribal transgender person still wait for an efficient protective mechanism for protection of their rights in a full-fledged manner. They still remain far away from the welfare policies of the government because of their hidden identity as a tribal transgender person. And further there is absence of any social mapping so as to trace the tribal transgender persons in India, especially in North East India.

⁷⁴ Transgender Person (Protection of Rights) Act, Section 18 (2019).

⁷⁵ The Indian Penal Code, Section 375 (1860).

VI. Tribal Equity Toolkit: Protective Net for Two-Spirit Individuals

The exclusionary forces have degraded the life of the tribal transgender persons by isolating them from cis-gender persons. Because of narrow and orthodox mindset, the members of tribal communities restrain themselves from accepting individuals suffering from gender dysphoria. The members of the transgender community being victims of gender dysphoria lives secluded and harsh life because of their gender identity and sexual orientation. They are considered as forced marginalized who are driven out of their family because of their non-confirming gender identity with other members of the society.

The exclusionary practice and the persecution faced by the transgender persons gets proliferated for the transgender person being a member of the tribal or indigenous community. The Native American countries after taking into consideration the vulnerability of Two-Spirit or LGBT members of tribal communities have devised the toolkit.⁷⁶ It purports towards protecting the most vulnerable individuals by bringing necessary development in the existing tribal laws.⁷⁷ Through the Toolkit, smaller changes are being made in the existing policy and schemes to strengthen its protective mechanism for securing the rights of Two-Spirits individuals.⁷⁸

⁷⁶ Tribal Equity Toolkit 2.0: Tribal Resolutions and Codes to Support Two Spirit & LGBT Justice in Indian Country | National Institute of Corrections, <https://nicic.gov/tribal-equity-toolkit-20-tribal-resolutions-and-codes-support-two-spirit-lgbt-justice-indian-country> (last visited Jan 8, 2022).

⁷⁷ *Id.*

⁷⁸ *Id.*

The basic framework of the Toolkit is premised on the basic legal information about the Two-Spirit communities and discrimination faced by them.⁷⁹ The protective mechanism is well structured through various categories namely Family, Employment, Education, Health Care and Hate Crimes.⁸⁰ Each categories forms chapters of the Toolkit and is further broken into various sub-categories. The Toolkit identifies the potential areas of discrimination of Two-Spirit individuals in the existing tribal and LGBT laws.⁸¹ The existing legislation gets reinforced and supplemented by the Toolkit thereby strengthening the protective framework and recognizing the rights of Two-Spirit or LGBT individuals to the utmost extent.⁸² The issues of Two-Spirit or LGBT members which remains untouched by the tribal governments are encapsulated within the Toolkit. In nutshell the Toolkit tunes the existing tribal and LGBT laws as per the changing needs of the Two-Spirit or LGBT communities.

The recent Toolkit i.e. *Tribal Equity Toolkit 3.0: Tribal Resolutions and Codes to Support Two Spirit & LGBTQ Justice in Indian Country* provides seven chapters of distinctive importance namely Non-Discriminating Protections, Education, Health Care, Family, Jury Service, Law Enforcement and Corrections, and Identity Documents and

⁷⁹ Gale Courey Toensing, Two Spirit/LGBT Rights Toolkit for Tribal Governments Introduced, INDIAN COUNTRY TODAY , <https://indiancountrytoday.com/archive/two-spiritlgbt-rights-toolkit-for-tribal-governments-introduced> (last visited Jan 8, 2022).

⁸⁰ *Id.*

⁸¹ Tribal Equity Toolkit 2.0: Tribal Resolutions and Codes to Support Two Spirit & LGBTQ Justice in Indian Country | National Institute of Corrections, *supra* note 76.

⁸² Toensing, *supra* note 79.

Name Changes.⁸³ Toolkit 3.0 suggests sample of various laws, ordinances and policies so as to bring changes in the existing laws and make it Two-Spirit or LGBT conducive. It provides for non-discrimination, educational equality, non-discrimination in health, elder care facilities, end-of-life equality, marriage equality, child adoption equality, child welfare and juvenile justice etc.⁸⁴ It also deals with various advanced and untouched aspects such as addressing bullying and harassment in the educational institutions, maintaining equality in law enforcement and corrections, and providing for identity documents.⁸⁵ The Toolkit 3.0 is one of its kind as it tends to cover everything within its fold which is essential for upliftment of Two-Spirit and LGBT individuals.

The initiative taken by the Native American Countries creates an example for India for recognizing and securing the rights of Tribal Transgender persons as well as other Tribal LGBT members. In Contrast to the Tribal Equity Toolkit 3.0, the Indian laws are devoid of any provisions which specifically deal with the gender fluid members of tribal communities. Although, the rights of transgender persons in general are somewhat recognized within the Transgender Persons (Protections of Rights) Act, 2019, but the same is being severely criticized for its inefficient provisions. Unlike the Native American countries, the Trans protective legislation, the tribal welfare legislations and schemes of India also fails to extend its protective mechanism for the tribal transgender persons. There is absence of any common legislations and schemes which protects and recognizes the

⁸³ Tribal Equity Toolkit 3.0: Tribal Resolutions and Codes to Support Two Spirit & LGBT Justice in Indian Country, <https://www.thetaskforce.org/wp-content/uploads/2014/09/TET3.0.pdf> (last visited Jan 8, 2022).

⁸⁴ *Id.*

⁸⁵ *Id.*

rights of both the communities in a conglomerate manner. The tribal transgender person stands at a juncture where two different marginalized communities meet and shares vulnerability. The lacunas in existing laws and absence of common legislations makes the tribal transgender susceptible to long term pattern of double discrimination and persecution.

VII. Conclusion

Discriminations and persecutions are being commonly faced by the members of tribal communities across the globe. The persecution gets multiplied when the members of the tribal community is a gender queer or gender fluid individuals. They most often face double persecution and marginalization because of their gender identity and indigenous status. The Native American countries tend to protect the tribal LGBT members by annexing an identity to them which is known as Two-Spirit. The Two-Spirit identity provides a protective umbrella to them from every kind of persecutions and discriminations. Unlike the Native American Countries in India the scenario is completely opposite as there is neither any uniform term for tribal LGBT members nor their rights is being recognized and protected. Although, the meaning of the term Two-Spirit remains same as that of Native American Countries, but it fails to recognize the rights of LGBT members of tribal communities. The exclusionary forces in India have degraded the life of the tribal transgender persons by isolating them from cis-gender persons. Because of narrow and orthodox mindset, the members of tribal communities become the victims of gender dysphoria and lives secluded and harsh life.

The never-ending pattern of discrimination has not yet been cured because of the inherent lacunas and discriminatory provisions in the existing Trans legislations,

and other ancillary schemes and policies. Unlike the Two-Spirit communities of Native America, in India neither there exists any law nor any resolutions like the Tribal Equity Toolkit for protecting the LGBT members of tribal communities. Despite of the double discrimination and persecution faced by them, the government fails to engulf them within the realms of a distinctive identity like Two-Spirit. Although they are similar to that of Two-Spirit individuals of Native America, their rights and identity are not yet been recognized in a true sense in India. As a result of which even today they are facing double persecution and discriminations. Therefore, it is of utmost importance to bring the LGBT members of tribal communities within the realms of a universal term like Two-Spirit to recognize their identity and provide a protective net like Tribal Equity Toolkit to protect them from discrimination and persecution.

VIII. What to do?

The democratic Constitution of our country is under constant pressure to expand its horizon in order to assimilate all forms of diversity, which our great land is willing to offer, but the moment any diversity is denied of its rightful existence, it becomes a moment of shame, not only for the great Constitution of India but rather for all the institutions of India; which are established for the sole purpose of bringing in a consonance between the people and their documented will. The high ideals of equality and liberty are not ornaments in a shop meant for being gazed at through the window but are rather communitarian goods; made for society at large. Equality does not only imply the recognition of the dignity of the Individual or the community, but it rather inculcates the principles of equality of status and equal opportunity, as well as social, economic and political justice.

The principles of transformative Constitutionalism are dedicated to this purpose.

If deconstructed with precision, the horizon of transformative Constitutionalism revolves around the question of conviction. As to how much conviction does an institution have in bringing about a reformation in the present society; as to how far is the institution willing to go for questioning its own beliefs and to move beyond that to recognize the rights of communities who have suffered humiliation under the garb of intolerance either due to their sexual orientation, or religious beliefs. The paper makes following recommendations:

1. There is a dearth of information about tribal transgender persons in India, thus, a social mapping is required to be done so as to trace the transgender persons from tribal communities.
2. A universal term similar to that of 'Two-Spirit' is required to be annexed with the LGBT members of tribal communities so as to give them a sense of recognition. The existing laws and policies are required to be aligned with the interest of the tribal transgender persons. By making simple adjustments in the existing laws and policies viz. creating an inclusive definition of family, extending criminal laws to address hate crimes based on sexual orientation and gender identity will ensure better protection to all the tribal citizens especially transgender.
3. A separate resolution like Tribal Equity Toolkit is essentially required to be framed to protect the interest of LGBT members of tribal communities so that notion of equality is promoted in every sector including health, employment and education. This will also ensure that

Two Spirit/LGBT people have the same access and opportunities as other community members. The essential civil rights of the LGBT members of tribal communities such as marriage, adoption, custody etc. is to be recognized within the realms of legislation.

4. A policy may be framed to spread awareness amongst the members of the tribal communities about the transgender persons and their rights. It is only through awareness and gender sensitization programs the persecution faced by the tribal transgender persons can be reduced. Trans Friendly Education Ecosystem will go in long way to change the mindset of people.
5. The distance between the transgender protective legislations and tribal welfare legislations is required to be made nearly to zero so as to curb the double persecution faced by the transgender persons being members of tribal communities.
6. There is a need to create Public-Private Partnership to create employment opportunities for tribal transgender persons. The government being a major stakeholder in social upliftment can play a pivotal role in creating employment opportunities for transgender persons with the help of a private market player.
7. The reservation provisions for tribal transgender persons is required to be clarified by the government as they fall under both scheduled tribe and other backward caste.

Chapter - 2
FOREST RIGHTS LEGISLATION OF 2006:
OPPORTUNITIES AND CHALLENGES

*Debashis Debnath**

I. Historical Background

For centuries, the forest-dwelling communities, also known as tribals in Indian connotation (in Constitutional category as 'Scheduled Tribes') on a large number have been living in and around the forests for a long period in harmony and symbiotic relationship with informal customary rules in the environment and forest ecosystem to eke out their existence and retaining cultural patterns congenial to their physical and social environment. The focus was shifted from the forests during colonial time and these forests were used as resources for commercial interests and the development of lands for agricultural use. The three forest acts of 1865, 1878 and 1927 of India in the wake of 1894 Forest Policy, have several policies of the central government of some state forest acts which curtail the customary use and century-used rights to local communities. The forests and the lands were owned by these communities in Common property resources system

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with tenurial insecurity. In the statutes of the Indian Forest Acts 1865, 1878 and 1927, the British government had obliterated centuries old customary rights of the local communities and established exclusive state control over forest resources, and were the rights of settlements that were provided by the procedure and were followed hardly. Legally minded as the British Monarchy were, they rationalized that under the Indian custom all property held in common belonged to the king, and since they were in conquerors, that property now belonged to them, to meet the economic needs. The British diverted the abundant forest wealth of the Nation into agricultural development after declaration of 1894 Forest policies in the colonial era.

On May 3, 2002, the Ministry of Environment and Forests (MoEF), Government of India, issued a circular to all the states and union territories to summarily evict all forest dwellers and users—the "encroachers". Nevertheless, the struggle against evictions continues, and in 2002, an estimated 10 million Adivasi people faced the threat of eviction, given the lack of appropriate definition and problems with forest land settlement processes in India. From the launch of the eviction order until the 31st of March 2004, it is estimated that "encroachers" were evicted from 152,000 hectares of forest land in India, despite neither the Supreme Court nor the MoEF having defined the term "encroacher". Official documents never clarified whether peoples carrying out illegal, commercial logging activities or Adivasi peoples, or both, fell under the definition of "encroacher". On the 23rd of December 2004, the MoEF issued a further circular confessing that due to the lack of definition of "encroacher", many Adivasi people were unjustly evicted from their lands, and that this important distinction

would be made in future so-called 'eviction drives'. Finally, following heightened protest by Adivasis and support organisations in late 2004, in the wake of the National Tribal Policy 2006 document (draft), which cited points to a "very strong symbiotic relationship between the STs and Forests, the Scheduled Tribes (Recognition of Forest Rights) and realizing the disadvantage position of forest dwelling communities, the Indian government took steps to enactment for the Forest Rights Act in 2006 (FRA 2006 henceforth) to correct the historic injustice done to tribal people and forest dwellers Government of India (Anitha, et.al 2015). Bill was placed in the Parliament in 2005, which sought to recognize forest rights of forest dwelling Scheduled Tribes (FDSTs), who have been occupying the land before October 25, 1980. The act, apart from ensuring land rights to the tribals and other forest dwellers, who have been cultivating prior to 2005, also guarantees forest use right and right to conserve and protect forestland. Some of the emerging issues in implementation of FRA that have to be flagged for in depth understanding and discussions are outlined below. The Bill would provide Adivasi communities with legal recognition of their forest resource and access in areas traditionally used and occupied by them. This law would facilitate the regularization of lands being cultivated by Adivasis, the conversion of so-called forest villages to revenue villages (with title deeds), and the settlement of disputed land claims. Currently, Adivasi and support organisations have to fight against dilution of the Bill's provisions, and for its safe passage through parliament. The Rights of the Forest were not recorded for generations who were residing in such forest-dwelling in forest lands and the Act which recognizes the forest rights and some occupation with Scheduled tribes and other traditional forests. It was enacted to protect the right to life and

livelihood of scheduled tribes and other traditional forest dwellers.

The other questions raised by the wisdom of present development strategy in the draft policy as follows:

“it has to be considered that the costs, including opportunity costs, are borne by local stakeholders while the benefits accrue to a dispersed group of stakeholders, viz country at large. The STs cannot be forced to view their surroundings as total externalities for the good of nation without getting the right to possess a homestead or earn a living”

(MoTA, GOI, 2006)

The causes behind the Act are as follows:

1. Wrongful alienation
2. No titles, i.e. ownership for lands
3. Denial of ownership rights on Minor Forest Products
4. Non involvement in forest management
5. Denial of Developmental benefits
6. Tribal means of livelihood not safe guarded (Debnath, 2009: 213).

It has got the assent of the President of India on the 29th December 2006 and Dr. Bachittar Singh, Jt. Secretary, Ministry of Tribal Affairs, Government of India has appointed in exercise of the power conferred by sub-section 3 of the Section 1 of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act 2006 (2 of 2007), the day of 31st December, 2007 as the date on which the provisions of the said act has come into force between 31.12.2007 and 01.01.2008,

that was published on the 2nd January, 2008. Amid strong oppositions from environmentalists the process of implementation of the FRA (2006) started in 2008.

II. FRA 2006- Introduction

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 or in short FRA 2006 is one of the important and popular entitlement based laws ever enacted in Forestry that recognizes the rights of the forest-dwelling tribal communities and other traditional forest dwellers to forest resources, on which these communities were dependent for a variety of needs, including livelihood, habitation and other socio-cultural needs, but their rights could not be recorded.

In the Preamble, the FRA is based on the premise that forest dwelling communities are “integral to the very survival and sustainability of the forest ecosystems” and therefore, invests such communities with “responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance”. Therefore, while the pre-existing forest and wildlife laws have sought to ‘settle’ rights by compensating and extinguishing the same, the FRA seeks to recognise and vest forest rights in such a manner that these continue to subsist in order to ensure livelihood and food security of the forest dwelling communities. National parks are, by definition, also included within this framework, The Act further enjoins upon the Gram Sabha and rights holders for the responsibility of conservation and protection of biodiversity, wildlife, forests, adjoining catchment areas, water sources and other ecologically sensitive areas as well as to stop any destructive practices affecting these

resources or cultural and natural heritage of the tribals (Debnath, 2009: 213).

The Act is a key piece of forest legislation passed in India to rectify over century-old historical injustice done to Scheduled Tribes and Traditional forest dwellers relating to extinguishing of Tribal rights over their holdings in the constitution of forests, denial of ownership over Minor nominal relief Forest Products and restraints on enjoyment of usufructs of the forests like grazing and *Nistar* (Nominal relief) and which were traditionally enjoyed by them in the past. It has called the 'Forest Rights Act', 'The Tribal Rights Act'. It expands the mandate of the Fifth and the Sixth Schedules of the Constitution that protect the claims of indigenous communities over tracts of land or forests they inhabit.

The Act encompasses Rights of Self-cultivation and Habitation which are usually regarded as Individual rights; and Community Rights as Grazing, Fishing and access to Water bodies in forests, Habitat Rights for PVTGs, Traditional Seasonal Resource access of Nomadic and Pastoral community, access to biodiversity, community right to intellectual property and traditional knowledge, recognition of traditional customary rights and right to protect, regenerate or conserve or manage any community forest resource for sustainable use. It also provides rights to allocation of forest land for developmental purposes to fulfil basic infrastructural needs of the community.

Thus, the Act empowers the forest dwellers to access and use the forest resources in the manner that they were traditionally accustomed, to protect, conserve and manage forests, protect forest dwellers from unlawful

evictions and also provides for basic development facilities for the community of forest dwellers to access facilities of education, health, nutrition, infrastructure etc. (Debnath, 2009: 214)

Forest right act involves a large size of land. Majority of these land are under varying states of degradation as these lands were never been prepared for maximum production due to many factors like fear of evacuation, uncertainty in tenurial rights, non availability of credit facilities, absence of irrigation and power etc. Even on better quality land, the above condition make it difficult for tribals to survive, many cases have been documented where they get alienated from the land. A challenge lies in front of the civil society organisations and government department to develop this land, so that it can meet maximum possible livelihood needs of the dependent communities. Also, there is a need to adapt integrated approach where entire components of livelihoods viz. Food, Fodder, Energy and Employment are addressed. In a way the reform, therefore, have to conceptualize land as a productivity unit, rather than merely being an exercise in transferring of titles.

FRA 2006 recognizes 14 pre-existing rights of forest dwellers on all categories of forestland, including protected areas. The major rights are of four types as follows:

- (a) Title rights- i.e. ownership- to land that is being framed by tribals or forest dwellers as on December 13, 2005, subject to a maximum of 4 hectares; ownership is only for land that is actually being cultivated by the concerned family as on that date meaning that new lands are granted. Ownership is

only for land that is actually being cultivated by the concerned family and no new lands will be granted.

- (b) Use rights– customary and usufruct (also including ownership) to minor forest produce, to grazing areas (for settled), to pastoralist routes (for nomadic communities), rights over habitat for ‘Primitive Tribal Groups etc. The rights of the dwellers extend to extracting Minor Forest Produce, grazing areas etc.
- (c) Relief and development rights – to rehabilitation in case of illegal eviction or forced displacement and to basic amenities, subject to restrictions for forest protection; Relief and development rights. To rehabilitate in case of illegal eviction or forced displacement and to basic amenities, subject to restrictions for forest protection.
- (d) Forest management rights – to protect forests and wildlife. It includes the right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use.

III. Importance of Forest Right Act

For the first time, the law recognizes and vests forest rights in Scheduled Tribes and other traditional forest dwellers, thereby undoing the historical injustice to them. Also for the first time the Act provides for ‘Community Rights’ and rights over ‘Community Forest Resources’, thereby ensuring rights and ownership of tribal and traditional forest dwelling communities over ‘Common Property Natural Resources’. A democratic model of biodiversity conservation is also envisaged in the

law, in the form of Critical Wildlife Habitat in Sanctuaries and National Parks. While there is much optimism following the enactment of the Forest Rights Act, there are still challenges to be overcome before its provisions deliver strong gains to local communities. In many cases, the positive changes observed so far have taken place only because of the active role played by civil society organizations and people's informal socio-economic networks. The act has made good beginning, by constructing the process for determination of rights as a bottom-up, democratic one. Section-6 of the act stipulates that the Gram Sabha shall initiate the process for determining rights at the village level through Gram Sabhas. The Gram Sabha shall:

- Identify the local community forest resources to be managed under the Act's provisions.
- Receive, consolidate and verify claims on individual and community rights, and pass appropriate resolutions on the claims.
- Ensure protection and conservation of forest and biodiversity resources, and
- To check any activity which could affect the natural and cultural heritage of the forest dwelling community.

IV. Some Related Acts and Provision

There are three Provisions and Acts which defines the Forest Rights Act, 2006:

- (a) Wildlife protection Act, 1972

The Wildlife (Protection) Act, 1972 was enacted by the government with an effective objective to protect the wildlife of the country to control the poaching, smuggling, and illegal trade in wildlife and derivatives. In January 2003 the Act was amended and the punishments and penalties of offences under the Act which were more stringent have been made. Some further amendments were proposed by the ministry in the laws by introducing rigid measures to strengthen the Act providing protection is the objective to listen to the endangered flora and fauna with ecologically protected areas.

(b) 1988 National Forest Policy

The policy aims at maintaining the stability of the environment and the conservancy of the natural heritage of the country to remain in natural forest. The increase in forest and trees were covered in the country through massive afforestation and forestry in the social programs. The massive creation of a movement of people achieves the objects and minimizes the forest existence.

(c) The Provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996 (PESA)

The tradition and much different perseverance and safeguard customs of people with a different culture, resources of the community, and mode of dispute resolution with some customs are retained. This empowers the appropriate level of gram sabha/panchayats with mandatory rights of consultation in the acquisition of land and the displaced persons with rehabilitation. The alienation was reduced in tribal areas as PESA will have better control over the utilization of

public resources. This helps the exploitation of the tribal populations and able to control the lending of money and manage the controls of consumption and liquor sales with markets of the village. PESA looks to preserve the traditions to promote cultural heritage, customs, and cultural identity of tribal populations (Sisodia, 2009).

V. Objectives of Paper:

The paper will discuss the issues in implementation process as well as opportunities and challenges in the wake of implementation.

VI. Implementation Process

- (i) Awareness generation about the content of the Act and Rules among the public, PRI & other elected representative and field staff & officials: The information and awareness building by the Ministry of Tribal Department of the respective states, as nodal agency have, would be done through pamphlets in local or tribal languages, followed by their distribution and advertisements in the local dailies, hoardings, wall paintings and by broadcasting radio messages.
- (ii) The entire process starts with convening of the meeting of Gram Sabha and constitution by it of Forest Rights Committee amongst members, comprising of not less than ten, but not exceeding fifteen members, wherein at least one-third members shall be the Scheduled Tribes. Number of gram sabhas at the appropriate village level with the quorum of 2/3rd members held and Forest Rights Committees elected: The Quorum of the Gram sabha meeting shall not be less than two-thirds of all members of the Gram sabha. If where there

are no Scheduled Tribes, at least one-third shall be women. The Forest Rights Committee (FRC) has the major responsibility of initiating the process of determining the nature and extent of forest rights, conduct survey of the land under the occupation of individual or community and pass resolution on claims has been constituted at Panchayat or habitation/hamlet level, so that every habitation shall be represented as far as possible.

(iii) Chapter IV of FRA 2006 provides that the Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights and the Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. As per Rule 11(1)(a), which provides that the Gram Sabha shall call for the claims and authorise the Forest Rights Committee to accept the claims. Since the Gram Sabha is the “authority to initiate the process for determining the nature and extent of individual or community forest rights or both”, the commencement of the process must be made by the Gram Sabha, and not the Forest Rights Committee.

(iv) The Gram Sabha is also a highly empowered body under the Act, enabling the tribal population to have a decisive say in the determination of local policies and

schemes impacting them. The Gram Sabha will prepare a list of claimants of forest rights containing all details, pass a resolution and after giving opportunity to interested persons and authorities concerned, forward the same to Sub Divisional Level Committee (SDLC). It will also prepare a resettlement package if required; will form Committees for protection of wild life, forest and biodiversity. The SDLC to be constituted by the States will be chaired by SDO (representing revenue department also) from Block/ Tehsil level Panchayat to be nominated by District Panchayat. It will arrange to provide all the documents / data, hear and forward the claims with the draft record of proposed forest rights through SDO to the District Level Committee (DLC). The Committee will provide information to each Gram Sabha about their duties and duties of holder of forest rights and others towards protection of wild life, forest and biodiversity with reference to critical flora and fauna which need to be conserved and protected. The committee will provide forest and revenue maps and electoral rolls to the Gram Sabha or Forest Rights Committee. The committee will raise awareness among the forest dwellers about its objectives and procedures and to ensure that the Gram Sabah meetings are conducted in free, open and fair manner with requisite quorum.

- (v) The DLC will be chaired by the District Collector/ Deputy Commissioner (head of land revenue in the district) and composed of will examine whether all claims, especially those of Primitive Tribal Groups, pastoralists and nomadic tribes have been addressed keeping in mind the objective of the act; and consider and finally approve the claims and record of forest rights prepared by the Sub-divisional Level Committee.

As per Annexure II & III of the FR Rules, the titles for forest land and community forest rights are to be signed by the District Collector/Deputy Commissioner. This power is in exercise of the functions of the District Level Committee under Rule 8(h) of the FR Rules, and therefore it cannot be delegated to the Revenue Divisional Officer or any other official. The committee will hear petitions aggrieved by the orders of Sub-Divisional Level Committee and will coordinate with other districts regarding inter-districts claims and will issue directions for incorporation of forest rights in the records including record of rights. The Committee will ensure publication of the record of forest rights as may be finalized. The State Government shall constitute a State Level Monitoring Committee consisting of Chief Secretary as Chairperson along with six members representing heads of concerned departments and three Scheduled Tribe member nominated by the State Government will monitor the entire process and furnish a six monthly report to the Nodal Agency, viz., the Ministry of Tribal Affairs.

- (vi) These details needed to be mentioned here as it is necessary for the State Governments at both political and administrative levels, also for Panchayat Institutions and finally for the hitherto deprived but entitled people to appreciate the golden opportunity presented by this Act and to immediately constitute all Committees and make the Gram Sabha and its Forest Right Committee start its work.
- (vii) Training of FRC members about their functions and procedures to be followed and the committee has the major responsibility of initiating the process of determining the nature and extent of forest rights,

conduct survey of the land under the occupation of individual or community.

- (viii) As per Section 6(7) of FRA, State Level Monitoring Committee is to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency such returns and reports as may be called for by that agency. Section 11 of FRA Act provides that the Ministry of the Central Government dealing with Tribal Affairs or any officer or authority authorized by the Central Government in this behalf shall be the nodal agency for the implementation of the provisions of this Act.

- (ix) Mapping would be done using GPS technology (through personal digital assistants- PDAs) for mapping the boundaries of a large fraction of the approved claims and also to build a state-wide digital data base of the approved claims and claimants, including photographs, copies of rights certificate.

- (x) Number of claims approved, rejected or remanded by the Sub-Divisional and District Level Committees with a breakdown categories of reasons and whether rejected claimants were informed about the same;

- (xi) Number of rights recognized by each type of right. Overall there are two main sets of rights to be gained in the FRA:
 - 1. Private /or communal land ownership rights, including resolution for past illegal eviction/ displacement.

2. Community resource use rights, including collective management of common (or community) forest resources; rights over common property resources such as produce of water bodies, grazing rights (both for settled and nomadic communities); rights over 'habitat' for Primitive Tribal Groups'; other customary rights and usufruct (actually 'ownership') rights over non-timber Forest Produce (although there is some ambiguity over whether these shall be 'community' or individual rights.

VII. Interdepartmental Coordination

The act involves four major departments. Ministry of Tribal Affairs (MoTA) is the nodal agency for the implementation of the act. This ministry is mandated to streamline the development of tribal communities including the implementation of PESA within the schedule areas. However, the land on which the act will be implemented is under the jurisdiction of the Forest Department which is mandated for forest management within the country. The revenue department is mandated to keep the database related to land records. Around 1.2 million ha is disputed between FD and RD in MP alone. The Panchayati Raj is another department which is responsible for recognizing the claims at the village level and forwarding it for settlement to the SDLC and DLC headed by district head and responsible for final decision. There is also need to study the sanctity of the decisions made by Gram Sabha and their acceptance by the SDLC and DLC. All the departments involved within the implementation of this act have different mandate, so their priorities are different. There is a need for convergence, so that the core of the FRA i.e. "Livelihood Security through Forest" could be achieved. There is a need to understand

the interaction processes among these departments, also the factors that are playing role into improper implementation of this act.

It is enforced within the act that the rights are non-transferable except inheritance. It means such land cannot be sold. It is necessary to understand whether these rights are loan-ble or not and the investments rose of financial institutions.

VIII. Opportunities

After analyzing of the Act and it's implementing rules the following opportunities are

1. Greater role and empowerment of Gram Sabha in determining claims, managing forests it has traditionally conserved, checking processes destructive of forest-dweller's habitats, and protecting traditional knowledge.
2. Site-specific and knowledge-based determination of critical wildlife habitats, and prohibition on their diversion for any other purpose.
3. Greater livelihood security for traditional forest-dwellers who have been unjustly denied tenure.
4. Displacement and relocation only by consent (Debnath, 2009: 217).

IX. A way ahead Forest based Livelihood

There is a need to pay attention to the model of agriculture within the land under FRA and it should be specific to the region/geographical, community, culture and is sustainable in the context of small and marginal holdings. It should be adaptable to the climate change need of the region and regard to the local bio-diversity. There is a need for ecological balance between the proportion of land designated for forestry, agriculture and non-agricultural purposes. However, a reduction in area under forest cover has now been a cause for concern in India for several years. There is a need to introduce the agricultural practices that significantly involves tree plantation also. This can ensure the need for the fuel wood, timber and fodder including ecological balance (Mathew and Umesh. 2019).

Benefits towards eco-tourism : The visits to forest areas by tourists are very beautiful scenes in the wildlife with inhabiting the forest of hosting nations and various communities to get the revenue from this tourism. These forests also became the source for rare animals like rabbits and vegetables/foods like some berries, tubers, and mushrooms to grow on forest floors. .

X. Challenges

There were many challenges given below which were faced by the forest act to work efficiently for the improvement and rehabilitation and protection of species of plants and animals from getting extinct are:

1. Administrative Apathy

The Acts remain the biggest challenge in the implementation as the Acts related to the environment are not entirely compliant with the law or illegal encroachments that have claimed to be rejected unfairly. The deliberate sabotage by the forest bureaucracy for both centres and states to some extent by big corporations there. The fear of forest bureaucracy lost enormous power over land and people of current joys with the corporates to have the fear of losing cheap access over valuable natural resources. The forest bureaucracy has misinterpreted the FRA as an instrument to regularise encroachment instead of a welfare measure for tribals. Corporates fear they may lose the cheap access to valuable natural resources.

2. Identification of beneficiaries

The bureaucracy of the forest has misinterpreted the forest rights act to regulate the encroachment of welfare and its measures for tribals as an instrument.

3. Lack of Awareness

The forest officials at lower levels were unaware of the help of forest rights processes to claim its high majority to get aggrieved with the population to remain with dark regarding their rights.

4. Dilution of Act

The sections in the raise of environmentalists' concern about the FRA bends in the favour of individual rights to give less scope for community rights. The effective community rights of local people control forest resources with a significant portion of

the forest to make states wary with revenue of forest rights to gram sabha.

5. Delineation of forest areas for exercise of forest rights: In the process of implementation of act lack of knowledge and skills for delineation and mapping of community rights and community forest resources.
6. Survey and elements of encroachments; Due to lack definition of encroachment and pro-long historical-based customary laws, there has been found lack of recoded survey and loopholes in the survey.
7. Dissuading tribals form Shifting cultivation: Shifting cultivation continues to be a predominant agricultural practice in many parts of India, despite state discouragement and multipronged efforts to wean indigenous communities away from it. Their land, due to remoteness, poor access to markets and undulating terrain, leaves them with few alternatives.
8. Empowerment for management of Forests: The Principles of Forest Management assert the right of nations to profit from their own forest resources, but recommend that this should occur within a framework of forest protection, management and conservation. The principles are not legally binding but provide recommendations on sustainable practice.
9. Forging links between Forests Department and Tribal institutions to ensure proper implementation of Act- Tribals are dependent upon forest resources for bio-resources and livelihoods, but Forest

Department is concerned with protecting and conserving their forest lands. 11. Cut-off date for eligibility of land claims as December 2005 instead of 1980- The two dates contradict each other from the point of view of their objectives. It is important to understand that cut-off dates are relevant in the case of schemes for regularising fresh encroachments. Since FRA is not a law relating to regularisation of encroachments, but rather a law for recognition and vesting of forest rights in genuine claimants existing on the 13 December 2005, a cut-off date, as such, is not required.

10. Exclusion of certain development projects and activities (e.g. Construction of roads) from the purview of forest clearances –
11. Unclear relationship with existing forest/wildlife laws and institutional arrangements for enforcement (Debnath, 2009: 2017).

XI. Conclusion

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA), 2006 is framed to undo the "historical injustice" suffered by communities living or dependent on the forest resources of India. The Act has been amended in 2012 (Madhusudan, 2012). The act for the first time recognized customary rights of indigenous forest-dwelling communities over the forest. The underlined idea is to achieve inclusive development, where the most marginalized community can have a say in the process of development. The paper looks into the issues in relation to implementation of the act. It investigates into the

process of the emergence of the act. It reviews the range of forest rights deprivations in the act and how they came about. For instance how over emphasis is given to recognize individual forest rights other than community forest rights and community forest resources rights. It seeks to investigate how in-spite of operational limitations, the act has significant implication on the livelihood of forest dwellers and the conservation of forests. In the long run an effective and comprehensive FRA has potential in achieving larger goal of inclusive development.

In conjunction with the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Act, 2013 FRA protects the tribal population from eviction without rehabilitation and settlement. The eviction order by the apex court was based on affidavits filed by the States. According to the Ministry of Tribal Affairs, up to September 30, 2018, 4.2 million individual and community resources claims were filed, of which, 1.9 million claims were rejected. It empowers the communities to use, manage, and govern forests for their livelihood as well as for the conservation and protection of forests. But its poor implementation remains an issue.

In the study, Lee and Wolf (2018) of the United States-based Cornell University, revealed that “there is a large variation in the outcomes of claims submitted under the Act across states.” The study analyses the implementation of the FRA 2006 across India for the period 2008-2017 by examining the rates of formal distribution of rights claims at the level of individual states. It aims to explain variance across states through reliance on political, economic and ecological considerations. It emphasises that a “greater extent of

forest cover is associated with higher claim distribution rates, while the presence of left-wing extremism is associated with higher claim rejection rates.” The study highlights “important governance tensions underlying prospects for environmental conservation through decentralization of forest management authority”. It indicates that the “local political climate and interests, along with existing ecological conditions, may mediate implementation of forest policy reforms in an important way.” “Sweeping institutional change to socio-ecological relations and property rights may be difficult to achieve in a country where political relationships and controls over access to resources differ across local contexts,” said the study published in the Land Use Policy journal. The study highlights that there are several trends in the processing of FRA claims with major ones like high variation among state in the number of claims received and titles distributed.

The belongings of other traditional forest dwellers people came in the category with the bulk of claims and got established with the continuous occupation of 75-years of eligibility. The FRA was enacted in 2006 as per the September 2018 statement of the Ministry of Tribal Affairs (MoTA) with the total claim of 42 lakh over the forestlands which include National Parks and Sanctuaries and was filed by the tribal people and the other traditional forest dwellers (OTFD) which came under a nebulous category of people who were not defined in the Constitution. The analysis of the official data reveals the total of 18,89,835 titles which were granted and the massive 72,23,132 with 72,000 sq km of the public forest land was granted and converted to the individual and community ownership in pieces across the country. From the loss of forests, the wide-ranging was granted by the

rights in the scattered parcels of the forestland which is cursing a deleterious impact of habitat in the form of fragmentation or breaking up the large forest blocks into some smaller pieces. The scientific fragmentation was established by the most serious threat to the long-term conservation of forest and biodiversity. Due to the process prescribed under the law with the level of appeal with a total of 19,34,345 and claims stand rejected on 30th September 2018 as per the MoTA statement which has an individual claim of 18,88,066.

The claims were rejected by gram sabha itself with the said statement with the number of 14, 77,793. The statement of MoTA does not provide the actual data on the extent of the forestland which is occupied by the rejected claimants and was estimated in the area which could be more than 19 lakh by applying the average area approved to an individual claim. The independent agencies including the Saxena Committee which were appointed by MoTA and appointed by TERI by the Maharashtra Government for the Gujarat Government by the Bhaskaracharya Institute of Space Applications with already cleaned documents fresh forest lands without cut-off by satellites in imaginary analysis in 2005.

The imagery evidence of satellite forest encroachment has been considered by the CAG and was accepted by the Supreme Court and High Court as well in many other cases. The National Parks and Sanctuaries were protected by the sensitive habitats of highly endangered wildlife and to which we occupy just less than 5% of India's landscape and one salutary clause was also included in FRA. The notification provides the National parks and Sanctuaries were critical wildlife habitats from where people can be resettled. Even 72 lakh of forestlands

were granted under FRA since 2008 and critical welfare habitat was ignored to one hectare and had not been notified yet.

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Chapter - 3

FICTION VIS-À-VIS TRIBAL DICTION: FACTFINDING BEYOND NARRATIVES

*Debasis Poddar**

*CALIBAN: This island's mine by Sycorax, my mother,
Which thou tak'st from me. ...*

*PROSPERO: Thou most lying slave, ... I have used thee,
Filth as thou art, with humane care, and
lodged thee
In my own cell, ...*

*CALIBAN: O ho, O ho! Would 't had been done!
Thou didst prevent me. I had peopled else
This isle with Calibans.*

- *Shakespeare, The Tempest (1611).*¹

I. The Discovery of Tribal India

The Shakespearean melodrama- as cited above- possesses potential to decipher the want of eye-connect

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¹ Barbara A. Mowat and Paul Werstine (ed.), *The Tempest* by William Shakespeare, Folger Shakespeare Library, Act 1, Scene 2. Available at:
https://shakespeare.folger.edu/downloads/pdf/the-tempest_PDF_FolgerShakespeare.pdf

between Caliban and Prospero, a sea tribe and an Italian elite in exile. The latter expropriated the former from default homeland island of the tribe. Shakespeare voiced universal concern of both sides; of the tribe and of the civilized respectively; one hardly getting heard by another. What the author has ascertained is want of intent in either side to listen to the voice of reverse side and consequent negation of an otherwise happening conversation from getting graduated to communication to other; something similar in semblance to the exchange between Caliban and Prospero, the tribe and the civilized, with little meeting of minds; something commonplace in course of the mainstream tribal studies scholarship; often than not available in India. Accordingly, after respective ideologue polemics, different schools engage different means and methods; followed by different reasoning behind their respective studies. Each claims validity with the respective epistemology; yet falls short to reach its teleological end, i.e., engagement of two sides in course of meaningful discourse. The author undertakes comparative analysis in major schools of thought to engage assessment of prospect and consequence involved therein; thereby extends a roadmap toward more perfect research experience. The deliverables of this effort are extended in two otherwise independent yet interconnected trajectories, e.g., how to engage-something inclusive of implicit innuendo vis-à-vis how not to engage- research in tribal studies scholarship. In other words, researching the potential pitfalls behind research in tribal studies scholarship, followed by conundrum of choice vis-à-vis most appropriate and available genre of the intellectual technology in regional reality of the South-Asian subcontinent, constitutes agendum of this effort.

The core research foci comprise linguistics in brief, besides semantics, semiotics, alphabets, etc., in details. Also, the author engages literary theories with nitty-gritty, viz., rhetoric, dialectic, dialogic, structuralist, poststructuralist, bio-linguistic, etc., to name few among them. The author engages hermeneutics to decipher the narratives; thereby brings in discursive precision to research output. The author explores the final quest in discursive perspective: “*Can the tribe speak?*” The given inquiry follows oft-quoted phrase of a prior literature.² Spivak engaged a historiographic inquiry about the Subaltern in course of colonial discourse. Apparent simile apart, this effort also proceeds with inquiry on the tribe in course of neoliberal discourse; thereby drives his readership elsewhere toward poles-apart knowledge domain.

The genesis of difference between civilization and tribalism lies in purposive knowledge exclusion on the basis of domination and subordination. Thus, in the light of so-called Occidental enlightenment, modern science was developed and exported (read imposed) worldwide by the Westerners as if it is the universal knowledge system alone; customized to peoples across the world. Consequently, all other otherwise wise knowledge systems elsewhere went endangered- if not extinct- out of a systemic exclusion; perpetrated by colonizers in a way or other. For instance, the Indic knowledge system- a regional cult of spiritualism- was

² Gayatri Chakravorty Spivak, *Can the Subaltern Speak?* in Cary Nelson and Lawrence Grossberg (eds.), *Marxism and the Interpretation of Culture*, Macmillan, London, 1988, pp. 24-28. Available at: <https://jan.ucc.nau.edu/~sj6/Spivak%20CanTheSubalternSpeak.pdf>

discredited by these colonizer Westerners as occult; with little heed to premises of the knowledge system. A fiction of the juxtaposition was narrativized to posit cult and occult at loggerheads; thereby get the science-a materialist knowledge system- mainstreamed and all these otherwise wise regional spiritual knowledge systems marginalized and often than not endangered; if not extinct:

“Modern science (materialism) attempts to prove that man is an animal; the teachings of the Adepts show that he may be a God. Modern science invests him with the power to lift his own weight; ancient science (Occult Philosophy) invests him with the power to control the destiny of the world. Modern science allows him to live for a very limited number of years; ancient science teaches that he always existed, and will never cease to exist if he desires to live. Modern science deals with the instrument that the real man uses as long and as often as he comes into relationship with the world of phenomena, and she mistakes that instrument for the man; the Adepts show you the true nature of the essential man, to whom one earthly existence is nothing more than one of the many incidents of his eternal spiritual career.”³

Similar reference of immortality is also available in an oft-quoted text of the ancient India;⁴ something

³ L. W. de Laurence, *The Mystic Textbook of “The Hindu Occult Chambers: The Magic and Occultism of India,”* de Laurence, Scott and Co., 1909, p. 2-3. Available at: <https://ia800202.us.archive.org/18/items/mystictextbookof00dela/mystictextbookof00dela.pdf>

⁴ The Svetasvataropanisad, Chapter 2, verse 5. Invocation to Savitr and practice of Yoga (transliteration of the Sanskrit):

reiterated in recent times in the Chicago Address (1893); where Swami Vivekananda has reiterated human race as “children with immortal bliss”:

“Hear, ye children of immortal bliss! Even ye that reside in higher spheres! I have found the Ancient One who is beyond all darkness, all delusion: knowing Him alone you shall be saved from death over again.’ ‘Children of immortal bliss’—what a sweet, what a hopeful name! Allow me to call you, brethren, by that sweet name—heirs of immortal bliss—yea, the Hindu refuses to call you sinners. Ye are the Children of God, the sharers of immortal bliss, holy and perfect beings.”⁵

The legacy of getting other cults reduced- if not ridiculed- to de-minimis, sometimes demonized, attributed to other the clans captured or cornered by the Aryans, the so-called civilized by means of exclusive politics;

*yuje vāṃ brahma pūrvyaṃ namobhir vi śloka etu pathyeva
sūreḥ /
śṛṅvanti viśve amṛtasya putrā ā ye dhāmāni diviyāni
tasthuḥ //*

O senses and O deities who favor them! Through salutations I unite myself with the eternal Brahman, who is your source. Let this prayer sung by me, who follow the right path of the Sun, go forth in all directions. May the sons of the Immortal, who occupy celestial positions, hear it!

This is one of the important Mantras of this Upanishad as it refers to the entire human race as ‘*amritasya putrah*’ - sons of immortality showcasing all the humans as divine. Available at:

[https://www.esamskriti.com/e/Spirituality/Upanishads-Commentary/Svetasvatara-Upanishad-~-Chap-2-Invocation-to-Savitr-\(The-Sun\)-and-Practice-of-Yoga-2.aspx](https://www.esamskriti.com/e/Spirituality/Upanishads-Commentary/Svetasvatara-Upanishad-~-Chap-2-Invocation-to-Savitr-(The-Sun)-and-Practice-of-Yoga-2.aspx)

⁵ Swami Vivekananda, *Chicago Address* (1893), 43rd reprint by Advaita Ashrama, Kolkata, 2010, p. 22. Available at: <https://ia903403.us.archive.org/13/items/chicago-addresses/Chicago%20Addresses.pdf>

so far as knowledge governance is concerned. Thus, realpolitik of hierarchy reigned to get the West and the East mutually dissociated. Likewise, the South-Asian subcontinent is victim of similar politics. The civilized and the tribes got divided, distanced and differentiated on the basis of self-styled civilizational insignia; thereby ascertained who's civilized and who's not. With the mainstream society getting more modernized (read Westernized), an evil trend is on its rise toward othering peoples dissociated from the mainstream (read uncivilized) to the extent of its repugnancy to the mainstream.

The distance- if not difference- between civilization and tribalism hardly prevails since time immemorial. In the Mahabharata, reference of the courtship- followed by marriage- between Arjuna, a prince of Hastinapur, and Chitrangada, the tribal princess of Manipur (in North-East India), was portrayed with picaresque details.⁶ With the passage of time, since the time of colonization in particular, distance and difference went widened with galloping effect; by courtesy, exclusive politics of getting peoples with diversity othered; thereby getting classified as inferior after the stereotypical standards by those in the mainstream, construed to themselves.

Thus, compared to the Aryan India, such a gap went increasingly widened later in the Islamic India due to want of engagement with so-called tribal India and more so in the Colonial India due to aggressive engagement. After independence, policy initiatives were adopted in

⁶ Refer to The Mahabharata, Fourteenth Parva. Available at: <https://ia800302.us.archive.org/34/items/TheMahabharataOfKrishna-dwaipayanaVyasa/MahabharataOfVyasa-EnglishTranslationByKMGanguli.pdf>

good faith to bridge widening gap between tribal India and post-colonial India, also, between tribal India and globalized India; albeit, often than not counterproductive to gross detriment of the inter-community relations. The controversy on so-called marriage by exchange of garland between the then Prime Minister Nehru and Budhini- a fifteen-year-old tribal wage earner of Damodar Valley Corporation in district of Dhanbad- on 6th December of 1959 remains a classic citation on this count.⁷ This effort engages a timely quest for space toward civilizational conversation among these otherwise Janus-faced groups of population; thereby deescalates their given trust deficit.

II. Taxonomy of Tribal Studies in India

Albeit, rare exceptions apart, hitherto tribal studies are often than not charged by prudence (read politics) of its own; with least heed to the larger public good to this end. The taxonomy of tribal studies knows no end. Unlike popular gaze upon the tribes as one, taken together, they are by default split into myriad ethnic groups. With occasions of overlap, the following comprise major variants in the taxonomy of tribal studies scholarship in India:

Vertical approach and horizontal approach. The researchers remain dissociated here. The vertical approach has had two variants. Few are obsessed with the populist perception that tribes suffer from backward inertia; thereby running behind the time

⁷ For details, see Sangeetha Sreenivasan (tr.), Sarah Joseph, *Budhini*, Penguin India, New Delhi, 2021. Available at: <https://penguin.co.in/book/budhini/>

worldwide.⁸ The rest engage reverse perception that tribes by default engage most apposite choice of the chronicles; something not necessarily tested by lived experience and- at times- tested otherwise. While the former is the genesis of cynical approach to tribal studies, the latter leads to Quixotic approach to tribal studies. Consequently, the former find faults in tribal lifeworld since their approach suffers from prejudices. On the contrary, the latter get the tribal lifeworld glorified since their discursive approach is vitiated by hypothesis in wisdom to the credit of tribes themselves; something influenced by their obsession vis-à-vis ingenuity of the community. So far as the horizontal approach is concerned, the researchers- who share a parallel approach- add no value judgment on their own to either the tribes or to those civilized and, consequently, find both placed similarly situated at a level-playing field in their given circumstances. Thus, with their horizontal approach, the researchers explore *sui generis* practices in the tribes and in conventional society without value judgment- either favourable or unfavourable- to either. Rather than text, what matters to those with horizontal approach is context behind text of the law of the land or the customary law of the community- as the case may be- with reasoning of its own. In forthcoming paragraphs, with the hypothesis of the tribes and those civilized as both of them are stakeholders of two parallel civilizations, the author pleads horizontal approach; thereby engages a discursive

⁸ Biswaranjan Tripura, *Decolonizing Ethnography and Tribes in India: Toward an Alternative Methodology*, *Frontiers in Political Science*, Volume 5, 26 January 2023, pp. 1-15. Available at:
<https://www.frontiersin.org/articles/10.3389/fpos.2023.1047276/full>

craftsmanship to develop civilizational dialogue while researching in tribal studies. In this effort, research on the methodology of research in these mainstream tribal studies constitutes a core corpus of this effort.

The horizontal approach may be divided in two major variants as per treatment toward target groups. The researchers, therefore, engage either normativity or comparison in course of civilizational discourse between the tribe and those civilized. While normativity involves value judgment vis-à-vis validity of the normative standards set, comparison involves no less value judgment since the approach involves cost-benefit analysis of certain practices available in the tribes and in those civilized. The author pleads for resort to either upon case-to-case basis, rather than prescription of one alone- followed by proscription of other (option) left- as standard praxis, set irrespective of variation in the given context of situation. Again, rationale behind choice of either ought to get testified by the quest for truth; a teleological end of research. The researcher ought to usurp the intuition of what suits to the given research universe *per se* and within its given time and space.

With reference to juridical taxonomy of tribal governance in postcolonial India, so brought in by the Constitution of India, the author explores juridical state of affairs of the tribal governance in its cross-disciplinary context- from poles-apart perspectives- including the 'fourth-world approaches' on its rise;⁹

⁹ *Vide* Hiroshi Fukurai, *Fourth World Approaches to International Law and Asia's Indigenous Struggles and Quests for Recognition under International Law* (Presidential Address at 2017 Annual Conference of the Asian Law and

thereby places emphasis upon the polycentricity in tribal lifeworld; officially engaged by the Constitution of India after respective interregional diversity, also, after respective intra-regional diversity with tribe-specific historical background despite getting spread over close proximity. Besides, there are unsettled questions of law vis-à-vis nomadic tribes across the country. While state takes cognizance of cartography, tribe at times constitutes a cluster of demography. With no settled territory of its own, nomadic tribe thereby remains devoid of cognizance since these tribes are denizens of no constituency. With its stake in no electorate, nomadic crowd cannot voice an otherwise *bona fide* claim for their identity by means of representative politics. Technical (read cartographic) count apart, however, nomads deserve tribal status by means of so-called “numinous;” as insignia of tribal lifeworld.¹⁰ The author thereby unsettles an otherwise unproblematic ideation about understanding the given tribal population- about 8% of the total population of India- as one public grouped together with no heed to the intelligible diversity among myriad tribes in India; something *prima facie* unsustainable on apparent face of the record. Despite populist perception to this end, tribes in India share poles-apart diversities *inter se*; irrespective of the shared vulnerability common to all these tribes- followed by functional unity- with a trend of tribal expropriation by contemporary civilization

Society Association), *Asian Journal of Law and Society*, 5 (2018), pp. 221-231.

¹⁰ For details, refer to Christian Lee Novetzke, *The Subaltern Numen: Making History in the Name of God*, the University of Chicago, 2006, pp. 99-126. Available at: <https://faculty.washington.edu/novetzke/subaltern%20numen.pdf>

getting on its rise. Before entry to the forthcoming operative paragraphs, diversity in the juridical status of tribe deserves due clarification for mutual convenience.

III. Taxonomy of Territorial Tribes in India

Taken all hitherto variants of territorial tribe across the South-Asian subcontinent, albeit arguably, India resembles another “melting pot” of population diversity; similar to USA. While taxonomy under the Constitution divides the tribes into two groups, e.g., Fifth Schedule and Sixth Schedule to the Constitution, those under the Sixth Schedule are again divided; primarily, by default habitat, viz., Assam, Meghalaya, Tripura and Mizoram. Due to intra-regional diversity *inter se*, tribes in these four States of North-East India are once again divided by ethnicity, as Autonomous District Councils named after resident tribe concerned (albeit, not always); with autonomy higher than Tribes Advisory Councils in tribal states; provided by the Fifth Schedule. There are few cases of rare exception. For instance, Bodo tribe in State of Assam enjoy *sui generis* status with Bodoland Territorial Region (BTR), a tribal region mentioned in the Constitution with autonomy higher than all otherwise autonomous District Councils elsewhere; yet lesser than full-fledged State in technical sense of the term. There are other somewhat similar cases of *sui generis* autonomy available elsewhere, though came into existence by legislation in respective States, e.g., six Autonomous District Councils in Manipur, Gorkhaland Territorial Administration in West Bengal, and two others, both named Ladakh Autonomous Hill Development Councils; in Kargil and Leh respectively. Last yet not least, tribes of the North Sentinel Island

in Andaman and Nicobar- otherwise a Union Territory- enjoy *sui generis* autonomy of its own by means of non-interference policy of Republic of India. Indeed, Manipur has had six Autonomous District Councils, they are but devoid of comprehensive legislative and administrative powers available with other autonomous District Councils constituted under the Sixth Schedule. Likewise, District Councils- established in Assam yet not constituted under the Sixth Schedule- remain devoid of comprehensive legislative and executive powers; unlike the District Councils established in Assam and constituted under the Sixth Schedule. The tribes in Nagaland derive autonomy higher than other tribes in North-East India; by courtesy, Article 371-A of the Constitution. In particular, Article 371-A(1)(d) of the Constitution provides *sui generis* status to Regional Council of Tuensang; the largest District in Nagaland. Despite provisions under the Constitution, tribes in three other major states of the North-East India, viz., Arunachal Pradesh, Manipur and Sikkim, are left out of constitutional or other legislative coverage vis-à-vis interests in immovable property, natural resources, etc. However, through circuitous routes, interests of the tribes in Arunachal Pradesh are still protected by the Inner Line Permit under Bengal Eastern Frontier Regulation of 1873.¹¹ A core intent behind Regulation was maintenance of inter-community peace; more than interests of tribes in

¹¹ It shall not be lawful for any person, not being a Native of the districts comprised in the preamble of this Regulation, to acquire any interest in land or the product of land beyond the said "Inner Line" without the sanction of the [State Government] or such officer as the [State Government] shall appoint in this behalf.
Bengal Easter Frontier Regulation, 1873; Section 7.

Arunachal Pradesh. Due to want of historic reasoning behind, similar buffer is not available to tribes in Manipur and Sikkim under the Constitution despite strong geographic reasoning vis-à-vis hypersensitive international borderlines of these two states in North-East India. However, major logistic challenges in the accessibility to these remote States often than not play default buffer here. For instance, four states under the Sixth Schedule apart, all Scheduled Areas and Scheduled Tribes deserve autonomy under the Fifth Schedule.¹² However, other states in the North-East India often than not avail legislative recourse to assert higher autonomy by means of *sui generis* chronicles behind. In recent times, statutory provisions for the Inner Line Permit went extended to Manipur.

The stock of asymmetric federalism, more so of tribal governance, in the Republic to such extent leaves little doubt about intelligible diversity among these myriad tribes across the country, followed by spectacular diversity in the genre of good governance. Such a typology traces two derivatives, at the least, to prove that: (i) functional unity apart, tribes cannot necessarily be taken together to count this population as one group; (ii) minute effort to work out functional balance between ancient civilization and present public administration- so far as possible- is

¹² Administration of Scheduled Areas and Tribal areas. — (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram.
(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram.
Article 244 of the Constitution of India.

apparent on the face of record. The author hereby unfolds the discursive vacuum, followed by gap analysis in tribal governance. For instance, a vacuum lies in territory-specific tribal governance; something charged with a naïve presupposition that all tribes are static and settled to their default habitat. The nomadic tribes across the country but unsettle such naïve premise; thereby engage a different discourse vis-à-vis population-specific tribal governance to address the vacuum in present discourse. The ideation of all tribes taken together as one unified population on the count of indigeneity constitutes the core concern while tribe-specific ideation constitutes no less concern to this end. The former reflects macro-ethnographic scope and the latter micro-ethnographic scope. They supplement one other with mutual relations *inter se*. Both play their respective part to unfold comprehensive research potential in tribal ethnography; irrespective of functional separation between these two. While the tribes are diversified with characteristics of their own, all of them share commonality on the count of indigeneity; compared to the contemporary world.

In forthcoming paragraphs, effort is on to address singularity of the population in its entirety on the basis of commonality, including shared vulnerability. Also, parallel effort is on to trace derivative features non-negotiable for their grouping to be graduated to a tribe in regional reality of the South-Asian subcontinent.

IV. Pedantic Ethnography: The Pathology behind

Back to mainstream tribal studies scholarship, tribal ethnography in India suffers from want of scientific method to serve discursive purpose for

generation of objective observation over the subject population. There are four major methods: (i) classical, (ii) systematic, (iii) interpretive (hermeneutic), and (iv) critical; each has had potential of its own. Since time immemorial, tribal ethnography in the South-Asian subcontinent was initiated and developed by several foreign explorers and, consequently, influenced by the realpolitik they intended to get institutionalized. Accordingly, the tribes in India became introduced to gentry of the contemporary world as poor folk who could not keep pace with time; out of either inability, or unwillingness, or both; something vitiated by anachronism and, therefore, anathema to alternative chronicles of their civilization, often than not found in literature and/or heard in orature; derived from local resources. On the contrary, there is likelihood of local resources getting vitiated by the then elites to serve vested interest of their own and, thereby, get ethnography far away from truth. Tribal ethnography appears a double-edged sword with potential to damage the discourse by either edge.

Ideologue struggle apart, otherwise objective ethnographers may and do fall prey to discursive falsehood out of want of technical knowhow to engage empirical studies in the tribal lifeworld. Besides minute disciplinary nitty-gritty of tribal ethnography in India, semantics plays potential role to decipher ethnic lifeworld behind indigeneity of the given tribe; something instrumental to generate insight vis-à-vis sociology of the tribe concerned. The genesis of semantics as a discipline lies in a classic of ancient Greek civilization¹³ where variety of means were

¹³ Aristotle, *Rhetoric* (350 B.C.E.). Available at:

mentioned in vivid details, viz., *ethos*, *logos*, *pathos*, etc., followed by mention of *telos* as corollary goal or purpose to be served by these means.¹⁴ In the early-twentieth century, Saussure sharpened the semiotics with wise use vis-à-vis the signifier and the signified.¹⁵ Nowadays these two refer to the insignia of expression and impression respectively.¹⁶ The author

<http://classics.mit.edu/Aristotle/rhetoric.html>

- ¹⁴ In ancient Greece, these terms corresponded with basic components that all rhetorical situations have: *logos* means “text”, ... *ethos* means “author”, ... *pathos* means “audience”, ... *telos* means “purpose”, ... *Kairos* means “setting”. Aristotle’s Rhetorical Situation: Rhetorical Concepts, Purdue Online Writing Lab. Available at: https://owl.purdue.edu/owl/general_writing/academic_writing/rhetorical_situation/aristotles_rhetorical_situation.html#:~:text=Many%20people%20have%20heard%20of%20the%20rhetorical%20concepts,with%20basic%20components%20that%20all%20rhetorical%20situations%20have
- ¹⁵ The word *symbol* has been used to designate the linguistic sign, or more specifically, what is here called the signifier. Principle I in particular weighs against the use of this term. One characteristic of the symbol is that it is never wholly arbitrary; it is not empty, for there is the rudiment of a natural bond between the signifier and the signified. The symbol of justice, a pair of scales, could not be replaced by just any other symbol, such as a chariot. Wade Baskin (tr.), Charles Bally and Albert Seignette (ed.), Ferdinand de Saussure, *Course in General Linguistics* (1916), Columbia University Press., New York, 1959, p. 68. Available at: https://books.google.co.in/books?id=ffzWX9LeeykC&printSection=frontcover&source=gbs_ge_summary_r&cad=0#v=snippet&q=chariot&f=false
- ¹⁶ From the very beginning, practical needs have driven human actions often at the cost of ideals. The usefulness aspect of actions, or, the happiness of the greatest number of people (mere timeserving rhetoric mostly), directs realpolitik in the age of democracy.

explores causal relations between means and ends of sign on the given subject, thereby engages a quest for truth through impression out of literature, orature and/or other relevant resources in the narrative available in course of ethnic discourse with reading in between signs of expression visible, audible and/or traceable by scholarship engaged in mainstream tribal ethnographic studies. With cue from prior literature, the author demonstrates disconnect between expression (read the text) and impression while ethnographers read the latter in different context- after their respective times- and claim their impression as truth derived of expression,¹⁷ something alien to the context in the time of text, thereby amounts to imposition of their opinion upon expression. The given chronicles of tribal ethnography are ridden with myriad cases of imposition with adverse impact upon tribal governance discourse in recent times.

Without getting judgmental, the recent debate vis-à-vis the Khasi Hills Autonomous District Council (Khasi Social Custom of Clan Administration) Bill of 2020 (hereafter, the Bill) deserves discussion; so far as interpretations out of ethnographic readings are concerned. the Bill is intended to amend the Khasi

A. J. Thomas, *Impressions, Expressions*, Indian Literature, Vol. 60, No. 4 (294) (July/August 2016), p. 10. Available at: <https://www.jstor.org/stable/pdf/44479512.pdf>

- ¹⁷ What has been cut apart cannot be glued back together. Abandon all hope of totality, future as well as past, you who enter the world of fluid modernity. Zygmunt Bauman, *Liquid Modernity* (2000), Polity Press, Cambridge (USA), 2000. Available at: https://books.google.co.in/books?id=xZ0RAAAAQBAJ&printSection=frontcover&source=gbs_ge_summary_r&cad=0#v=snippet&q=what%20has%20been%20cut&f=false

Hills Autonomous District (Khasi Social Custom of Lineage) Act of 1997 (the Act); thereby get the Khasi woman isolated from the clan and the property in an otherwise matrilineal tribe after her marriage with a man from non-indigenous community. The Bill has earned wrath from human rights scholarship; followed by an otherwise right reasoning behind.¹⁸ The author prefers to add another. With similar legislative intent, the Bill of 2020 has been preceded by another of 2018 and, with no dissent voice in the House, unanimously passed by the Council in 2020; something difficult enough to digest in representative democracy while the basic human rights of almost half of their total population ought to get hurt by default.

Despite proposition resembles devil's advocacy, let us pay due heed to reverse side since adversarial procedural discourse under the common law tradition thereby derives legitimacy by correspondence to *audi alteram partem* rule; a non-negotiable principle of the

¹⁸ Because of the matrilineal system, which place Khasi women at a much higher pedestal than their other counterpart in the North East finds itself in precarious situation because of the inherent powers of male to decide and take decisions in the social and political lives of Khasis. The fervour of the Khasi male to preserve purity of the race and of the property seems to have led to unspoken insecurity because inter-marriage of Khasi women with non-Khasis. The drastic step taken by the KHADC to stripped Khasi women their status of tribe on marrying non-Khasi and subsequent disqualification from inheritance and also of their children is regressive as it strikes at the root of Universal Human Rights.

Thangzakhup Tombing, *Comparative Legal Analysis of Indigenous Customary Institutions among Mizo, Khasi and Paite Tribes of North East India*, Contemporary Law Review, Vol. 4, No. 1, p. 189.

natural justice discourse, commonplace in civilizations across the world. A classic illustration of getting self-isolated from royal status was set by Edward VIII, a king of England, by abdication of his seat way back in 1936 while the king got married to Wallis Simpson; a divorced lady of America. Since time immemorial, customary laws to minimize marriage of Khasi women with men of non-indigenous communities are in vogue to safeguard the clan property owned by Khasi women; by courtesy, matrilineal legacy of the tribe. The draftsmen codified valid customary laws and got them codified in the Act of 1997. Accordingly, even after getting married to men of non-indigenous communities, Khasi women and their children cannot be made *ipso facto* deprived of status and property so long as statutory points are fulfilled by them to continue with the clan. The customs, once codified, cannot get set aside with the expiry of two decades- from 1997 to 2017- to get the given juridical position of customary laws unsettled 2018 onward by whim and fancy of public rage. While blind negation of inter-community marriage finds no juridical endorsement, reasonable restraints on marriage with aliens are apparent in the Act of 1997 itself.¹⁹ Also, last yet not least, the legislation is by and large devoid of gender discrimination. While section 3(1)(b) of the Act extends reasonable restrictions on the marriage of Khasi women, section 3(1)(c) extends the same to men alike.

The Bill of 2020, if the same enacted likewise, ought to take the Khasi legacy to the community-fetishism of so-called civilized legacy. In all other

¹⁹ The Khasi Hills Autonomous District (Khasi Social Custom of Lineage) Act, 1997; Section 3(1).

communities, viz., Hindu Law, Islamic Law, Christian Law, etc., inter-community marriage is prevented by circuitous routes: with no provision for solemnization of inter-community marriage; either by customary laws, or by statutes primarily meant for codification of customs. A recourse to the Special Marriage Act of 1954- the law of secular marriage in India- is available. The same, however, cannot set aside the consequence of inter-community marriage against either Khasi women or men- as the case may be- under the Act of 1997 and, if enacted, under the impugned Bill of 2020. Therefore, customary laws of the Khasi tribe alone cannot be condemned for regional tribal parochialism toward the matrimonial relations.

V. Signifier and Signified: Avant-garde Readings

After decade of “A Course on General Linguistics” (1916), the given structuralist reading of the science of symbolism went contested by subsequent discourse. Within a decade, more than author, text was brought to the forth; by courtesy, ‘Triangle of Reference’.²⁰ Accordingly, Ogden and Richards extended arguendo for recognition of an insight into potential of the language in itself; followed by illustration of primitive peoples and their means of communication through symbolism; hardly theorized by grammatical distinctions.²¹

²⁰ For details, read C. K. Ogden and I. A. Richards, *The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism* (1923), Harcourt, Brace and World, New York, 1930, p. 11. Available at:
https://ia800402.us.archive.org/30/items/meaningmeaning00ogde_336/meaningmeaning00ogde_336.pdf

²¹ Philosophers and philologists alike have failed in their attempts. There remains a third group of inquirers with an

Subsequently, with poststructuralist reading, Barthes questioned exclusive authority of the authorship alone; thereby contested single theological meaning of the language as message of the author-God after structuralist construction.²² With deconstruction of authorship, along with monopoly upon meaning of the text, Barthes unsettled Saussure on authorship and Ogden-Richards on text, so far as originality is concerned, thereby replaced source by destination.²³

interest in linguistic theory, the ethnologists, many of whom have come to their subject after a preliminary training in psychology. An adequate account of primitive peoples is impossible without an insight into the essentials of their languages, which cannot be gained through a mere transfer of current Indo-European grammatical distinctions, a procedure only too often positively misleading. In the circumstances, each field investigator might be supposed to reconstruct the grammar of a primitive tongue from his own observations of the behaviour of a speaker in a given situation.

Id., p. 6.

²² A text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture. ... Succeeding the Author, the scripiter no longer bears within him passions, humours, feelings, impressions, but rather this immense dictionary from which he draws a writing that can know no halt: life never does more than imitate the book, and the book itself is only a tissue of signs, an imitation that is lost, infinitely deferred. Roland Barthes, *The Death of the Author* (1967), in Stephen Heath (tr.), Roland Barthes, *Image, Music text*, Fontana Press, London, 1977, pp. 146-147. Available at: https://monoskop.org/images/0/0a/Barthes_Roland_Image-Music-Text.pdf

²³ No one, no 'person', says it: its source, its voice, is not the true place of the writing, which is reading. ... Thus is revealed the total existence of writing: a text is made of

After his poststructuralist reading, therefore, reader-a discursive and not individual persona- has usurped hermeneutic focus in recent times.²⁴ Thus, semantics turned volte-face by half a century (1916-1967). The basic semantics in legal education engages a student exploring the critical crossroads of legal language.²⁵ The pedagogue but preached his wisdom on deaf ears.

Back to the given social custom in Khasi tribe, the Act of 1997 is embodiment of expression while the Bill of 2020 that of impression derived by popular perception. As mentioned earlier, after structuralist approach, the Act of 1997 represents original intent of tribal ancestry. After poststructuralist approach,

multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination.

Id., pp. 147-148.

²⁴ Yet this destination cannot any longer be personal: the reader is without history, biography, psychology; he is simply that someone who holds together in a single field all the traces by which the written text is constituted.

Ibid.

²⁵ The student who receives a general semantic kind of orientation with his survey of legal thought sees more easily what he is working with and sees how important a cultured imagination is to him. If he can give an intelligently critical mind and free himself from at least a few of the fetters of his preoccupations, he will surely be a better lawyer and a better citizen- that is, more useful to himself and to his society.

Walter Probert, *Why Not Teach "Semantics" in Law School?* *Journal of Legal Education*, Vol. 10, No. 2 (1957), p. 214. Available at: <https://www.jstor.org/stable/pdf/42891115.pdf>

the Bill of 2020 represents intent of tribal population apparent on the face of record through caucus on this matter. In the very early twentieth century itself, Maine observed change in the customary law of tribe as a social fact. Therefore, change appears constant to occur at regular intervals with the passage of time; thereby keeps customary laws afloat to remain relevant. Thus, even before the codification of such a custom by written legislation, change of one custom by another proved a constant social fact.²⁶ Thus, an otherwise axiomatic hypothesis- that codification alone changes a custom- cannot necessarily prove likewise by default. Also, earlier custom may be replaced by newer custom. Without semantic nitty-gritty, Maine discovered the same; long before the deconstruction of source and destination by Barthes. In juridical studies, custom is often than not qualified by criteria of its existence since time immemorial and without major contestation by persistent objector anyway. In ethnographic studies, however, slow-yet-steady shift from a custom to another by means of evolution is endorsed as a social fact; by Maine and by Barthes alike. While Maine maintained his focus on custom irrespective of shift from one

²⁶ When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without. It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long -- in some instances the immense -- interval between their declaration by a patriarchal monarch and their publication in writing.

Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*, John Murray, London, 1908, p. 19. Available at: <https://ia802704.us.archive.org/2/items/ancientlaw030840mbp/ancientlaw030840mbp.pdf>

custom to another, Barthes broke the custom of getting glued to custom. Rather, he preferred to shift the focus to destination with the ideation of reader without persona as an end of communication. Back to debate on social custom in the Khasi tribe, after poststructuralist reading, a custom cannot be held sacrosanct since public opinion in present generation is the destination and there is caucus for departure from the archaic custom; unable to resolve the crisis looming larger in contemporary times.

Whether and how far social custom- codified by the Act of 1997- may usurp volte-face within two decades- codified by the Bill of 2018, amended by that of 2020- raises discursive concern for those in juridical studies. After traditional jurisprudence, the custom ought to remain in place (i) since time immemorial, (ii) with *opinio juris*, (iii) no interruption, and (iv) no persistent objection.²⁷ A newer jurisprudence but appears on its rise in course of international juridical discourse vis-à-vis climate change where the United Nations Framework Convention on Climate Change of 1992 (UNFCCC) creates timebound global standards; followed by *de jure* adherence by all sundry state parties. Besides, there were recent occasions where the United Nations General Assembly set several timebound development agenda, e.g., Millennium Development Goals of 2000 and Sustainable Development Goals of 2015, by resolutions in floor of

²⁷ For details, refer to Draft conclusions on identification of customary international law 2018, adopted by the International Law Commission at its seventeenth session, in 2018. Available at:
https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf

the House;²⁸⁻²⁹ something obligatory for the civilized nations- by courtesy *erga omnes* doctrine- not to defy expression taken together by all sundry states; with due stake in the international community. The veteran readership ought to remember the cardinal legal maxim of the common law tradition- *salus populi suprema lex esto*³⁰- to bring in legitimacy for the systemic action undertaken by governmental institutions in course of public service discourse. Thus, with legislative intent to safeguard public welfare as reasoning behind, the Bill of 2020 is meant to resist expropriation of Khasi tribe from land property and other resources owned by Khasi woman in matrilineal societal legacy; by courtesy, marriage with one of non-indigenous community who may and does exert proxy on behalf of his spouse; thereby administer property to gross detriment of Khasi tribe. Whatever discrimination against gender may happen is incidental- and not intentional- in its essence. With no intent to practise patriarchy, the author demonstrates the potential *arguendo* to be advanced by community advocacy; with the poststructuralist hermeneutics to this end.

With diversified epistemology behind, bio-linguistic cynicism backs Roland Barthes against cognitive faculty- where lies the discursive genesis of custom- to validate poststructuralist scepticism against customary law

²⁸ *Vide* Millennium Development Goals, 2000. Available at: <https://www.un.org/millenniumgoals/>

²⁹ *Vide* Sustainable Development Goals, 2015. Available at: <https://sdgs.un.org/goals>

³⁰ G. M. Lee (ed.), Oxford Latin Dictionary, Clarendon Press, Oxford, 1968, p. 1684. Available at: <https://ia801901.us.archive.org/35/items/aa.-vv.-oxford-latin-dictionary-1968/AA.VV.%20%20Oxford%20Latin%20Dictionary%20%5B1968%5D.pdf>

through circuitous route. While the cognitive faculty is subject to transformation, as a corollary institution, the customary law ought to be qualified by change experienced by cognitive faculty in the tribal lifeworld around.³¹ For instance, while otherwise urban gentry of pre-digital world cannot cope with net, otherwise peri-urban youth of the digitalized Jamtara do reign the world of cybercrime. Albeit, not in the context of tribes, the text in prior literature by Chomsky ought to be read likewise. After structuralism, with their own respective means and methods, all sundry thoughts in course of semantic discourse contested sacrosanctity of the custom as a source of law. Despite the historic value of custom, law ought to keep pace with time; thereby remain relevant to serve purpose of its subjects in their given time and space. In final count, across the world, present generation matters; much more than predecessor generation.

VI. Communion by means of Lingua Franca

By courtesy, international environmental regime, intergenerational concern continues in course of an

³¹ More generally, it appears that the notion of “understanding a sentence” must be partially analyzed in grammatical terms. To understand a sentence, it is necessary (though not, of course, sufficient) to reconstruct its representation on each level, including the transformational level where the kernel sentences underlying a given sentence can be thought of, in a sense, as the ‘elementary content elements’ out of which this sentence is constructed.

Noam Chomsky, *Syntactic Structures*, 2nd Edition, Mouton de Gruyter, Berlin, 2002, pp.107-108. Available at: https://ia903405.us.archive.org/18/items/NoamChomskySyntcaticStructures/Noam%20Chomsky%20-%20Syntcatic%20structures_text.pdf

otherwise unproblematic developmental discourse vis-à-vis sustainability. Also, intra-generational concern is afloat with climate diplomacy of the global South. While the former technical term centres around time, the latter centres around space. The values conveyed, however, often than not fall short to reach the desired destination vis-à-vis universality of rights discourse. The Universal Declaration of Human Rights of 1948 (UDHR), for instance, centred around space (the then population present in 1948) and not around time; albeit, the then real-time apart. All these multilateral environmental agreements- taken together- centres around time (ancestry-present dynasty-posterity taken together) and not around space; something commonplace enough in argumentative space of the Global South diplomacy alone. In short, every sundry juridical instrument suffers from mutual disconnect between two fundamental linear variants, e.g., space and time, non-negotiable for social studies.

In the tribal semantics, several trajectories run their respective studies: (i) intra-generational research engages spatial studies to decipher relations between the tribes and those civilized and inter-ethnic relations between/ among two or more tribes in same tenure, i.e., spatial variants of the same time and space; (ii) intergenerational research engages continual studies to decipher the intergenerational relations between/ among two or more generations; between predecessor and present generations of the same tribe in particular, i.e., continual variants of the same space. The author hereby underscores vacuum, if not void in both spatial and continual studies with quotes from Shakespeare and reference from a custom on marriage of Khasi women with her man of the nonindigenous community

respectively. Shakespeare identified no space for the tribe and the civilized to engage level-play dialogue *inter se* despite getting placed together in real-time; gross failure of the politics of spatiality to facilitate communication between them. In recent times, Khasi tribe cannot accept the continuity in getting custom of predecessor generation upheld despite taking pride out of their respective stakes in the tribal community tradition; gross failure of the continuity politics to vindicate communication between them. In cases of rupture in the communication, either between the tribe and those civilized or between successive generations of the tribe concerned, commentary about progressive development in course of civilizational discourse remains unattended while the spirit of modernity lies in the development of mutual dialogues.³² Thus, listening to earlier social custom and learning from past generations cannot be dissociated since the same marks the end of tribalism. On the contrary, unlike the tribes posited in the Sentinel Island by providence, all sundry tribes cannot keep the communities isolated from the world. In recent times, marriage of Khasi woman with non-

³² The historian and the facts of history are necessary to one another. The historian without his facts is rootless and futile; the facts without their historian are dead and meaningless. My first answer therefore to the question "What is history?" is that it is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past. R. W. Davies (ed.), E. H. Carr, *What is History?* (1961), 2nd ed., Penguin Books, New Delhi, 1986, p. 30. Available at: https://ia802900.us.archive.org/9/items/EdwardHallettCarrWhatIsHistoryPenguinBooks1990/Edward%20Hallett%20Carr-What%20is%20History_-Penguin%20Books%20%281990%29.pdf

indigenous man is commonplace. Therefore, naïve social custom vis-à-vis ownership of land other resources in matrilineal legacy of Khasi tribe deserves review in public interest. Thus, an apparent and irreconcilable conflict between social custom of the predecessor generation and proposed legislation of the present generation has posited men and women of Khasi tribe at loggerheads; with no remedy available to the tribe.

All these apparent belligerent relations apart, mutual intercommunity relations between the tribe and the civilized are fragmented in the following patterns of civilizational intercourse: (i) Daniel Defoe depicted the relationship between Robinson Crusoe and Friday. The former was an American castaway to island where he rescued an indigenous from the savagery of fellow natives. Since the community was devoid of language, the rescued was named by Crusoe as Friday; after the day he was rescued and thereby received his present life. With no language of his own, Friday learnt English and engaged mutual conversation with Crusoe. Also, Friday was baptized by Crusoe. The readership witnessed hierarchy by default; similar to hierarchy between the creator and the created: uncontested. (ii) While Shakespeare depicted the relationship between Prospero and Caliban, the former was an Italian Elite and the latter an island tribesman with local language and legacy of his own, the readership witnessed otherwise.³³ With anti-colonial arguendo behind, Caliban condemns the hierarchy as aggression in letters and spirit; thereby played persistent objector to contest colonization as an(y) international custom.

³³ For details, read William Shakespeare, *The Tempest* (1611).

The realpolitik behind aboriginal identity of Friday and tribal identity of Caliban apart, Defoe and Shakespeare engaged their respective experiments with linguistics. Friday lacks his language by inheritance. Therefore, while he learnt the foreign alphabets, he thereby turned baptized in English. With default loss of his indigenous origin, he thereby turned to replica of his saviour. In the absence of difference between Robinson and Friday, despite dialectic space, their conversation created no dialogic space between them.³⁴ On the contrary, Prospero and Caliban could create dialogic space since they shared dialectic difference; by courtesy, their respective linguistic resources; irrespective of the spatial apposition of two otherwise poles-apart personae by chance. With cultural erasure, the tribal dialectics turn endangered toward extinction in time ahead.

Before proceeding to elsewhere, inter-ethnic relations deserve deliberation on a count. More than semantics, tribes are mutually isolated by alphabets. In course of voyage to the sea, Lemuel Gulliver came across several island tribes, e.g., in respective isles of Lilliput, Brobdingnag, Laputa, Balnibarbi, Luggnagg,

³⁴ Dialogue and dialectics. Take a dialogue and remove the voices ... remove the intonations ... carve out abstract concepts and judgments from living words and responses, cram everything into one abstract consciousness- and that's how you get dialectics.

Caryl Emerson (ed.), Mikhail Bakhtin, *Problems of Dostoevsky's Poetics*, University of Minnesota Press, Minneapolis, 1984, Editor's Preface, p. xxxii. Available at: https://ia803408.us.archive.org/13/items/bakhtin-mikhail-problems-of-dostoevskys-poetics-1984/Bakhtin_Mikhail_Problems_of_Dostoevskys_Poetics_1984.pdf

Glubbdubdrib, Japanisolated, Houyhnhnms, etc., or, in the same island, Yahoo, each isolated from others by language; each blessed with own orthography to its credit.³⁵ With exile in self-contained island, each tribe remains cut-off from larger tribal experience with others across the board. The want of lingua franca thereby prevents conversation between/ among these tribes. Here lies reasoning behind inter-ethnic struggle, quite commonplace since time immemorial, and the South Asian subcontinent is no exception to this end.³⁶ The want of dialectic space between/ among otherwise neighbouring denizens thereby stands supplemented by duel; followed by the debacle of either in a way or other to the travesty of indigeneity as a generic cause; irrespective of the victor or the vanquished concerned in the fateful fratricide.

The readership witness want of communication between Caliban and Prospero since none of them is willing to listen to and learn from one in conversation despite mutual conversation by getting face-to-face. Despite linguistic similarity, therefore, both engage monologues since intent required to apply mind over the conveyance of another is non-existent. Without meeting of respective minds, therefore, communication between Caliban and Prospero remained incomplete;

³⁵ For details, read Jonathan Swift, *Gulliver's Travels* (1726).

³⁶ The arms of all the tribes are the same—namely, the matchlock, sword, and shield, and their fighting power taken together is not inconsiderable; but they are always at war with each other, and can never heartily combine for any common enterprise.

Horatio Bickerstaffe Rowney, *The Wild Tribes of India*, Thos. De La Rue & Co., London, 1882, p. 119. Available at: https://www.rarebooksocietyofindia.org/book_archive/196174216674_10152149193986675.pdf

followed by the exchange of condemnation between themselves. Likewise, there lies want of communication between/ among generations in the Khasi tribe while reading the essence of ancient social custom: to get women in the tribe blessed with land and all other resources; thereby avoid violence against woman and her child through empowerment of the more fragile gender of the society with default tender features and continuity of the familial lineage by means of female members in the tribe alone. As a jural correlative,³⁷ right to run family- the most primary institution in the society- is followed by duty not to get the legacy affected by personal sycophancy of a woman as head of the family; something central to the tribal family jurisprudence yet not stated since present peril was not even subject of wild imagination for the tribe while the matrilineal-matrilocal social custom went initiated. Thus, a claim for human right to prefer spouse of her choice ought to fail before a court with cognizance of social fact on the count of her stoic silence while man is deprived of human right to property and thereby remain dependent to her without remedy by the same corpus of customary law. The case of feud between men and women in Khasi tribe proves want of lingua franca- followed by consequent struggle between them- while man is devoid of property and woman is devoid of liberty and neither pays heed to the void suffered by reverse side.

³⁷ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, The Yale Law Journal, Vol. 23, No. 1 (Nov., 1913), p. 30. Available at: https://www.jstor.org/stable/pdf/785533.pdf?refreqid=excelsior%3A389205a6d616aa38533d3342ee06cce9&ab_segments=%2Cfe-placement-control&origin=&initiator=&acceptTC=1

The Universal Declaration of 1948 is but meant to protect all basic human rights of all; both liberty and property of man and woman, including others. After the legal maxim, *quod approbo non reprobo*, while she approves the Declaration of 1948 for property, she cannot disprove the same for liberty. The maxim is applicable vice versa for him. Thus, internal feud in the Khasi tribe is a classic case to prove that *lingua franca* does never refer to dialectic text alone, but includes dialogic context, reasoning behind *arguendo*, intent behind argumentation, etc. Last yet not least, goodwill, i.e., will to serve the public good is another tributary to bring *lingua franca* into fruition while the moot point is charged by vested interests in the tribe on the basis of gender.

Whether and how far the Declaration of 1948- founded on individualism in the Occidental setting of contemporary times- may apply to the Khasi tribe of India with customary laws since time immemorial poses another moot point on this count;³⁸ more so,

³⁸ The word individualism, like any other symbol or verbal coin has become worn, refined, and transmuted by usage through the centuries. If the rise of modern individualism be traced to the Renaissance, its earliest manifestations were in an intellectual and spiritual release. If not concomitant, certainly, not long in following was the rise of an economic individualism which was to see its first flowerings in the Com- metrical Revolution, the national state, and mercantilism.

Samuel Mencher, *Individualism in Modern Western Culture*, The Southwestern Social Science Quarterly, Vol. 28, No. 3 (December, 1947), p. 257. Available at:
https://www.jstor.org/stable/pdf/42880103.pdf?casa_token=52ZwWUWgFFQAAAAA:vZX_4mW8uEkzGd1FGVJD26CvAmiPccYWkb4DNcO3w_f3jm-5W_8ON2ueCMBWdc4_lnTP-

while human rights discourse is foreign to Khasi tribe. Since time immemorial, deontic jurisprudence- no less righteous than modern individualist rights jurisprudence of the Occident- keeps order and peace in the South Asian subcontinent. Indeed, tribes in India possess their own *sui generis* tradition; with diversity between/ among the tribes. Even they are unfamiliar to rights discourse. Last yet not least, the South-Asian soil cements traditional communitarianism of the East; rather than modern individualism of the West. Here lies a conundrum of policy choice. The apprehension of intervention into her property by male spouse of non-indigenous community after marriage cannot be ruled out and the same has had endorsement from witnesses with prior experience. On the contrary, whether and how far the basic freedom of choice vis-à-vis life-partner may be limited to all Khasi women on the basis of unpleasant prior experience in some cases poses a moot point- more so while Khasi men enjoy freedom of choice on this count. Besides, whether and how far a classification vis-à-vis exclusive stake of Khasi women to hold family property- with nothing left to Khasi men- after the custom may be upheld as reasonable classification in the given circumstance poses another moot point.

VII. Tribal Alphabets: An Endgame Ahead

The paradox in hermeneutics of tribal semantics apart, slow-yet-steady erasure of tribal alphabets- apocalyptic enough to take tribalism to doomsday- appears clear in sight and such apprehension receives

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QtJIGsHCRtfwB0cngUGFW

acknowledgement by the UN international organization.³⁹ A concern for gradual erasure of indigenous languages worldwide from the UNESCO World Atlas of Languages- including India- is built on its lived experiences from its own literature since long back; something more fundamental in its potential to turn the tribes fragile from within vis-à-vis freedom of expression of the tribe in vernacular.⁴⁰ In final count, among others, means and methods of self-expression by local languages- communicable to public - is held non-negotiable trait of human existence. For the community, more so for the tribe, access to local language (read mother tongue) is meant to connect to its own chronicles, cultural ancestry, social custom, and so on. In recent times, myriad tribal languages in India get endangered, many among them get extinct; something endorsed

³⁹ When we lose a language, a community loses its unique vision- its history and culture, we lose the local perspectives and stories. It is tragic that, with loss of their mother tongue, people find themselves unable to speak their first language. It is an irreplaceable loss.

Eric Falt, Director, UNESCO New Delhi, quoted in its webpage. February 22, 2022. Available at:

<https://www.unesco.org/en/articles/unesco-launches-report-indias-tribal-and-indigenous-languages>

⁴⁰ The UNESCO Atlas of the World's Languages in Danger, Paris, 1996, 2001 and 2010. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000187026>

by official literature.⁴¹⁻⁴² More than local alphabets, at bottom, the loss of voice extends its stretch to cover cultural expression; thereby leave the tribe devoid of its traditional insignia. Without access to ancient chronicles, tribesmen turn severed from their connect to indigenous narratives; thereby left with no other option but to take cognizance of foreign tautology as their native narratives.⁴³ Thus, loss of alphabets

⁴¹ The languages spoken by tribals - tribal languages - are treated as unscheduled languages. In the wake of changing educational scenario, many of the tribal languages are facing the threat of extinction. The loss of language may adversely affect tribal culture, especially their folklore. Ministry of Tribal Affairs, New Delhi, *Draft National Policy on Tribals*, Australian Indigenous Law Reporter, Vol. 9, No. 2 (2005), p. 107. Available at: https://www.jstor.org/stable/pdf/26479588.pdf?refreqid=excelsior%3A2b38b5c7efc9edf29b66279dee364bc6&ab_segments=&origin=&initiator=&acceptTC=1

⁴² Unfortunately, Indian languages have not received their due attention and care, with the country losing over 220 languages in the last 50 years alone. UNESCO has declared 197 Indian languages as 'endangered'. Various unscripted languages are particularly in danger of becoming extinct. When senior member(s) of a tribe or community that speak such languages pass away, these languages often perish with them; too often, no concerted actions or measures are taken to preserve or record these rich languages/expressions of culture. National Education Policy, 2020; paragraph 22.5.

⁴³ When Oldspeak had been once and for all superseded, the last link with the past would have been severed. History had already been rewritten, but fragments of the literature of the past survived here and there, imperfectly censored, and so long as one retained one's knowledge of Oldspeak, it was possible to read them. In the future such fragments, even if they chanced to survive, would be unintelligible and untranslatable.

George Orwell, *Nineteen Eighty-four* (1949), A Project Gutenberg of Australia e-Book, 2001, p. 282. Available at:

leaves the tribal voice silenced; thereby supplements- sometimes supplants- tribal truth by the import of foreign fantasy- authored by otherwise scholastic strangers elsewhere- after hearsay story to hoodwink history as generational discourse between ancestry and posterity of the same community. In the absence of acquaintance to alphabets, the posterity is left devoid of lingua franca to speak to its own ancestry.

As stated in preceding paragraphs by innuendo, a candid statement is imperative to keep functional clarity on following points: (i) while non-tribal tributary to mainstream tribal studies scholarship is celebrated on the count of scholastic insight and merit involved, due to want of the lived experience since childhood, so-called civilized scholars- of India and abroad alike- sometimes fell short to decipher the tribal lifeworld with inner spirit of the tribe; in spite of cutting-edge knowledge in their respective subject universe. All non-tribal anthropologists- well known for the contribution to socio-anthropological studies in the South-Asian subcontinent- are divided as: (i) foreign anthropologists in India, who reached the British India and engaged tribal studies either as mercantile administrator or as missionary clergyman; (ii) native anthropologists but engaged tribal studies either as philanthropist or as social reformer. Indeed, both foreign and native anthropologists employed vertical and horizontal approaches; mentioned earlier. This similarity apart, foreign and native anthropologists demonstrated dissimilarity vis-à-vis intent behind their tribal studies. Rare exceptions apart, while foreign explorers by and

<https://ia800403.us.archive.org/30/items/NineteenEightyFour-Novel-GeorgeOrwell/orwell1984.pdf>

large studied tribes with minute observation, native reformers went ahead with interventionist approach toward betterment of the tribes; with intent to bring them into the nationalist discourse.⁴⁴ Later, however, cynicism against interventions by native scholars was commonplace since these were seen as adventures uncalled for in an otherwise naïve tribal lifeworld. The observations of foreign scholars as evidences of theatrical audience thereby stands endowed with the credit for documentation of tribal lifeworld as it was.

A vacuum- if not void- lies in deafening silence of the tribes in getting their own ancient chronicles conveyed to the posterity anyway. Among several other hermeneutic canons to decipher the silence, loss of

⁴⁴ History of Indian anthropology is based on two sources. One source is the reading of the original texts by pioneering anthropologists who were committed to various tasks of nation building and the other is the reading of literature by anthropologists who regarded Indian anthropology simply as a continuation of the western tradition. There also existed a view that an Indian form of anthropology could be discerned in many ancient Indian texts and scriptures before the advent of a colonial anthropology introduced by the European scholars, administrators and missionaries in the Indian subcontinent. ... Studies for the betterment of the underdog were often conducted by anthropologists and sociologists who belonged to higher castes occupying elite positions in the society. The critics have only followed the smart way to criticize the pioneers instead of studying the socially committed works of the later and this was one of the reasons that Indian anthropologists failed to honour their nationalist predecessors and depended more on the wisdom of the Western scholars.

Abhijit Guha, *In Search of Nationalist Trends in Indian Philosophy: Opening a New Discourse*, Institute of Development Studies, Kolkata, Occasional Paper 62, September 2018, pp. 3-4. Available at: <http://idsk.edu.in/wp-content/uploads/2018/10/OP-62.pdf>

indigenous languages may be identified as one behind the absence of tribal chronicles by themselves. While the tribal languages get extinct, even if endangered, literary works stand subjected to oblivion and oratory cult follows the same fate since the headcount of familiarity to written scripts and spoken dialects in these languages suffers from gradual downfall with time; to turn the same negligible and non-existent. More than absence of interest in the tribes to get chronicles recorded for conveyance to the posterity, absence of their own languages to engage the practice of looms larger in contemporary times. Thus, loss of languages is pregnant with potential to silence the tribes vis-à-vis access to their own cultural heritage by means of chronicles in the antiquity. Devoid of lessons from the past, no community in hitherto chronicles of civilization could charter its prospect so far and, without access to its chronicles, the tribes ought to suffer the same fate. If the tribes speak their chronicles in foreign or local language, unconnected to tribal lifeworld, the voice ought to merge with mainstream population at large through assimilation; something unbecoming to identity politics of the tribes.⁴⁵ A tribe getting merged to the mainstream

⁴⁵ With the great schemes of development coming into being, a twofold policy was necessary. One was to ensure that the people were not culturally emasculated in a way that would rob them of their identity and character. India's is a rich and varied tapestry, as Mr Nehru has said, and the tribes had to be encouraged to maintain their own personality, their own culture and their own language.
Verrier Elwin, *The Tribal World of Verrier Elwin: An Autobiography*, Oxford University Press, New York, 1964, pp. 294-295. Available at:

resembles the allegorical salt-idol merged to sea since both the tribe and the salt-idol thereby cease to exist.

On the contrary, irrespective of literary worth, accounts of ancient tribal denizens by subsequent non-tribal citizens- foreign and native scholars alike- are dubbed voices of chronicles since tribal India has lost its voice with the loss of languages of its own. These dubbed voices apart, the tribe struggles for speech-ability on its own narrative. The tribal lifeworld is somewhat devoid of pluralism: a trait of modernity. Thus, tribal accounts in other (foreign) languages engage no communication with the tribes about their own chronicles since these accounts belong to those civilized. Subjected to systemic silence, therefore, diction of the modern civilization turns monologized since the same falls short to reach the tribe with communication intended by both sides: the signifier and the signified. Hence, deafened by systemic censure, the tribe cannot learn lessons on its own lifeworld from the civilized since the meaning of authoritative voice intended by those civilized and translated to the tribal voice cannot meet the tribe to generate 'dialogization'.⁴⁶ The reasoning lies here: (i)

<https://ia801004.us.archive.org/31/items/tribalworldofverriervinautobiography/TRIBAL%20WORLD%20OF%20VERRIER%20ELVIN%20-%20AUTOBIOGRAPHY.pdf>

⁴⁶ A word, discourse, language or culture undergoes 'dialogization' when it becomes relativized, de-privileged, aware of competing definitions for the same things. Undialogized language is authoritative or absolute. Michael Holquist (ed.), Caryl Emerson and Michael Holquist (tr.), M. M. Bakhtin, *The Dialogic Imagination: Four Essays*, University of Texas Press, Austin (USA), 1981, p. 427. Available at:

differences in dialectic, i.e., text; (ii) differences in dialogic, i.e., context; and (iii) both. More than question, a fundamental quest deserves deliberation on the moot point and the same lies in speech-ability of the tribe in course of tribal studies discourse. In other words, regular colloquial exchanges in the everyday tribal lifeworld apart, a series of wh-questions await the author: *can the tribe speak? If so, how? If not, why?* followed by respective responses with their reasoning behind.

A takeaway from the deliberation mentioned above lies in the plurality vis-à-vis want of speech-ability. The subaltern cannot speak out of solitary societal confinement; albeit arguably.⁴⁷ The tribe cannot speak out of altogether different reasoning behind. Despite being collective entity by default, the tribe suffers from solitary confinement in its own cage. The tributaries toward censure and/or erasure of their collective voices are (i) ethnic parochialism against merger with the mainstream; (ii) want of inclusivity in modern (read urban) civilization behind apathy toward engagement with the tribe. In either case of dissimilar causes, the vacuum- if not void- in mutual communication between the tribe and the civilized culminates into similar consequence to get the tribe subjected to systemic silence to the detriment of mutual conversation between them; something identical to the subaltern silence, though, out of singularity. Speech-ability, therefore, can be subjected to negation; even in case of the collective.

https://archive.org/details/dialogicimagnat0000bakh_r5j1/page/426/mode/2up?view=theater&q=dialog

⁴⁷ *Supra*, n. 2.

VIII. Conundrum: Can the Tribe Speak?

Before entry to the candid wh-question hereby mooted, core insignia vis-à-vis tribal identity politics deserves deliberation and the same is run into two trajectories. On one side, hardware of tribal lifeworld deserves assertion through its cartography;⁴⁸ something tangible enough to prove its presence in the soil. The fallacy, however, lies in pluralism of tribal lifeworld to miss the nomadic tribes in India- who deserve assertion through demography- with no settled territory to their credit. On the other, software of the tribal lifeworld deserves assertion through its respective cultural praxis: language constitutes one among them. The given policy advocacy reigns since long back and documented by prior literature meanwhile.⁴⁹ Rather than rigid policy approach- where to rely upon hardware and where to rely upon the software as a determinant of tribalism- reliance is placed by prior literature in dynamic approach;⁵⁰ something more convenient to

⁴⁸ The Adivasi consciousness and the articulation of indigenous people status is not so much about whether they are the original inhabitants of India as about the fact that they have no power whatsoever over anything (land, forest, river, resources) that lies in the territory they inhabit. This is despite being the original inhabitants in relation to the others. The consciousness and the articulation are basically an expression of the yearning to have or to establish a special relation with the territory in which they live.

Virginus Xaxa, *Tribes as Indigenous People of India*, Economic and Political Weekly, Vol. 34, No. 51 (December 18-24, 1999), p. 3595.

Available at: <https://www.jstor.org/stable/pdf/4408738>

⁴⁹ *Supra*, n. 45.

⁵⁰ Dynamic approach is required in interpreting the 'idea of Indigeneity', and in doing so, 'Indigeneity' should be seen

extend the idea of indigeneity- after international law- to tribal population in India. Whatever serves best interest of the vulnerable without offensive to the others ought to be the adopted as tribal policy advocacy; similar to child rights advocacy. Language but plays a default qualifier in tribal identity politics.

A Monad 1 is able to speak by the expression- either by visual or vocal or otherwise-if (s)he is able to convey something by means of a signifier to Monad 2, able to take cognizance of the signified with its meaning; intended by one who sent the signifier. Therefore, speech-ability of Monad 1 turns contingent to knowability of the signifier to be translated by the Monad 2 as the signified; with the identical meaning intended. In cases of communication failure or gap, Monad 1 turns dumb vis-à-vis mutual conversation with Monad 2. Likewise, Monad 2 turns deaf vis-à-vis conversation with Monad 1. It is a case of systemic subversion to turn them deaf-n-dumb in respective circumstances. The vacuum- if not void- in course of tribal studies discourse causing communication failure or gap between these two otherwise competent monads constitutes the omega in the grand saga of testamentary narrative initiated by 'logos' and 'telos', then, 'expression' and 'impression', later yet not least, 'signifier' and 'signified', etc., to remember all these

as a social fact. In this sense, the tribal people of India do share similarities with indigenous peoples.

Rashwet Shrinkhal, *Tribes as 'Indigenous Peoples': Revisiting Indigeneity Debate in India*, *The Oriental Anthropologist*, Vol. 17, No. 2, 2017, p. 230. Available at: <https://journals.sagepub.com/doi/abs/10.1177/0976343020170201>

representative buzzwords from the modern glossary of literary terms and Phrases.

Why communication fails? The power relations- followed by vocabular hierarchy- between signifier and signified often than not plays havoc for communication failure since power is pregnant with potential to get its spatial and temporal presence elevated toward omnipresence and eternity by means of authority; as it is embodiment of power. On the contrary, rebel forces voice radical truth to unsettle hitherto truth:

“*GALILEO: Truth is the child of time, not of authority.*”⁵¹

From the narrative testamentary of otherwise poles-apart totalitarian regimes of the twentieth century, e.g., one in the then Union of Soviet Social Republics and another in the then Third Reich of Weimer Republic respectively, the perennial truth finds endorsement. The former could not resist Bakhtin and Solzhenitsyn in getting their intellectual expression public; if not published in technical sense of the term. Nor the latter could resist Brecht and Vogeler from indulging in dissident expression. Thus, by the tug-of-war, dissident works turned immortal by global public choice afterwards. Likewise, in course of inter-civilizational discourse, an otherwise liberal democratic civilization has had totalitarian features to turn tribal lifeworld trivialized; thereby get population across the board monologized to gross detriment of the dialogic exchange between the tribe

⁵¹ Wolfgang Sauerlander and Ralph Manheirn (tr.), *Life of Galileo* (1938), 2007, p. 24. Available at: <https://cpb-ap-se2.wpmucdn.com/learn.stleonards.vic.edu.au/dist/7/135/files/2013/11/Life-of-Galileo-by-Brecht.pdf>

and the civilized. Thus, indigenous voice of the tribe stands silenced. In case of loss of tribal language, it resembles a case of foeticide. Absence of dialectics ought to spoil the prospect of dialogue between the tribe and the civilized by default. Even a conversation between Robinson and otherwise English-speaking tribe Friday cannot be held as communication since, devoid of language of his own, Friday turned to a dummy of Robinson; his colonizer. Also, exchange (read abuse) between Prospero and Caliban cannot be held as dialogue since none was prepared to listen to another. Consequently, despite mutual knowability of their respective dialectics, free-for-all hate speech hurled by master and servant toward one other got reduced to cacophony- rather than communication - thereby fell severely short to get elevated to conversation. Therefore, despite knowability, speechability remains absent in this noise; something anathema to the conveyance. These three challenges of communication apart, another deserves mention by means of zoom focus; identified by the alien astronautic research: "Here (in the Earth) the most confusing social fact is language; ... content and intent (may and do) differ between course of thought and discourse of speech;"⁵² something peculiar to civilization and not to tribalism. In an earlier regional-

⁵² Watch Rajkumar Hirani (dr.), "*PK*", Rajkumar Hirani Films Private Limited, Mumbai; 2014, protagonist in final scene (translated from Hindi by author. Available at: <https://www.bing.com/videos/search?q=pk&&view=detail&mid=067CA939AAEA532E8E04067CA939AAEA532E8E04&&FORM=VRDGAR&ru=%2Fvideos%2Fsearch%3Fq%3Dpk%26FORM%3DHDRSC4>)

yet-universal film,⁵³ a similar wisdom went apparent in the early-1990s.

Indeed, diversified tribesmen have had class-apart dialectics of their own. Still, the tribe can speak with one other irrespective of diversity of ethnicity and dialectics through exchange of common experience of tribalism since (s)he shares commonality with all similarly situated on the count of indigeneity; something articulated earlier. Likewise, in the contemporary age of representative democracy, (s)he may engage conveyance toward communication with representative of civilization as one- if not only- voice of the tribal population in India. While reading customary laws, the civilized commits mistake by hermeneutic readings of the text in the given context of own civilization. Here there is space for the civilized to decipher the given text in its letters and spirit; also, in the context of time of the tribe; whenever the law came into existence. Like subjects, law as a societal institution lives with time. Therefore, interpretation of the law out of context cannot be held as justice to the law as a societal institution; something applicable to customary laws. Rather than regular vertical approach, the author pleads for a radical policy advocacy with resort to horizontal approach; thereby regards tribalism as remnant of altogether different genre of civilization reigned in ancient antiquity. A parallel exchange between the tribe and the civilized as equal representatives of their respective civilizations ought

⁵³ Satyajit Ray (dr.), *Agantuk* (The Stranger), Janus Films, New York, 1991; observation by protagonist. Available at: <https://www.facebook.com/GriffnMedia/videos/watchagantuka-satyajit-ray-film-satyajit-ray-movie-marathon-714067886008524/>

to enable mutual communication between the tribe and the civilized; followed by conversation; thereby engage the tribe speak to the civilized and vice versa. Also, in the given circumstance of India as a statecraft of one-nation-multiple-civilizations, the tribe can speak to “the State,”⁵⁴ as an ambassador of national or regional population, provided that (s)he reflects chorus of the tribal caucus. Unlike modern individualist, an insignia of the civilized, the tribe lives a communitarian lifeworld with all around; taken together. In discursive perspective, therefore, the tribe can speak for plural cause. In a nutshell, (s)he can (i) voice collective concerns of the community she represents; (ii) engage communication with other tribe to exchange their collective experiences; (iii) engage communication with the world to exchange their civilizational experiences of either all sundry indigenous peoples across the board or the particular ethnic group (s)he lives in.

In its corollary effect, modern individualism of the civilized citizens culminates into the privatization of time and space; followed by hedonistic consumption fetishism of all sundry material resources⁵⁵ while

⁵⁴ *Vide* Articles 12 and 36 of the Constitution of India, 1950.

⁵⁵ The selfish ye shall always have with you. But individualism was something else. It was a self-conscious social philosophy, “a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and friends, so that ... he willingly leaves society at large to itself.” For Tocqueville, individualism was not merely a self-indulgent form of social atomism, or a sustained hissy fit, but something quite new: a conscious and calculated withdrawal from the responsibilities of citizenship and public life. For Tocqueville—who was,

tribal communitarianism of the denizens culminates into reverse cult vis-à-vis distribution of resources among others in the same ethnic group; along with rational consumption for oneself. To the tribe, therefore, civilization and monopolization sound antinomies since (s)he is customized to poles-apart civilization where the resources available in public domain are meant to get accumulated together and subjected to rational distribution to reach out to all in the tribe with the resources; albeit, often than not, most fundamental social relations and economic resources apart. Thus, coexistence of the materialist civilization and spiritualist tribalism- taken together-construct apposition of two otherwise binary opposites; thereby resembles ideation of good and evil in course of romantic discourse; after the English poetic diction:⁵⁶

“Without contraries is no progression. Attraction and repulsion, reason and energy, love and hate, are necessary to human existence.”

“From these contraries spring what the religious call Good and Evil. Good is the passive that obeys reason; Evil is the active springing from Energy.

unlike Maistre, a qualified friend of democracy— there was no greater threat to the new order than this tendency toward privatism.

Wilfred M. McClay, *Individualism and Its Discontents*, The Virginia Quarterly Review, Vol. 77, No. 3 (Summer 2001), p. 394. Available at:

https://www.jstor.org/stable/pdf/26440780.pdf?casa_token=UA_ht94qJhQAAAAA:yCysckw01T97LsB0rt1We12_xCJfHzAq0gem3fkHW98QW_LWDerxACSWBWDmu0ceZWeKpqaP_n1QEdUH0RiRuK3gx0fMnhNPzZ4A3Dgj1cZrN2sJsno7qg

⁵⁶ William Blake, *The Marriage of Heaven and Hell* (1790).

“Good is heaven. Evil is hell.”

With its etymologic essence, *ubuntu* transcended the African regional limits to get spread with global institutional enterprises; UBUNTU UNITED NATIONS may be named as one.⁵⁷ Named after a cultural praxis once initiated by dialectics of the Nguni-Bantu ethnic group in South Africa, *ubuntu* is elevated to a universal clarion call for humanity. After hitherto experience, despite ossicular silence, humane empathy has had potential to sprint supersonic and get inner goodwill conveyed; faster than vocabular expression. Hermeneutics apart, vocabular expression has had myriad trajectories with diversified variants of poles-apart dialogic, dialectic, alphabetic, etc., worldwide. Even in the classic case of Esperanto, an otherwise auxiliary language scribbled by Zamenhof in 1887 and internationalized afterwards, the same belongs to none as a primary language; inherited as mother tongue. No less vocal than audible signifier, therefore, *ubuntu* resembles a poetic rhetoric:⁵⁸

*“Yonder a maid and her wight
Come whispering by:
War’s annals will cloud into night
Ere their story die.”*

The civilized owes humane empathy to tribalism, originated in the African soil, where the Nguni-Bantu tribesmen initiated the best praxis good governance by the communitarian call for collective survival since

⁵⁷ Ubuntu United Nations is a program aimed to train a new generation of leaders around the world based on the Ubuntu philosophy-“I am because you are”. Available at: <https://www.ubuntuunitednations.org/>

⁵⁸ Wilfred Owen, *In Time of ‘The Breaking of Nations’* (1915).

time immemorial with the praxis of distributive justice; something to be followed by subsequent civilizational treatises; including the Constitution of India of 1950,⁵⁹ a feature in course of the good governance discourse for the country. “India, that is Bharat,”⁶⁰ is inclusive enough to deliver distributive justice to Adivasi Bharat alike and, after hermeneutic construction vis-à-vis distributive justice or economic justice by Apex Court as a basic feature of the Constitution,⁶¹ the same is non-negotiable to “unity and integrity of the Nation”;⁶² with umpteen civilizations involved therein, viz., Tribes, Dravidians, Aryans, Persians, Europeans, etc., to name few- too few- among them, by means of uninterrupted customary presence in the South-Asian subcontinent and in their respective societies since time immemorial.

The vacuum- if not void- in the challenges of communication remains unsettled since distributive justice constitutes the single largest agendum of the tribe; something subject to juridical caveats vis-à-vis availability of resources. Also, logistic shortage to reach out to the target population in remote hinterlands is add-on to the challenges. Without settled cartography of its own, the nomadic tribe constitutes another challenge for otherwise professional personnel in logistic services. In the given circumstances, communication has had potential

⁵⁹ *Vide* Articles 38 and 39(b)(c), Constitution of India, 1950.

⁶⁰ *Vide* Article 1(1) of the Constitution of India, 1950.

⁶¹ Khanna, J., in *Kesavananda Bharati Sripadagalvaru and Ors v. State of Kerala and Anr*, W. P. (C) 135 of 1970, Supreme Court, 24/04/1973, p. 251, paragraph 1239. Available at:

<https://main.sci.gov.in/judgment/judis/29981.pdf>

⁶² *Vide* the Preamble to the Constitution of India, 1950.

to minimalize the gap while the tribe remains silenced by dialogic, or dialectic, or alphabetic want; to gross detriment of the communication. Thus, silence of voice and corollary voice of silence by means of systemic subversion- more incidental than intentional- comprise the core component of tribal narrative testament- and testamentary narrative- to testify very speech-ability of the tribe; in the South-Asian context in particular. While it is conclusive that the speech-ability is not one-way course but meant to engage discourse with meeting of minds by means of meeting of the signifier and the signified to a communion of the meaning in transit. A discursive conundrum- whether and how far the tribe and the civilized can engage communication to mutual intelligence, thereby reach dialogic to make a meaning, therefore, remains contingent; and left to prognosis: “*To be or not to be—that is the question.*”⁶³ More than intention to place these Monads to mutual convenience, the communication is meant to connect them to mutual intelligence; thereby get civilizational dialogic brought in from within. Here lies rationale behind the horizontal approach to allow the tribe right to be heard; albeit, not with the procedural rhetoric- *audi alteram partem*- after the traditional Anglo-Saxon discourse. The civilized ought to listen to wisdom of the tribe; more than mere voice of the tribe. As stated by Owen in his anti-war rhetoric, with potential of its own, eternal wisdom- like emotional murmur- deserves little expression; something

⁶³ Barbara A. Mowat and Paul Werstine (ed.), William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* (1600), Folger Shakespeare Library, Act 3, Scene 1. Available at: https://folger-main-site-assets.s3.amazonaws.com/uploads/2022/11/hamlet_PDF_FolgerShakespeare.pdf

enough to outlive louder expression of the war. More than communications on technical count, prudence lies in getting civilizational bridges built between the tribe and the civilized by means of ‘dialogy’; thereby understand and appreciate plurality (read diversity); followed by mutual exchange of the better practices.

Rather than creation of Adam by the Almighty after the Bible,⁶⁴ time appears apt for Adams of poles-apart times to develop ideation of ‘dialogy’ in differences; i.e., differences between the ancient generations and their present posterities respectively. With the passage of four centuries after early-modern age, horizontal approach proves better pragmatic to the contemporary cosmopolitanism; compared to the vertical approach then; reflected by Shakespeare in *‘The Tempest’* and Michelangelo in *‘The Creation of Man’* respectively. Can the ethnic hierarchy in vertical approach get set aside by means of representative politics? For instance, with coronation of the tribe to grace the coveted seat of highest public office in largest Republic? Identity politics apart, whether and how far gesture brings in dialogic space between the tribe and the civilized appears a research question on its rise in time ahead.

The hitherto civilizational chronicles witnessed incomplete civilizational ordeals since time immemorial. A proposition by the UN agency for ideation of dialogic space⁶⁵ in time ahead has had no claim to

⁶⁴ Michelangelo, *The Creation of Adam* (1512); representation of the Biblical mythology with fresco. Available at: <https://www.michelangelo.org/the-creation-of-adam.jsp>

⁶⁵ Recommendation of the Third Committee to the UN General Assembly on Rights of Indigenous Peoples, seventy-fourth session (A/74/396), 2 December 2019, paragraphs 24-25.

take civilization to perfection since perfection refers to a perennial ordeal- with no end in itself- to testify the civilizational principles with praxis and vice versa. The celebration of indigenous languages through enterprises for revival (if it is extinct) and for recovery (if it is endangered) is but meant to increase systemic inclusivity. Besides dialogic space, another ordeal is on toward resurrection of dialectic space; something reflected in the National Education Policy of 2020.⁶⁶ Indeed, an ambitious project, for North-East India where total number of the tribal languages shoots through the roof, inbuilt systemic intent but deserves appreciation for acknowledgement to tribal languages. Besides, the (Draft) National Policy on Tribals voices reasonable apprehension; followed by commitment to address the vulnerability of tribal languages.⁶⁷ Tribal India, that is *Adivasi Bharat*, deserves inclusion of major tribal languages of India in the Eighth Schedule; or, another schedule, exclusively for tribal languages, appurtenant to Eighth Schedule to the Constitution;

Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/389/49/PDF/N1938949.pdf?OpenElement>

⁶⁶ They (students) will also learn what geographical areas speak which languages, get a sense of the nature and structure of tribal languages, and they would learn to say a few lines in every major language of India and a bit about the rich and uplifting literature of each.

National Education Policy, 2020, paragraph 4.15.

⁶⁷ The National Policy (on Tribals) aims at preserving and documenting tribal languages. Education in the mother tongue at the primary level needs to be encouraged. Books and other publications in tribal languages will be promoted. (Draft) National Policy on Tribals, on issues of tribal languages, Second paragraph. Available at: <http://www.mcrhrdi.gov.in/87fc/policies/NATIONAL%20POLICY%20ON%20TRIBALS.pdf>

thereby get major tribal languages of the subcontinent acknowledged accordingly. Thus, constitutional fiction ought to get extended to the diction of hitherto excluded tribal languages as a juridical acknowledgement; lest indigenous landscape is left devoid of its soundscape. Let the tribes remain vocal with indigenous colloquial of their own.

Nota bene. The decade 2022-2032 is celebrated by the UN General Assembly as the International Decade of Indigenous Languages.⁶⁸ This chapter is scribbled with authorial intent to translate this vision to fruition.

⁶⁸ The UN General Assembly Resolution number. A/74/396, dated, 2 December 2019. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/389/49/PDF/N1938949.pdf?OpenElement>

Chapter-4

RE-VISITING STATE POLICY TOWARDS TRIBES: FROM COLONIAL TO POST-LIBERALIZATION PERIOD IN INDIA

*Shiladitya Chakraborty**

I. Introduction

The tribes in India are regarded as the autochthonous people of the land. Generally known as 'Adivasis', they are the earliest inhabitants of this land with a distinct territorial and cultural identity of their own. From the Vedic times, there have been accounts of the tribal population of India. Such pieces of evidence are found in ancient Sanskrit literature and ancient Tamil books. The Scheduled Tribes despite being quite numerous (approximately around 8.6% of the population of India) are the most marginalised and vulnerable sections in India. The scheduled tribes live in naturally isolated remote areas devoid of any modern infrastructure facilities or amenities like road and safe drinking water, sanitation, health, education, and communication. Centuries of exploitation and marginalization have not only made them very poor and underdeveloped but their geographical isolation has made it very difficult for the government to provide them with technological and

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financial help. It is against this background; the paper would evaluate the approach of the Indian state towards the issue of tribal development and their assimilation into the mainstream of Indian society. This paper is divided into four broad sections. Starting with the concept of scheduled tribes in India, the paper would trace the evolution of the tribal policy of the Indian state from the colonial period to the post-liberalization period in India. This paper ends by suggesting a way forward in dealing with the issue of initiating tribal development keeping in mind the sensitive issue of preserving the century's old tribal culture in India.

II. Who is a Scheduled Tribe?

In around thirty Indian States and UTs we have notified Scheduled Tribes. Changes have been made in the record of Scheduled Tribes in States/ UTs during the last decade. Around seven hundred and five ethnic groups have been notified as Scheduled Tribes in India. There has been a significant rise in the Scheduled Tribe population in India. As per the Census report of 2011, the Scheduled Tribes population of India in 1961 was 6.9 percent which increased to 8.6 percent of the population of India in 2011. (Chandramouli,2013, p.8). Collectively, they probably constitute one of the biggest problems of the country. Not because the problem is insurmountable, but because the country wishes to forget its existence, if not deny it altogether. However, this is not possible. One, they are too many to be wished away, and second, they want to live and be heard.

The word "Tribe" has its etymological origin in the Latin word "*Tribus*" which has evolved over time to mean - "A group of persons forming a community and claiming

descent from a common ancestor”. India since ancient times has been the melting pot of tribes and races. India has one of the largest concentrations of tribal populations in the world. As per the definition of Oxford Dictionary, a tribe is " a social group in a traditional society consisting of people with the same language, culture, religion, etc., living in a particular area and often having one leader known as a chief.”(Oxford Learner’s Dictionary.)The Imperial Gazetteer of India, 1911, defined a tribe as a “collection of families bearing a common name, speaking a common dialect, occupying or professing to occupy a common territory and is not usually endogamous though originally it might have been so”. Another definition of a tribe was provided by D.N. Majumdar who wrote - “a tribe is a collection of families or group of families bearing a common name, members of which occupy the same territory, speak the same language and observe certain taboos regarding marriage, profession or occupation and have developed a well-assessed system of reciprocity and mutuality of obligations”. Scheduled Tribes are also known as Adivasi, Vanavasi, or Adimjati in common parlance in India. (Purshottam & Dhingra, 2017, p. 1589).

Considered to be a “backward class” the Constitution of India refers to tribal communities as “Schedule Tribes” or “Anusuchit Janjati”. The Constitution of India under Article 366 (25) defined scheduled tribes as "such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this constitution". (Agrawal & Gupta, 2022, p.200). Article 342 prescribes the procedure of specification of scheduled tribes in India. These include characteristics like autochthonous traits, backwardness, distinguishing culture, geographical isolation, and

reticence in contact with the outside world. Although, this criterion is not spelled out in the Indian Constitution, it has become well established convention. (Purshottam & Dhingra, 2017, p. 1589).

III. Tribal Policy in Colonial India:

Scheduled tribes in India have never been completely isolated or autonomous in India. From the Vedic times, there have been accounts of this contact with the non-tribal population of India. Many anthropologists have written about the process of tribal acculturation or Hinduization whereby tribes were incorporated into the Hindu society at the lowest rungs of caste-based socially stratified Hindu society. This interaction continued through the medieval period of Indian history even with the onset of Islamic rule in India. However, the thorough penetration of tribal territories began with the onset of the British conquest of India. The British government due to their commercial and economic interests penetrated deeper into tribal lands to set up modern administration and infrastructure for augmenting trade and revenue. This also inevitably led to the transference of tribal land into the non-tribal landlords and moneylenders. This caused widespread resentment among the tribal's who rose in rebellion thereby forcing the Colonial government to introspect on their tribal policies. As a result, several legislations were passed by the British government like the Regulation XIII of 1833 in Chotanagpur or the Act XX IV of 1839 in Madras Presidency whereby tribal lands were administered by simple codes by the agents of the Governor-General in consonance with the tribal social norms. In 1874, the British government passed new legislation known as the Scheduled Districts Act which established administrative uniformity in tribal areas

throughout the country. This legislation designated the tribal areas as Scheduled Tracts. This policy of isolation was further consolidated in the Government of India Act of 1919 whereby tribal areas were recognised into Backward Tracts under Section 52-A of the act. These Backward tracts were either fully or partially removed from the jurisdiction of the modern administrative ministries. Under the Government of India Act of 1935 the Backward Tracts were converted into areas of Total Exclusion or Partial Exclusion. Thus, it is abundantly clear that the official tribal policy of the British raj was that of isolation, protecting them from exploitation and land alienation, thus allowing them to pursue their own culture. However economic compulsions of the colonial rule ensured the protraction of a contradictory policy whereby the tribal's in India were exploited by the moneylenders, bootleggers and petty traders trading in cash crops like indigo, tea etc. As a result, the tribal were exploited and alienated from their traditional lands leading to their consequent pauperization. (Sen, 1992, p.78). Thus, during the colonial period in India, the British government applied the isolationist approach to tribal development which sought to treat the tribal communities as specimens in a 'National Park'. This 'leave them untouched' approach not only kept them isolated from the mainstream of Indian society and perpetuated their exploitation and marginalization in the hands of the non-tribal vested interests.

IV. Tribal Policy in Post-Independence Era:

In the post-independence period, the Government of India tried to enunciate a progressive tribal policy built on the twin objective of the protection of tribal identity and their simultaneous development. However, even before

they could embark on implementing the tribal policies, the Government of the day unknowingly got itself involved in the assimilation-isolation controversy which had its origin in colonial India. The two most important exponents of this debate were Govind Sadashiv Ghurye and Harry Verrier Holman Elwin respectively. According to Ghurye, the modernization and assimilation of the tribes into the mainstream were an absolute imperative to ensure that they got the fruits of development and also to ensure national solidarity. Ghurye further argued that the tribes in India were in different stages of Hinduization and to guarantee their development it was necessary to absorb them into the larger Hindu fold. This led to the development of a new intellectual paradigm on tribal development known as the 'assimilationist' approach. The critics of this approach however argued that this assimilationist approach tried to forcibly change the tribes by imposing on them the majoritarian non-tribal customs and traditions. On the other hand, a contrarian viewpoint emerged through Elwin who argued that the disruptive process of tribal acculturation ultimately led to their alienation and exploitation. He called for the creation of insulated areas like 'National Park' for the preservation of the centuries-old tribal cultural identity. He actively propagated the policy of controlled isolation whereby these national parks would be under the direct administrative control of the Tribal Commissioner and the non-tribal would be prohibited from entering these areas. (Sen, 1992, p. 79).

In fact, this intellectual debate soon erupted into the public domain, especially between social workers and anthropologists. While the social workers advocated the assimilations approach that is the immediate and rapid assimilation of the tribal's into the mainstream, the

anthropologists disapproved the paternalistic interventionist of the social workers which they regarded as a threat to tribal identity. This controversy between the assimilations and isolationist thinkers delayed the formulation of the state policy towards the tribal's and also rendered it vague and inconclusive in the initial years after independence.

To strike a sort of balance between these two contrarian viewpoints, the founding fathers of the Indian Constitution adopted a new approach known as the integrationist approach which was based on the twin planks of protective discrimination and promotion of tribal welfare. The best exposition of the integrationist state policy towards the tribes was given by Pt. Jawaharlal Nehru himself, who elucidated it in the Foreword to the second edition of A Philosophy for NEFA by Harry Verrier Holman Elwin. Pt. Nehru wrote - "We cannot allow matters to drift in the tribal areas or just not take interest in them. In the World of today that is not possible or desirable. At the same time, we should avoid over-administering these areas and sending too many outsiders into tribal territory"(Jawaharlal Nehru, October 1958).

Prime Minister Nehru further amplified his statement by enunciating the five famous principles which constitute the basic tenets of this policy in the foreword of the book A Philosophy of NEFA by Verrier Elwin. Nehru further elaborated his policy towards the tribal community in India through his five principles which were as follows—“(i) People should develop along the lines of their own genius, we should avoid imposing anything on them. We should try to encourage in every way their traditional arts and culture. (ii) Tribal rights in land and forest should be respected. (iii) We should try to train and build up a team

of their own people to do the work of administration and development. Some technical personnel from outside will, no doubt, be needed, especially in the beginning. But we should avoid introducing too many outsiders into tribal territories. (iv) We should not over-administer these areas or over-whelm them with the multiplicity of schemes. We should rather work through and not in rivalry to, their own social and cultural institutions. (v) We should judge results, not by statistics or the amount of money spent, but by the quality of human character that is evolved.” (Jawaharlal Nehru, October, 1958)

The integrationist policy of Jawaharlal Nehru was based on two main strategies of protective discrimination and promotion of welfare of scheduled tribes in India. Protection to the scheduled tribes in India was operationalised by the Indian State through the introduction of many constitutional provisions related to the reservations of seats for the Scheduled Tribes in legislature and in educational institutions and, jobs in the government services as was reflected in Article 46 of the Constitution of India. Article 46 states that “the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” (Agrawal & Gupta, 2022, p.31). Apart from that, several other constitutional provisions were created in the Indian Constitution for the protection of the scheduled tribes. Under Article 164, a minister in charge of Tribal Welfare in the states of Bihar, Madhya Pradesh and Odisha was appointed. Under Article 275 of the constitution special grants-in –aid was paid out of the Consolidated fund of India to the state governments for the purpose of promoting the development of the

Scheduled Tribes or raising the level of administration of the scheduled area. (Agrawal & Gupta, 2022, p.143). Under Article 330 of the Constitution, seats were reserved for both the Scheduled Castes and Scheduled Tribes in the house of the people (Lok Sabha). (Agrawal & Gupta, 2022, p.173). Similarly, Article 332 Reserved seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. Article 335 of the Constitution, reserves posts for services under both the Union and State governments for the Scheduled Castes and Scheduled Tribes, consistent with the maintenance of efficiency of the administration. Art.338 of the Constitution, appointed a Special Officer (Commissioner) for SC&ST Community in 1949. His duty was to investigate and report to the President on all matters pertaining to the working of the safeguards provided to the SCs and STs by various statutes. To facilitate the working of the Commissioner for (SCs & STs), 17 Regional Offices were set up in different parts of the Country. (National Commission for Scheduled Tribes)

To retain the unique tribal cultural identity and social customs, the two important provisions were also incorporated in the Indian constitution about the administration of tribal areas were Schedules V and VI. The Constitution of India under the Fifth schedule, attached to Article 244(1) made special provisions for the administration of certain areas called 'Scheduled Areas'. Article 244(1) states that – “the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura, and Mizoram.” (Agrawal & Gupta, 2022, p.129). Subject to the prior approval by the Parliament, the power to declare any area as 'Scheduled Areas' is given to the President of

India and the President made the Scheduled Areas Order, 1950 in pursuance of this power. Under the Fifth Schedule of the Constitution, the Union government can give directions to the respective States regarding the administration of the Scheduled Areas. The Governors of the States having Scheduled Areas shall have to submit annual administrative reports to the President. Tribes Advisory Councils were also constituted to advise on matters of tribal welfare and advancement. Tribes Advisory Council would consist of twenty members three-fourths of who are representatives of the Scheduled Tribes in the legislative assembly of the state. The Governor can modify general laws, or restrict their application, when applied to the tribes, at the advice of the Council. These may relate to issues like the prevention of land alienation, land allotment and control of the activities of businessmen and money lenders in the Scheduled Areas. (Basu, 1997, p. 280)

In the North-East the Sixth Schedule is in operation, which is attached to Articles 244(2) and 275(1). The 6th Schedule of the Constitution includes the tribal areas of Assam, Meghalaya, Tripura, and Mizoram. These Tribal Areas are administered as autonomous districts and Autonomous Regions. These autonomous districts are under the executive control of the respective state governments. These Councils are representative bodies enjoying certain legislative powers in certain specific fields like management of a forest other than reserved forest, inheritance of property, marriage, and social customs. These Councils also enjoy the power to assess and collect land revenue and to impose certain specified taxes. The Councils can prohibit or restrict the application of Parliamentary or State laws to their areas. The Governor, however, has the power to appoint a commission to report

on the working of these Councils and to annul or suspend them if he is adequately satisfied that their activities are likely to endanger the security of India. (Basu,1997, pp.280-281).

The promotional measures of this integrationist tribal policy aimed at socio-economic development of the tribal community through various welfare programmes implemented by different government and non-government agencies. Consequently, five-year plans were introduced along with special budgetary provisions for welfare and upliftment of the tribal population. Tribal development policies were framed through the different five-year plans of the Planning Commission since 1951 when the first five-year plan was introduced. The First Five Year Plan (1951-56) introduced welfare schemes for the backward classes including tribal populations. Forty-three Special Multipurpose Tribal (SMPT) Blocks were established in the scheduled areas during the Second Five Year Plan (1956-61). Additional financial allocations to the tune of Rs 15 lakhs were made in each of these blocks as special allocations for five years. It was during the Third Five-Year Plan (1961-69), that around four hundred and fifteen Tribal Development Blocks were set up to improve the conditions of tribal areas. Panchayati Raj Institutions were created to involve the tribal people at the grass-roots level in the process of development. However, the actual budgetary allocations for tribal development in the first three Five Year Plans were extremely frugal. As quoted by Harsh Mander - "On an average the government spent Rs. 87.3 million annually on the Scheduled and Denotified Tribes during the period of the first three Plans. The average annual spending, per head, came to as little as Rs. 3.50". (Mander, 2020, p.21).

During this time, the Dhebar Commission (1960-61) was appointed to investigate and report on the problems of the Scheduled Tribes. The Dhebar commission recommendations strengthened and gave a tribal bias to the Panchayati Raj Institutions in India. Besides taking a comprehensive and integrated view of tribal development, it tried to solve the problems of land alienation, indebtedness, tribal forests rights. It called for the establishment of Tribal Cultural Research and Training Institutes in states for conducting training of official and non-official functionaries involved with development of the scheduled tribes. According to its recommendations, such institutions would also undertake research studies so that their results can be used as feedback in planning and administration of tribal areas. (Mohanty, 2002, p.94). The Special Multipurpose Tribal (SMPT) block program continued through the third (1961-66) and fourth (1969-74) five-year plans. However, there was a gradual realization that unless a comprehensive directed program was devised for the tribal's they would continue to remain backward. Because of this, during the fifth (1974-78) five-year plan a paradigm shift happened with the launching of the Tribal Sub- Plan (TSP) for the direct development of the tribal population in India. Under the TSP funds were allocated by the State and Central governments based on tribal population. Moreover, budgetary mechanisms were devised in such a way to ensure accountability and transparency in the utilization of funds for the development of Scheduled Tribes. During this period, funds for the development of Scheduled Tribes were considerably increased. Integrated Tribal Development Agency was also established during the fifth five-year plan period as nodal Tribal Development Agency. (Suresh, 2014, p. 798).

It was during the Sixth Five-Year Plan (1980-85), that the Modified Area Development Approach, (MADA) under the Tribal Sub-Plan was implemented. This was done to ensure the total development of the dispersed tribal population residing outside TSP area, in contiguous smaller areas having a population of 10,000 or more, with at least 50% tribal concentration. [Modified Area Development Agency (MADA)]

During the Seventh Five-Year Plan (1985-90), due to substantial increase in the flow of funds emphasis was on the educational development of Scheduled Tribes. Apart from that during this time, two national level institutions were set up viz., (i) Tribal Cooperative Marketing Development Federation (TRIFED) in August 1987 under the Multi-State Cooperative Societies Act, 1984 as an apex body for State Tribal Development Cooperative Corporations. Its main task was to bring about socio-economic development of scheduled tribes by marketing the Minor Forest Produce (MFP) & Surplus Agricultural Produce (SAP) collected or cultivated by them. Another institution created during this time was the National Scheduled Castes and Scheduled Tribes Finance and Development Corporation (NSFDC) in 1989. Its aim was to provide concessional financial support for employment generation of scheduled castes and tribes. (Suresh, 2014, p.798).

If one makes an objective analysis of the tribal policy pursued by the India state in the post-colonial period in India one would sadly realize that economic compulsions made the Indian state to adopt a duplicitous policy towards the tribal community in India. The tribes have a least developed, non-mechanized economy in India. Yet vast sections of the tribal lands are resource rich either

because of their mineral reserves, forest produce or hydro-sources. Unfortunately, the tribes themselves do not use much of these resources. Moreover, the tribal lands provide a virgin territory for supply of cheap labour required by the Indian capitalist class. The Indian capitalist class cannot exist without these resources of the tribal community or the cheap labour provided by them. Thus, the Indian state adopted the dual policy of rejecting the exclusion principle and assimilating the resource rich tribal lands for economic exploitation and at the same time implement the Scheduling principle by excluding the tribal community from reaping the benefits of development by deliberately keeping them outside this partnership of the state and the industry. Several tribal development policy and program were implemented to create an illusion of social welfare and keep them under control. This process of surreptitious exploitation was facilitated by creating a class of tribal elites who in turn legitimized the policies of the state. (Sen, 1992, p.82).

V. Tribal policies in the era of economic liberalization

India embarked on the process of liberalization since the early 1990s which brought about sweeping changes in our socio- economic spheres. Liberalization made tremendous positive changes in the economic and social life of certain tribal groups, particularly those who were able to ride the tides of development ushered in by it. Large-scale migration of the tribal people, working in non-traditional sectors like in MNCs became a more discernible trend in post-liberalization period in India. For the first time, MNCs started investing in various sectors in India including the tribal areas which were traditionally rich in mineral resources and forest produce. This policy of liberalization aimed at bringing about changes in the

structure of production in order to increase and improve the quality of production, ultimately having an eye on export markets.

The 8th Five-Year Plan (1992-97) was implemented during this period of liberalization of the Indian economy. Under the 8th Five-Year Plan, education of the tribal children became a priority. As a result, special schemes were formulated during this period for the educational development of the scheduled tribes, particularly the tribal women. In the post-liberalization period several legal and institutional reforms were also initiated by the Government of India to keep in tune with the changes brought about by the impact of liberalization. The multi-member statutory body known as the National Commission for SCs & STs was formed in March, 1992 through the 65th Constitutional Amendment Act of 1990. Shri Ram Dhan Became its first Chairperson. It replaced the Special Officer for SCs and STs. (National Commission for Scheduled Tribes)

Another significant development during this time was the passing of the Panchayat Raj Extension to Scheduled Areas Act, 1996 based on the recommendations of the Bhuria Committee of 1995. The basic objective of the PESA Act 1996 was to ensure self-rule of the tribal people living in scheduled areas of India. The PESA Act was extended to the Fifth Schedule Areas. This remarkable flagship legislation, tried to coalesce the simple system of tribal communities governed by their respective social customs and traditions with the formal Panchayati Raj Institution system of India. Under the PESA act the tribal Gram Sabha's have been vested with a wide range of powers namely - safeguarding and preserving their tribal customs, traditions and resources;

prevention of any unlawful alienation and restoration of tribal land and the ownership of minor forest produce; management of village markets; or restriction of the sale and consumption of any intoxicant, etc. Under the PESA Act, the Panchayats at the higher level cannot assume the powers and authority of any Panchayat or Gram Sabha at the lower level. The post of the Chairperson at all the levels of the Panchayat is reserved for Scheduled Tribes (STs). Through the PESA, the Indian parliament tried to radically democratize and decolonize tribal governance in India. In consonance with this national law, the state governments were expected to enact laws for their respective Scheduled Areas. Unfortunately, they incorporate with varying degrees the PESA provisions into their respective panchayat laws resulting in the partially implementation of PESA. This made the issue of self-governance in tribal areas like Jharkhand much worse. Issues affecting the daily lives of the tribal's like money lending, forest, mining rights, restoration of illegally alienated tribal land remain unresolved since many states are yet to amend all the subject laws and rules and harmonize them with the PESA provisions. Thus, many experts have pointed out that despite good intentions the PESA could not bring about any real changes at the grass-roots level in scheduled areas. Unfortunately, several impediments like bureaucratic apathy, absence of a political will, resistance to change in the hierarchy of power, lack of clarity and legal infirmity have rendered the PESA act ineffective. (Bijoy, 2015, pp.1-2).

The Ninth Plan (1997-2002) aimed at empowering the Scheduled Tribe community by creating an environment conducive for their socio-economic development. Its main objective was to bridge the gap between Scheduled Tribes and the rest of the population.

Literacy being a key indicator of socio- economic development, the focus was on improving the level of education of the scheduled tribe's children. As a result, Eklavya Model Residential School (EMRS) was established for the Scheduled Tribes in remote tribal areas. It was introduced in the year 1997-98 by the Ministry of Tribal Affairs, Government of India to impart quality education to tribal students. It was during this period that the 73rd and 74th Amendments Act, 1992 was passed by the Indian parliament which heralded a new chapter in the process of democratic decentralisation in India. This act was also important for the Scheduled Tribe community as it reserved seats for them in proportion to their population in the three-tier Panchayati Raj Institutions and in the urban local governments.

However, the structural adjustment policies of the Government of India posed more threats than opportunities to the tribes in India. Agriculture was the main source of livelihood for most tribals in India. However, the traditional and time-tested methods of agriculture could not help them to compete with the MNCs who introduced new technologies into the agricultural sector. Shifting cultivation, which was the common agricultural practice in most tribal areas could not make agricultural commercially profitable for them. Agricultural innovations introduced by liberalization proved to be very expensive for the poor tribal's. For instance, the tribal peasants could not purchase the expensive high-yielding variety seeds, insecticides and fertilizers from the MNCs. Influx of non-tribal's into the resource rich tribal areas led to increasing pressure on land. All these factors in the post-liberalization period led to the alienation of tribal lands as they became more prone to falling in debt traps. It is a known fact that considerable mineral wealth exists

in tribal areas, and due to liberalization the MNCs started investing in tribal areas by constructing factories, irrigation projects, mining and industrial complexes and power projects. This not only caused ecological and environmental problems, but it led to large scale displacement of the tribal population from their traditional land. Therefore, the most important issue haunting the policy makers was - how to protect the rights of the tribal population and at the same time empower them to initiate their development. (Venkatrao, 1996, pp. 490-492). The Tenth Five Year Plan (2002-07) focused on tackling these unresolved issues and problems in a time-bound manner. It was during this time that the National Scheduled Tribe Finance and Development Corporation (NSTFDC) were set up in 2001. (Ministry of Tribal Affairs)

It was during this time that structural changes of apex organizations catering to the needs of the scheduled caste and scheduled tribes were initiated by the then Indian state in 2003. The 89th Constitutional Amendment Act, 2003 was implementation due to which the erstwhile National Commission for SC & ST was replaced by two separate commissions viz: National Commission for Scheduled Castes (NCSC) and National Commission for Scheduled Tribes (NCST). The National Commission for Scheduled Tribes has been constituted under Article 338A of the Constitution with effect from 19 February, 2004. Its primary duty is to investigate and monitor matters relating to legal safeguards provided to the Scheduled Tribes (STs) under the Constitution of India and to evaluate the working of such legal safeguards. (National Commission for Scheduled Tribes)

In July 2006, the Ministry of Tribal Affairs prepared a draft National Tribal Policy which aimed at integrating

the Scheduled Tribes into the mainstream of Indian society for their all-round development without disturbing their distinct culture. To initiate this change, the National Policy recognized the importance of participatory approach to tribal development. As a result, it proposed to build up a partnership with Non- Governmental Organisations (NGOs) and Voluntary Agencies (VAs) who had direct linkages with tribal people and were aware of their problems. It was proposed to use such NGOs and VAs for reaching benefits of Government programmes and policies to the target groups of the tribal society. The National Policy for Tribals also proposes that the existing Tribal Research Institutes Should carry out purposeful research and studies for preservation of the rich tribal cultural heritage of India. The National policy also talked of establishing a national-level research institution. (National Policy on Tribals, 2006, p.8). Again, in December 2006 a significant legislation known as The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, (popularly known as the Forests Rights Act (FRA) or Tribal Land Act, was enacted. The Act recognizes and vests the individual forest-dwellers with the rights to live in and cultivate forest land that was occupied before 13 Dec 2005. It also grants community forest rights to the tribal's so that they can manage, protect and regenerate the forest. (Twelfth Five Year Plan (2012–2017) Social Sectors Volume III, 2013, pp. 236-237).

The Eleventh Five Year Plan (2007-12) made a paradigm shift with respect to the overall empowerment of the tribal people, keeping in mind the largely under-effective government delivery mechanism in India. To initiate the vocational educational among the tribal population, the Eleventh Five Year Plan recommended

setting up of Industrial Training Institutes (ITIs) in the TSP areas. The issue of tribal land alienation caused a lot of unrest in different parts of the country. Therefore, Eleventh Five Year Plan recommended the translation of anti-alienation laws into regional languages and computerization of land records in tribal areas. It also talked of creating separate fast-track courts in the Scheduled Areas to deal with cases of tribal land alienation. It also recommended effective follow-up action to operationalize the National Rehabilitation and Resettlement Policy 2007 so that it caused least displacement of the Project Affected Families (PAFs) in tribal areas and also ensured their standard of living with a sustainable income source. (Eleventh Five Year Plan(2007-2012), Inclusive Growth, Volume I, 2008, pp.115-117).

The Twelfth Five Year Plan (2012 -17) was India's last Five-Year Plan. It aimed at an overall improvement in the socio-economic conditions of the Scheduled Tribes. To bring about socio-economic improvement of the Scheduled Tribes, it recommended administrative strengthening of the implementing agency with a special focus on the personnel policy. In this regard, it talked about fixity of the tenure of officials and incentivizing them for having rendered their services in those areas for a prescribed period. It also recommended sensitizing officials detailed for serving in the tribal areas so that they become empathetic to the sensitivities of tribal lives and their traditions. It also recommended that no post in the implementing agencies in scheduled areas should be left vacant and every post must be filled up and wherever necessary, additional posts should be created for effective implementation of development schemes. Secondly, preferring engaging people from the tribal community in

the areas predominantly inhabited by tribal's for government efforts at spreading education, health and extension services, nutrition, public distribution, and so on. Apart from these recommendations, the Twelfth Five Year plan focused on better road and railway connectivity in tribal areas. Regarding the issue of tribal land acquisition, it recommended that the issue should be addressed as required under PESA and displaced tribal population to be resettled and rehabilitated. It also said that tribal communities should have full right to minor forest produce. (Twelfth Five Year Plan (2012–2017) Social Sectors Volume III, 2013, pp .236-237).

VI. NITI Aayog and Tribes in India

On 1 January 2015, the Cabinet passed a resolution to replace the existing Planning Commission of India with the newly formed NITI Aayog (National Institution for Transforming India). The NITI Aayog replaced the earlier bureaucratic approach to policy making with a technocratic approach to policy making which was more inclusive and sustainable. SAMAVESH implies inclusion and is an approach to extend knowledge to all especially the most deprived communities like the Scheduled Tribes and Scheduled Castes. The policy of SAMAVESH tries to include institutions of excellence in national development initiatives, linking policy and practice. SAMAVESH has linked together various leading Knowledge and Research Institutions to accelerate the development processes thereby focusing on capacity building of institutions and enabling a field-level interface with the community for mutual benefit. The basic aim of the policy of SAMAVESH is to create evidence- based policy research. As a result, the tribal development policies formulated by the NITI Aayog through its

SAMAVESH program have made tribal policies more transformative and it aims at achieving a sustainable and more inclusive development of the tribes in India in line with Sustainable Development Goals.

One important division of the NITI Aayog is the Social Justice and Empowerment (SJ&E) Division. It tries to actively provide inputs in the formulation and strengthening of policies and programs to promote and safeguard the interest of the socially, educationally and economically weaker sections of the society including the Scheduled Tribes (STs) and the Nomadic, Semi Nomadic & De-Notified Tribes (NT, SNT & DNTs). The Social Justice and Empowerment (SJ&E) Division of the NITI Aayog undertook specific activities as far as tribal policies were concerned. Firstly, in line with its SAMAVESH approach to policy making, it revamped the Tribal Research Institutes to transform them into top-class research institutes. The aim was to encourage research on scheduled tribes so that they could positively contribute to policy making pertaining on Scheduled Tribes. It also developed a guideline for monitoring the effective implementation of Tribal Sub Plans by the Central Ministries/Departments and States /UTs which it gave to the monitoring agencies like the Ministry of Social Justice and Empowerment and the Ministry of Tribal Affairs. The Social Justice and Empowerment (SJ&E) Division of the NITI Aayog along with M/o Micro, Small & Medium Enterprises (MSME) also prepared a concept paper on livelihood opportunities for tribals which have been circulated for consultations with stakeholders. The SJE Division of NITI Aayog regularly consults and seeks opinions from state governments and independent agencies on Tribal Sub Plans. (Niti Aayog)

VII. Conclusion

Tribal policy of the India State is very dynamic and complicated in nature. India has come a long way from the Isolationist approach of the colonial period to the integrationist's approach of post-independence period. During the colonial period the State deliberately adopted a policy of isolation which isolated the tribal population from the mainstream masses. This resulted in further perpetuation of underdevelopment of the already backward tribes and led to their systematic exploitation by the non-tribal people during colonial India. The integrationist approach which was the brain-child of Pt. Jawaharlal Nehru sought to rectify this mistake. Known to adopt a middle path, the integrationist approach to tribal development was based on the twin planks of protective discrimination and promotion of welfare of scheduled tribes in India. The protective measures were given a constitutional and legal mandate to protect tribal culture and traditions. The promotional measures aimed at socio-economic development of the tribal community through various welfare programmes implemented by different government and non-government agencies. The basic objective of the integrationist approach was to bring about a holistic development of the tribal community in India without damaging their tribal identity and social customs. Unfortunately, several impediments like bureaucratic apathy, absence of a political will resistance to change in the hierarchy of power, top-down approach to planning and lack of clarity amongst the policy makers could not bring about true development of the tribal people in the post-independence period. This made the policy makers to make a paradigm shift in the tribal policy in the post-liberalization period in India. Keeping in mind the largely under-effective government delivery

mechanism in India they adopt the SAMAVESH approach to tribal policy making in post-liberalization period in India. This approach has marked a shift from the earlier bureaucratic approach to a technocratic approach to tribal development thereby focusing on the capacity building of institutions and enabling a field-level interface with the community for mutual benefit. What is required is not assimilation or 'integration' of the scheduled tribes into the larger whole of the Indian mainstream. But they should be given an agency or an autonomy to decide on their future course and this is what the policy of SAMAVESH aim at doing.

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Chapter- 5

DISPENSATION OF JUSTICE UNDER THE KHASI HILLS AUTONOMOUS DISTRICT COUNCIL: A CRITICAL ANALYSIS ON THE CUSTOMARY LAWS

*Pulak Symon**

I. Introduction

A simmered interpretation of ‘customs’ in nearly every society picturesque an almost unconscious evolution of rules which are nurtured by members of each group by means of social pressures.¹ Halsbury laws reflects the usage of specific principle from time immemorial which has received the power of law in a particular territory to be acknowledged as a custom though erratic with the general precedent-based law of the community. At the National level in various States, customs are considered rather a cumbersome source of law.² It has been a continuous trend that the mainstream laws through more sophisticated rule-making supersedes the customary laws through the establishment of a formal legislature.

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¹ Malcolm N Shaw, ‘International law’, Eight Edition, page 68.

² *Ibid.*

The Constitution of India has played a crucial role in balancing the interests of the tribal people through recognition of their unique “political and administrative structure” of governance which prevailed from time immemorial. The empowered Autonomous District Councils of Meghalaya under the Sixth Schedule of the Constitution have the flexibility to frame laws in consonance with the tribe’s ancient customs. In Meghalaya, there are three Autonomous District Councils namely, Khasi Hills Autonomous District Council (hereinafter KHADC), Garo Hills Autonomous District Council and Jaintia Hills Autonomous District Councils. The Autonomous District Councils has its own legislative, executive, and judicial wing to administer its customary laws and functions which is unique in contrast with other States of India.

The first dig to sow the seeds of the Sixth Schedule commenced with the Britishers legislating ‘The Government of India Act, 1919’ to demarcate areas under the British regime as ‘backward areas’, later preceded as ‘tribal areas’ in subsequent legislations. The lackadaisical attitude of the Britishers to learn the rich culture and justice dispensation of these tribes were totally disregarded at that time. Even while drafting the Constitution, the drafting members did not put much stress on the inclusion of the administration of tribal areas. It is only in the fifth and the sixth schedule that autonomy is given to the tribal traditional institutions to govern themselves with the tribe’s customary laws.

Thus, with this background in place, the paper will streamline to understand the quintessential question as to how is the ideation of such framers who partakes in a commitment to the welfare of the tribe play the role of

justice dispensation through the KHADC in the smooth functioning of the customary laws. A slice through each transitional period will aid to determine the present state with the development of laws in place and the constant conundrum it faces with the mainstream laws.

II. Comprehending Justice Dispensation in the Khasi Tribe: *Pre-British to post Independence*

The ‘utilitarianism concept of Justice was firmly opposed by John Rawls in his book ‘Theory of Justice’, even though embraced by Bentham, Mill, and Sidgwick. Rawls was critical of the concept as it serapes the happiness and the well-being of a greater number of people while at the same time superimposing the happiness of the majority people over the minority people.³

Constitution through its Fifth and Sixth schedules has allowed the minority people with rich customary laws to govern themselves. The idea behind this hypothecation is that the flexibility of law-making is not just centered on a particular section of society but has allowed its roots to breathe while encompassing every people in the State.

The Khasi Tribe considers justice dispensation as divine in nature. It is believed that since time immemorial dispensing justice by the elders namely *RangbahShnong*, *Lyngdohs*, *Syiems*, and *Sirdars* has been acknowledged and accepted by the people. The customary acceptance of God’s presence to be central in adjudicating a case aid in dispensing it by finding the right solutions. Thus, khasis speak of the judgment as *kabishar-bleñ*, e., it means the

³ John Rawls, ‘Theory of Justice’, Belknap Press of Harvard University 1971.

judgment of God. The analogy behind it is that the judgement is based on justice and truth.⁴

Most of the tribe's ancient laws are mostly oral in nature and have passed from one generation to another. The unwritten laws are slowly codified by the strong efforts of Autonomous District Councils in Meghalaya. The Sixth Schedule under para 4 and para 5 is empowered to draft laws for the dispensation of justice under the customary laws.

Flipping the pages of history, the justice dispensation in ancient times settled disputes by *Pyniasukor* which means through compromise between the disputed parties.⁵ Unlike, the turtle-paced process of justice delivery mechanism in the mainstream functioning of the Courts, the village trial upheld reconciliation as the way forward. If the reconciliation does not come to fruition, the Chief orders proceeding by consigning a crier (*U nongpyrtashnong*). The chief proclaims to the villagers for community participation and witness the Durbar proceeding.⁶ The rules relating to the durbar proceedings were quite strict. Every people should be present in the Durbar proceedings failure to attend resulted in the imposition of fines against the person concerned.⁷

⁴ Barnes L Mawrie, 'Khasi Ethics', Vendrame Institute of Publications (2014).

⁵ B.Pakem, "Administration of Justice in the Khasi Hills", tribal Institution of Meghalaya, Pg-351, (Spectrum Publications Guwahati, Delhi, 2017).

⁶ PRT Gurdon, Khasis, Pg-91, (Akansha Publications, Delhi, 2012).

⁷ *Id.*

The advent of the British had enmeshed the tribes with their wiles and guiles when the Britishers succeeded in making the people sing 'God save the king'. After the fall of the trailblazer patriot U Tirot Sing, the independent estates had no escape but to surrender to the British after losing the Anglo-Khasi war between 1829-33. The trail of events thereafter led to the Britishers intervening in the customary administrative system by rounding all Khasi Syiems within their control.

There were further internal shifts done by the Britishers in the customary practices relating to administrative functions, one such was the 'appointment of Chiefs'. Even though the Britishers alienated themselves from tribal politics, they ensured to diminish the power of the Chiefs. For instance, an appointed Chief Syiems subordinate to the Durbar, his power to act against the decisions of the durbar is restricted and he will be expelled if he overrules the decision.⁸ However, this practice was abolished by the Government. Secondly, another marked change by which Britishers gobbled the customary practices is the introduction of 'Sanad'. It was an agreement with the British government to take their confirmation on the election of Chiefs. The practice of hypocrisy was evident as the Britishers put a condition that the Chiefs had to obey the orders of the Deputy Commissioner and other officers of the Government and also at the same time disregard the authority of the dorbar.⁹

⁸ L.S Gassah, 'Autonomous District Councils in Khasi Hills: A critical analyses.

⁹ Keith Cantlie, 'Notes on Khasi law', Pg:151, (Chapala Publication, Shillong,2009).

The strings were further pulled to suffocate the traditional customary institutions by the British through more instances. The Dorbar Hima which is also known as the Court of the King had earlier the final decision-making power which was made appealable in the Court of Deputy Commissioner. Also, the sudden cessation of power of the Syiem to try criminal cases further impaired the system as the institutions wherein jeopardy with all cases being tried by the Deputy Commissioner. Additionally, all cases of non-tribals were debarred to be heard in the traditional Courts which limited the roles of justice dispensation to a great extent.¹⁰

The incoming of the British in the hills of Meghalaya can be learned to have debilitated the traditional legal system. The sour truth is that the British arrangement on justice dispensation has somewhat affected the process post the British period as well even though the enactment of the Sixth Schedule has provided flexibility in justice dispensation though tribe's customary laws.

Post-Independence scenario regarding justice dispensation initiated with signing the 'Stand Still Agreement'. The agreement explicitly stated that the Federation will play its part to set up a competent Court and the judicial power of each Court shall be limited to its jurisdiction. The justice dispensation through customary practices witnessed a change when the 'Indian Penal Code' (IPC) and the rules administering civil and criminal justice were put to play through the 'Scheduled District Act 1974'.¹¹

¹⁰ E Jyrwa, 'Administration of Justice in the Khasi Hills, Pg:35 (Akansha Publications, Delhi, 2006).

¹¹ *Id* at 50.

The Khasi State Federation (Administration of Justice) Order, 1948 was published under Notification number 237-P dated 16, June 1948. The order empowered the Courts with the power to sentence the highest punishments such as death sentence, transportation, or imprisonment. It was subject to revision and due confirmation of the Assam High Court.¹² On the other hand, Courts were allowed to adjudicate civil laws which arose within the State. There was no bar between the parties even though they were khasis or non-khasis. It was the subordinate Court of the first instance to be approached. The Court of Federation was cancelled later and the Khasi Syiemship (Administration of Justice) Order 1950 was enacted for justice dispensation.¹³

The inclusion of the Sixth Schedule to the Constitution of India, 1950 aided in to progress and preserve the Autonomous District Councils created under the Schedule. The justice dispensation system in the Sixth Schedule of Meghalaya roots in the principles of restorative justice. Unlike the adversarial system prevalent in mainstream courts, restorative justice aims to repair the harm caused by an offence and restore relationships between the victim and the offender. The Dorbar Shnongs in Meghalaya follow this approach, and the primary focus through such traditional institutions is focused on restoring harmony and maintaining social order in the village.

¹² A.K Nongkynrih, "Khasi society of Meghalaya: A Sociological understanding" 121 (Galaxy Book Centre, Shillong, ed 2018), Pg: 119.

¹³ Khasi Syiemship (Administration of Justice) Order 1950.

The justice dispensation system under the Sixth Schedule of Meghalaya has several advantages. *First and foremost*, it is based on the principles of restorative justice, which emphasizes the restoration of relationships and the healing of harm caused by an offence. This approach is more humane and has a higher chance of reducing recidivism compared to the punitive approach of mainstream courts.

Secondly, the Dorbar Shnongs are closer to the ground and have a better understanding of the local customs and traditions. This enables them to dispense justice that is more relevant and acceptable to the community. The members of the council are elected by the people, and they are accountable to the community for their actions.

However, there are also some challenges in the justice dispensation system under the Sixth Schedule of Meghalaya. One of the main challenges is the lack of trained personnel to administer the system. The members of the Dorbar Shnongs are not legal professionals, and there is a need to train them in legal procedures and principles.

III. Understanding the Sixth Schedule to the Constitution of India with a focus on Khasi Hills Autonomous District Council Acts and rules

After heated debate in the Constituent Assembly and after certain amendments were made, the Sixth Schedule finally emerged and was incorporated in Articles 244 (2) and 275 (1) of the constitution of India. The Schedule provides for the establishment of Autonomous District Councils in certain areas of the country that are

predominantly inhabited by tribal communities. The Schedule applies to the states of Assam, Meghalaya, Tripura, and Mizoram. The quintessential objective of the Schedule is to preserve and promote the distinct cultural and social identity of the tribal communities in these areas.¹⁴

In the case of '*Wes Bamon v Jaintia Hills Autonomous District Council & Anr*' upholds the role of the Autonomous District Council to that of a guardian to protect and preserve the customary practices of the traditional institutions.¹⁵

The Sixth Schedule in para 4 and 5 states the role of justice dispensation in the Autonomous areas. Para 4 empowers the District Councils to constitute village councils and Courts with approval from the Governor to adjudicate cases with the customary laws and practices. These Courts are civil in nature and do not hear cases that are punishable by death, transportation of life, or imprisonment of more than five years. The officers designated to the District Councils are appointed under the United Khasi–Jaintia Hills District (Administration of Justice) Rule 1953.¹⁶ Also, the rules include the jurisdiction of the High Court to deal with such suits and cases accordingly.

Chapter II of the 1953 rule states the constitution of courts which are hierarchical into three classes under the Khasi Hills Autonomous District Council which are as follows:

¹⁴ *Id.*

¹⁵ 1976 (III) GLT 30 (GHC) (35).

¹⁶ Para 4, Sixth Schedule, Constitution of India, 1950.

1. Village Courts
2. Subordinate District Council Courts and Additional Subordinate District Council Court
3. District Council Court and Additional District Council Court

The above-mentioned Courts are unique in the way that they uphold the sanctity of the tribe's customary practices to provide simple, faster, and effective justice delivery to cater to the tribal people with less monetary investment. The traditional Courts follow a quadruplex tier system of "Durbar Dong, Durbar Shnong, Durbar Raid, and Durbar Hima". Implementation of these customary practices and usages are routed through these durbars.¹⁷

Paragraph 5 of the Sixth Schedule provides conferment of powers on the District Council Courts for the trial of suits or cases under the CPC and Cr. PC. Being a traditional Court sometimes powers are enlarged to include in its scope various issues but in the case of '*Council of the Jowai Autonomous v. Dwet Singh Rymbai*' it is stated that such powers of the Court cannot be enlarged by any means.¹⁸

Over the years, KHADC has enacted several Acts, Rules, and Bills to regulate various aspects of governance in the Khasi Hills region. Some of the important Acts passed by the Council include the Khasi Hills Autonomous District Council (Land Transfer Regulation)

¹⁷ Role of KHADC and its Constitutional mandate, Khasi Hills Autonomous District Council, https://khadc.nic.in/archive/roles_of_khadc.html.

¹⁸ AIR 1986 SC1930.

Act, 1954, the Khasi Hills Autonomous District Council (Trading by Non-Tribals) Regulation, 1959, and the Khasi Hills Autonomous District Council (Village Administration) Act, 2015.

The Khasi Hills Autonomous District Council (Land Transfer Regulation) Act, 1954, is one of the most significant Acts passed by the KHADC. The Act regulates the transfer of land within the jurisdiction of the Council. It prohibits the transfer of land by tribal members to non-tribals without the prior permission of the Council. The Act also provides for the creation of a Land Transfer Board to oversee the transfer of land and ensure that the rights of tribal members are protected.¹⁹

The Khasi Hills Autonomous District Council (Trading by Non-Tribals) Regulation, 1959, is another important Act passed by the KHADC. The Act regulates the trade and commerce activities of non-tribals within the jurisdiction of the Council. It prohibits non-tribals from carrying on any trade or business within the Council area without the prior permission of the Council. The Act also provides for the creation of a Trading by Non-Tribals Board to oversee the trade and commerce activities of non-tribals and ensure that the rights of tribal members are protected.²⁰

In the case of “*Bara Bazar, Merchants & Shopkeepers Association v. Khasi Hills District Council*”, the appellants went to Supreme Court against the

¹⁹ The Khasi Hills Autonomous District Council (Land Transfer Regulation) Act, 1954.

²⁰ The Khasi Hills Autonomous District Council (Trading by Non-Tribals) Regulation, 1959.

mandatory obtaining of the trade license of every non tribal trader either whole seller or retailer under the United Khasi–Jaintia hill District (Trading by Non-tribals) Regulation, 1954 from the District Council as stated under paragraph 20 of the Sixth Schedule. The Supreme Court dismissed the said writ appeal.

With the passage of time, it was quintessential for the traditional institutions to achieve transparency in the appointment of Chiefs and headmen for the administration of justice which is a step forward in protecting the customary practices without further dilution with the prevalence of the mainstream laws. Thus, KHADC initiated the codification of such laws with the drafting of United Khasi-Jainita Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959.

In the case of “*Morningstar Khontthiem Vs. District Council, Khasi Hills, (1983)*”²¹ it was stated that through this Act there was no such interference with the customs prevailing in the concerned Elaka. The Act ensures that all elections or nominations and appointments of such Chiefs and headmen should be in accordance with the prevailing customs practiced Elaka concerned.

Furthermore, KHADC has been empowered to make laws with respect to a wide range of subjects, including land, forests, agriculture, fisheries, water supply, public health, and sanitation. The Council also has the power to levy and collect taxes, fees, and other charges within its jurisdiction.

²¹ (1983) 1 Gau. LIZ 1(3).

IV. Conclusion

Against this milieu, the research paved the way to endeavour to construe the traditional customs handed down across generations in providing justice dispensation under Sixth Schedule in Meghalaya. The thrust of inquiry to learn the sandwich of traditional and modern laws at par in providing amicable solutions for the tribal people in a matrilineal structure is an example. Change is inevitable in every society and with time every society undergoes rapid change but respecting and preserving the culture of one's tribe through understanding multifaceted factors in a fast-changing societal diaspora inclusive of different levels of social strata with rather conflicting interests paves the way for a wholesome heterogeneous unit.

Since antiquity, it is learned that society has devised different methods to transmit information from beating drums and inviting people to be present at the dorbar to the present shift in using sound speakers at each junction to transmit information. Likewise, the transference of oral traditions requires codification to keep intact justice dispensation floated at par with the mainstream laws. The empowered Autonomous District Councils under Constitution have the duty to draft practical laws while keeping in mind various emerging societal issues that require concerted attention such as registration of marriages.

Since time immemorial, the tribes of Meghalaya have faced turbulent changes making history pages lengthier about success and defeats without compromising the basic tenets of matrilineal society. Likewise, it is also imperative that the present efforts should be initiated through the traditional institutions to hold the baton firmly through preserving and

strengthening customary laws for the society for providing smooth justice dispensation by upholding the same while maintaining parity with the mainstream laws.

Chapter-6

TRIBAL LOCAL SELF-GOVERNANCE: A STUDY OF KUKI VILLAGE COUNCIL IN CHURACHANDPUR DISTRICT, MANIPUR

*Dr. NemthianngaiGuite**

*N.T Thomas***

I. Introduction

One definition of "governance" that is generally appropriate to the programme is the one that was developed by the United Nations Development Programme (UNDP): The exercise of economic, political, and administrative authority in order to manage a country's affairs on all levels is what is understood to be "governance." It is made up of the systems, processes, and institutions that allow persons and groups to express their interests, exercise their legal rights, fulfil their obligations, and arbitrate their disagreements. Although it is a relatively new idea, governance covers a great deal more than simple rule or administration. Rather, it denotes a dedication to democratic institutions, procedures, and values in order to secure

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economic, political, and social security. It invites members of civil society and the general populace to collaborate with the government in order to further the common good. In the framework of a dynamically shifting political and social environment, governance is currently in the process of being evolved (Nalbandian et al., 2013).

The past twenty or thirty years have seen a significant amount of transformation in local governments around the world. These changes are the result of external changes, such as economic interdependence, globalisation, the evolving technological landscape, and the collapse of communism in Eastern Europe. The privatisation of state services, the reform of the local government system, and the alteration of intergovernmental ties are all examples of changes that are taking place within the nation-state. Some shifts are political in the sense of partisanship, while others may be social, such as increasing social segregation in cities or the rise in drug-related crime. The ever-evolving characteristics of the modern state and the society that it serves have inevitably resulted in the formation of unavoidable repercussions for democratically elected administrations (Andrew & Goldsmith, 1998).

The significance of democratic institutions has come into sharper focus as a result of recent advancements in efficient governance. At this point in time, democracy is seen not just as a means, but also as an end in and of itself to realise economic, political, and social rights. This is a significant shift from previous eras. In order for the term "Governance" to make sense when applied to its expanded meaning, which is the

result of employing a rights-based strategy to development, it must be qualified by the word "democratic." As a result of this, the more conventional and limited concept of governance as effectiveness in economic management has given way to a broader understanding of how leaders utilise power and authority in a way that is both effective and inclusive in order to further the cause of human rights. This broader understanding focuses on how leaders use power and authority in order to advance the cause of human rights. A bare minimum requirement for local self-governance is the participation of a large number of people. We are able to exercise our right to self-determination, which is one of the rights that falls under the broader category of human rights, when we take part in the affairs of the public sector. However, in order for participation to count, it can't be limited to just voting or making wish lists. This is a requirement for validity. When it comes to the implementation of a rights-based strategy in local self-governance, one of the most important factors to take into consideration is the type of participation. At its core, rights-based participation is concerned with decisions that pertain to an individual's life as well as the factors that play a role in the formation of those decisions. In other words, rights-based participation focuses on the individual's life decisions.

II. Kuki Traditional Self-Governance

The majority of Manipur's non-tribal population, almost two-thirds of the state's total population, resides in the valley, which comprises approximately 10% of the state's total geographical area. The valley is far more urbanised than the hill regions, with over 40 percent of the population residing in urban areas. In contrast,

approximately 90 percent of the state's land area consists of hilly terrain, which is virtually entirely rural. The rural population is comparable to that of non-tribal areas, and they reside in dispersed villages. Manipur has had Panchayati Raj Institutions (decentralised administration at the village level) for a very long time. However, these were restricted to valley districts and the Tamenglong hill district's Jiribam Sub-division. In the hill districts, village officials resembled village panchayats quite closely. Manipur has developed village councils that are fully separate from district councils. This is governed by the Manipur Hill Village Authority Act of 1956¹. This Act provides for the democratic election of village councils. Similarly to the Panchayati Raj legislation, it too establishes quotas for women legislators. However, there is significant hostility from the Kuki traditional village chiefs, who view them as rivals and competitors to the traditional village councils. The village council and tribal organisations are in charge of maintaining law and order in Manipur's tribal governance, particularly in Kuki's case. Among the Kuki tribes of Manipur, 'Housa'² (Chieftainship) is the oldest

¹ An Act to consolidate and amend the law relating to the constitution and functions of Village Authorities in Manipur's hill areas.

² The Kuki Chiefs were masters of the hills all around the valley of Imphal, where Naga also lived. They ruled over the northeast of the Imphal valley, extending to the 'excluded' or 'unadministered' areas of Somre (Burma). Doungul, the most senior member of the Haokip clan and Chief of Chahsad, ruled the hills east of Imphal and the region bordering Thongdut State and parts of the Somra Tracts. Jampi's Sitlhou Thadou Chief ruled the hills west and northwest of Imphal Valley that bordered the Angami Naga territory. The minor Chiefs of the Haokip sub-clans, the Lunkhel, Songthat, and Telngoh, lived in the region

type of tribal administration known to still exist. Chieftainship remains the only form of village governance among the Kukis of Manipur, despite being beyond the ambit of the Panchayati Raj Institutions and the Sixth Schedule. Many works have detailed the Kuki Chieftainship (D. Haokip, 2020). It revealed the role of the Chieftainship in ensuring the development of the poor, weak, and vulnerable section of the villager, as well as the roles of the chiefs in maintaining justice, peace, law and order, security and service paid to the widow, respect for women, and provision of land for grazing cattle, for cultivation, etc (Chongloi, 2018).

Villages among the Kuki are typically significantly smaller than those among the Naga and may consist of as few as 20 families. In addition to this, the nature of these villages is more fluid than that of the Naga villages. The Kukis have a traditional style of government that places a considerably more emphasis on the role of "chief" than the Nagas do. The role of Village Chief is one that is usually passed down through families (Kipgen & Roy Chowdhury, 2016). Not only does this person inherit all of the land in the community, but they also hold the authority to make administrative decisions. In addition to the Haosa, who is the Chieftain of the village and the person who is in charge of the village land, there are also the Semang, who is the Administrator of the Village, the Pachong, who is in charge of Defense, Social Organization,

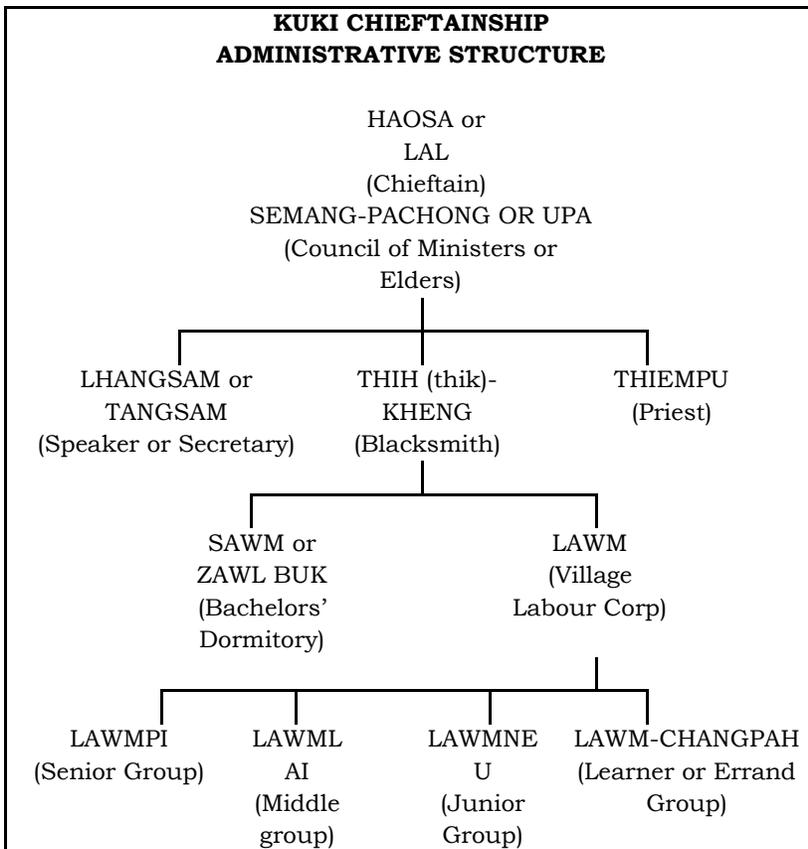
between the Sitlhou country in the Northwest and the Imphal valley. The Manlun (Zou) Chief's land was to the south, adjoining the Teddim districts of Chin Hills. The Mangvum, a Haokip sub-clan, dominated the region east of Imphal valley, which included the Kabaw valley and Sukte nation in modern-day Northwest Burma.

and Relief, the Lhangsam, who is in charge of Information, and Thuching (the secretary and record keeper).

There is not a single piece of land in any of the Kuki communities that has been 'settled' by means of land surveys and title assignments. The land needed for cultivation and the establishment of homesteads is distributed among the villagers by the Chief (Guite, 2018). Certain kinds of land cannot be put up for sale. If a household moves to a different community, the land reverts back to the Chief without any more action being required. Unfortunately, as a result of the British colonisation of the tribal lands, the institution of chieftainship became corrupted. The law-and-order situation in the hill parts of Manipur is at its worst right now; the education system, the healthcare system, the power grid, and the water supply are all in disrepair. In the hilly regions of Manipur, there is a system of District Autonomous Councils, however they have very little natural rights and regulatory powers that are subject to state authority. When it comes to carrying out functions related to development, they are completely dependent on the State Government. They are becoming increasingly dependent on the State Government as a result of the instability of their respective financial situations (S. Haokip, n.d.). It is critical to instill a sense of belonging in those who live in isolated mountainous places. A comprehensive and participatory form of development in the region will be significantly facilitated by the implementation of a responsible administration and the revitalization of local self-government structures, such as Hill Autonomous Districts Councils. It will provide good governance, making it possible for all finances and development programmes to be sent directly to the people who are intended to benefit from

them. In addition to this, it would further check rep tapism, which is deeply ingrained in the state of Manipur and is one of the primary causes behind the underdevelopment in the sections of the hill district that are occupied by tribal people.

Figure 1: Administrative Structure and Functions (where from customary laws flow):



Source: T. S. Gangte: *The Kukis of Manipur: 1993; p.126; Gyan Publishing House, New Delhi*

It is imperative that the Sixth Schedule of the Constitution of India be brought back into effect as soon as possible, and that the traditional institution of chieftainship be limited to serving only ceremonial functions (S. Haokip, n.d.). Women's political engagement and gender issues can be viewed as yet another essential field to research how new forms of village governance integrate into and interact with the social background of rural communities. This is because these topics pertain to women. The research that has been done so far indicates that women participate in official elections and other political activities at levels comparable to those of males, and the disparities between the sexes compare favourably with those shown in other countries' historical examples. When it comes to the representation of women in institutions like as the Village Council, Autonomous District Council, or Party branch committee, the picture is far more skewed.

III. Objective of the study

The study's overarching objective was to explore the efficacy of village councils as a unit of local self-governance; to comprehend ordinary citizen participation in village planning and development processes; and the role of women in Kuki society's local self-governance; and to gain an in-depth understanding of the efficiency and effectiveness of the traditional village council as compared to Panchayati Raj Act (73rd Amendment of the Indian constitution) also with the tribal administration under the fifth and sixth schedule.

IV. Research Methodology

Research Design:

The study was carried out through the use of a social action research methodology, with the data being gathered from field interaction. The research design for this study was a combination of descriptive and exploratory methods. In order to depict how the institutions worked as well as the activities that were carried out in the communities, a descriptive design was utilised. The exploratory aspect of the study was utilised for the purpose of gathering information concerning a variety of challenges that are faced by the community in regards to its governance system.

Universe of the study:

Churachandpur District of Manipur was the field study area. From this district, only four blocks were selected purposively for undertaking the study. The selected blocks are, Tuibong, Lamka, Samulamlan and Henglep Block. Out of these four blocks, fourteen villages were selected for the study. The selected villages are New Boljang, Tuinom and Kholmun from Tuibuong Block; Thingkangphai and Tangmual from Lamka Block; Gothol, Bunglawn and Kangathei from Samulamlan Block; Hermon, Lonphai, Phunchongjang, Leisanbung, New Ningthiching, L.Phainom from Henglep Block.

The study universe comprises village chiefs from all 14 villages and other stakeholders, including members of the Chief Association, Kuki Inpi Leaders, Kuki Women Human Rights Organisation, youth leaders

and student organizations, Church leaders and village council members.

Sampling Design:

Samples have been drawn as per Purposive Non Probability Sampling from the critical stakeholders from the four sub-divisions. The total number of respondents selected for the present study as a stakeholder could be divided into the following categories:

- **Village Chiefs:** The sample size of the fourteen villages equally selected from the four sub-divisions is fourteen (14) village chiefs. The Village Chiefs were selected purposively based on their geographical proximity to the research bases, willingness to participate in the projects, and contrasting demographic and organizational characteristics.
- **Kuki Innpi Leaders:** One member of the Innpi leaders from the district was interviewed.
- **Kuki Student organization:** Four members of the student organization were interviewed.
- **Members of Autonomous District Council:** Two members of the district council were interviewed, one from the Lamka block and the other from the Khouabung block.
- **Village Youth Leader:** Two youth leaders could be identified and interviewed.
- **Church Leader:** Three respondents were church leaders from the study villages

- **Social Activist:** One social worker who is actively engaged in social service activities was identified.

Techniques of data collection:

The research techniques, which were used to gather quantitative and qualitative data for the study, were:

- a) In-depth personnel Interview
- b) Focused Group Discussion (FGD)

The total number of interviews conducted for the study was 27 (14 Village Chiefs, 13 Stake Holders). In addition, 14 FGDs have been conducted in the sampled villages to understand the efficiency and effectiveness of the traditional village council/council compared to Panchayati Raj Act (73rd Amendment) and the tribal administration under the fifth and sixth schedules.

The tools or the instruments of data collection for the study were:

Interview Schedule:

An in-depth interview using a semi-structured interview schedule that included closed and open information on the profile of village chiefs was carried out in order to evaluate the self-governance, administration, and inheritance practises of the Kuki village. Interviews with a variety of interested parties have been carried out in order to gain a better comprehension of the hereditary chieftainship structure, as well as the factors that led to its creation, as well as the advantages and disadvantages of this kind of village self-governance. It was also anticipated that the stakeholders would propose further

ways in which the local autonomy may be improved. People from Kuki Innpi, student organisations, members of the District Council, church leaders and youth leaders, and elders from the sampling villages were all included in the group of stakeholders.

Checklist and Guidelines in FGDs:

The main aim of carrying FGDs was to understand the participation of ordinary citizens in the village planning and development process and the role of women in the local self-governance of Kuki society. A total of 14 FGDs was conducted covering 14 villages from 4 Blocks. Checklist and guidelines were used to conduct the discussion for focus towards the objectives of the study. These focused group discussions include persons from women's groups, village council, youth clubs, village elders and church leaders. The number of participants in each focused group discussion varied from 7-14.

Data processing and analysis:

A methodology that utilised multiple methods to collect data was utilised, with an emphasis placed on the iterations that occurred between defining the challenges, producing solutions, and evaluating. A constant comparative method was utilised in order to do the analysis of the data, which included reflective diaries, field notes, and interview transcripts. During the discussions held with the participants, the research team was able to identify recurring themes that reflected their perspectives on Traditional Government and the function of the District Council. The themes were discussed and interpreted in an interactive manner with the people who took part in the project. Following this,

the themes were triangulated among the various stakeholder groups and sites.

Ethical consideration:

The study's purpose was explained to all the respondents. The respondents were given a choice to withdraw from the study as and when desired during the research study. Oral consent was taken from all the respondents and participants for using their names and information in the study. Throughout the study, care was taken not to hurt the religious and cultural sentiments of respondents and people of the community.

Constraints in the study:

Research requires repeated review and introspection during its development. It is challenging to incorporate all the dimensions of a given inquiry in a single piece of work. Not being exceptional, even the present study suffers from several weaknesses in it. The term Tribal governance in Manipur is broad, but the study must limit itself to one tribe (the Kuki Tribe) in one hill district (Churachandpur District). Manipur has five hill districts and around 29 major tribes in the hills dividing into two main ethno-denominations, namely Nagas and Kuki-Chins, which have similar but different traditions and customs of local self-governance. Therefore, a series of such micro studies focusing not on one tribe alone is likely to do justice to the current enquiry.

The area of Manipur that is the focus of the study is one in which it is difficult to carry out the research due to a lack of appropriate infrastructure and

communication facilities. Hence, even if the researcher wanted to cover the far rural areas in order to achieve the goals of the research, they would not be able to do so in order to fulfil the requirements of the study. It is important to note that a study that includes both rural and urban bases will do justice to the participatory decision-making process and a rights-based approach to development in general. This is something that needs to be kept in mind.

V. FINDINGS AND DISCUSSIONS

A. Socio-Economic Profile of the Study Village Chiefs

The village Chiefs that took part in the study had an average age of 45 years, with the youngest Chief being 27 years old and the oldest Chief being 67 years old. The age range of the Chiefs was from 27 to 67 years old. The only method to attain the position of Chief at the tender age of 27 is through the inheritance of the Chieftainship institution. The job of running the institution was not passed on to the youngest Chief until his father passed away, at which point he was forced to assume control of it.

Most of the village Chiefs who participated in the survey are in their undergraduate years; only three (or 21%) of the village Chiefs who participated in the survey are graduates. In terms of their income and their current economic standing, the village Chief responder has an annual income of approximately 1.5 lakh on average. The Chiefs of the entire village are among the most financially prosperous people there, and the land that they own is the most valuable item that they have in their hands.

Some chiefs derive a substantial portion of their revenue from the land itself. Cultivators make up 46% of the village's Chief respondents, while those working in government services make up 31% of the village's Chief respondents (three of whom are retired). 15% of respondents identified themselves as social workers as their occupation (basically means providing social services to the community and not necessarily a professional social worker with a degree). A total of 8% of the population is represented on the autonomous district council.

The Chief's occupation highlighted the fact that they have an active lifestyle and are able to provide for themselves through their work. Because just one female Chieftain was discovered during this research out of a total of fourteen Chieftains, the Chieftainship is an institution that is predominated by men. This Chieftain also happens to be a widow. So, the subject of gender equality in an institution of this magnitude becomes an important one, which leads to the even more important problem of the role of women in the decision-making process inside these power structures of Kuki society.

B. The involvement of the populace in the process of governance

The level of involvement of the State government in the process of developing the hamlet is extremely low. The lives of the peasants were filled with numerous challenges, and they had to fight for even the most fundamental of necessities. In order to develop roads, the Chief of the Village and the authorities have to go through a lot of trouble, and occasionally the villagers have to chip in money so that they can purchase an

electric transformer. To actively participate in the village council as a unit of self-governance, the most significant barrier to overcome is the corrupt system that exists inside the state government. They are being denied their fundamental right to progress because they do not have access to vital facilities like schools and health centres, which in turn leads to more poverty and poor health.

According to the opinions of around 72% of the stakeholders, the traditional hereditary system of Chieftainship is the greatest obstacle standing in the way of a transparent government system. They also considered that the communication network between the village council and the residents was poor; as a result, the problem of transparency became a serious concern. Despite this, around 28 percent of the stakeholders continue to maintain the view that the governance system is transparent due to the fact that regular agendas are discussed and deliberated upon during meetings, and decisions are voted on. The monologue system, often referred to as the listening system, is the primary mechanism utilised in the Kuki governance system for the purpose of decision-making. The village chief presides over the village council in his capacity as Chairman, and he is the one who calls and leads meetings of the VA whenever they are necessary. Many stakeholders are of the opinion that having a Chief that is democratically chosen rather than one that is hereditary is necessary in order to ensure that people can fully participate in the system of governance. Also, there should be democracy at the grassroots level, and everyone should be permitted to take part in the gatherings that are held for that purpose.

C. Women's Role in Local Self-Governance in Kuki Society

During the focus group discussions (FGDs) that were held with the women self-help groups (SHGs), as well as the women welfare committee, the study revealed that women do not take part in the decision-making process in the village because doing so is against both the law and the custom of village governance. This is the primary reason why women do not participate in the decision-making process in the village. They expressed their desire for a society in which everyone is accorded equal treatment and in which work and responsibilities are assigned in a manner that is fair to all members of the community. They believe that women have a disproportionate amount of responsibility for the upkeep of the household, as well as for agricultural activities and animal husbandry. Hence, if given the choice, active participation as an official member of the village council is not the path that is suggested to take advantage of if given the opportunity. Despite this, they were all of the same opinion that women should be treated with the respect that they deserve and be given equal footing in issues that concern the welfare of the community.

In addition, there is a significant portion of the procedure for making decisions in the village administrations that does not include the participation of any women. Most of the significant decisions that pertain to women are taken by the male-dominated village council, which then imposes these decisions on the women. This is because the village council is dominated by men. There is not even the slightest hint of any involvement on the part of women in the

deliberations and choices that are made by the village council. Even the local youth organisations are not permitted to have a say in the decisions that are made by the village council. This is very unfortunate. On the other hand, they take part in the meeting of the general body that occurs once a year in order to make choices regarding the one-year action plan for the village. The majority of the time, the women's welfare organisation in the village is invited to take part in talks addressing topics such as the ban on the sale of alcohol and drugs, gambling, and the maintenance of peace and order in the community of the village.

On the idea of promoting gender equality, about 64% of respondents believed that women should be permitted to hold the office of Chief of the Chieftainship institution. Nonetheless, more than one-third of those polled believe that it would be improper for a woman to serve as the leader of the village council. They argue that women should not be allowed to serve as chiefs of the village council since land can only be inherited by men and men alone can inherit land. The majority of respondents (64%) are in favour of providing women with a greater opportunity to participate in decision-making. They argued that there should be democratic participation in the government and that every individual should be entitled to the same rights. A little less than a third of those polled have a favourable opinion of the traditional system of government. They believe that males are more responsible than females in the majority of circumstances.

D. Effectiveness of Traditional Village council in comparison to Panchayati Raj Institutions

When it comes to the make-up of the village council, tradition dictates that communities with a population of 600 people or more must have 12 members on the council, or even more if the Chief so chooses to expand the council's membership. If there are fewer than 50 households in the village, the number of residents who serve on the council can range from 5 to 6. There is no maximum number of people who can be elected to serve on a village council; however, the typical number of people who serve on a village council is seven. The number of people who can be elected to serve on a village council is not limited in any way. The Village Chief and the other members of the Village Council are the ones that make decisions and take care of every issue in the village. About matters that were either brought to the Chief's attention or that he became aware of on his own, the Village Council was consulted by the Chief. The members of the village council are notified of upcoming meetings by word of mouth through the village messenger. This method of communication is gradually being phased out in favour of communication via mobile phones. To communicate with the Village Council, an appeal must be made to the individual or organisation in question. After that, the village council will decide the appropriate punishment based on both the law and local customs. For instance, if a family has a disagreement about something like getting divorced or remarrying, the person in question must sacrifice a pig or another animal with four legs in order to settle the argument once and for all. In such a scenario, the problem is fixed, which stops any additional disagreements from occurring.

The Chief and the other members of the Village Council's major responsibility is to keep the peace and harmony among the people and to stop any future misunderstandings from occurring. The decision that was made by the village council is final. The members of the tribe or ancestral group conferred and deliberated in accordance with the customs and laws that had been passed down. The meat was never served to anybody else, but it was consumed or served as a token of settlement or agreement during the meeting of the village council when important topics like as divorce, murder, or family conflicts were being discussed. Even if there is something left over, it is buried far beneath the surface of the earth.

The village council's primary responsibilities include the building of roads, the supervision of schools, awareness campaigns about education and health, and participation in the Mahatma Gandhi Rural Employment Generation Projects. When it comes to the development of infrastructure in certain villages, a subcommittee of the village council is sometimes formed to look into issues such as the provision of electricity, water, and roads, as well as the utilisation of various government programmes, job cards, and other similar matters. The Village Chief and the other members of the Village Council are responsible for monitoring the health of the village as well as its infrastructure. Any new construction must be approved by the Chief of the village, who then confers with the other members of the council before making a final decision. The majority of the town governments in the villages did not carry out activities of this kind. Regarding any efforts involving the village women's self-help groups (SHGs) in the areas of conservation and cultivation, the council is always

consulted. On all matters pertaining to the preservation of the land, the maintenance of law and order, the decisions of the council are final. Activities that directly affect the council are those that support the health and growth of the people living in the village. It may include the building of infrastructure, the preservation of the natural environment, and the provision of a reliable source of income for the local population.

The Panchayati Raj Institutions (PRI) have the potential to be an influential body in the planning and implementation of activities on a local level. This potential exists only in theory. In point of fact, however, there have been a variety of factors that have acted as obstructions to people's participation in politics at various times. It's possible that other states have similar roadblocks. There are a number of essential social and economic reasons, the most important of which are discrimination based on social standing and income, a lack of education, occupation, race, place of residence, and most importantly, sex. There are also a number of essential social and economic reasons, the most important of which are discrimination based on social status and income. All of these aspects contribute to the practice of gender bias and discrimination. In addition to this, the majority of the members of the Panchayat do not necessarily work towards the accomplishment of social goals, and as a consequence, they are unable to be sensitive to the requirements that the people have. To say the least, the study reveals an intriguing finding: The Public Distribution System (PRI) is still not functioning at the intended pace and size, particularly in the state of Manipur (Pal, 2004). This is especially the case because there is a lack of active engagement from individuals coming from all walks of life, as well as political currents

and crosscurrents that are routed in a narrow fashion. This is particularly the situation.

E. Effectiveness of Tribal Governance under Sixth Schedule as compared to Panchayati Raj Institutions

The Manipur (Hill Areas) District Council Act of 1971 gave the local council in that state the authority to perform as many as seventeen different tasks. The Autonomous District Council (ADC), which started functioning following its first election in May 1973 and continued doing so until its supersession and suspension in 1988, was in charge of discharging these functions. All of the District Councils in Manipur came together to form the Sixth Schedule Demand Committee because they were unhappy with the functions that were being performed. Along with the Sixth Schedule Demand Committee, the All-Tribal Students Union in Manipur put pressure on the government to extend the Sixth Schedule. In 2008, the government of Manipur passed the Third Amendment to the Manipur (Hill Areas) District Councils Act, which increased the number of functions that the act may have to twenty-six. This action was taken in response to a portion of the desire that had been voiced.

Within the scope of their authority, the PRIs are responsible for covering up to 29 different subjects. When compared to ADCs, which frequently find themselves at the mercy of the state government for funds, the Panchayat bodies are in a better position to address developmental challenges, both in terms of the breadth of their functions and the financial front. They are eligible for financial assistance from both the state

and the federal government, which is provided through a variety of programmes. In addition, a finance commission has been established so that the Panchayat bodies do not suffer from a lack of financial resources. This was done in order to prevent financial hunger.

One of the most significant differences between the two laws is the representation of women. The autonomous councils and local bodies in the Sixth Schedule territories are male-dominated because the tribal traditions do not accept women's role in social politics. Women representatives are considered as exceptions rather than the rule. The PRI system receives very good marks and is a lot more progressive in this regard. Another aspect that stands in contrast is the continued functioning of the institutions.

It is required that the Panchayat bodies be reestablished no later than six months after the day on which they were dissolved. Subject to the approval of the state government, the time frame for holding new elections for district councils might be anything from six months to a year. The majority of autonomous councils have not fostered the development of entities at the village level nor institutionalised intermediary bodies that cover groupings of villages; instead, they have chosen to concentrate all of the authority in their own hands. Because of the councils' monopoly on power, there are only a select few people qualified to hold officer positions. The democratic voice of the regular, less well-off tribal members has been silenced as a result of this, and the concept of democracy at the grassroots level has been misconstrued as the autocracy of a select few top council members. Clearly, as a result of this, there is now rampant corruption and incompetence inside the

councils. As a result, there is neither a participatory nor an inclusive democracy in the areas covered by the Sixth Schedule.

Once again, the structure of the PRI is incomparably greater since it is composed of three tiers that are institutionalised. Hence, the Sixth Schedule that was established was successful in protecting the land and the unique customs of the tribes, but it was unable to institutionalise grass-root or participatory democracy. It was a significant barrier to growth, especially when combined with monetary dependence and unscrupulous practises. When it comes to the execution of decentralisation plans, one of the factors that is believed to be a barrier is a lack of capacity in both institutions and competent employees.

The findings of the study revealed that in the current scenario there is a mismatch between the vertical plane of decentralisation, which involves the transfer of power from the centre to sub-national structures, and the horizontal plane of decentralisation, which involves the empowerment of grassroots communities to decide, plan, manage, and manage to implement specific programmes, is another important constraint that needs to be addressed. Mismatch between the vertical and horizontal planes of decentralisation is an important constraint that needs to be addressed. The failure to make the shift to people-centered governance, with its concomitant consequences for participation and empowerment, even legally, through laws and regulations, is the other limitation; yet, this has resulted in an expanded area for decentralised decision-making.

The study revealed that there is lack of accountability and transparency that exists from the centre to the periphery and vice versa is one of the factors that hinders the decentralisation process. Historically, this kind of accountability was conceived of in a hierarchical fashion, working its way up from the bottom: from local authorities to the national government. The demand that responsibility must also function in the opposite direction, from the communities and civil society to the subnational authorities, is one that is becoming more prevalent among the groups that are part of civil society.

VI. Conclusion and Recommendations

According to the findings of the study, additional concerted efforts are required to strengthen the democratic functioning of the village council, promote popular engagement, and build capacity at the grassroots level in Kuki villages. To begin, the Manipur Hill Areas Act of 1956 needs to be revised in order to make it possible for the village council to perform its duties as a unit of local self-government in a more efficient manner. Defining the functional domain of the Village Council enables them to concentrate their efforts on improving the quality of services provided, responding to the desire of residents for diverse service areas, and enhancing the capabilities of the Village Council, which may include providing additional assistance to the workforce. At the level of the village, there is an urgent need to develop a structured system for the preparation and implementation of participatory plans, as well as for the integration of these plans with plans that have been prepared by the council. The connection that holds the Village Council and the Civil Society together.

The village council must be given complete autonomy, and the finances, functions, and functionaries outlined in the Sixth Schedule must be devolved. Adequate administrative and legislative measures, as well as the launch of training programmes at all levels, are unquestionably important in this regard, but the political will and concerted political efforts of the ruling elites or party, are even more critical. Furthermore, a strong state and an engaged civil society are required to ensure that local elites do not undermine decentralisation efforts and widespread popular engagement.

However, it is critical to recognise that the aforementioned positive elements may not produce the desired results if the necessary conditions for local government success are not met. Gandhiji's vision of people empowerment implies inclusive growth, which can only be achieved through inclusive governance. A functional village council structure is essential to accomplishing this. Delegation of resources, subject transfer, and transfer of administrative authority of public servants are thus critical to the operation of village government. The presence of elected officials is another important factor in the development of local government. Capacity building in areas such as accounting, budgeting, and monitoring is urgently needed. Local governance will be a pipe dream unless more extensive authorities and resources are delegated and elected representatives are not trained. To make democracy meaningful in the state, the Village Council system of governance must be changed in order to establish them as a local level of governance within the broad parameters of the constitutional instructions. According to the study's findings, the most effective

strategy for moving forward is to work towards District Council recognition under the Sixth Schedule.

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Chapter-7

A DISCOURSE ON LEGAL PROTECTION OF KHASI LANGUAGE

*Arun Kumar Singh**

I. Introduction

India is the Country, which has unity in diversity. It has various cultures and languages. Certain areas of the country enjoy special status. Article 244 in Part X of the Constitution envisages a special system of administration for certain areas designated as 'scheduled areas' and 'tribal areas'. The Fifth Schedule of the Constitution deals with the administration and control of scheduled areas and scheduled tribes in any state except the four states of Assam, Meghalaya, Tripura and Mizoram. The Sixth Schedule of the Constitution, on the other hand, deals with the administration of the tribal areas in the four North-eastern states of Assam, Meghalaya, Tripura and Mizoram. Khasi is one of the tribes who are resident of the State of Meghalaya and their mother tongue is Khasi. Maximum people of the State speak either Garo or Khasi language. But these are not the official language of the

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State. English had been the official language from independence. However, a lot of discussion took place in Constituent Assembly to make Hindi as an official language of India but was opposed by some people.

However, a solution took place, *viz:*(a.) English would continue as the official language for fifteen years;(b) Hindi is to take place thereafter;(c) Meantime steps are to be taken to promote growth of Hindi. And also the liberty was given that a State may adopt any other language as its official language. Ultimately from 26 January, Hindi became the Official Language of the Union.¹ Despite that the Hindi could not be the National language. The reason behind it is that once Hindi was declared as National language other languages would be treated as foreign language which was not the intent of Constitution makers because all languages spoken in India are the National language. Since inception it has been mentioned in the Constitution that Hindi would be the official language but English would also continue for all official purpose of the Union for a period of fifteen years.² Apart from above the Constitution framers were

¹ Article 343(1) of the Constitution of India provides that; 1) The official language of the Union shall be Hindi in Devanagari script The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numeral.

² Article 343(2) of the Constitution of India, 1950 provides; “Notwithstanding anything in clause (1) , for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement: Provided that the president may, during the said period, by order authorize the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in

bothered regarding the role of regional languages. It was felt that regional language should be promoted and developed so that they could play a meaningful role in future.³ That is why to achieve this objective; Eighth Schedule is kept in the Constitution of India which is presently containing 22 Languages.⁴ The purpose of this Schedule is to represent these regional languages in the Official Language Commission as Constituted under Article 344(1) of the Constitution of India.⁵ But there are languages like Khasi did not get place in the Eighth Schedule. This paper aims to protect the identity of the tribes of by protecting the Khasi language as got the status of endangered language in the list of UNESCO. For above task the Constitutional provisions as well as other statutory provisions are examined. The views of Judiciary have also been highlighted regarding protection of languages. The methodology that has been

addition to the international form of Indian numerals for any of the official purposes of the Union.”

- ³ Prof. M.P. Jain, *Indian Constitutional Law*, 2008, Lexis Nexis, Butterworths Wadhawa, p.774.
- ⁴ Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kashmiri, Kannada, Konkani, Mathili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santali, Sindhi, Tamil, Telugu, and Urdu are the languages of Eighth Schedule.
- ⁵ Article 344(1), of the Constitution of India, 1950 provides that; The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the English Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

adopted for the above is doctrinal which is based on primary and secondary sources.

II. Khasi Language and its Legal Protection

According to the UNESCO Atlas of the World's Languages in Danger 2009, India has around 196 endangered languages, including about 80 in the North-East.⁶ The UNESCO list, has described Manipuri (Meitei), the Karbi language of Assam and Khasi in Meghalaya as endangered languages. The Indian Government, however, does not agree with the UNESCO list. So, for as Khasi language is concerned it is a language with commandment and promise. It is a God's gift and a treasure.⁷ According to the UNESCO Atlas of the World's Languages in Danger released on 7th March, 2009, Khasi is one of 196 languages of India might which will have speaker left in coming days or it will be silent. Although, Khasi is a language spoken by over 12 lakh people and it has a rich literature but unavailability of its own script deprived it to be the part of Eighth Schedule of the Constitution. Khasi language was first written in the Bengali script in 1813, with the first printed book 'The *Khasi New Testament*'.⁸

William Carey tried to write the language with the use of Assamese Script that included the well-known book 'The *Rule of Khasi*' which is an important

⁶ <https://www.indiantribalheritage.org>, (Accessed on 15-05-2018).

⁷ R. SLYNGDOH, Ka Histori Ka Thoh Ka Tar Byntal, Shillong, Meghalaya, 7thed.2008,p.1,<http://shodhganga.inflibnet.ac.in>, Accessed on 22nd May,2018.

⁸ *Id.*

manuscript of the Khasi religion.⁹ In 1841 the Welsh Missionary Mr. Thomas Jones wrote the Khasi language in Latin script. Thus, the Latin alphabet of the Khasi language has little similarity with the alphabet of the Welsh. As far as the question of legal protection of Khasi language is concerned, Article 345 of the Constitution of India authorizes the States to adopt, by making law, any regional language for its official purpose.¹⁰ It is not essential that only that language can be adopted which is mentioned in the 8th Schedule rather any language can be adopted even it is beyond the 8th Schedule. But it is a matter of discussion, why the Khasi language did not get place in Eighth Schedule? What is the objective behind that? And also, if this language got the place in Eighth Schedule, how would it be advantageous for the tribal people of Meghalaya.

III. Objectives and advantages of the Eighth Schedule of the Constitution of India

The objective of including any language in Eighth Schedule is that these languages to be represented in the Official language.¹¹ And also, from these languages the words are to be drawn for developing Hindi. The unstated

⁹ *Id.*

¹⁰ Article 345 of the Constitution of India provides that; "Subject to the provisions of Article 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State: Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution."

¹¹ *Supra* note 3.

idea behind the languages mentioned in the Eighth Schedule is that it gives psychological and emotional satisfaction to the proponent of these languages.¹² If Khasi language is included in Eighth Schedule the Parliamentarians who belong to this language can speak in their own mother tongue. And also, they will be able to take part in Language Commission and Committee.¹³ One more advantage is that after inclusion of Khasi language in Eighth Schedule the candidates will be allowed to answer the questions in their own mother tongue for its Civil Service Examinations conducted by the Union Public Service Commission.

One more major benefit of including a language in the Eighth Schedule is that, an author would not be entitled to get the *Sahitya Akademi* Award, unless his language of his literature is part of Eighth Schedule. It means the author of any write up cannot be nominated for *Sahitya Akademi* Award if his write up is not covered under any language of Eighth Schedule. Besides above, the most important benefit is that by getting the place in Eighth Schedule it will be recognized as one of the official languages of India. The Khasi Author's Society (KAS) has been urging upon the State Government to seriously

¹² *Id.*

¹³ According to Article 344 (1) of the Indian Constitution provides that the President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the English Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

take up this matter with the Central Government and convince them so that their language can be given the recognition in 8th Schedule. The KAS argues that if *Bodo, Konkani and Manipuri* could get the place in 8th Schedule then there was no reason to deprive the Khasi language. But the Supreme Court of India in case of *Kanhaiyalal Sethia vs Union of India*¹⁴ has made it clear that inclusion of a particular language in 8th Schedule is a policy matter of the Central Government. No one can compel or claim it on the ground of Fundamental Rights. Courts do not by way of judicial review interfere in such matters, unless such policy violates any Constitutional or statutory provision or is actuated with *mala fides*.¹⁵

IV. Inter-Governmental Communication and the Khasi as the Official Language

As India has different languages and dialects, the communication between the people of two states has been an issue. If Khasi is adopted as official language of the State of Meghalaya and it has to make certain communication to the Government of Uttar Pradesh then being Khasi as official language of Meghalaya the communication would be done in Khasi. But Uttar Pradesh Government Officials do not understand the Khasi language, so in that very case it will be an issue of communication. That is why Constitution makers had made the provision of Article 346 which states that communication between two States or between Centre and a State; the official language of Centre should be

¹⁴ AIR 1998 SC 112.

¹⁵ Durga Das Basu, *Commentary on the Constitution of India*, 2012, Lexis Nexis, Butterworths, p.12220.

used.¹⁶ So in the above situation the communication will be either in Hindi or English. Apart from this, another Act dealing with languages is, the Official Language Act, 1963 it says that if any Act has been enacted in local languages (official language) it will be translated in English or Hindi.¹⁷ However, if any discrepancy is found between Official language, Hindi or English, which will prevail, is not clear.

V. Language of Law and Courts

The Indian Legal System is based on the English Common Law. India has a much-unified legal system. There is basic unity in the laws prevailing in the country. The decisions of one High Court are freely cited in other High Courts. If the High Court delivers verdicts in local

¹⁶ Article 346 of the Constitution provides that; “Official language for communication between one State and another or between a State and the Union The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union: Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication”.

¹⁷ Section 6 of the Official Secret Act, 1963 says; “Where the Legislature of a State has prescribed any language other than Hindi for use in Acts passed by the Legislature of the State or in Ordinances promulgated by the Governor of the State, a translation of the same in Hindi, in addition to a translation thereof in the English language as required by clause (3) of article 348 of the Constitution, may be published on or after the appointed day under the authority of the Governor of the State in the Official Gazette of that State and in such a case, the translation in Hindi of any such Act or Ordinance shall be deemed to be the authoritative text thereof in the Hindi language”.

languages, then it would be difficult to cite the precedent from this High Court to other High Courts. And, if different High Courts adopts different official language the difficulties would arise in functioning of Supreme Court as the appeal against the judgment of these High Courts will be done before the Honourable Supreme Court, but if the languages of the verdicts of various High Courts are different then the Supreme Court will face difficulty.

The then Chief Justice of India, Justice N V Ramana said that mother and motherland are superior even to heaven.¹⁸ In 2013 while he was judge in High Court called upon the Advocates and Judicial Officers to use the language that is understood by majority of people. He wanted the Judiciary in the State to use mother tongue. The language issue is not a problem only in judiciary rather similar problem is regarding the language of legislation also. If law of a State was enacted in its own official language, how could the other State's people understand it? As per Indian Evidence Act, 1872 the legislations of any States are judicially noticeable facts and everyone is presumed to know about such legislation. The Supreme Court regarding interpretation of such legislations will face same problem because it is not practically possible for the Supreme Court to know the official languages of all the States. That is why our Constitution has made special provisions concerning the language problem in the area of Judicial and Legislative process. Article 348(1) of the Constitution of India says

¹⁸ <https://www.thehindu.com/news/national/andhra-pradesh/dont-forget-roots-and-mother-tongue-cji/article38032430.ece> visited on 15th March, 2022.

that all proceeding of Supreme Court and all legislation will be in English.¹⁹

VI. Status of Khasi Language post 1972

When Meghalaya became a separate State the languages Khasi and Garo received a greater importance. Although, State of Meghalaya chose English as its common language in the administrative works but, the Khasi language is used in Khasi speaking areas and Garo in Garo speaking areas, and also, it has been used in extensively. In education the Khasi language is used as medium of instruction up to class IV and afterwards it has become compulsory subject especially in Khasi schools. Khasi language is also permitted in the lower Courts and also in the Khasi Hills Autonomous District Council. In order to provide facilities for teaching a

¹⁹ Article 348(1) in The Constitution Of India says;

(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides;

(a) all proceedings in the Supreme Court and in every High Court,

(b) the authoritative texts

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in the English language.

minority language or a mother tongue, the Union Education Ministry in consultation with States formulated a Three Language Formula.²⁰ This formula as enunciated in the National Policy Resolution of 1968 reiterated in the National Policy on Education 1986 provided that in Hindi speaking states, Hindi, English and a modern Indian language should be taught. And also, in the non-Hindi speaking States Hindi, English and the Regional language should be taught.²¹ In 2005, when the Meghalaya Language Act, 2005 was enacted the Khasi and Garo languages became associate languages of the State of Meghalaya. For the implementation of the aforesaid mentioned Act, the State Government through the Political Department has made certain Rules for the usage of the Khasi language in the District Sub- divisional Block level.

Apart from the above, Articles 29²² and 350A²³ of the Constitution of India provide protection to the languages. The purpose of Article 29 is to promote interstate migration of the people, and protect their culture as well as linguistics of linguistic minority

²⁰ <http://www.education.nic.in>, Accessed on 21st May, 2022.

²¹ *Id.*

²² Article 29(1) of the Constitution of India provides that any Section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

²³ Article 350A of the Constitution of India provides that it shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for Securing the provision of such facilities.

groups. A linguistic minority is a group of people having mother-tongue different from that of majority in a State.²⁴ For example, a few people whose mother-tongue is Khasi, from Meghalaya came and settled in Mumbai. Here they would constitute a culture as well as linguistic minority group. In State of Maharashtra they would be considered as minority. Article 29 would protect their culture, language and script in Maharashtra. Article 29 does not impose any positive obligation on the State to conserve any culture or language. It merely enables linguistic minority groups to preserve its own culture and language and bars State from imposing on any other language or culture.²⁵ Department of Law, North-Eastern Hill University (NEHU), However, Article 350A supplements Article 29 as it directs every State and local authority within the State to provide adequate facilities for instruction in mother-tongue at the primary education to the children of linguistic minorities.²⁶

VII. Conclusion

Language which is an important part of any society plays very crucial role in protection of culture. But unfortunately, many of them are at the verge of extinction. When a language dies out, future generations lose a vital part of the culture. As from above discussion it appears that Khasi language is also one of them that are going to die. So, awareness should be raised about the issues of language extinction and their preservation. These languages can be protected not only by legal means but the technology can also help to preserve

²⁴ Supra note 3.

²⁵ *Id.*

²⁶ *Id.*

them. The internet can be used to raise awareness about the issues of language extinction. Khasi one of the indigenous languages of Meghalaya is still associate language of the State. It did not yet get the place in Eighth Schedule. Now the time has come that the Khasi language should be accorded a full status of Constitutional recognition in the Eighth Scheduled of the Constitution of India which has been pending since long back.

Chapter-8

EXAMINING THE IMPACT OF INTELLECTUAL PROPERTY RIGHTS ON BIODIVERSITY VIS-À-VIS RIGHTS OF TRIBAL PEOPLE

*Mamta Rana**

I. Introduction

Biodiversity is the variety and variability of living organisms on the planet and it forms the bedrock for sustainable economic development. The greatest part of the global biodiversity is found in animals and micro-organisms. Over two-third of the estimated 300,000 species of higher plants in the world occur in the tropical forests of South America, Africa, Madagascar and tropical Asia including New Guinea and tropical Australia. Most of the countries located in these regions are interestingly the Third World Countries (TWCs) blessed with almost all known type of topographic and climatic conditions ranging from tropical to temperate and alpine zones. The rich biodiversity of India is matched with an equally rich cultural diversity and a unique wealth of traditional knowledge by millions of

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ethnic and indigenous people living in the rural and forest areas.¹

Traditional knowledge is a community-based system of knowledge that has been developed, preserved and maintained over many generations by the local and indigenous communities through their continuous interactions, observations and experimentations with their surrounding environment. It is unique to a given culture or society and is developed as a result of the co-evolution and co-existence of both the indigenous cultures and their traditional practices of resource use and ecosystem management. Through years of observations and analysis, trial, error or experimentations, the traditional communities have been able to identify useful as well as harmful elements of their ambient flora and fauna. Such knowledge (acquired through ages) has always remained as part of their life, culture, traditional beliefs, folklores, arts, music, dance, etc. Traditional knowledge covers a broad spectrum of the local and indigenous people's traditional life and culture, art, music, architecture, agriculture, medicine, engineering and a host of other spheres of human activity. Traditional knowledge thus can be of direct or indirect benefit to society as it is often developed, in part as an intellectual response to the necessities of their life. Protection and maintenance of the traditional knowledge of local and indigenous communities is vital for their well-being and sustainable

¹ P. Pushpangandan and K. Narayanan Nair, Value Addition and Commercialization of Biodiversity and Associated Knowledge in the Context of the Intellectual Property Rights, *Journal of Intellectual Property Rights*, 442, Vol. 10, 2005.

development and for their intellectual and cultural vitality.²

TWC's are not only rich in biodiversity but also have a strong cultural history. For example, a megadiverse country like India has 7000 years of continuous cultural history and thus very rich in traditional knowledge. The *Kani* tribal people's practice of eating the small blackish fruits of their magical plant during an expedition result in the invention of an anti-fatigue medicine commercialized by the name '*Jeevani*'. The ancient knowledge of the plant '*sarpagandhi*' led to produce the invention of '*serpasil*' used for controlling the blood pressure. Similarly, a particular tribe in Andhra Pradesh used certain gums and wood materials to convert turbid water into clear water. After scientific experimentation it was found out that the materials used by these tribal had the property of absorbing heavy materials.³

In recent years, intellectual property rights (IPR) have emerged as an important mechanism for securing an equitable share of benefits of developing countries and communities. Particularly with the dramatic growth of forest-based medicine and biomedical research, securing IPRs is a priority issue for some national governments.⁴

² *Id.*

³ J. David Livingston, India Needs an idea bank to Lead the World in Intellectual Property Protection, *Journal of Intellectual Property Rights*, 216, Vol. 8, 2003.

⁴ R. Raina, Romesh Chand, Yash Pal Sharma and Meenu Sood, *Intellectual Property Rights and Traditional Medicines*, 189 (2005, 1st ed.).

IPRs and traditional knowledge must be created in a complimentary manner in order to coexist. Both systems have virtues in and of themselves, and they represent two very different but equally valuable knowledge paradigms. Traditional knowledge provides a valuable base that exists in the public domain, whereas IPR encourage innovation by shielding investment of time, thought, and money. For some, the protection of traditional knowledge is associated with intellectual property rights (IPR), where protection primarily implies preventing unlawful use by other parties. Others see conservation as a means of preserving traditional knowledge and ensuring the long-term viability of biodiversity. There are various examples to demonstrate the fact that traditional knowledge has played a critical part in the invention of key pharmaceuticals, as well as the benefits that industry has reaped from traditional knowledge's leadership.⁵

II. Protection of Traditional Knowledge

Defensive protection of traditional knowledge prevents others from seeking IPR to one's Traditional Knowledge. There are measures which ensure that IPRs over Traditional Knowledge are not given to parties other than the customary Traditional Knowledge holders. These measures include the amendment of WIPO administered patent systems (the International Patent Classification system and the Patent Co-operation Treaty Minimum Documentation). Some countries and communities are also developing Traditional Knowledge databases that may be used as evidence on such Traditional Knowledge;⁶

⁵ *Id.*, at 190.

⁶ Notes of IGNOU, supra note 99 at 14.

Positive protection of Traditional Knowledge establishing IPR to one's Traditional Knowledge, with the resulting possibility of preventing others for using the Traditional Knowledge without permission. This is a creation of positive rights in Traditional Knowledge that empowers these holders to protect and promote their Traditional Knowledge. In some countries, *sui generis* legislation has been developed specifically to address the positive protection of Traditional Knowledge, providers and users may also enter into contractual agreements and use existing Intellectual Property systems of protection.⁷

III. Intellectual Property Rights and Traditional Medicines

Indigenous knowledge is used in three ways by industrial countries that utilize biological resources from developing countries. For starters, biological resources such as varied crop populations have been screened, selected, and maintained by hundreds of generations of farmers and plant gatherers, and they reflect the sum of thousands of individual selections. Second, because plant collectors from industrial countries frequently rely on indigenous informants and guides in their hunt for beneficial plants, indigenous farmers' local knowledge systems are directly employed in the collection of biological resources. Third, for the conservation of biological resources, industrial countries rely on indigenous knowledge.⁸ Traditional medicine plays a

⁷ *Id.*, at 15.

⁸ Stephen B. Brush, *Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology*, *American Anthropologist*, 660 Vol. 3, 1995.

crucial role in health-care and serves the health needs of a vast majority of people in developing countries. Access to modern health care services and medicine may be limited in developing countries. Traditional Medicine becomes the only affordable treatment available to poor people and in remote communities.

World Health Organization (WHO) defines traditional medicine as “the sum total of all the knowledge and practices, whether explicable or not used in diagnosis, prevention and elimination of physical, mental or social imbalance and relying exclusively on practical experience and observations handed down from generation to generation, whether verbally or in writing.”

Traditional medicines are largely based on medicinal plants that are native to the countries where the system has been in use for centuries, and the effort is focused on gaining access to them either directly or through the use of modern breeding and cultivation tools, such as tissue culture, cell culture, and transgenic technology.⁹

Under the aegis of the World Intellectual Property Organization (WIPO) an agenda for the future of IPR in the traditional medicines was prepared, which prioritized activities in this area, namely, development of standards for the availability, scope and use of IPRs on traditional medicine in Asian Countries, systematic documentation of traditional medicine for protection

⁹ R. A. Mashelkar, *Intellectual Property Rights and Wrongs: The Developing World Concerns*, Chartered Secretary, 16, Vol. 32, 2002.

purposes, regional and inter-regional information exchange and compilation of the requisite data bases, etc.

Folk traditions in India are passed down orally from generation to generation. Traditional beliefs, attitudes, and practices underpin 'folk' medicines, which are built on centuries of tries and errors, successes and failures at the family level. These are known as 'people's health culture,' 'home remedies,' or 'folk remedies,' and are passed down by oral tradition.¹⁰

The grant of patents on non-original innovations (particularly those linked to traditional medicines), which are based on what is already a part of the traditional knowledge of the developing world have caused a great concern to the developed world. A perfect example of this is the US patent which was granted for the wound healing properties of turmeric. The process of re-examination of the US patent is well laid and in the landmark judgement, the US Patent Office revoked this patent in 1997 after ascertaining that there was no novelty. The findings by innovators have been known in India for centuries.

The Coordinating Body of Indigenous Organisations of Amazon basin (COICA) which represents more than 400 indigenous tribes in the Amazon region, along with other protested about a wrong patent issued on a plant species native to the Amazon rainforest called B. Capi and its traditional medicinal uses through an indigenous product called 'Ayahusca'. This patent was though revoked when

¹⁰ *Id.*

USPTO re-examined it. Still, the inventor was able to persuade the USPTO¹¹ and the original claims were reconfirmed and the patents rights restored to the innovator. The two cases were followed by yet another case of revocation, which was granted to W. R. Grace Company and U. S. Department of Agriculture on *Neem* by European Patent Office was squashed again on the same grounds that its use was known in India. India filed a re-examination request for *basmati* rice lines and grains granted by the USPTO and Rice Tec Company from Texas has decided to withdraw the specific claims challenged by India and also some additional claims.

The governments in the third world as well as members of public are rightly concerned about the grant of patents for non-original inventions in the traditional knowledge system. At the worldwide level, there is widespread opposition to the awarding of patents on non-original inventions.¹²

IV. Benefit Sharing: International Scenario

Indigenous knowledge is a potential commodity because of its use, and it is fair to compensate indigenous people if their knowledge allows industrial users to profit. Compensation may also encourage the protection of biological resources. Three hurdles, however, make calculating the precise value of indigenous biological resource knowledge nearly impossible. First, there is no market for indigenous people's expertise or resources. Second, it's difficult to separate the contribution of knowledge from the

¹¹ U. S. Patent and Trademark Office.

¹² R.A Mashelkar, supra note 6 at 17.

resources themselves; for example, a plant may be recognised by indigenous people for one property and by industrial pharmacology or crop breeders for another. Third, it's difficult to separate contributions from indigenous knowledge and biological resources from contributions from industrial countries' scientific production and marketing infrastructure. One way to address the lack of valuation is to convert indigenous biological resource knowledge into intellectual property.¹³

Following the GATT and TRIPs agreements, India and other developing countries were granted time to build an intellectual property system that was consistent with that of other trade nations in order to secure their patent rights. However, international concern over intellectual property held collectively within traditional indigenous cultures prompted a number of Third World countries to establish *sui generis* legislation.

The TRIPs agreement of the World Trade Organization, which strives to secure broad international patent protection, makes no mention of the intellectual property rights of the Indian population that originally discovered and exploited neem-based goods. Such a disrespect for cultural understanding, they believe, will exacerbate the North/South divide while ensuring unfair and unequal trading. Bio-piracy of biological and genetic resources from indigenous peoples, tribes, and cultures will become more common

¹³ Stephen B. Brush, *supra* note 5 at 661.

as a result of the agreement.¹⁴ The struggle that frequently occurs when traditional industries face the commercial and technological dominance of global businesses like W. R. Grace is illustrated by the case of neem.

The Convention on Biological Diversity, in effect, serves as a template for countries and businesses to establish equitable access and benefit-sharing agreements. It also outlines techniques to make biodiversity conservation profitable. The Convention has three goals: biological diversity conservation, long-term use of its components, and a fair and equitable distribution of benefits from their usage and genetic resources. The CBD recognizes the interdependence of countries controlling genetic resources and those creating technologies that make use of these resources. The ability to determine genetic resources rests with national governments and is subject to national legislations, according to Article 15 of the Convention, which recognizes nations' sovereign rights over their natural resources.

The CBD further stipulates that any enterprise or country gathering natural products must get the source country's prior informed consent. Any species may also be immune from patenting or intellectual property rights in some countries.¹⁵ The solution, which is in conformity with the CBD, is cooperation rather than confrontation. Many discussions of establishing intellectual property

¹⁴ John Merson, Bio-Prospecting or Bio-Piracy: Intellectual Property Rights and Biodiversity in a Colonial and Post-Colonial Context, *Orisis*, 289, Vol. 15, 2000.

¹⁵ Corliss Karasov, Who Reaps the Benefits of Biodiversity? *Environment Health Perspectives*, 584, Vol. 109, 2001.

rights for indigenous knowledge do not include specific strategies, but three approaches can be summarized:

- (1) a top-down approach in which international and national agencies grant rights to indigenous groups;
- (2) a middle-ground approach in which indigenous groups use existing intellectual property laws; and
- (3) a bottom-up approach in which indigenous groups assert rights. These approaches agree that indigenous knowledge should be conserved, but they disagree on whether remuneration for equity or conservation is appropriate, and whether indigenous people should be reimbursed directly.¹⁶

The top-down method is a well-established strategy for dealing with the requirement for an indigenous knowledge intellectual property rights framework. Indirect pay for indigenous people is envisioned in top-down initiatives with the purpose of fostering conservation. The top-down strategy is likely most visible in the long debates over farmers in less developed countries' rights to benefit from the use of crop genetic resources in industrialised nations' breeding programmes.

The middle ground method seeks to reconcile the interests of indigenous peoples and industrial users of biological resources by applying traditional intellectual property rules to indigenous knowledge. In this technique, indigenous peoples would seek direct

¹⁶ Stephen B. Brush, *supra* note 5 at 661.

recompense for their biological knowledge and resources by using patents, copyrights, trade secrets, and plant variety protection.¹⁷ The bottom-up method encourages indigenous peoples to declare their knowledge as their property and to charge for its use. This technique differs from the middle ground plan in that it anticipates an indigenous form of intellectual property that is unaffected by traditional approaches. This remuneration could be provided by selling licenses to collect plants, interviewing farmers or herbalists, or agreeing to split earnings from the use of plants and indigenous knowledge. There are now four key models for such cooperation, all of which are based in the United States: (i) the INBIO – Merck approach; (ii) the National Cancer Institute (NCI) model; (iii) the Shaman Pharmaceutical model; and (iv) the International Cooperative Biodiversity Groups (ICBG) model.

Collaboration between the pharmaceutical giant Merck and Costa Rica's Instituto Nacional de Biodiversidad (INBio), a private non-profit conservation and research organisation, was one of the first bioprospecting groups to seek to apply the CBD's goals and criteria. INBio agreed to supply Merck with a limited quantity of plant, fungal, and other samples for scientific and commercial examination in Costa Rica's protected areas. Merck committed to pay INBio a million dollars every two years in return, as well as royalties on any commercial products based on INBio's contribution to the drug development process. Merck will have exclusive rights to assess the approximately 10,000 samples that INBio promised to provide to Merck under the terms of the agreement, known as 'right of first refusal.' INBio

¹⁷ *Id.*, at 662.

may enter into similar partnerships with other firms, but it must not furnish Merck with the same species samples unless given explicit authorization. Merck profits from the arrangement by receiving a restricted quantity of already identified and classed plant, insect, and soil samples. Merck can focus on assessing the samples for chemical activity right away because the samples are extracted and processed before they arrive at the Merck facilities. The agreement stipulates that if Merck discovers any active compounds from which it produces commercial products, the parties will collaborate to develop commercial products.

The partnership also benefits INBio and Costa Rica. The capacity to exploit Costa Rica's natural resources in a sustainable manner while simultaneously growing the Costa Rican economy is one of the most essential but least tangible benefits. INBio will utilise the royalties it receives from Merck to assist the conservation of Costa Rica's biodiversity, as well as to help create a Costa Rican biotechnology industry and enhance the country's economy.¹⁸

It is used by the NCI to collect natural products from throughout the world, ship them to its laboratories in the US, and analyse them using its scientific infrastructure. The NCI only provides a source country a nebulous promise of a percentage of royalties if the chemical is commercialized, as well as training of one or

¹⁸ Elissa Blum, *Making Biodiversity Conservation Profitable: A Case Study of the Merck INBio Agreement*, Environmental Management, Readings and Case Studies, 45 (1997, 1st ed.).

two of the source country's scientists in its US facilities.¹⁹

Raw natural materials are delivered to US laboratories under the Shaman Pharmaceuticals (a US corporation) model, just like NCI. Through its non-profit business, the Healing Forest Conservancy, Shaman will allegedly contribute an unspecified tiny percentage of its income with source countries.²⁰

Under the ICBG process, raw material extracts are forwarded to US pharmaceutical companies for further study and analysis. In exchange, the source country will receive an undisclosed royalty rate and some limited training for its scientists.²¹

V. Benefit Sharing: Indian Scenario

The Tropical Botanic Garden and Research Institute (TBGRI) in Kerala, which has proved the value of indigenous knowledge, deserves encouragement, recognition, and just and equitable remuneration. Based on a lead obtained from the *Kani* tribe of Kerala, Pushpangadan and his co-workers developed an antifatigue immunoenhancing herbal formulation named 'Jeevani,' developed on the basis of their knowledge of a lesser-known wild plant, *trichopuszeylanicus* subsp. *transvancoricus* Burkill ex Narayanan, locally known as *Arogyapacha* i.e., the giver of green health.

¹⁹ S. K. Verma, Biodiversity and Intellectual Property Rights, *Journal of the Indian Law Institute*, 212, Vol. 39, 1997.

²⁰ *Id.*

²¹ *Id.*, at 213.

TBGRI refined the manufacturing process, and the medicine *Jeevani* was licensed and sold to a pharmaceutical firm in exchange for a license fee and royalty. TBGRI decided at this moment to split the licensing cost and royalties with the *Kani* tribe 1:1.

In addition to the license fee and royalty that *Kani* trust is receiving, a large number of *Kani* families are getting benefit from the cultivation of *Arogyapacha* and supply of the raw material to the pharmaceutical company for the production of the drug. TBGRI has trained many tribal families for the cultivation of 'Arogyapacha' in and around their dwellings in the forest.²²

Developing countries will have to bear a higher share of the risk and provide more value if they want to benefit from and safeguard their high biological variety endowment. It is preferable to transfer technology to developing nations so that they can invest national capital in value addition rather than sending raw materials to affluent countries for value addition. If they can create value in their own countries, they will be able to define what an adequate compensation to indigenous peoples or rural communities should be, and so will be able to sustain biodiversity by spending more in it.²³

VI. Protection of Indigenous People and Traditional Knowledge: International Perspective

The adoption of a draft Declaration on the Rights of Indigenous Peoples was one of the outcomes of the

²² P. Pushpangandan, *supra* note 2 at 448.

²³ S.K Verma, *supra* note 16 at 213.

United Nations International Year for the World's Indigenous Peoples. Article 12 of the Draft Declaration recognized the rights of indigenous people to “practice and revitalize their cultural traditions and customs including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as artifacts, designs, ceremonies, technologies, and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions, and customs.”

Indigenous people have the right to full ownership, management, and protection of their cultural and intellectual property, according to Article 29. This Article also asserts the right of indigenous peoples “to special measures to control, develop and protect their cultural manifestations, including oral traditions, literatures, designs and visual and performing arts.”²⁴

The UN International Labour Organisation (ILO) in 1954 adopted ILO Convention 107, which recognized indigenous rights of customary law, social organization, land tenure, collective land ownership and customary practices. However, these were conceived as individual rather than sovereign rights, and were promoted primarily to integrate indigenous people into the labour pools of the modern nation state. The Convention did not

²⁴ P.K. Vasudeva, *Intellectual Property Law: WTO and India*, 401 (2005, 1st ed.).

receive wide support, and has been ratified by only 27 countries.²⁵

The first International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, convened by the nine tribes of Mataatua in the Bay of Plenty Region of Aotearoa, New Zealand, in 1993, was a significant initiative during the UN International Year for the World's Indigenous Peoples. The Mataatua Declaration on Indigenous Peoples' Cultural and Intellectual Property Rights asserted that protecting indigenous peoples' rights to their Traditional Knowledge was an important component of their right to self-determination. The Mataatua Declaration recommended in Article 1 that in the development of policies and practices, indigenous peoples should:

1. Define for themselves their own intellectual and cultural property.
2. Note that existing protection mechanisms are insufficient for the protection of intellectual and cultural property rights of indigenous peoples.
3. Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.
4. Prioritize the establishment of indigenous education, research and training centers to promote their knowledge of customary environmental and cultural practices.
5. Develop and maintain their traditional practices

²⁵ Francesco Mauro, Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives*, Ecological Applications, 1264, Vol. 10, 2000.

and sanctions for the protection, preservation and revitalization of their traditional intellectual and cultural properties.²⁶

The Mataatua Declaration in Article 2.1 recommended that in the development of policies and practices, states and nationals and international agencies should recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.²⁷

In Article 2.2 it urged the “recognition that indigenous peoples also have the right to create new knowledge based on cultural traditions.”

It stipulates in Article 2.5 that an extra cultural and intellectual property rights framework, containing the following aspects, be developed in full cooperation with indigenous peoples.

- Collective (as well as individual) ownership and retrospective coverage of historical as well as contemporary works;
- Protection against debasement of culturally significant items;
- A framework which is Cooperative competitive;
- First beneficiaries to be the direct descendants of the traditional guardian of that knowledge;
- A coverage span which is multi-generational.

²⁶ P.K Vasudeva, supra note 21 at 401.

²⁷ Quoted from Id. at 402.

The statements issued by the International Consultation on Intellectual Property Rights and Biodiversity organized by the Co-coordinating Body of the Indigenous Peoples of the Amazon Basin (COICA) reaffirmed the Mataatua Declaration's assertion that all aspects of the issue of intellectual property (determination of access to natural resources, control of people's knowledge or cultural heritage, control of the use of their resources, and regulation of the terms of exclusion) must be addressed.²⁸

Article 9 of the COICA declaration warned that adapting indigenous systems to the current intellectual property law could cause them to be distorted.

Article 12 recognised that “there are some formulas that could be used to enhance the value of our products (brand names, appellations of origin) but on the understanding that these are only marketing possibilities, not entailing monopolies of the product or of collective knowledge.”

Article 14, proposed the designing of a protection and recognition system in short and medium term of mechanisms, which will prevent appropriation of our resources and knowledge. These would include appropriate mechanisms for maintaining and ensuring rights of indigenous people to deny indiscriminate access to the resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially indigenous.²⁹

²⁸ *Id.*

²⁹ *Id.*

VII. Protection of Traditional Knowledge: National Perspective

India is a party to the CBD and it envisages that the benefits accruing from commercial use of traditional knowledge have to be shared with the people responsible for creating, refining and using this knowledge.

Article 8(j) of CBD is subject to national legislation and provides for respecting, protecting and rewarding the knowledge, innovations and practices (KIP) of local communities.³⁰

But TRIPs agreement did not specifically bar countries developing systems to protect traditional knowledge at the national level. Some countries make it obligatory in all patent applications for biotechnological innovations, to include the country of origin of the germplasm, and to indicate whether prior informal consent was obtained for the biological genetic resource or traditional knowledge so as to facilitate benefit sharing mechanism.³¹

Section 36 (v) of the Biodiversity Act of 2002 mandates that the Central Government take steps to respect and protect local people's biological diversity knowledge, as recommended by the National Biodiversity Authority, through measures such as registration of such knowledge at the local, state, and national levels, as well as other safeguards, such as the *sui generis* system.

³⁰ *Id.* at 403.

³¹ *Id.* at 405.

Sections 19 and 21 require the National Biodiversity Authority's (NBA) clearance before they can gain access. NBA will set rules and conditions on approval that ensure an equitable distribution of benefits.

Section 6 of the Act states that anyone seeking intellectual property rights on a research based on biological resources or knowledge received from India must first seek NBA clearance. Benefit sharing conditions will be imposed by the NBA.

One of the NBA's tasks, according to Section 18(4), is to oppose the grant of IPRs on any biological resource received from India or information linked with such biological resources in any country outside India.³²

Non-disclosure or wrongful disclosure of the source of origin of biological resource or knowledge in the patent application, as well as anticipation of knowledge, oral or otherwise, are grounds for rejection of the patent application and revocation of the patent, according to the Patents (Amendment) Act, 2005. Patent applications are now required to declare the source of origin of the biological material employed in the innovation in their patent applications. This provision, which is also referenced in the Biodiversity Act of 2002 and the Patents (Amendment) Act of 2005, would ensure an equal distribution of benefits emerging from the utilization of traditional knowledge with the holders of such information. However, this provision is explicitly not included in the present Patent Act.³³

³² *Id.*

³³ *Id.*

Thus, the main objective of protection would be to obtain recognition and some compensation for the commercial use of traditional knowledge outside the community or the society, which generated it, either by excluding the unauthorized use by third parties, or by ensuring a right to remuneration for such use.³⁴

VIII. Concluding Observations

In recent years, intellectual property rights (IPR) have emerged as an important mechanism for securing an equitable share of benefits of developing countries and communities. Particularly with the dramatic growth of forest-based medicine and biomedical research, securing IPRs is a priority issue for some national governments. IPRs and traditional knowledge must be created in a complimentary manner in order to coexist. Both systems have virtues in and of themselves, and they represent two very different but equally valuable knowledge paradigms. Traditional knowledge provides a valuable base that exists in the public domain, whereas IPR encourage innovation by shielding investment of time, thought, and money. In some countries, *sui generis* legislation has been developed specifically to address the positive protection of Traditional Knowledge, providers and users may also enter into contractual agreements and use existing Intellectual Property systems of protection. Various measures at the international level have also been introduced to protect and sustainable use of biological resources and for the protection of rights of the tribal people. The development and preservation of resources should go hand in hand for that effective mechanism is required to achieve the same.

³⁴ *Id.*

Chapter-9

IMPACT OF MARKET ECONOMY ON LIVELIHOOD PATTERN OF ETHNIC TRIBAL COMMUNITIES IN INDIA: A CASE STUDY OF TOTO TRIBE OF WEST BENGAL

Anil Kumar Biswas*

I. Introduction

India is the country having the largest concentration of tribal people after Africa. Theoretically, tribal people in India are classified based on their (a) territorial distribution, (b) linguistic affiliation, (c) physical and racial characteristics, (d) occupation or economy, and (e) cultural contact and religious beliefs. B.S. Guha, a scholar has classified Indian tribes into three zones based on geographical location. These zones are; (i) the north and north-eastern zone, (ii) the central or the middle zone, and (iii) the southern zone. The northern and northeastern zones consist of the Sub-Himalayan region and the mountain valleys of the eastern frontiers of India.

Some of the important tribes of north and north-eastern region are Aka, Dalfa, Miri, Gurung, Apatani, Mishmi, Khamti, Singpho, Naga, Kuki, Lushai, Kashi,

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Garos, Lepchas, Tharus, Bhoksas, Khasas, Bhutias, Rajis, Bodos, Adis, Apatanis, Monpas, Noctes, Deoris, Karbis, Kambas, Misings, Mukups, Padams, Phakes, Sherdukpens, Singphos, Tangsas, Tanis, Wancho, Totos etc. The central zone consists of plateaus and a mountainous belt between the Indo-Gangetic plain to the north and roughly the Krishna River to the south and this is separated from the northeastern zone by the gap between the Garo hills and the Rajmahal hills. The important tribes inhabiting this zone are the Savaras, Gadabas, Boridos, Juangs, Kharias, Khonds, Bhumjis, Mundas, Santhals, Oraons, Hos, Birhors, Katkari, Kols, Bhils, Gonds, Korakus, Agarias, Pradhans, and Murias. The southern zone is consisting of Andhra Pradesh, Telangana, Karnataka, Kerala, Tamil Nadu. The most primitive tribes of this region are Kadar, Kanikkar, Malvadam, Malakuravan, Toda, Badaga, and Kota. The main tribes living on the Andaman Nicobar Island are Jarwas, Onges (Biswas, 2021).

Traditionally tribal people living across India by maintaining their own indigenous identity by their customary law. As per the 2011 Census, 705 ethnic indigenous groups are living in India. Out of these 75 groups are declared as primitive/isolated tribes by the government of India. Census report 2011 mentioned that 10,42,81,034 tribal people are living across the country. Out of them, more than 10 crore population 5,24,09,823 are male and 5,18,71,211 are female. Out of the total tribal population, only 10.3% are living in urban and semi-urban areas and the rest are living in rural hilly terrain and remote forest areas. They are a disadvantaged and vulnerable section of society in all aspects of their life. These disadvantaged communities are Scheduled Tribes declared by the government of India. Scheduled Castes (SCs) and Scheduled Tribes (STs) are the most

disadvantaged sections of our society due to their socio-economic exploitation and isolation for a long time. They lag behind the rest of the population of the country in terms of various developmental indicators such as social, economic, and political. There is no clear definition of Scheduled Castes and Scheduled Tribes in the Constitution itself. But the President is empowered to draw up a list in consultation with the governor of each state, subject to revision by parliament. The President has made orders, specifically the Scheduled Castes and Scheduled Tribes in the different states in India, which have since been amended by acts of parliament (Basu, 2006).

A tribe is generally defined as a social group usually living in a definite area, having a dialect, cultural homogeneity, and unified social organization. A tribe is also defined as a 'social group' usually comprising several sibs, bands, villages, or other special groups and is normally characterized by the possession of a definite territory a distinctive dialect, or a homogeneous and distinctive culture; it is either a unified political organization or, at least, has some sense of common solidarity vis-à-vis outsiders. Thus, a tribe is a territorial group with its language, religion, culture, and unified social organization (Mandal, 2015). A Scheduled Tribe is an administrative and Constitutional concept. It refers to the tribal community, those who are enlisted in Article 342 of the Indian Constitution. According to Article 342 of the Indian Constitution, "the President may, for any State or Union Territory and where it is a state, after consultation with the Governor thereof, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities, which shall for this Constitution, be deemed to be Scheduled Tribes with the

state or Union Territory, as the case may be” (Mandal, 2015). According to the Lokur Committee, those tribes have taken primitive traits, distinctive culture, geographical isolation, shyness of contact with the society at large, and backwardness as the important criteria for testing the eligibility for a tribe as a Scheduled Tribe.

As per the 2011 Census, the total population of West Bengal is 9, 13, 47,736. Out of them, tribal people's share is only 52, 96,963 which is 5.8% of the total population of the state and 5.08% of the country's population. Alipurduar, Jalpaiguri, Purulia, Dakshin Dinajpur, Jhargram, Paschim Medinipur Darjeeling, and Kalimpong are the highest tribal populated districts. There are 40 Scheduled Tribe communities are living in the state. Out of the 40 communities 3 communities namely Lodha, Birhor, and Toto have been declared primitive tribes by the government of India. The total population of these three communities is only 57,186. Out of them, Totos are only 1385 in number as per Census report 2011. They are belonging to the Mongolian stock.

The existence of the Toto people was first mentioned by BabuKishenKanta Bose, a British government employee of Rangpur collector in 1815 (Gait, 1901). He found people called Toto in a village called Lukepur, under the FalakataTahashil of western daurs, present in Totopara village. Since then, the Totos have become a popular topic for discussion both among the official and academic circles for their distinct culture, lifestyle, livelihood, and socio-economic activities. After independence Presidential order was issued on 6th September 1950 as 'Constitution (Scheduled Tribes) order 1950. But the name of the Toto was not included in the first list. The community was included in the list on 29th

October 1956, by the Scheduled Castes and Scheduled Tribes lists (modification) order 1956 (Das, 1969). During the Sub-Plan preparation period, the government has stressed taking special care for the development of the primitive and isolated tribal groups. Under this scheme, the 'Birhor' of West Bengal is declared as the primitive tribe and the 'Toto' tribe is declared as the isolated tribe (Biswas, 2013). Since then, the government has taken various special programmes for the development of the primitive and isolated tribes.

The 12th Five Year plan noted that the incidence of poverty is most pronounced among the SCs and STs across all social groups. The 12th plan document notes that “this calls for an inclusive growth process which provides opportunities for all to participate in the growth process combined with schemes that would either deliver benefits directly or more importantly helps those groups to benefit from the opportunities thrown up by the general development process” (Srivastava, 2014). The main objective of the tribal sub-plan is to channel plan funds for the development of the STs. Under this planned period the government has taken various plans and programmes for the development of the Toto community. From this viewpoint, this paper deeply analysis the impact of the market economy on the livelihood pattern of indigenous ethnic toto communities.

Hope this study will be able to make an understanding of the impact of the market economy on indigenous ethnic tribal communities across the country; which will be able to support policymakers in future planning for the development of the livelihood pattern of the communities.

II. Objective of the Study

- To study the nature of the traditional livelihood pattern of the community
- To study the impact of the market economy on the livelihood pattern of the community
- To study the impact of their new livelihood pattern on their identity

III. Methodology

The empirical study is qualitative and based on primary and secondary data. Primary data was collected from 345 households through the interview method used by structured and unstructured questionnaires. Government reports are also used in the works as data sources. Published works, theses considered as secondary data sources. Simple statistical methods were used for drawing the result of the study.

IV. Findings

The community has been moving from a subsistence economy to a market economy. The livelihood patterns of the community are now changed. Class division has emerged within the community due to the impact of the market economy. This type of challenge has created an identity crisis among the ethnic communities across the country.

V. A Saga of the Ethnic Toto Tribe

The ethnically endangered Totos cannot say anything about their origin. There is not a single historical

evidence of the community. The word 'Toto' in Bhutia language means an image. The word 'Toto-Fong' in the Limbu language means roasted meat-eaters or the people who consumed roasted meat (Burman 1985). The Totos are seasoned meat eaters and they did it in the old day simply by roasting on the fire. In Rabha language 'Tapta: p' means quickly. The Totos are known to move first when the occasion arises in connection with their portage or trade tours which they are used to undertaking very often. Again in the Toto language itself, there is a verb 'Totowa-Wang' which means come quickly. From this verb, an inner meaning can also be derived as the people who can walk quickly even with heavy loads. J. Milligan, in his survey and Settlement Report (1916) did not comment on the origin of the tribe; while B. Mukharjee (1931) only notices that the Totos are 'allied to Bhutias'. Roy Burman said that there are various myths or traditions current among the Totos about their origin. According to him, the Totos used to live dispersed in different areas in the neighborhood of Deingoho Garden inside Bhutan. There was no territorial unity of the tribe at that time. The genealogy shows the settlement of the Totos at the Totopara from the middle of the 18th century. Dr S. K. Pathak, a Tibetologist opined that Totos might have migrated from Tromo valley, meaning the Jelep- la (Sanyal 1979). Present community leader Dhaniram Toto and other members of the community narrated that they are living in the present Totopara village since a very early time which lies under the Alipurduar district in West Bengal. But they do have not any written evidence of how long they are living in this place. According to them, the particular village is the only existence of the Toto community in India.

VI. Traditional Livelihood Pattern of the Community

Before the annexation, by the British government, the community fully depended upon the portering as a profession under Bhutanese administration for their livelihood (Majumder, 1998). They did such types of work for six months in a year in a dry session. Other six months of the year in the rainy session they depended upon forest collection for their livelihood; because the area was discarded from other parts of the country by rivers and watercourses. So in the rainy session, their business was closed due to heavy rain. In that situation, they were bound to collect various items of forest collection as their livelihood. They collected wild mushrooms, wild potatoes, wild arum, various roots, insects, honey, medicinal herbs, various leafy herbs, various wild vegetables, bamboos, and woods for their livelihood.

One of the middle-aged male persons in the community interviewed in 2015 said that they were taking lunch and dinner with wild potatoes and wild arum in their childhood. They also said that before the implementation of various social security schemes, they fully depended upon the forest's products, hunting, and fishing for their livelihood. Hunting and fishing were the only way of earning for the community in the pre-independence period. They were also employed on the orange plantation as labours for nurturing, plucking, and bearing orange from the plantation to the nearest markets during that time in winter and dry sessions. They had never been good agriculturists. Agriculture was one of the supplementary occupations of the community. With little knowledge of agriculture, they were mainly dependent on 'Jhoom' agriculture. They only engage themselves in such type of 'Jhoom' farming at the time of the rainy session as

their subsidiary earning for their livelihood. Many people of the community engaged themselves as labours in various orange plantations in the jurisdiction of Bhutan in winter. There is no evidence as they were cattle farmers.

Traditionally they never gave due importance to cattle farming as earnings. They were rearing some common cattle in their houses for daily needs of meat and milk. They were never interested in animal husbandry because of their pre-occupation with portorage, forest collection, and shifting cultivation. One important feature of the community was that there was no occupational division among the community before the initiation of planned development in the area. In course of the struggle for their livelihood, the different families with cooperating through the established customs of Toto society and anyone violating this practice would be punished by the village council in the presence of 'Kazi' (Majumder, 1998). Traditionally the community depended on their community land for their livelihood; where all were granted equal rights on the land. People of the community depended on zoom agriculture in the land as the partial fulfilment of their livelihood. At that time, they were cooperating among all the members of the community; equality was there in their livelihood.

VII. Impact of Market Economy on Traditional Livelihood Pattern of the Community

According to Bimalendu Majumder, "the Toto tribe has been moving away from a subsistence economy to a market economy to sedentary shifting cultivation not always in keeping with the general march from one stage to another as is visualized by the economic historians. Further, the transformation of the village from community

ownership of land to individual landholdings and from mono-ethnic nature to the multi-ethnic habit has also taken place in the recent past" (Majumder, 1998). The community is now involved in multi-dimensional economic activities for their livelihood like other communities. Hunting practice is disappeared from their present livelihood activities. The government of West Bengal ceased the right of community land ownership in 1969 and distributed the land to the name of the headman of every family in the same year. Due to the changing nature of the landholding pattern, they are now settled, agriculturists. Now they produce rice, maize, zinger, potato, millets, and various types of vegetables, jackfruits, pineapples, betel nut, big cardamom, and pepper in their lands (Biswas 2019). Betel nut plantation is one of the economic products of the villagers. Most of the houses of the village planted betel nuts in their adjoining areas of the houses. People of the community said that betel nut is one of the most economic crops of this village now. Villagers sell the crop to the local traders and traders are selling this to big traders from outside Totopara. Three betel nut traders are within the community who are buying the products from the farmers and sell them to urban traders (Biswas 2019).

One important finding of the study is that most of the people of the community now depends on farming as their main source of livelihood as well as on local small business. So, it is a very interesting dimension of the changing nature of their livelihood pattern. Once those who depend on hunting, fishing, and forest collection as their main sources of livelihood now are settled agriculturists, small businessmen, and also government employees. Now they are settled agriculturist like other communities and harvesting big cardamom commercially

in their betel nut plantation. Cardamom is a variety of spices that have a big market all over India, so they hope this spice cultivation will be able to change their livelihood pattern by earning more money. Zinger is also one economic crop of the village. Farmers of the village cultivate zinger and trade this item outside the village. Now they are rearing cattle in their home with the aim of commercial gain. They are now rearing cows and goats as their subsidiary occupation with cultivation. There are two farmhouses in the Totopara where cattle rearing, goat rearing, and poultry farming is going for the aims of economic growth. This type of farming indicates that now they are advancing toward modern agriculture with the aim of improvement of their economic life. There is a great opportunity for cattle rearing in Totopara because of a vast green grassland on the bank of the Torsha river and adjoining forest areas. The researcher observes that the villagers' grazing their cows and goats on the bank of river Torsha and the adjoining jungle areas of the village. But one thing is noticed that mainly children are always preferred for the job. They are engaging with the job for the whole day; they leave home in the early morning after taking food and returned with the group of cattle in afternoon. It also found that children in a group went to the nearby rivers and watercourses for catching fish and for hunting a variety of animals such as rats and rabbits.

The engagement of the children is one of the challenges to ensuring education for all. There is a marketplace in the middle of the village. There are some permanent shops of grocery items run by Bihari owners, two tea stalls cum hotel run by Bengali owners, four pork shops run by Toto owners, two betel leaf stalls run by Toto owners, four chicken shops run by Toto owners, one beef shop owned by Toto vendor, five grocery shops run by the

Toto owners, one bookstall run by a Bihari owner, one betel leaf stall run by a Bihari owner, two fast-food stalls owned by Toto women, one parlour for the beautification of women is also run by Nepali woman in her home near to the market place, there is also one foreign liquor shop run by a Toto owner in his house with other grocery items. The market is running two days in a week as a large form called 'hat' in Bengali term. On the days of weekly 'hat' traders/vendors from outside also come to the market with varieties of modern items. They mostly come from Madarihat, Lankapara for selling vegetables, fruits, garments, cosmetics items, sweet items, dry fish, and various daily uses items.

The researcher observes that near about two hundred to three hundred customers are buying their necessary items from this market. Villagers have also sold their agricultural products on that market. Nearest villagers from adjoining areas have also come to the market for buying their necessary daily items. Customers also come from Bhutan for the collection of necessary daily items. The researcher interviewed one such customer from Bhutan who came by walking for collecting necessary essential items for his family. The researcher noticed that he bought grocery items with some cosmetic items, vegetables, rice, and flour, and also two batteries for his torchlight. He said that like him many people came from Bhutan to this market by walking for collecting their rations. He said that he is walking three hours hilly forest to the market. The researcher also found that women also come from Bhutan by hiring vehicle for collecting their necessary essential items from the market. Traders from outside Totopara said that they have to make an adequate business from this market, so they come in every week. But due to a lack of transportation facilities, they are

facing a challenge to reach the market and return. Most of the vendors from outside are small businessmen. *Gol-Gappa* is also sold on that market. So, from the view of the researcher, the importance of the village market to the people of Totopara and the adjoining area is too high. The market has a positive impact on the livelihood pattern of the community. The market is situated in an isolated place, but it has international importance.

There are three pork shops, four chicken shops and one beef shop run by Toto people from their temporary shed in the market are satisfied with their earnings from business. There are some grocery shops owned by the Toto people are also satisfied from their selling. One Toto lady owner of a grocery shop said that she sells an average of Rs. 1000 per day. Another Toto lady owner of a betel leaf stall said that she also sells an average of Rs. 1000 per day. One fast-food vendor said that he sells an average of Rs. 300 per day. Another two fast food sellers said that their average selling is also near about Rs. 400 per day. Some Toto people working as construction contractor in Totopara under various government schemes. By profession, they are financially solvent than other members of the community. Two people of the community are also engaged in construction works in Bhutan as their livelihood. Two people working as a stone and send suppliers to the nearest town from the river beds of Totopara.

Usually, this foothill area is a major reservoir of stone and sends comes down from the upper streams of the rivers and watercourses. The river beds of the area are filled with bolder sand every year in rainy sessions. So these natural materials are another big earning source for some people of Totopara. In dry session send and

boulders/stones are supplied from every river bed from the village and its adjoining areas to the nearby town. Merchants of the nearest towns have bought these materials from the local traders and carried this by lorries. Daily 10 to 12 lorries are uploaded in surrounding river beds in session. One people by professionally is a cattle trader who buys cattle from the local villagers and sells it to the urban markets. Five people from the community are earning their livelihood by driving car; one of them is ambulance driver of the Totopara Primary Health Centre.

VIII. Government Jobs as Occupation

Some learned people of the community are employed as government employees in various government departments. Two of them are employed in the Uttar Banga Kestriya Gramin Bank, a North Bengal-based rural bank at Totopara. One of them is a manager of the branch of Uttar Banga Kestriya Gramin Bank in Totopara and another one is serving as a fourth-grade staff in the branch (Biswas, 2019). One people from the community is serving as a fourth-grade staff in an agriculture cooperative bank. The first graduate Toto woman Rita Toto employed as a social welfare officer under the backward class department at Totopara. Dhaniram Toto the present community leader was employed under the district backward class welfare department at Alipurduar. One people from the community is employed as Inspector under the backward class department at Garubhatan and another one person from the community is working as a fourth-grade employee in the backward class department at Totopara. One person is employed as a Post Master in Totopara and one is posted as a fourth-grade veterinary staff in Totopara veterinary hospital. One young people serving as military

personnel in the Indian Army. One member from the community is employed as a fourth-grade staff in the Tribal Welfare Centre at Totopara and one people employed as a constable in West Bengal Police service. One is employed as a fourth-grade staff in Sonapur Club cum library, one as a fourth-grade staff of the forest department posted at Lankapara range and one is employed as a driver for the ambulance of Totopara primary health center. One is employed as a fourth-grade employee of PHE and two are serving as para-teacher and one as fourth-grade staff in Dhanapati Toto Memorial High School at Totopara.

One people from the community employed as a fourth-grade staff in a dispensary at Totopara run by NGO and one leady from the community is employed as a principal in ITDP primary School at Porgoan. Two members are employed as an assistant teacher in a primary school at Totopara, two are employed at the rural library at Totopara. Two women from the community are employed as Assistant of Anganwadi Kendra in Totopara and three are working as helpers. One people employed as teacher in an English medium pre-nursery school at Totopara run by a British NGO. So, almost thirty people from the community are employed as government and semi-government employees under the various departments. This is a very positive dimension of the changing nature of the occupation pattern of the community are notice in the era of market economy. But interestingly most of the employees from the community are employed as fourth-grade staff.

IX. Livelihood under Various Social Security Schemes

Totopara is under various social and economic security schemes. One of the major social security schemes is the Mahatma Gandhi National Rural Employment Guarantee Act. Under the act people from the community have attained jobs. The community is satisfied doing work under the scheme. There are also other social security schemes, which help improve the livelihood of the community. Five people from the community have benefited under the Old Age Pension scheme. Three male differently-abled persons have got benefits from the respective government scheme. People of the community have got the house under Indira Awas Yojana; now Pradhan Mantri Awas Yojana and Gitanjali Yojana schemes. They earn rice and flour under the food security scheme free of cost. All 345 families are declared as below the poverty line families. Under the status, they attain various facilities from different governmental schemes. Some short studies on Totos showed that life expectancy is very low than other communities in India, but beneficiaries under such social security schemes proved that their life expectancy rate is high as others. These types of livelihood security schemes can improve their lifestyle by changing their traditional old livelihood pattern.

X. Migration for Jobs across Country

As per traditional Toto custom, they were not permitted to stay outside the village. There was not single evidence for residing any member of the community outside the village in the pre-independence period. As per their old social custom; if anyone resides outside the village with another community he or she was boycotted

by the community. But after independence expansion of education and under the impact of various modernization programmes now they are allowed to go to the outside village for their livelihood. At present some of the people from the community are posted as government employees in various parts of the country. Except for such cases now some of the youth migrated to Kerala and Sikkim for earning their livelihood. As per the report provided by the Dhaniram Toto, three youth migrated to Kerala for earning their livelihood.

In 2015 a group of 15 people went to Sikkim for electrical construction works under a contractor. As per the report delivered by the people from the community they are also going to Bhutan for works on a cardamom plantation. Workers who are employed at cardamom plantation in Bhutan get Rs. 300 as a daily wage for male labor and Rs. 150 for female workers. It is clear from the above that the economic status of the Totopara is now changing in order but the motion is very slow. The above discussion on their economic status and livelihood activities indicates that the occupational status of the community is now changing. Previously they were mainly dependent on only hunting and portering for their livelihood. But slowly they changed their occupational habits to jhoom agriculturist and now they are settled, agriculturist. Now they are chosen business, government jobs, a job as a security guard, construction jobs, teaching jobs, banker jobs, traders, and suppliers as their occupations. This type of changing nature of occupation indicates that they are forwarding themselves; although most of the people of the community to date lagging behind the fruits of all kinds of development.

XI. New Livelihood Pattern of the Community and their Identity

After the implementation of planned development in Totopara, the livelihood pattern of the community has been changed. Before independence, they depended only on hunting, fishing, and forest collection for their livelihood. At that time, they were living with wild food habits; they were taken roots, fruits, available leafy vegetables, available fish in surrounding rivers and watercourses, and available animals in surrounding forests and insects as their regular dishes. They were never good agriculturists before the distribution of land in the name of the family headman. Previously they were enjoying community life depended on community land and forests. Community land ceased in 1969 by the government distributing the land among the community in the name of the headman of each family. The system reserved the right of land by the name of the headman of a family; at the same time, it creates a serious challenge within the community.

Previously they have felt the whole community is one family, now they are feeling that 345 different families are living in the area. Each family is responsible for its own; so, previous cooperation and coordination within the community is now lost after the introduction of individual land rights. Moving from a subsistence economy to a market economy has been changed their traditional old livelihood pattern, which made challenged their identity by creating class division within the community. Market economy by nature-nurture class division; the community is now followers of that type of economy, and as a result, class division is emerging within the community. Few families of the community are now enjoying all modern

facilities in their houses and maintain distance from poor and vulnerable people of the community. Impact of modern education and working outside the village turn them mainstreaming into a modern society which also creates serious challenges to their identity and purity. Panchayati raj institution is introduced in the area after Constitutionalization of the institution. Their traditional village administration is now lost importance after the introduction of modern panchayats. Under gram panchayats, various developmental programmes are going on in the areas for the improvement of the socio-economic condition and development of the physical infrastructure of the village.

Under various developmental programmes Totopara is now connected with the outside world. Due to emergence of a new liberal economy, products of multinational companies are now available in every corner of the world; which changed the food habits, dress, and customary laws of the communities. This type of adverse impact making serious challenges to the ethnic community across the world. People of ethnic communities across the world faced serious challenges before the emergence of the market economy. Class division is arising, community bonding is decreasing within the community, and the purity of the community is now under serious threat. The market economy slightly improves the economic condition of certain percentages of the population although it turns down a major portion of the population in a vulnerable condition. So vulnerable communities facing serious challenges under the new pattern of the economy.

XII. Conclusion

The community is the smallest ethnic community in India. They are living in a single village in the country.

Traditionally they have their social custom, faith, belief, and unique identity. But due to the impact of the market economy, they have lost their social custom, faith, belief, and identity; although their socio-economic status is improving slightly. Due to the impact of the market economy and governmental policy their traditional old community land rights are now ceased and land is now distributed among the members of the community to the name of the head of the family. Class division is arising within the community due to the impact of their changing pattern of livelihood activities. Changing the pattern of livelihood of the community also creates some challenges to their identity. They are now facing an identity crisis due to the impact of various developmental schemes. In this situation, there is a need to implementation of the appropriate indigenization policy programme for the development of the community under which they can protect their identity and purity. There is a need to take special initiative for the development of the livelihood of the ethnic endangered tribal communities across the country; under which they can protect themselves. Indigenization policy programmes will be able to improve the status of the community by preserving the identity of the ethnic communities in the country.

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Chapter-10

GENDER JUSTICE AND LAND RIGHT IN TRIBAL INDIA: A CRITICAL ANALYSIS

*Lipika Sharma**

I. Introduction

Nearly one hundred million indigenous people make up India's population. The two primary areas of tribal habitation in India are the northeastern provinces bordering China and Burma, and the highlands and plains of peninsular India.

Land is considered as an essential productive component or as a center of cultural traditions, and robust and stable land rights provide a solid foundation for a dignified existence. Land rights in India are determined by a complex combination of tenurial laws, personal laws, and customary rules. A flawed system of persecution and torture that discourages indigenous women from exercising their land rights. Women in tribal communities are more disadvantaged since customary practices do not support their land rights and state law

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recognizes tribal community customary practices as lawful.

“India’s tribal land laws have categorically failed to protect the rights and interests of women in tribal communities,” said lead researcher Shipra Deo, Landesa’s Director of Women’s Land Rights, India. “Though intended to preserve cultural and religious practices of Scheduled Tribe communities, these laws instead fortify deeply entrenched gender discrimination, subjecting women in tribal communities to the basest assaults against their dignity, livelihoods, and even their lives.¹”

Our tradition and customs have long been prejudiced towards women when it comes to land ownership. However, women in tribal societies are doubly disadvantaged since customary traditions do not complement their land rights and state law recognises tribal community traditions as valid. A variety of historical, social, legal, and institutional barriers further complicate the problem. Tribal women in India are therefore imprisoned amid tribal norms that deny them equality before the law and a judicial system that provides little redress for recourse. In a society in which land ownership is the defining attribute of one’s social position, women are once again stuck between - an outsider in her marriage house and undesired in her birthplace. During the survey conducted by a research group, one woman said, “As girls grow up, they keep hearing this is not your

¹ Tyler Roush, Media Lead , ‘*This Is Not Your Home*’ – *Revealing A Brutal System Of Oppression And Gender Discrimination Among India’s Scheduled Tribes*, Landesa, press and media, what is new? (Dec. 6, 2021. 10.29 am), <https://www.landesa.org/press-and-media/this-is-not-your-home-revealing-a-brutal-system-of-oppression-and-gender-discrimination-among-indias-scheduled-tribes/>.

home, you will go one day to your (marital) own home. But when she gets married, she realizes that (marital home) is not hers either.”

Tribal women in India are imprisoned between tribal norms that deprive them basic human rights and a judicial system that provides inadequate redress for justice. In a society in which land ownership is the defining attribute of one’s social position, women are once again stuck between - an outsider in her marriage house and undesired in her birth home. “As girls grow up, they keep repeating this is not your home, you will go one day to your [marital] own house,” interviewee remarked. However, when she marries, she finds that [marriage house] is not hers either.

II. Tribal Rights and Constitutional Provisions

Recognizing the plight of indigenous groups is critical to fully comprehending the Constitution, its structure, and its prospects. In these turbulent times, maybe it is time to re-energize our study of the Constitution and have a rethink. While the Indian Constitution guarantees property rights to all, it enshrines special protections for land rights of ‘Scheduled Tribes’, vis-a-vis the state and other communities, in geographically demarcated tribal majority areas known as ‘Scheduled Areas’ under the Fifth and Sixth Schedules of the Constitution.²

² Report by CPR Land Rights Initiative, The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India, CENTRE FOR POLICY RESEARCH, (Apr 3, 2018, 14.28 PM), <https://www.cprindia.org/news/legal-regime-and-political->

The Constitution provides specific safeguards for Scheduled Tribes' land rights in Scheduled regions since land is not only the most major source of tribal incomes, and it's also vital to tribal local identity, history, and culture. Many non-Scheduled Area states have also enacted legislation to preserve indigenous land rights. The constitution of India framework for protecting and advancing the rights of the tribals communities is amongst the most advanced in the world³. Still the land rights are the most neglected area explicitly for tribal women.

Nevertheless, the Hindu Succession Act, much like Hindu Marriage Act and the Hindu Adoption and Maintenance Act, ignores the implementation of customs to Scheduled Tribes as explained by Clause (25) of Article 366 of the Constitution, unless the Central Government alternatively directs by notification in the official gazette. Tribals are not included as Hindus in explanation 11 of Article 25. As a result, neither the Hindu Succession Act, the Indian Succession Act, nor even Shariat Law apply to the customarily ruled Adivasis. As a result, Adivasi/tribal women face discrimination.

III. Tribal Women and Land Rights

The challenge of non-recognition of Scheduled Tribes (ST) women's rights in ancestral property in the

economy-land-rights-scheduled-tribes-scheduled-areas-india.

³ Government of India, Ministry of tribal affairs and UNDP, Land and governance under fifth schedule: An overview of the Law", (Dec. 6, 2021. 10.29 am)
<https://tribal.nic.in/downloads/FRA/5.%20Land%20and%20Governance%20under%20Fifth%20Schedule.pdf>.

community has been lingering for a long period of time and must be addressed in the perspective of both customary laws and fundamental rights given under the Indian Constitution. The Tribes Advisory Council is a constitutional body formed under Fifth Schedule to the Constitution. On Jul 23rd,2021 its meeting was held at Andhra Pradesh. The issue of non-recognition of ST women's right in inherited property in the family has come for discussion. The meeting chaired by the Deputy Chief Minister, Tribal Welfare Pushpa Srivani discussed the issue with a positive note.⁴ The positive results of the discussion are awaited.

It is necessary to understand that tribal communities don't have the concept of modern private property regime. In fact, customary property regime is not based on the concept of property. Their governance is built on the notion that inhabitants belong to the land, not the other way around. Tribal people cannot possess land in the sense of private property ownership because of their traditional relationship with it. Moreover, property and assets are not meant for the accumulation of money as under a capitalist economic government, but rather to meet their necessities for survival. As a result, it is frequently confined to the right to utilise resources rather than resource "rights" in terms of ownership.

Constitution of India have specific articles related to land rights and the protection of customary rights of

⁴ Palla Trinadha Rao, *ST women's inheritance rights to property: A suggestive legislative framework*, COUNTERVIEW.ORG, (July 26, 2021), <https://counterview.org/2021/07/26/st-womens-inheritance-rights-to-property-a-suggestive-legislative-framework/>.

the tribals in India. Article 371A and G for Nagaland and Mizoram, and Article 244 for V and VI Schedule Areas, that explicitly recognise customs and traditions, especially those related to land and natural resources. The problem is that these articles are not operationalized and tribal women are still deprived of their land rights.

In so far as land related issues are concerned, the Ministry of Rural Development, Department of Land Resources (DoLR), is the nodal Ministry at the Centre, which plays a monitoring role in the field of land reforms, Land and its management fall under the exclusive legislative and administrative jurisdiction of States as provided under the Constitution of India (Seventh Schedule)-List-II (State List)-Entry No. (18)⁵.

V. Legislations dealing with Tribal Land Rights

To understand the issue of land rights related to tribals and specifically tribal women it is necessary to understand certain legislations dealing with the rights of Tribals. Most important among these legislations is right to protect land alienation and restoration of unlawfully alienated lands have been vested in them under the Provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996 (PESA).

Bhuria Committee was constituted 1994 to examine various dimensions of self-rule for tribals, the constitutional requirements and to make

⁵ Press Information Bureau, Land rights of scheduled tribes, PRESS INFORMATION BUREAU GOVERNMENT OF INDIA MINISTRY OF TRIBAL AFFAIRS, (Nov, 22,2021, 10.50 am), <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579747>.

recommendations for extending the provisions of the Constitution 73rd (Amendment) Act, 1992 to the Scheduled Areas. Following the recommendations of the committee, the Parliament extended the provisions of 73rd Amendment Act to the Scheduled Areas in the then eight states (now nine states) by passing Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996.⁶

Another important legislation in this domain is Inalienable but inheritable communal rights to legal organisations known as 'Gram Sabhas' have evolved. In addition, the Forest Rights Act 2006 (FRA), which gives an acceptance of widely prevalent traditional and customary traditions prevalent among tribal peoples. The act empowers women in various ways by giving them representation in the decision-making bodies at various levels this in turn ensures that with a voice in the legally established decision-making bodies they will be able to push their land rights and other essential rights. The active participation in the mainstream governmental agencies ensures the confidence-building and is a road to emancipation of tribal women.

Equality for women has turned into a clichéd. Under the FRA, a new legal framework has been intended to guarantee the registration of forest land titles in the

⁶ Enviro Legal Defence Firm, *PESA Implementation – Some Essential Prerequisites And Suggestions For The State Of Rajasthan*, MINISTRY OF PANCHAYATI RAJ, GOVERNMENT OF INDIA, (December, 15, 4.50 pm), https://www.panchayat.gov.in/documents/20126/0/Report_on_Compliance_of_State_Laws_Rules_and_Government_Orders_on_PESA_Suggested_Amendments_in_Rajasthan_by_ELDF.pdf/6fca09b7-93f8-1333-af42-3b3095388be0?t=1554813855167.

names of both spouses in the event of married people. These forest land rights can be passed down from generation to generation. However, there are no just inheritance rules in place to allow an Adivasi woman to make a claim on the same terms as a man. The FRA is a legal mechanism for recognising Adivasi and other traditional forest dwellers' rights to forest areas. However, the new legal space created by the FRA can only secure joint titles and that a woman title holder can enjoy the land for the rest of her life.

Female successors of any spouse are forbidden from advocating for justice and pursuing fairness in inherited property rights on an equal basis with their male counterparts in the family. In the context of Scheduled Tribes, there is a clear gap in the country's policy and legal structure. Some policy initiatives were undertaken to give land titles over government lands in the names of women or jointly in the names of spouses. However, Adivasi uncodified customary rules do not recognise a woman's hereditary property right in the family, and her rights are severely restricted and limited to usufruct alone.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 under section 2(g) specifically grants rights to women to actively participate in decision making. The definition clause while defining the gram sabha in the given sub-section grants rights to be active participant in the decision-making body which in turn ensures that the women folk have power to frame laws and take decision which will empower them.⁷

⁷ The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006, No. 2 of 2007, 2(g) "Gram Sabha" means a village assembly which shall consist

The Section 3(1) of the Act states,⁸ gram sabha shall be conveyed by the elected members and provides that not less than one-third of such members shall be women. Further section 4 (2)⁹ of the act ensures that the quorum is maintained while taking decisions 1/3 of the members present must be women.

Chapter IV, Authorities and Procedure for Vesting of Forest Rights under section 6 (8) ensures that all the prominent decision-making bodies i.e., sub-divisional level, district level and state level monitoring committee must have representation by tribal women¹⁰.

of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women;” No. 2 of 2007, (India).

⁸ Gram Sabha.-(1) The Gram Sabhas shall be convened by the Gram Panchayat and in its first meeting it shall elect from amongst its members, a committee of not less than ten but not exceeding fifteen persons as members of the Forest Rights Committee, wherein at least two-third members shall be the Scheduled Tribes: Provided that not less than one-third of such members shall be women: Provided further that where there are no Scheduled Tribes, at least one-third of such members shall be women.

⁹ 4(2) Functions of the Gram Sabha.-The quorum of the Gram Sabha meeting shall not be less than one-half of all members of such Gram Sabha: Provided that at least one-third of the members present shall be women:

¹⁰ The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006, No. 2 of 2007, section 6(8), “The Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee shall consist of officers of the department of Revenue, Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions at the appropriate level, appointed by the respective Panchayati Raj Institutions, of whom two shall be the Scheduled Tribe

We must take reasonable steps to ensure that indigenous women and children are fully protected and guaranteed against all types of abuse and discrimination, according to the United Nations Declaration on the Rights of Indigenous Peoples. In India, the principles of equal opportunity are deeply enshrined in the Indian Constitution, which also empowers states to implement ‘positive discrimination’ measures in favour of women and tribals in order to mitigate the cumulative socio-economic, educational, and political disadvantages they face.

V. Land rights and State of Jharkhand

The women in the tribal communities are particularly disadvantaged, as the customary practices do not support their land rights and the law of the state accepts customary practices of the tribal communities to be legal. While the research area focuses on the state of Jharkhand, similar trends are observable in India’s other tribal areas¹¹. Researchers for a global land rights organisation have published a grim assessment of the land and inheritance rights of women living in scheduled tribe communities in the state of Jharkhand, India – and how the existing system of laws and cultural practices denies them their rights¹².

members and at least one shall be a women, as may be prescribed.”

¹¹ Shipra Deo, ‘This Is Not Your Home’ – Revealing A Brutal System Of Oppression And Gender Discrimination Among India’s Scheduled Tribes, Landsea, (Oct.16, 2021, 12.20 pm), <https://www.landsea.org/press-and-media/this-is-not-your-home-revealing-a-brutal-system-of-oppression-and-gender-discrimination-among-indias-scheduled-tribes/>.

¹² System of oppression and gender discrimination among India’s scheduled tribes revealed, System Of Oppression And Gender Discrimination Among India’s Scheduled Tribes

Researchers, in the field for an international land rights organisation have authored a bleak analysis of women's land and inheritance rights in Scheduled Tribe community members in specifically Jharkhand, India – and how the existing eco-system of laws and cultural traditions perpetuates a system of terror and brutality meant to deny women their land rights. While, the study focuses on the state of Jharkhand, comparable tendencies may be seen in other tribal areas of India.

During research in the area of land rights of the tribal women it was found by a case study that Talabitti's a tribal woman in Jharkhand area whose husband died in 2016, her claim to the family land seemed to die with him. Though her husband had worked the family land by himself, upon his death his male cousins laid their claim. If Talabitti attempted to make a competing claim, they threatened to drive her away – with violence, if necessary. Sadly, this threat materialized.¹³ This scenario is all too reminiscent of how women are habitually forced to abdicate in Jharkhand state in eastern India, and many other Scheduled Tribe communities. Women have long been discriminated against in India's culture and traditions when it comes to land ownership, but tribal women are doubly afflicted, first as women and then as tribal women. Widowhood exacerbates these issues.

Revealed, Nov. 21, 2021, 11.40 AM),
file:///C:/Users/HP/Desktop/BOOK%202021/ASSAM%20
NLU%20Book%20CHAPTER/19th%20Edition%20Blue%20
Book.pdf

¹³ Shipra Deo, 'Why Are Tribal Women In India Still Robbed Of Their Land Rights?', LANDSEA,(Oct.16, 2021, 12.20 pm), <https://www.landsea.org/press-and-media/this-is-not-your-home-revealing-a-brutal-system-of-oppression-and-gender-discrimination-among-indias-scheduled-tribes/>.

Customary laws govern inheritance in tribal communities, not statutory rules that apply in non-tribal areas. These norms are locally acknowledged and largely accepted in Talabitti's home state of Jharkhand. They also have legal standing.

Most tribal communities in Jharkhand believe that their traditions have been approved by their forefathers. Traditional practices aim to keep property ownership in the hands of men and do not usually allow women to own land. These rules solely give women — mothers, daughters, sisters, wives, and widows — maintenance rights for the rest of their lives. This mostly refers to receiving food, clothing, and housing. While lawmakers and community leaders believe that maintenance rights are beneficial to women, in practice, these inferior rights frequently cause conflict and violence.

VI. Land rights and State of Chhattisgarh

Research conducted in August 2019 among the Gond, indigenous community in the Chhattisgarh state reaffirmed the sorry state of affairs related to land rights in these communities. While national legislation recognized the equal rights of children to ancestral property, sisters were put under considerable pressure by the community to waive their rights to their brothers.¹⁴

¹⁴ Naila Kabeer, Nivedita Narain, Varnica Arora and Vinitika Lal, *Group rights and gender justice: exploring tensions within the Gond community in India* (The International Inequalities Institute (III) based at the London School of Economics and Political Science (LSE) Atlantic Fellows for Social and Economic Equity programme), working paper no. 33), <https://www.lse.ac.uk/International->

A case study conducted under the research found out that women, specifically daughters responsible for caring for ageing parents or women whose nuptials were problematic or had broken up, had an especially enormous problem with property rights insecurity. The tribal women are entitled to loans and benefits from government subsidized housing scheme but they are not able to take advantage of scheme as their brothers refuse to give share to them from the ancestral property. The study found out that those women who can approach the administration to intervene and when patwari tries to resolve the issue same is not supported by the villagers and there is looming threat of ostracization.

VII. Land rights and State of Andhra Pradesh

During a Workshop on non-recognition of tribal women inherited property rights on 15th May, 2017, Vide Ref. RC No 2/TRI-SPMO/2017 dated 2-5-2017 of the Commissioner of Tribal Welfare, represented by the tribal leaders of ST groups -Koya, Kondareddy, Jatapu, Bhagata, Valmiki, Nukadora, Gadaba, Savara and Kammara concluded that “it is an undisputed fact that the tribal traditions and customary norms are not supporting the tribal women to claim an equal share on par with men in the inherited property”. The Project officer, ITDA, Nellore Vide ref. Lr RC No: SOWO3-MTG/2/2019-DPO-18-ITDA-NLR Dated 19-11-2019, reported that the group discussions with Yanadi STs in general areas reveal on the issue that “as per the traditional norms a tribal woman

cannot claim rights over the inheritance property on par with men”.

Prof. Christopher Von Furer- Haimendorf, a German Sociologist appointed by Nizam of Hyderabad in 1940 who spent his life with the tribals in Nizam State in Andhra Pradesh stated in his book “Tribes in India, the Struggle for Survival” that Chenchoo women, tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property”.

The Parliamentary Secretary to Government, Ministry of Women and Child Welfare, Vide DO Lr 4296/WP1/2009/14-10-2009 addressed a DO letter to the Parliamentary. Secretary to Government, Tribal Welfare, noting that there is an urgent need to enact a separate law to protect the rights of the tribal women over the inherited property as well as to prevent alienation of her right to property got through succession to any other members who are other than the STs.

All the above observations pertain strictly to the realm of inheritance with reference to the lands that are titled under prevailing formal property laws. These do not cover the large arena of resource use by community and its members outside of the formal official regime and the rights of ST women in this. These currently fall within the prevailing social practices in the community.

VIII. Apprehensions and issues related to Land Rights

In the context of tribal land alienation problem in the Fifth Scheduled Areas of the State there is also a need to protect the tribal lands from alienation to non- tribals

and to other tribals. The argument of traditional tribal elders is that if tribal women are given right to inherited property, there will be every possibility of non-tribal migrants to gain access and control to land through marital or illicit relationship with tribal women. This has been reported to be widely prevalent. So are various other means of tribal land alienation despite protective laws too are widespread. The argument that it is necessary to deprive their right to property of tribal women is necessary to prevent tribal land alienation has no rational basis or justification. And it does not address the issue of tribal land alienation. In fact, this apprehension is based on the paternalistic ideas that property can only devolve through men and that when women own property, they cannot keep it protected.

The A.P. Scheduled Area Land Transfer Regulations 1 of 70 prohibits transfer of lands not only between tribals and non-tribals but also between the non-tribals in the Scheduled Areas. Therefore, even a tribal woman cannot transfer her right over the land in favor of a non-tribal husband.

Further a law is required to be made that protects the interest of tribals at large in the case of a tribal woman marrying a non-tribal person. In case if a tribal woman dies intestate, her property should devolve to her children, in the absence of children the property should revert to any male or female successors who are the members of ST. And in no case succession of property to a non-tribal husband shall be permitted to devolve if a tribal woman dies intestate. This principle may also be made applicable to tribal men also if he marries a non-tribal woman.

Thus, a comprehensive legislation is essential to be brought out under Fifth Schedule to the Constitution in order to reverse the historical injustice being perpetrated to tribal women in claiming her share in the inherited property. Article 14 of the constitution provides them with fundamental right to equality and this right needs to be interpreted in their context. This can be done at two levels: One is to recognize the plurality and diversity of tribal communities and hence recognizing their autonomy. Two, to then go one step further and say that this is equally applicable to women. So, a custom which does not recognize their equal rights, is also unconstitutional. The centrality of the Gram Sabha as the primary governing structure both under PESA 1996 and FRA 2006 for determination of rights and their adjudication that already exists in law has to be the basis for embedding inheritance rights which is an integral part of rights determination, protection and adjudication. The following provisions in law constitute the basis of the inheritance law:

According to Section 4(d) of the PESA Act of 1996, every Gram Sabha has the authority to protect and safeguard the people's traditions and customs, their cultural heritage, community resources, and the customary mode of resolving disputes, as well as to avoid alienation of land in Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe, and to exert power over entities and competent authorities in all regions.

Correspondingly, under Section 6(1) of the Forest Rights Act 2006, the Gram Sabha has the power to initiate the process of defining the nature and magnitude of individual or community forest rights, or even both, that may be awarded to forest dwelling Scheduled Tribes and

other traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims, consolidating and verifying them, and getting ready a map demarcating the area of each recommended request in the prescribed manner for claiming such rights, and the Gram Sabha shall then pass a resolution to that extent, and a copy of the same shall be forwarded to the Sub-Divisional Level Committee.

Family Courts have jurisdiction with reference to the revenue lands and the Gram Sabha as under FRA 2006 with reference to the forest rights on forest lands under FRA 2006 to deal with matters of inheritance or rights of STs whether of property or usufruct or use rights which are inheritable by law, customs and traditions but not in derogation of the equity principle that daughter should have the same rights as the son in the inherited property of the family.

IX. Judicial Response to Tribal Women's Rights

The Indian judiciary has time and again stressed the need of gender equality. With regards to the tribal rights the judicial decisions are not very empowering. Time and again at high court and Apex court level there have been difference of opinion while dealing with the prominence of customary laws and reluctance of these communities to adapt the mainstream laws.

The Supreme Court of India while dealing with a gender bias case in 1996¹⁵ held that "it is not desirable to declare customs of tribal inhabitants as offending Articles

¹⁵ Madhu Kishwar and others Vs State of Bihar, A.I.R. 1996 S.C. 1864 (India).

14,15 and 21 of the Constitution and each case must be examined when full facts are placed before the court.” The judgement reinforces gender inequity and female subordination in sharing the resources on equal base¹⁶. A three-judge Supreme Court judgment headed by Justice Arun Mishra on 11 August, 2020¹⁷ ruled that the Hindu Succession (Amendment) Act 2005, which states that a daughter has the same rights as a son, applies regardless of if she was born before or after the amendment. It also declared that she cannot be deprived her share since her father died before the statute came into effect. As a result, the Hindu Succession Laws were enacted in order to correct previous injustices and elevate a Hindu woman to equal status with the dignity of a person on par with men in sharing their rights over inherited property.

The Muslim Personal Law (Shariat) Application Act of 1937 and the Indian Succession Act of 1925 both exclude its application to Scheduled Tribes. Nevertheless, in the absence of formal legislation controlling the inheritance rights, tribal communities will only be able to use traditional practices to determine the legal successorship of a deceased member of the family.

The Himachal Pradesh High Court in 2016¹⁸ issued one of the first judgements outlining the issues underpinning blind adherence to traditions, whether by

¹⁶ Dr Palla Trinadha Rao, Gender justice eludes Adivasi women, THE HANS INDIA, (Nov.24,2021, 1.20 pm),https://www.thehansindia.com/posts/index/News-Analysis/2016-10-22/Gender-justice-eludes-Adivasi-women/260345?infinite_scroll=1.

¹⁷ Vineeta Sharma vs Rakesh Sharma, A.I.R. 2020 S.C. 3717 (India).

¹⁸ Bahadur Vs Bratiya and ors, A.I.R. 2016 H.P. 58 (India).

mainstream Hindus or tribals. It held that gender discrimination violates fundamental rights and daughters are entitled to equal share in the properties and further concluded that the daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per customs and usages. It invoked the Constitutional philosophy underlying Articles 15, 38, 39, and 46 of the Indian Constitution.

The Supreme court in the matter of Sabarimala Temple Case¹⁹ held that *“Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny is to deny the primacy of the Constitution”*.

The Apex court in the case of held²⁰ that if documentation revealed that parties belonging to the Santhal Tribe were following Hindu customs rather than Santhal customs, the provisions of the Hindu Succession Act would apply to property succession.

X. Conclusion

According to the United Nations Declaration on the Rights of Indigenous Peoples, states must take measures

¹⁹ Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors., (2019) 11 SCC 1 (India).

²⁰ LabishwarManjhi vs PranManjhi and Ors. (2000) 8 SCC 587 (India).

to ensure that indigenous women and children have full protection and safeguards against all types of abuse and prejudice. In India, the concept of equality and equity is deeply embedded in the Indian Constitution, which also empowers states to implement "positive discrimination" initiatives in favour of women and tribals in order to offset the accumulated socioeconomic, educational, and political drawbacks that they face.

Despite land in the rural context being the most important asset available to a family, women are systematically excluded from asset ownership both in their maternal and marital homes. They, therefore, remain vulnerable and without any back-up support in case of emergencies and unfavorable situations. To guarantee gender parity, land laws will need to be reviewed and, in certain circumstances, revised. It will need sensitization of community and other leaders to fully understand women's interests and welfare, as well as the enormous consequences to women and families of disregarding rights.²¹

Furthermore, the need to increase women's understanding of land laws and their entitlements under such laws, as well as to improve their collective agency in exercising these rights. By going down this path for equality, we can provide the most valuable gifts to the

²¹ Ashok Sircar And Sohini Paul, Do Tribals Have Land Rights? A Study of Land Rights for Women, NEWREACH-May-June, (Dec.31, 2021, 3.45 pm), <https://www.pradan.net/sampark/wp-content/uploads/2019/07/Do-Tribals-Have-Land-Rights-A-Study-of-Land-Rights-for-Women-By-Ashok-Sircar-And-Sohini-Paul.pdf>

women in our communities who confront the most difficult challenges: dignity and opportunity.

To ensure the tribal women gets at par with man folk of their community the crucial tool is awareness. The very first step toward empowerment is information and awareness. To improve conditions, we must walk a long and tough road to guarantee that legal and social structures perform the task of ensuring tribal women fairness, justice, and equality in terms of land rights.

Chapter-11

A STUDY ON WITCHCRAFT PRACTICES IN JHARKHAND

*Sameer Kumar**
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I. Introduction

Witchcraft is a long-standing criminal (immoral) activity that dates back to the dawn of humanity. The witchcraft has not died out, and the witch system continues to be popular today. The phrase 'witchcraft' is derived from the old English word 'wicce,' which means 'witch,' and 'craft,' which means 'skill or talent' (Dilts, 2015). Witches (daayan, bishahi) are thought to communicate with demonic forces and use them to carry out bad deeds.

Despite the existence of the "*Prevention of Witch (DAAYAN) Practices Act, 2001- Jharkhand*," it is galling that a large number of cases are still being registered as witchcraft acts or witch hunting. It is learnt as an assumption that superstition kills more people in Jharkhand than Naxals. According to NRCB crime figures,

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between 2016 and May 2019, 123 persons, predominantly women, were slain after being accused of being witches.

In India, the state of Jharkhand ranks first in the number of people killed for witchcraft. 4,514 offences involving witchcraft were registered between 2008 and 2017. According to NCRB data, including both 'witch torture' and 'witch murder' the highest number of cases was reported in the Garhwa District, with 1035, followed by Palamu (383), Hazaribaag (332), Koderma (289), and Godda (281).

Other states, like Madhya Pradesh, Odisha, Chhattishgarh, Gujrat, Maharashtra are also devastated by this calamity.

II. Theoretical Framework

Demonological Theory:

One of the earliest criminological concepts is 'demonology'. People used to believe that demons or malevolent spirits infiltrated people's souls and drove them to do sins. The initial reason given for criminal behaviour and crime was that demons, witches, and windigo were all terms used to describe people who had become criminals as a result of demonic influence.

Labelling Theory:

In the field of criminology, another key theory is the labelling theory. According to this idea, the deviation is caused by labelling rather than an inherent act. After being labelled a criminal, a person becomes 'deviant'. Acts are not inherently deviant, but they do become deviant

after being labelled as such. Furthermore, once a person is classified as deviant, all other aspects of his life and personality are pushed to the background. When deviance becomes ingrained in a person's identity, he or she will pursue a deviant vocation. The most fundamental notion behind this theory is 'self-identity' and how labelling affects people's lives and actions. In this way, the labelling theory aims to explain how labels attached to people can alter the trajectory of their lives and professions, potentially turning them to become criminals. However, this is insufficient in terms of explaining criminal behaviour. Aside from labelling, there may be a variety of other causes of deviance that labelling does not adequately explain.

III. Method and Materials

- The research is based on a qualitative analysis. The case study method was utilised for this investigation.
- Secondary data has been collected from various books, articles and online platforms.

IV. Limitations

One of the limitations of this study is that it did not cover the whole villages of Jharkhand which are badly affected by witchcraft practices, hence this paper is subject to further detail study.

V. Case Study:

Case 1

Thakur Munda and his wife Chamri Devi live in Baroti, a village in the Namkum block of Ranchi district,

15kilometers from the Jharkhand State Secretariat. Munda's wife was dragged over the ground on September 24, 2019. Devi's lifeless body lay where the trail stopped which was at the bottom of a slope. Munda's nephews had hacked her to death, according to investigators. Munda's 15-year-old grandson had been ailing for some time, and a local ojha, or witch doctor, blamed Devi for casting an "evil eye" on him. The boy's father and uncle had planned her assassination.

Case 2

On the outskirts of Jamshedpur, a 55-year-old tribal woman named RupiMurmu was beaten to death with sticks by two men on the 27th of October 2021 at Margu Village under the Kovali Police Station in Potka Block of East Singhbhum in a suspected case of witch-hunting. According to the residents, the woman was undressed and attacked as she was taken out of her house by two people. Her remains were later discovered on farmland in the vicinity of her home.

According to news reports, SP Rural Nathu Singh Meena stated that the killing seemed to be motivated by a land dispute. He stated that it does not appear to be a witch hunt, but that it cannot be ruled out.¹

¹ Women killed in suspected, Times of India, <https://timesofindia.indiatimes.com/city/ranchi/woman-killed-in-suspected-witch-hunting-case-in-east-singhbhum/articleshow/87346282.cms> (accessed on 15 Feb 23).

Case 3

In the early hours of September 4, 2019, a 52-year-old tribal man was beaten to death by renegade villagers in Lohardaga district's Jhaljamira village on suspicion of practising witchcraft. This is the sixth mob lynching case in Jharkhand in less than three months. Shahnai Oraon, the deceased, was reportedly thrashed at midnight with sticks and batons by his nephew and some fellow villagers as police claimed, adding that Oraon died on the spot. In the night, Shahnai Oraon's older brother Birsa Oraon died of natural causes. His son summoned Oraon late at night to perform a few rites before preparing the attack with other villagers. It appears to be an instance of superstitious beliefs at first glance.

Case 4

On the 24th of February, five members of a family were hacked to death by their relatives at Kuruhatu-Amtoli, Gumla, under the Kamdara Police Station, on suspicion of practising black magic. The massacre was carried out as a result of the villagers' decision. During the last few weeks, the villagers discovered that people have been falling ill and dying at an alarming rate. They believed the tragic events were caused by the sorcery of Nikodine Topno, 58, and his wife Josephina Dahanga, 55.

During the investigation, it was also discovered that after a few incidents of death and illness, the locals came to the conclusion that it was a result of the couple's witchcraft. Thereafter, the villagers held a meeting in a football field and decided to execute the pair because they were the only ones responsible for the people's misery. That night, eight locals gathered near the couple's home

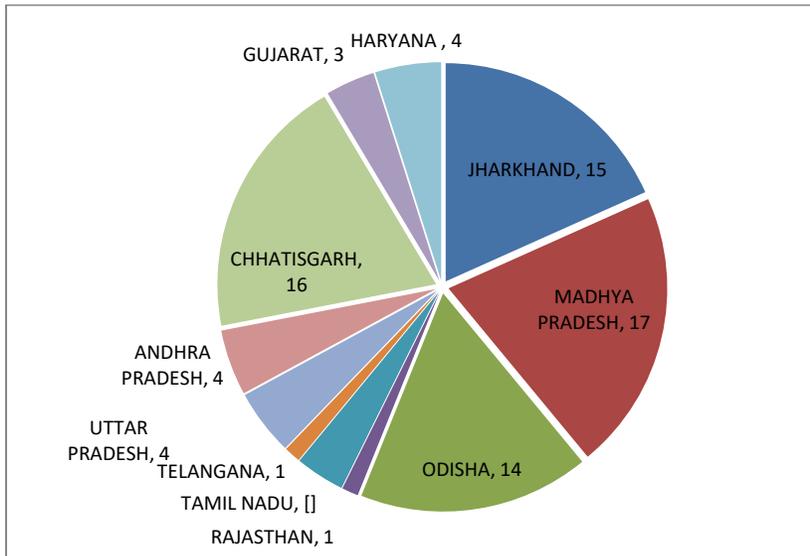
and hacked Nikodine and his wife Josephina to death using sharp weapons. The couple's son Vincent Topno, 32, daughter-in-law Silvanti Topno, 30, and 5-year-old grandson Albine Topno were also slashed to death according to the report.

Case 5: A Worthwhile Effort

Chutni Devi, a woman from Jharkhand's Beerbans village in the Saraikela-Kharsawan district faced extreme atrocities in the name of witchcraft, She was awarded the fourth highest civilian award, the Padma Shri, by President Ram Nath Kovind for rescuing and assisting hundreds of women who had been subjected to atrocities over the years. Chutni was vilified and labelled a witch after a neighbor's daughter became ill. She was fined Rs 500 by the Panchayat and accused of plotting to murder the daughter of a neighbour. When the neighbor's daughter did not recover from her illness, Chutni paid the fine, but the next day, a gang of 40 to 50 people invaded her house. She was hauled out of the house, beaten severely, threw urine and faeces at her, and stripped naked. Chutni began working for the empowerment of women and the battle against superstition after her harrowing experience. Chutni's crusade is still going on, but the roots of evil in Jharkhand are so deep that such acts still happen today.

VI. Data & Statistics:

Figure 1: Number of death due to witch craft in Jharkhand



VII. Discussion

Not only in India, but all around the world, witchcraft is practiced. Written evidence of witchcraft practices may be found all throughout the world, and the following are some of the historical aspects: - In 1486, two German friars, Heinrich Kramer and Jacob Sprenger, published a book titled, 'Malleus Malefic arum' (Hammer of the witches). This book describes how a witch may be tracked for hundreds of years, why women have more phantom abilities than men, and how to prosecute and punish a witch.

The first witch trials took place in Salem, Massachusetts, where a huge number of witches were

tried, 19 of whom were hanged, and over 150 others were suspected but not found guilty of witchcraft. The Catholic Church dutifully passed a blasphemy statute against the Witch in 1490.

Ursula Southeil (Mother Simpton) was regarded as the most powerful witch in England during the 16th century. She is supposed to have prophesied the London plague, the city's largest fire, and the execution of Scott's queen, Marry Queen. Her remains was buried in an unclean location after she died in 1561.

MargaBn was the most powerful German witch of the 17th century. The witch was confirmed to be in England in Gerald Gardner's book witchcraft today, published in 1954. Women were often tortured in South Africa by being called witches, and this practice continues today.

In India, the term daaayan is used in place of witch, and it is derived from the Sanskrit word 'daakini,' which primarily refers to a woman who practices black magic. The witch is classified as Kali, which eats man's flesh, in the Bhagavata Purana, Brahmapurana, Markandeya Purana, and Katha Saritsagar. In the Ramayana, Mahabharata, and Vedas, there is discussion of being a witch.

Daayan's vestiges may mostly be found in the Mahabharata, where there is recorded evidence of a woman who was primarily trained for assassins, especially Kritiya. Kritiyas are one-of-a-kind assassins. They've been fed a precisely balanced diet of poison and antidote since childhood, making every bite and scratch fatal. They were also taught to utilize their bodies as lethal weapons, in

addition to the various weapons they are said to possess, such as knives that fold up into benign hair decorations and diamonds encrusted with poisons that may lure or send a man insane.

There was no patriarchy structure in Indian civilization from the beginning of society or civilisation. Male and female had equal value but different functions. It lasted until the Maurya dynasty came into power. Female members of society were suppressed and harassed by male members of society when the patriarchy system began with the commencement of the Sung dynasty. Following the occurrence of such developments, women such as *kritiyas* and those who are self-sufficient revolted against the patriarchy system, and they began to hunt down male members of society who were harassing or attempting to harass female members of society. As a kind of protest against sexism and harassment, male members of the community began to prosecute those women, referring to them as *Dakini* or *Daayan*.

The *Daayan* cult is a secret society that arose in Harangul, a village in Maharashtra's Latur district, around the 15th century.

Before 1792AD, there was no record of or writing about witches in Jharkhand. (1958-88) Rai Choudhry

Young families, young ladies, and other family surrogates are said to be targets of *daayan*. She disguises herself as a young, lovely woman and stalks young guys on the roadways, seducing lone travellers into joining her. She feeds on a man's blood or perspiration while he is imprisoned. According to folklore, a *daayan* will keep a young man hostage until he is elderly, sexually abusing him until he dies and enters the spirit world. Another

legend claims that a young man who is tempted by the daayan and eats her meal returns to the hamlet as an elderly man at daybreak.

Witchcraft rituals and deaths have spread throughout Jharkhand. However, witchcraft practices and killings predominate in Jharkhand's rural and tribal areas, particularly in tribal-dominated districts like Garhwa, Palamu, Godda, Gumla, and Khunti. In tribal civilization, there has always been a belief in Tantra Mantra and miraculous powers. They believe destructive powers are to blame for their failure in this task. They are terrified of devils and ghosts.

They adore all Gods and Goddesses who have the potential to gain or lose. During this time, a brilliant man appeared among them, claiming to know tantra and totaka mantras and demonstrating destructive powers under his control. He has the ability to cure any ailment, locate missing items, and save people from natural disasters. The residents of the remote villages were honest and trustworthy, which is why they fell for Bhagat's deception and trusted his statements. The process of becoming a witch began in this milieu, and it progressed from there into a necessary scenario. Bhagat's shady thinking has produced the witch. Bhagat makes an odd claim about being able to identify the witch. When Bhagat is unable to treat an illness, he asserts that there is a witch (daayan) who committed the sin and cannot be cured without her consent.

In Jharkhand, witches were mostly old widows and destitute women. And the sick person's relatives or the Bhagat begin tormenting her to free the ghost from the

sick person's or animal's body; in the process, the targeted women may be slain by the villagers.

Because Bhagat belonged to the male class and was able to save himself, the people of the society did not hold him responsible for the failure. Bhagat does not label a woman who comes from a wealthy and powerful family as a witch (daayan) because she was able to resist. Family members used to protect her, and this practice continues to this day.

It is apparent from the preceding scenario that no lady becomes a witch in her heart. Due to his poverty, the people of the society began tormenting the woman who was indignant at Bhagat's misunderstanding and turned her into a witch. As time passed, the circumstances surrounding being a witch and calling oneself a witch evolved. Property disputes and efforts at land acquisition are the most common causes of witch-hunting in the state. Almost every untimely death in a region where superstition and irrational beliefs are common prompts a search for women who practice 'witchcraft.'

The following are the most commonly used tactics of harassing witches in today's society:-

- Social boycott and refusal to communicate with her and her family.
- Mentally tortured in numerous ways • Not calling in any social function
- Cutting off a source of food
- Public nakedness in the village streets • Head hair cutting or shaving • To Soot on face • Beating with

whips and sticks • Stab on the body with a pointed weapon

- Teeth breaking, nose cutting, secret organ damage, faeces feeding
- To bury naked in public, putting oil on the body and killing cruelly by removing both eyes
- Sexual intercourse that is coerced

VIII. Laws Related to Witch-Craft in Jharkhand

In 2021, the state of Jharkhand passed the Prevention of Witchcraft (DAAIN) Act. It is divided into only eight sections. Penal Sections 3-6 of the act include penalties and punishments for identifying a person as a witch, causing injury to a person by identifying as a witch, abetment in identifying a witch, and claiming for Witch cure. Section 7 discusses the trial procedure and declares that all offenses under this act are non-bailable and cognizable.

The act's penal provisions are woefully inadequate for deterring or penalizing those who brand and persecute women as witches. Depending on the nature of the offense, fines range from Rs. 1000 to Rs. 2000 and imprisonment range from three months to one year. Given the seriousness of the consequences of aiding in the identification and curing of witches, which almost always result in horrific crimes being committed against the women so identified, such as death, inhuman treatment, bodily mutilation, rape, and various forms of mental and physical torture, the act's penal provisions do not adequately punish the perpetrators of these crimes or deter others from committing them.

IX. Conclusion

The preceding discussion highlights the fact that the ancient practice of witchcraft persists in diverse forms in various cultures and regions of India. However, it has been said that due to the advancement of science and technology, as well as the arrival of Christianity on Indian territory, its relevance is waning. Witchcraft practices are accumulated and stored on economic, social, psychological, and educational difficulties without any research, and the old wisdom is being washed on the shoulder of superstition; no one has yet found truth in it, and this is superstition. On the one hand, many people advocate for the abolition of such activities because they are considered superstitious, while on the other hand, these practices are perceived as ancient ancestor customs that must be kept. Genuine traditional practices (with medicinal and healing values) in the name of magic that benefit society can be kept, but those that injure and impair the human fabric should be re-examined to see if they are still essential in society.

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CHAPTER-12

FOOD HABITS OF THE INDIGENOUS TRIBES OF NORTH EAST INDIA AND LEGAL REGIME: NEED OF THE HOUR

*Thangzakhup Tombing**

I. Introduction

North East of India is a home to more than 200 plus tribes. It is blessed with pristine scenic beauty which is slowly and gradually being discovered, explored and recognised as a 'high potential' global tourism destination. It is also place of exotic food, peculiar food culture and traditions. The foods are not only exotic they are also refreshing, simple, healthy and sustainable. Years of political turmoil in the region has kept this hidden treasure of India from the global tourism community for almost seventy years. The region has different indigenous communities like Khasis, Meiteis and Nagas. These indigenous tribes have peculiar ways of preparation and preservation of their traditional cuisine. Then, there is another set indigenous tribes like the Mizos, Kukis, Hmars

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and Paites who share similar patterns of preparation, processing and preservation of age-old culinary methods of cooking food.

Traditional knowledge and methods of preparation of food is passed on from generation to generation by word of mouth. The oral method of preservation of ethnic knowledge lack documentation on indigenous food value, as well, the lack of scientific collection criteria leads to undermining of market cost of indigenous food.¹ In its pristine form majority of the food and the ingredients of the cuisines prepared by indigenous people were derived from produce of the forest like bamboo shoots, wild mushrooms and different kinds of herbs. Sound knowledge of wild herbs, mushrooms and methods of preparation is utmost required as slightest of error of judgment could lead to drastic food poisoning to the extent of endangering life of consumer. In the near future, most likely with the growth of tourism in the region there is probability of stray incident of wrongful consumption of such indigenously prepared food which could cause grievous injury to the consumer.

Transition of indigenous communities from a homogenous kinship-based society to a more formal heterogeneous and economic based society requires introduction of 'intellectual property right regime', hereafter IPR regime, to indigenous food culture. Indigenous IPR regime is the need of the hour for the recognition, protection and preservation of traditional food

¹ Polashree Khaund & S R Joshi, Wild Edible Macrofungus Species Consumed by the Khasi Tribe of Meghalaya, India, 4 (2) Indian Journal of Natural Products and Resources, 197-204, (June 2013).

knowledge and wild food plants, herbs etc. As well, it will ensure continued connection with the local geography, and personal identification with the village or region.²

The paper attempts to explore how the traditional food knowledge of the indigenous communities of North East could be preserved, promoted and encouraged to bring it under robust intellectual regime for posterity and prosperity of the indigenous tribal communities. Also, to explore relevant institutional mechanisms under consumer protection law to ensure quality, potency, purity and safety of indigenous food as well to safeguard the cardinal rights of consumers in the region.

II. Food Habits of the Indigenous Tribes of North East India

Global tourism had seen a surge in tourists who are interested in exploring authentic food of these communities like Meiteis of Manipur, Mizos of Mizoram, Khasis of Meghalaya. Among city dwellers in these states marketing, safety, packaging, promotion and presentation of traditional food in present time is a lucrative venture with the increase of tourism and the related service sectors.³

In the state of Meghalaya the staple food of Khasis is rice, varieties of rice like red rice, yellow rice etc. are

² Prapimporn Somnasanc & Geraldine Moreno-Black, Knowing, Gathering And Eating: Knowledge And Attitudes About Wild Food in an Isan Village in Northeastern Thailand, 20(2) Journal of Ethnobiology 213, 197-216 Winter (2000).

³ Indian Chamber Of Commerce, India's North East: DiversifyinGrowth...https://www.pwc.in/assets/pdfs/publications/2013/north-east_summit-2013.pdf/

prepared in a Khasi household. Traditionally rice wrapped in banana leaf cooked in bamboo is served with varieties wild edible *chutnies* or sauce. Rice served with pork cooked with pumpkin, radish and sesame salads is a staple diet.⁴ Khasi community of Meghalaya have diverse knowledge about wild mushrooms. These wild mushrooms are local delicacy, they may be prepared with pork or chicken, fried with sesame seeds, boiled with bamboo shoot or prepared with fermented fish and they usually served with rice.⁵

They are sold in the local markets. It provides sustenance to the local people and forest dwellers during the lean period (rainy season) when other non-wood forest products are unavailable in the forests.⁶ Wild mushrooms are not only rich in protein sources but also have medicinal value. However, lack of proper traditional knowledge of selecting non-poisonous mushroom could prove harmful. The gatherers who have good knowledge could differentiate the edible mushrooms such as *Russulaemetica*, *Amanita* spp., etc from the poisonous ones called '*tit buit*', '*buit*' in the Khasi dialect meaning poisonous.⁷ In 2018 there was reported case of six people

⁴ PTI, Khasi Tribal Food Wows UN Gathering in New York, NDTV FOOD May 21 (2016) <https://food.ndtv.com/food-drinks/khasi-tribal-food-wows-un-gathering-in-new-york-1408462/>

⁵ *Id.* at 209- 210.

⁶ Polashree Khaund & S R Joshi, *supra*.

⁷ Polashree Khaund & S R Joshi, *supra*, 198. As a precaution by the traditional process of *narsuh*, if a the tip of red hot iron is placed in the middle of bowl containing cooked mushroom, the hot iron can effectively absorb or destroy the harmful content of the mushroom.

being hospitalised in local hospital in Meghalaya after eating poisonous mushroom.⁸

The indigenous people of Mizos and Paites in the States of Mizoram and Manipur have strong traditional knowledge of use of plants which is passed on orally from generation to generation. These two communities possess similar traditional techniques of processing of food with minor differences in the mode and method of preparation. They also shares similar food habit, culture, tradition and language.⁹ They are largely dependent on their rich traditional knowledge on wild edible products for their livelihood. Besides wild products they grow different kinds of seasonal vegetables such as mustard, pumpkin, chilly, cucumber, beans, and different varieties of spice etc.¹⁰ They have been consuming wild plants since very ancient times without knowing their nutritive and medicinal values.¹¹ Like in Meghalaya, in Mizoram three people

⁸ TNT Bureau, Mehgalaya: 6 Hospitalised after eating mushroom, TNT, Tura, Megahalaya October 22 (2018) <https://thenortheasttoday.com/meghalaya-6-hospitalized-after-eating-mushrooms/>

⁹ Hoihkim, Ankamthu: Traditional mustard leaves fermented food preparation of Churachandpur District, Manipur, 5 (3) International Journal of Research in Advent Technology, 24-28, March (2017)

¹⁰ *Id.*

¹¹ R. Lalfakzuala, H. Lalramnghinglova, & H Kayang, Ethnobotanical usages of western Mizoram, Indian Journal of Traditional Knowledge6: 486-493(2007); Bora Hr, A Yadav & JH Zohmingliana, Traditional Practices in Mizoram, Northeast India To Remove Irritant of *Amorphophallus Nepalensis* (Wall.) Bogner & Mayo: A Highly Irritating Aroid, 8 (12) International Journal of Recent Scientific Research, 22494-22495, December (2017).

including a child were killed after consuming poisonous in 2016.¹²

Telhawang-pa or corn, isa local delicacy of Mizos which is carefully dugout and collected from the farm involves delicate and time-consuming process of preparation. Corm contains highly irritating compound as such it causes irritation on contact with skin. Thus, to overcome such irritation, after 15- 20 days from the day of collection it is traditionally prepared by a tedious process involving of peeling of the outer cover of the corm with sharp knife and chopping them into small pieces. Chopped corms are then crushed carefully with a typical wooden mortar and pestle while avoiding contact with skin and eyes. The crushed materials is boiled for 72 hours, intermittently the water is changed the after 3-4 hours duration; after that, the boiled material is again boiled with traditionally made alkali solution (ash –filtrate) called “Chingal” for 3-4 hours. After thorough treatment, the alkali solution is discarded. Then, it is again treated with plant material, mixture of citrus juice (*Citrus medica*), ripened tamarind (*Tamarindus indica*) fruit pulp for 30-45 minute, this process is repeated 4-5 times.¹³ Only after this processes the corm is fit for sale or consumption.

In Manipur among the valley ‘Meitei community’¹⁴, some of the popular indigenously developed fermented

¹² Three people including a child, were killed and four fell sick after consuming wild mushrooms in Mizoram, NDTV, Aizawl, April 09 (2016) <https://www.ndtv.com/india-news/3-people-including-a-child-die-after-consuming-wild-mushrooms-in-mizoram-1353847>.

¹³ *Id.*

¹⁴ In Manipur the major Meitei community have distinct food habits and culture which is very different from the food

food of Meitei community are as follows: *hawaijar*, *Soibum/Soijim*, *Soidon*, *Ngari*, *Hentak*, *ZiangSang*, *Atingba* etc. These peculiar traditional fermented foods and beverages are consumed as regular food in different recipes.¹⁵ Climatic condition plays an important role in the type of fermented food produced and consumed in Manipur.¹⁶ *Ngari* is a popular traditional fermented fish product in the state. It is eaten as a daily compulsory side dish called *Ironba* (mixed with potato, chilies, etc.) with cooked rice by all communities of people in Manipur.¹⁷ *Hentak* is a traditional fermented fish paste another indigenously developed delicacy.

Soibum/Soijim, *Soidon* these are fermented preparations of bamboo shoot products are prepared only during June-September when bamboo shoots sprout¹⁸. In the traditional method, succulent bamboo shoot sprouts are defoliated, chopped, pressed tightly into the wooden or earthen pots to ferment for 6-12 months.¹⁹ It is consumed after cooking with *Colacasia* corms, green peas, pumpkins, potato, etc. in different recipes, especially chutney and ironba, also with fish curry.²⁰ *Hawaijar* is a

habits of the hill people. With the passage of time many of the food habits of the hill people have been continuously influenced by that of the valley Meitei community.

¹⁵ K Jeyaramet et al., Traditional fermented foods of Manipur, 8 Indian Journal of Traditional Knowledge, 115- 21 January (2009).

¹⁶ Somishon Keishing & TahiraBano, *Hawaijar*- A fermented Soya of Manipur, India: Review, 4 (1) IOSR Journal of Environmental Science, Toxicology And Food Technology, 29-33, May - June (2013).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, after complete fermentation, *Soibum* could be stored even up to one year before marketing.

²⁰ *Id.*

traditional fermented soybean food for Manipur. Ammonia odour and mucilage fibre production are the indicators of good quality products. *Atingba* is another indigenously produced liquor by a process of fermentation. The methods of preparation and preservation of these peculiar traditional food are closely linked with the cultural identity of Manipur.

Among Paites, one of the hill tribes of Manipur, preservation of surplus mustard leaves is done through traditional process of fermentation. The fermented product is locally known as *Ankamthu*.²¹ It is mainly prepared for off season consumption. From time immemorial the Paite women folk have engaged in preparing the traditional fermented food as a means for preservation of surplus food. It not only supplements their nutritional requirement but is also a source of income.²² *Ankamthu* is prepared from leaves extract of mustard green leaves (*Brassica juncea*, *Brassica campestris* etc) which are plucked in bulk during peak season. They are cleaned and washed in water and then spread over bamboo mat (locally called *pheh*) and wilted in the sun.²³ The wilted leaves are then crushed in traditional wooden crusher. The mesh is then kept in an air tight fermentation basket made of bamboo with a lid.²⁴ The exudates or the leaves extract are squished and collected in a pot and boiled till the extracts become condensed.²⁵ The extracts are then transferred to hollow bamboo container, its (the bamboo container) mouth is then tightened and kept near the fire or under the sun to

²¹ Hoihkim, *Ankamthu*, supra

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

undergo fermentation for three to five days.²⁶ *Ankamthu* is served as appetizer and one can consume food with this preparation only, even without other vegetable supplement.

Zungou is a locally brewed alcoholic beverage. It is prepared from rice by adding yeast called '*silngou*' by a process of fermentation. Rice is soaked for about 1-2 hrs in water along with some germinated paddy.²⁷ The mixture is crushed and then poured cautiously in a wooden barrel called *bu* or earthen pot and then hot water is added in it.²⁸ The mixture is stirred with wooden spoon until it becomes completely cool down.²⁹ Water can be added to the desired level and the *bu* or pot is covered with banana leaves and left for fermentation for 3-4 days without any disturbance.³⁰ When form would start to come out from the pot and a typical flavor is released, *zungou* or local rice beer is ready for consumption.³¹

III. Intellectual Property Rights Regime and International Instruments

Traditional knowledge (TK) of indigenous communities refers to the knowledge and know-how accumulated across generations, which guide indigenous societies in their interactions with their surrounding

²⁶ *Id.*; also Thangjam Anand Singh et al, Traditional Process Foods of the Ethnic Tribes of Western Hills of Manipur, India, 7 (10) International Journal of Current Microbiology and Applied Sciences, 1103, 1100- 1110, (2018).

²⁷ *Id.* at 1107.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

environment.³² It is a form of knowledge which has a traditional link with a certain community: it is knowledge which is developed, sustained and passed on within a traditional community, and is passed on between generations, sometimes through specific customary systems of knowledge transmission.³³ The inherent dynamism of indigenous peoples' knowledge systems have considerable economic potential as sources of water, timber, medicinal plants and organic foods.³⁴ The tribal people and the forest dwellers collect a variety of leaves, fruits, seeds, nuts, roots, barks, tubers and rhizomes which have medicinal value. Traditional food knowledge suffers from market imperfections due to absence of definite system and institution. Apart from these two factors there exist the challenge of defining community property rights and lack of convincing patenting policy.³⁵ As well it suffers due to limited access predominantly due absence of organized market and accountability. And when others seek to benefit from TK, especially for industrial or commercial advantage it is construed as knowledge misappropriation.³⁶ Thus, proper management of intellectual property relating to Indigenous Traditional

³² Carla Francescutti, Traditional Knowledge Advantage: Indigenous peoples' knowledge in climate change adaption and mitigation strategies, International Fund for Agricultural Development, Rome, Italy, 5 April 2016

³³ Intellectual Property and Traditional Knowledge, WIPO Publication no. 920 (E)

³⁴ *Id.* at 6.

³⁵ Nemthianngai Guite & Sanghmitra S Acharya, Indigenous Medicinal Substances and Health Care: A Study Among Paite Tribe of Manipur, India Indigenous Medicinal Substances and Health Care, 2005.

³⁶ Intellectual Property and Traditional Knowledge, WIPO Publication no. 920 (E)

knowledge (TK) on food management, harvest, preparation and trade needs to be developed.

TK holders stress that it should not be used by others inappropriately, without their consent. There must be conscious efforts by all stake holders for fair sharing of the benefits to ensure that fruits of TK are enjoyed by future generations.³⁷ A comprehensive strategy for protecting TK should therefore consider the community, national, regional and international dimensions.³⁸ Traditional laws are currently the prime mechanism for achieving protection and practical benefits for TK holders. For instance, Brazil, Costa Rica, India, Peru, Panama, the Philippines, Portugal, Thailand and the United States of America have all adopted sui generis laws that protect at least some aspect of TK.³⁹ The major International Regulations effecting IPRs and traditional knowledge are "Convention on Biological Diversity" (CBD) and "Trade Related Intellectual Property Rights" (TRIPs).⁴⁰

TRIPS Signatory states are under the following obligation:⁴¹

- obliges new standard for various types of IPRs.
- provides for effective dispute settlement process by WTO.⁴²

³⁷ *Id.*

³⁸ *Id.* at p.11

³⁹ *Id.*

⁴⁰ Meeta Biswal & Debidutta Biswal, Issues Relating To Traditional Knowledge Systems And Intellectual Property Rights, XIIth World Forestry Congress, 2003, Quebec City, Canada, www.fao.org/3/XII/0911-A3.htm/

⁴¹ *Id.*

⁴² Though for all WTO members were given one year i.e. up to January, 1996 to phase in changes into their IPR or other

- domestic enforcement of IPRs, both within as well as across the borders of a country.
- protection on IPRs related to food, medicine and drugs in developing countries.
- provides for higher level of protection for geographical indications and reversal of burden of proof for process patentees.
- provides countries to exclude plants and animals from patentability by providing an effective means or sui generis system of protection of IPRs related to these, which will be interpreted differently by various countries.⁴³

CBD recognizes the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.⁴⁴ Main objective CBD is to conserve biological diversity on one hand and to provide appropriate access to this resource for utilization.⁴⁵ Moreover, the signatories of CBD are required to "respect, preserve and maintain knowledge of indigenous communities".⁴⁶ It also encourages

laws and regulations, developing and other countries were given an additional four years' time i.e. up to January, 2000. A further period of five years i.e. up to January, 2005 was given to developing countries for introducing the product patents regulations on product patents on food, medicines and drugs, in the field of technology excluded thus far from their patent laws.

⁴³ Trade Related Intellectual Property Rights, art. 27 (3)

⁴⁴ Convention on Biological Diversity, preamble.

⁴⁵ Art. 1.

⁴⁶ Art. 8

equitable sharing of benefits, thereby making the indigenous communities as stakeholders in benefits arising out of the utilization of knowledge, innovation and practices. Article 8 emphasizes upon in situ conservation of knowledge, innovation and practices of indigenous and local communities. Article 17 and 18, stress upon the exchange of the information, which is to be facilitated by contracting parties by all publicly available sources including indigenous and traditional knowledge. Other important international instruments include the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization (FAO), the International Union for the Protection of New Varieties of Plants (UPOV), and the UN Convention to Combat Desertification (UNCCD).⁴⁷

Thus, TK protection under IPR regime entails the following rights:⁴⁸

- recognition of value and promotion of respect for traditional knowledge systems.

⁴⁷ FAO 1993, *supra* at 11, Conference adopted the International Treaty on Plant Genetic Resources for Food and Agriculture which provides in Part III for the recognition of farmers' rights, including "the protection of traditional knowledge relevant to plant genetic resources for food and agriculture UNCCD provided for the protection of traditional knowledge in the ecological environment as well as the sharing of benefits arising from any commercial utilization of TK; In 2000, the United Nations Conference on Development (UNCTAD) in its Plan of Action stressed the importance of studying ways to protect traditional knowledge, innovations and practices of local and indigenous communities and enhance cooperation on research and development on technologies associated with the sustainable use of biological resources.

⁴⁸ *Id.* at 17.

- responsiveness to the actual needs of holders of TK.
- repression of misappropriation of TK and other unfair and inequitable uses,⁴⁹
- protection of tradition-based creativity and innovation,⁵⁰
- promotion of equitable benefit-sharing from use of TK
- promotion of the use of TK for a bottom-up approach to development

IV. Health benefits of Indigenous Food

Preservation of food by way of fermentation is practiced in many parts of the world. Study shows that fermented food provides the bio nutrients minerals and fortified with bioactive compounds enhancing the flavor, aroma and exert health promoting beneficial.⁵¹ Fermented soyabean products have been reported to be used extensively in almost all the states of northeast India and bears resemblance to *tou-shi*, *hamanto*, *chiang-yu*, *shi-tche*, *chiang* and tofu of China, *tempekedele*, *kecap* and *taoco* of Indonesia, *shoyu* and *miso* of Japan.⁵² Not only

⁴⁹ It allows for action to be taken against false or misleading claims that a product is authentically indigenous, or has been produced or endorsed by, or otherwise associated with, a particular traditional community.

⁵⁰ This protection has been used to protect non-disclosed TK, including sacred TK. Customary laws of communities often require that certain knowledge be disclosed only to certain recipients.

⁵¹ W.J. Darby, The nutrient contribution of fermented beverages in fermented food Beverages, 61-79. In Nutrition (eds. C.F. Gastineaw, W.J. Darby and T.B. Turna) , Academic Press, New York (1979).

⁵² MJR Nout, Useful Role of Fungi in Food Processing in Samson RA, Hoekstra E, Frisvad JC and Filtenborg O. (eds) (1995). Introduction to Food Borne Fungi, 295-303.

the process of fermentation preserve foods, it also improves digestibility by breaking down proteins within foods and have been known to enrich nutrients such as vitamins, amino acids and fatty acids.⁵³ Popular delicacy of Manipur the *hawaijar* are known for their anticancer, anti-osteoporosis and hypocholesterolemic effects.⁵⁴ Most of the fermentation process is related to the acts of mystics, arts and science.⁵⁵

Bamboo shoots are low in fats and cholesterol, high in potassium and carbohydrates and are rich in dietary fibre.⁵⁶ Anti-oxidants like phenols, steroids and flavonoids makes them beneficial food item besides being rich in vitamins, minerals (10 types) and amino acids (17 types).⁵⁷ Besides its nutritional aspect, they are believed to have anti-ageing properties, decrease blood cholesterol, acts as appetisers, enhanced appetite and are believed to have anti-microbial properties.⁵⁸ The bamboo shoots are rich in potassium, carbohydrates, dietary fibres, vitamins, antioxidants and various medicinal properties.⁵⁹ The

⁵³ Keith Steinkraus, Origin and History of Food Fermentation, Hand Book of Food and Beverage Fermentation Technology (2004).

⁵⁴ P. Devi & S.P. Kumar, Traditional Ethnic and Fermented Foods of Different Tribes of Manipur, 11(1) Indian Journal of Traditional Knowledge , 70- 77, (2012).

⁵⁵ E.J. Vandamme, Fermented Foods and Fermentation, Art and Sciences, Revue Der fermentations Et. Des Industries Alimentaries, (1982).

⁵⁶ MP Sarma, Analysis of Cyanide Concentration in Five Selected Bamboo Shoots Consumed in North East India, 2 (2)

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ S. Satya et al., Bamboo Shoot Processing: Food Quality and Safety Aspect (A Review), 21 Trends in Food science and technology, 181-189, (2010).

exotic taste, high nutritive value and possess medicinal properties of these mushroom commands very high price in local market.⁶⁰ Also, 'zungou' this traditional rice beer is good for health and complexion as they are believed to have medicinal properties.⁶¹

On the flip side health issues and cases of food poisoning bamboo shoot arises if they are not harvested as soon as they come out of ground as they develop an acidic flavour. It contains a toxic cyan glycoside, called taxiphyllin which is activated by hydrolytic beta-galactosidase. Bamboo shoot contains 0.3-0.8% hydrogen cyanide of which 0.16% is concentrated in the tips and only 0.01% at the base.⁶² The acute lethal dose of HCN in human beings has been estimated as 0.5 3.5 mg/kg body weight while in animals it is believed to be 0.66 to 15mg/kg body weight. The *Sa'um* a popular fermented delicacy of Mizoram prepared from fat of internal portion of animal has high population of *Proteus mirabilis*, a potential pathogen that causes urinary tract infection.⁶³

⁶⁰ M. Choudhary, et al. Diversity of Wild Edible Mushrooms in Indian Subcontinent and Its Neighbouring Countries, 1 Recent Advances in Biology and Medicine, 69-76 (2015).

⁶¹ P. K. Singh, & K. I Singh, Traditional alcoholic beverage, *Yu* of Meitei community of Manipur, 5(3) Indian J. Traditional Knowledge, 184-190, (2006).

⁶² S, Kananbala & Hoikhokim (2010) Cyanogen content in bamboo plants, 5(2) Asian Journal of Bio Science, 178-180, (2010).

⁶³ T.A. Singh, K.R. Devi, G. Ahmed, & K. Jeyaram, (2014) Microbial and endogenous origin of fibrinolytic activity in traditional fermented foods of Northeast India, 55 Food Research International. Food Research International 356-362 (2014).

V. Legal Regime and Consumer Safety

Traditional knowledge of food and medicine is a complicated issue. There is always the mysticism aspect to it. Many of the steps involved in the preparation of exotic food and medicines are passed on through oral memories as such it lacked scientific process, safety and quality. In fact, there had been reported cases of casualties of people who intake such food because of ignorance, probable negligence and other local factors. Under established consumer law regime manufacturer, seller, profiteer etc. owe an absolute duty of care towards the last consumer. Every product is legally expected to stand the test of purity, quantity, quality, potency and the good will. However, North East being an upcoming region where legal certainty and accountability toward the rights of consumer is still in its nascent stage, therefore, it is likely to lack judicial accountability with regard to deficiency of service or lack of purity, quantity, quality, potency of indigenously produced products. Such type of argument does not augur well in the larger interest of consumers as it tends to dilute the universal right to safety of consumers in this region.

VI. Critical Analysis of the Consumer Protection Law in India

Before the enactment of the Consumer Protection Act, 2019, to safeguard and protect and also safeguard the consumers from the glut of adulterated and substandard articles including food items legal protection against such malpractices was envisaged to have guaranteed via the Consumer Protection Act, 1986, hereafter the 1986 Act. To protect the consumers from exploitation and, also to save them from adulterated and sub-standard goods and

services the 1986 Act is further supplemented by the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Indian Penal Code, 1860, the Standards of Weights and Measures Act, 1976 and the Prevention of Food Adulteration Act, 1954. The 1986 Act, envisaged to promote and protect the rights of consumers to be protected against marketing of goods which are hazardous to life and property; the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices; the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums etc.⁶⁴

The 1986 Act, has been amended from time to time meet the changing definition of consumer interests and rights in consonance with changing economy and emerging consumer values and behaviours.⁶⁵ Global consumerism has brought about unprecedented global tourism in otherwise hinterlands of the North Eastern region. The region with more than two hundred recognised tribes, major and minor, is a probable gastro tourism hub. The unique and exotic culinary delicacies of the scattered tribes that reflects the local cuisine, heritage or the culture of the place or each tribe will also require certain minimum standard of hygiene, quality, quantity, potency, purity etc for the greater health benefit and safety of the all the prospective consumers. It is therefore pertinent to critically examine how the Consumer Protection Act, 2019, hereafter the 2019 Act, can provide to address,

⁶⁴ Consumer Protection Act, 1986, Introduction

⁶⁵ The Consumer Act, 1986 was amended in 1991, 1993 and 2002 to provide for the better protection of the interest of consumers.

redress and provide greater safety to consumers of indigenous tribal food of the North Eastern Region which hitherto may not have been subjected to the consumer protection regime in letter and spirit.

VII. Critical Analysis of Consumer Protection Act, 2019 and the Indigenous Food habits of the North Eastern Tribes

As already discussed in the paper the indigenous food habits of the North East tribes have aspects of mysticism along with peculiar and precise knowledge and process of preparations. Any deviation in the process or assessment of ingredients had also proven fatal to the health and well-being of very rare and unfortunate consumers. As it was laid down in *Donoghue v. Stevenson* case⁶⁶ is a watershed judgment which established the duty of care to the last probable consumer which the manufacturer intends to use their product. Therefore, under consumer law regime any consumable commodity, including indigenous food, must be safe for the consumption. And any product which is otherwise is unsafe must be interpreted as defective product under consumer law.

Defective Product

According to the 2019 Act defined defect as, “any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained or under any law for the time being in force...”⁶⁷ Which can be construed that any product is

⁶⁶ UKHL 100 (1932).

⁶⁷ The Consumer Protection Act, 2019, 35, India, Section, 2 (10).

available for consumption if it is otherwise imperfect or lack quality, quantity, potency, purity or standard is a defective product. Therefore, if any product marketed as indigenous food comes under the larger ambit of consumer rights and safety.

Further the Act define product as, “any article or goods or substance...which may be gaseous, liquid or solid state possession intrinsic value which capable of delivery...”⁶⁸ And “goods” means, “every kind of movable property and includes “food” as defined in clause (j) of sub section (1) of section 3 of the Food Safety and Standard Act, 2006”.⁶⁹ As such food principally means, “ any substance, whether processed, partially processed or unprocessed, which is intended for human consumption...”.⁷⁰ The term ‘any food’ in its legal ambit also includes indigenous food of the region. Therefore, indigenous food of the region whether it is processed, partially processed or unprocessed if it is meant for human consumption shall be liable to be fit as a product for human consumption.

Product Liability

According to the 2019 Act, product liability means, “the responsibility of the a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold...”⁷¹ And harm in relation to a product means and include ‘personal injury, illness

⁶⁸ Section, 2 (33).

⁶⁹ Section, 2 (21).

⁷⁰ The Food Safety and Standards Act, 2006, 34, India, Section, 3 (1) cl. j

⁷¹ Section, 2(34).

or death'.⁷² To ensure high standard of safety of product, the 2019 Act also provides that 'design' in relation to a product means, "the intended or known physical and materialistic characteristics of such product and includes any intended or known formulation or content of such product and the usual result of the intended manufacturing or other process used to produce such product."⁷³ In fact the 2019 Act has widened its scope to include the design or the unique process, ingredients, knowledge etc. and the final end product i.e. the food including indigenous food if it causes any harm which is personal injury, illness or death due to the consumption a legal liability.

Chapter VI of the Act lays down provisions pertaining to product liability. It provides that product liability action can be brought against product manufacturer or product if the product suffers from the following:

- The product contains a manufacturing defect; or
- the product is defective in designs; or
- there is deviation from manufacturing specifications; or
- the product does not conform to express warranty; or
- the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.⁷⁴

The Act further provides that the product service provider and the seller can be held liable for product

⁷² Section, 2 (22).

⁷³ Cons. Prot. Act Section, 2 (12) (2019).

⁷⁴ Section, 84 (1).

liability if they had failed to take due diligence and care to provide safe service or product to the last probable consumer. Lack of due diligence and care that could cause or injury to the intended consumer must be avoided. It further provides that service provider shall be held liable of product liability or injury, among many others, if he had provided service which was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance; or there was omission or commission or negligence or conscious withholding of any information which caused harm etc.⁷⁵

With regard to seller of product, it provides that seller shall be held liable of product liability, among many others, if he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling; or failed to conform to the express warranty; or he has altered or modified the product; or has failed to exercise reasonable care in assembling, inspecting or maintaining of such product which eventually caused harm to the customer etc.⁷⁶ And depending on the gravity the 2019 Act also prescribes certain offences and penalties including punishment which may extend to life imprisonment in cases where the injury resulted in the death of the consumer.

Provisions for Offences, Penalties and Punishments

Apart from penalty for non-compliance to the direction of the Central Authority the 2019 Act prescribed punishment for three types of offences, namely: misleading advertisement; adulterant and spurious.

⁷⁵ Section, 85 (a) read with (b).

⁷⁶ Section, 86 (a) read with (b), (c) & (e).

Misleading Advertisement

The Act provides that if any manufacturer or service provider indulge in false or misleading advertisement which is prejudicial to the interest of the consumers, he shall be liable for imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees.⁷⁷ On repeated offence he shall be punished with imprisonment for a term which may extend to five years and fine which may extend to fifty lakhs.⁷⁸

Offence of Product Containing Adulterant

To ensure safe products free from adulterant, the Act 2019 envisions that if producer of a product himself or by any other person on his behalf sale or stores or sells or distributes or imports any product containing adulterant shall be liable of punishment by imprisonment and fine depending on the gravity of injury- no injury; mild injury; grievous injury and injury resulting in death.⁷⁹ If the adulterant product does not cause any injury but it is any way found to be adulterated the Act prescribes imprisonment which may extend to six months with fine which may extend to one lakh rupees.⁸⁰ In case the adulterant product has caused injury not amounting to grievous hurt to the consumer, imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees.⁸¹ In case where the adulterant product has caused injury resulting in grievous

⁷⁷ Section, 89.

⁷⁸ *Id.*

⁷⁹ Section, 90.

⁸⁰ Section, 90 (1) cl. (a).

⁸¹ Section, 90 (1) cl. (b).

hurt to the consumer, imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees.⁸² And in cases where the adulterant product has caused injury resulting in the death of the consumer, imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and a fine which shall not be less than ten lakh rupees.⁸³

Offence of Spurious Goods

The Act also envisions that if any manufacturer of product by himself or by any other person on his behalf manufacture for sale or stores or sells or distributes or imports spurious goods, he shall be liable of the offence of spurious goods.⁸⁴ If the spurious goods has not cause any injury but it is any way found to be spurious good the Act prescribes imprisonment which may extend to one months and with fine which may extend to three lakh rupees.⁸⁵ In case the spurious good has caused injury amounting to grievous hurt to the consumer, imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees.⁸⁶ And in cases where the spurious good has caused injury resulting in the death of the consumer, imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and a fine which shall not be less than ten lakh rupees.⁸⁷

⁸² Section, 90 (1) cl. (c).

⁸³ Section, 90 (1) cl. (d).

⁸⁴ Section, 91.

⁸⁵ Section, 91 (1) cl. (a).

⁸⁶ Section, 91 (1) cl. (b).

⁸⁷ Section, 91 (1) cl. (c).

VIII. Conclusion

Indigenous foods culture and habits of the region is slowly gradually getting recognition with the spread of global tourism. As well social media influencers from the region have created indigenous food channels to highlight exotic indigenous foods. These channels have high viewership and attract interests of people from every nook and corner of the. The famous British chef- restaurateur Gordon Ramsey had visited Nagaland state to explore the exotic culinary delicacy of the Naga tribes in 2019. In an interview he had expressed his desire to re- visit Nagaland.⁸⁸ Patronisation by celebrity like him will go a long way in further enhancing the popularity of the food tourism of not only the Naga culinary exoticism but would foray gradual exploration of traditional culinary skills of other indigenous communities.

As already discussed, indigenous foods are part of traditional knowledge of the communities which has been passed on from generations and generations, it is but relevant to articulate that there is huge scope for development of robust IPR regime in the region. The spices, herbs and other plant materials and the unique and peculiar mode of traditional food not only provide nutrition to the body but also have intrinsic medicinal and therapeutic values. If this are not brought under strict IPR regime, there are chances of them appropriated or bio-pirated by entities with vested interest. Therefore, in order to preserve, protect and document indigenous food of the

⁸⁸ PTI, I am coming back to India: Celebrity Chef Ramsay Gordon, Business Standard, July 29, 2019, 1200 IST https://www.business-standard.com/article/pti-stories/i-m-coming-back-to-india-celebrity-chef-gordon-ramsay-119072800192_1.html/.

region it is pertinent to develop robust IPR framework for indigenous food TK Digital Library. As well TKDL will prove to be an effective tool against bio- piracy.

It has been established in this paper that some of the indigenous food of the region have aspects of mysticism, as well mandatory use of precise knowledge and intricate traditional knowledge. Misjudgement of plant varieties or mushrooms or mode of fermentation had, in rare cases, led to grievous injury which has led to hospitalisation. In some extreme cases, it has even led to the death of the consumer. Due to the absence of clearly defined legal regime of consumer protection and the notion of legal science still at being a nascent stage among majority of the indigenous tribal communities there is also complete ignorance about consumer rights. As there is no legal accountability of the manufacturer, the gatherer and seller of the food produce or products, exploitation of consumer rights and abject absence of consumer rights to legal recourse is the norm in the region.

In one unreported incident in the Southern Manipur, a young bride was declared death by the neighbourhood on the claim that she had consumed poisonous wild mushroom while no other family members were affected. One never knew the death could have been covered up under the guise of accidental consumption of poisonous wild mushroom. It is, therefore, submitted that romanticising of tribal innocence and simple ways of life needs an overhaul. Like any other community, indigenous tribal communities also have good people and bad people, as well as shrewd and cunning people with vested interests who know how to manipulate and take advantage of the absence of clearly defined legal system. It is a clarion call that if exotic food tourism of the

indigenous communities has to be marketed, attempt must be made as a matter of policy to set up accountable legal regime which will ensure the preservation and protection of consumer rights not just in spirit but in letter and spirit. Anything lesser than this will tantamount to discrimination and abrogation constitutional spirit of right to equality and right to life.

CHAPTER-13

INDIGENOUS AND TRIBAL RIGHTS AND ILO CONVENTION: A CRITICAL OVERVIEW

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I. Introduction

Indigenous peoples across the world share common history of discrimination and mistreatment. A range of problematic practices has forced indigenous peoples to margins of the societies in which they live. Moreover, there has been reluctance to recognise, both at international and domestic level, collective rights by which indigenous peoples can affirm their equal worth and dignity as distinct group. On the other hand, historical injustice necessitated the demand for exclusive legal provisions, which could protect and promote distinctive identity of indigenous communities. The voice of indigenous peoples has been recognised in the ILO Conventions on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples, 2007. This chapter aims to critically analyse the provisions of the ILO Conventions

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forming important component of indigenous rights regime in international law.

II. Indigenous Rights under the ILO Regime

A. Background

The question as to why do a body such as the International Labour Organization (ILO) enter into the regulation of indigenous peoples is both obvious and important. Or in other words what is the interest of the ILO on the indigenous people's issues? The ILO advanced interest in 'protection of indigenous workers' may be explained as the consequence of the interaction between, observes Luis Rodriguez-Pinero, "organization ill-defined mandate to procure 'social justice' with the enlightened initiative of number of international bureaucrats of the possibility of combining a 'social justice' and the pervasive continuity of colonialism."¹

From the standpoint of official historical account, from the very inception in 1919, the ILO has been solicitous about the dismal condition of indigenous and tribal peoples. In short run, by the year 1919, it commenced its survey on the condition of indigenous

¹ Luis Rodriguez-pinero, indigenous peoples, postcolonialism, and International law: the ILO regime (1919-1989), 23 (2005); see constitution of the international labour organisation, part xiii of the treaty of peace between the allied powers and associated powers and Germany, versailles, 28 June 1919 (entry into force:10 april 1920), 225 CTC 196 (1919) (*hereinafter*, 'ILO constitution') preamble para 1 (stating the principle that 'universal and lasting peace can also be established only if it based upon social justice').

workers,² and in 1926 the ILO's Governing Body established a Committee of Experts on Native Labours to prepare universal norms for the safeguard of the indigenous workers. Their work was instrumental and foundational for the adoption of a number of Conventions, including the Forced Labour Convention, 1930 (No. 29) as well as the other Convention more straightforwardly engaging issues relevant to indigenous workers.³

The ILO official history, however, fails to notice the fact that the organization's concern for emancipation of indigenous workers was colonial in nature. Van Daele, identifies some of the ulterior motives behind ILO proactive steps in protecting indigenous peoples as follows: (i) reforms were part of 'civilization' mission targeted on indigenous peoples so as to prepare them for next educative stage; (ii) the regard for indigenous labour was part of a tactic to prevent the popularity and rise of communism in colonies and the Southern hemisphere; (iii)

² ILO, International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (107)*, Report VI (1) 75th Session 1988, 3 (Geneva, 1988).

³ All three instrument – the *Convention Concerning Forced or Compulsory Labour, 1930 (No.29)*; *ILO Recommendation No 35 (1930) Concerning Indirect Compulsion to Labour*; and the *ILO Recommendation No.36 (1930), Concerning the Regulation of Forced or Compulsory Labour*, collectively constituted the Native Labour Code. The other prominent ILO recommendation or convention of that period were: *ILO Recommendation Concerning the Progressive Elimination of Recruiting, 1936 (No46)*; *ILO Recommendation Concerning Labour Inspectorates for Indigenous Workers, 1939 (No 59)*; *ILO Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers, 1936 (No 50)*; *ILO Convention Concerning the Regulation of Written Contracts of Employment of Indigenous Workers, 1939 (No 64)*; *Convention Concerning Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers, 1939 (No 69)*.

by initiating a indigenous labour policy it wished to elude potential racial warfare at global level .⁴

The ILO instruments of 1930s shared the common objective of ‘disciplining of the exploitation’ of ‘indigenous workers’ according to ‘civilized’ standards, with the implicit effect of legitimizing the exploitation.⁵ Thus, ILO’s first colonial discourse adopted the ‘dynamic of difference’ articulated by international law to justify colonialism. It was done through narratives of western ‘civilization’ expressed in the form of economic welfare of labourers.⁶ The ILO colonial discourse can be better understood if

⁴ J. Van Daele, *Industrial States and Transnational Exchanges of Social Policies: Belgium and ILO in the Interwar Period*, in Sandrine Kott And Joelle Droux (Eds.), *Globalizing Social Rights*, (2013).

⁵ For example, ILO *Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers, 1936* (No 50) fell short of banning the recruitment of ‘person who do not spontaneously offer their services’ , See Art 2(a) of the convention. On the contrary it subjected this practise to number of formalities and ‘humanitarian’ considerations, Art 11-16. Further, *Convention Concerning Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers, 1939* (No 69) did not automatically abolish the widespread colonial practice of penal sanctions for breach of contracts, but rather stated that the principle that this practise should be abolished ‘progressively as soon as possible’ , Art. 2(1).

⁶ Antony Anghie defines ‘dynamic of difference’ as “the process of establishing the gap between two cultures and then seeking to bridge the gap by developing techniques to normalize the aberrant society”. See, Antony Anghie, *Imperialism Sovereignty And Making Of International Law*, 4 (2005); Antony Anghie, *The Evolution Of International Law: Colonial And Postcolonialrealities* In Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (Eds.), *International Law And Third World: Reshaping Justice*, 38 (2008).

analysed from the perspective of international society interest's in the fate of indigenous peoples. The internationalization of the 'indigenous problem' as a matter of global concern requiring concentrated international action, took place within the framework of an emerging international regime constructed around the dubious objectives of 'development'.

Luis R. Pinero points out that the outgrowth of the UN development regime is usually associated with Truman's Four-Point Programme⁷, delivered in 1949-the same year in which Montevideo Plan of Action was adopted. And, also in that year the 'Expanded Programme of Technical Assistance' (EPTA) was set up within the UN

⁷ United States of America President Harry S. Truman in his inaugural address on January 20, 1949 expressed his now famous "Fourth Point" :

"I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspiration for a better life. And, in cooperation with other nations, we should foster capital investment in areas needing developing. Our aim should be to help the free peoples of the world, through their own efforts, to produce more food, more clothing, more material for housing, and more mechanical power to lighten their burdens. We invite other countries to pool their technological resources in this undertaking. Their contribution will be warmly welcomed. This should be a cooperative enterprise in which all nations work together through the United Nations and its Specialized Agencies wherever practicable. It must be world-wide effort for the achievement of peace, plenty, and freedom."

See, Hooker A. Doolittle, *Point Four Programme*, 2 Pakistan Horizon 181 (1949); D McFadden, *The Evaluation of Development of Progrmmes*, 34 The Rev. Econ. Stud. 25-50 (1967); Robert H Ferrell, *Truman's Face in History*, 18 Rev. Am. Hist. 1-9 (1990); Thomas G. Paterson, *Foreign Aid under Wraps: The Point Four Programme*, 56 Wis. Magz. Hist. 119-126 (Winter 1972-73).

framework-the immediate predecessor of the United Nations Development Programme (UNDP). Established on the idea of 'international economic and social co-operation' set forth in the UN Charter, the EPTA was established by the General Assembly and ECOSOC, with the express purpose of bringing 'economic and social development' to 'underdeveloped' countries.

The United Nation was cardinal in the formulation of the discourse on development. As James Ferguson observes 'development' became 'a central organizing concept' of the scholarly and political domain of the post-war era.⁸ 'Development' as a concept was composed of complex set of principles, institutions and practices Conceptualisation around an intricate set of principles, institutions and practices, 'development'. It was established as instructive tool for understanding the world, while creating the object of which it spoke: namely 'underdevelopment'.⁹ It seems as if indigenous population entered the agenda of international organisation as an object of the discourse of development.

In 1949, the U.N. General Assembly adopted a resolution recommending that the Economic and Social Council conduct a study on the "social problem of the aboriginal population and other under-developed social groups of the American Continent."¹⁰ This was followed by

⁸ James Ferguson, *the anti-politics machine: "development," de-politicization and bureaucratic power in Lesotho*, 4 (1990).

⁹ Arturo Escobar, *encountering development making: the making and unmaking of the third world to knowledge as power*, 39-44 (1995).

¹⁰ UNGA Res 275 (III) (11 May 1949). The resolution is founded on the opinion that 'there exist on the American continent a

two resolution by ECOSOC. However, these resolutions did not lead to any clear result but it became part of institutional framework that marks the beginning of the Andean Indian Programme, the most visible expression of such concerns in the post-war era.¹¹

The discussion in the UN context reveals that States regarded the persistence of indigenous people's distinct ways of life, and their depleted standards of living, as a matter of 'humanitarian' concern—a striking instance of the 'backwardness' that the international community was called on to combat in the post-war era —and also as a major barrier to the objective of 'development' and

large aboriginal population and other under developed groups that is necessary to study in the field of international cooperation'. See *ibid*, preamble para 2 (emphasis added). The resolution called on ECOSOC to conduct a study on the 'special problem' of American 'aboriginal groups and [other] Underdeveloped social groups'. *Ibid*, preamble at para 1 (emphasis added). The study should be undertaken with the assistance and co-operation of 'the special agencies concerned with the 'Instituto Indigenista Interamericano', *ibid*. Reference to the 'underdeveloped groups' derives from the proposal tabled by the Haitian government, that the study should also incorporate all the 'coloured population of the continent'. See, UN Doc A/AC.24/27; GA Ad Hoc Political Committee: Official records, UN Doc GA/III/1949,376-7 also cited in LUIS R PINERO, *supra* note 1 at 84.

¹¹ The Andean Indian Programme (hereinafter AIP) was aimed to improve the standard of living of indigenous groups along with objective of 'integration'. The AIP involved other international bodies, such as FAO, UNESCO, WHO and later UNICEF, with ILO being responsible for its general management. The programme was implemented in Bolivia, Ecuador and Peru and later it was extended to Argentina, Chile, Columbia and Venezuela. See, Antony Alcock: *History of the International Labour Organization*, 251 (1971); J. Rens, *Le Programme* and in: *Contribution de l'OIT à un project-pilote de cooperation technique multilaterale* (1987).

‘modernization’. Hence, indigenous problem was theorized as a problem of ‘underdevelopment’, falling within the objectives of the recently began system of development aid, to the ruling out of alternative approaches to indigenous issues.¹²With the above background, this part of the Chapter proceeds to critically analyse the two ILO Convention dealing with indigenous rights.

B. The ILO Convention No. 107

In 1957, in the course of the 39th session of the International Labour Conference, the Committee on Indigenous Population (Conference Committee) reviewed the draft transcript of a convention and a suggestion regarding indigenous population in independent countries. Based on the member states’ response of a questionnaire, the International Labour Conference adopted at its 40th session the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi Tribal Population in Independent Countries (Convention No. 107) and its accompanying Indigenous and Tribal Population Recommendation (Recommendation No. 104). Convention No. 107 was the first international convention that concentrated completely on the rights of indigenous peoples in a comprehensive manner.

It is worth mentioning that final form of the legal standards in the Convention No. 107 was target of sharp disagreement from the beginning of its drafting process. Among other issues, there was debate over the ultimate

¹² Statement by Matienzo, Bolivian government representative, GA Ad Hoc Political Committee: Official Records, 53rd session, UN Doc/GA/III1949, 375.

character of final standards to be adopted i.e. policy versus law or recommendation versus Convention.¹³ Strong supporters of the option of recommendation included the governments of Canada, New Zealand, and the United States. Luis R. Pinero summarizes the arguments of these groups against the convention. He observes, firstly and most importantly, a number of delegates dwelled on the *technical* —as distinct from *legal*—nature of the standards under discussion. The logic behind such an argument was that a convention “[would be] too legalistic as an instrument...and would not be workable in practice”.¹⁴

Second, recommendation was considered flexible and more suited handling an issue where extremely divergent circumstances existed among member States. As in the words of one of the delegate: “The instrument should be as flexible as possible to meet the variety of situations in which indigenous peoples lived”. Usually considered not legally binding instruments, recommendation does not create formal, enforceable commitments to implement the standard set forth therein.¹⁵

¹³ According to the ILO Constitution, international labour recommendation only provides the duty of ‘submission’ to the competent authorities, and, occasionally, to periodic reporting on their implementation. See, ILO Constitution, *supra note 1*, Art. 19(6).

¹⁴ Statement by Mr Finley, Liberian government delegate, ILC, International Labour Conference, 39th Session (Geneva: 1956), Minutes of the Committee on Indigenous Populations (1956) at ILC 39/CIP.VII/4.

¹⁵ The USA noted: “The problems to be faced in each country differs so greatly and the means at the disposal of each country vary so much that it would appear necessary to have

Thirdly, procedure of a recommendation was also supported in terms of simplicity and effectiveness. This logic was linked to a larger critique concerning the ILO's standard setting policy, historically, identified by an unrestrained over production leading towards a low level of effectiveness of both the standards and the organisation's related supervisory procedures.¹⁶

However, during the plenary meeting, an overwhelming majority of delegation consolidated in favour of a convention. Arguments in favour of the Convention essentially focused on the idea that the situation of the world indigenous populations required a formal, solemn commitment on the part of international community. A commitment grounded in feeling of human solidarity well beyond the somehow bare prescription of recommendation.¹⁷

flexibility in planning and executing measures to accomplish the protection and integration of these populations.”

See, Replies from the Government in ILO Off.; Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries, Report VI(2), International Labour Conference, 40th Session (Geneva: 1957) , p.9 cited in Alexandra Xanthaki, Indigenous Rights And United Nations Standards: Self-Determination, Culture, Land, 50 (2007).

¹⁶ Statement by Mr Hodgets: “[t]he more the ILO produced lengthy and detailed instrument, the more they are likely to receive less effective implementation”, See, Minutes of the Conference Committee, *supra note* 14 at ILC39/CIP/IV/2 cited in Luis R. Pinero *supra note* 1 at 136.

¹⁷ See, Statement by Puig Montenegro, Guatemala workers' delegate, “Convention implied responsibility for governments [whereas] [r]ecommendations are often not effective”, See, Minutes of the Conference Committee, *supra note* 14 at 39/CIP/VI/3.

The Conference's final decision was the 'mixed formulae' of adopting a convention backed by a recommendation. This kind of mixed formulae is not unusual in the ILO's standard setting pursuit. Despite the fact that the standards in Convention No 107 were endowed an international legal status. They were primarily designed as technical recommendations for government's development policy concerning indigenous groups, defining few obligations for ratifying States and affirming fewer rights for the population concerned. In the words of Luis R. Pinero, "the convention thus landed on the list of what would become known as 'promotional convention', *rarae aves* half way between binding convention and policy recommendation".¹⁸

C. Provisions of ILO Convention No.107

Scope of the Convention

One of the outcomes of the drafting of Convention No 107 and Recommendation No 104 was the architecting of the first international legal definition of 'indigenous' in the *modern* sense.

The final definition incorporated in Article 1 of both Convention No. 107 and Recommendation No.104 reads as follows:

This Convention applies to

- (a) Members of tribal and semi-tribal population in independent countries whose social and economic conditions are at a less advanced stage than the stage

¹⁸ Luis R Pinero, *supra note*, 1 at 139.

reached by the other sections of the national community, any whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

- (b) Members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of the nations to which they belong.¹⁹

“For the purposes of this Convention” the definition continues, “the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal, characteristics, are not yet integrated in the national community”.²⁰

The first paragraph of the abovementioned definition refers to a category, which includes shifting cultivators, and nomadic tribes who may not have ancient relationship with a specific area of land.²¹ Xanthaki, observes that the phrase “less advanced stage” reflects a negative approach on indigenous lifestyles : it is assumed that the majority of the society is at a more “advanced

¹⁹ Convention No. 107, Art. 1 (1); Recommendation No. 104, Art. 1 (1).

²⁰ Convention No. 107, Art 1 (2).

²¹ The use of terms ‘tribal’ and ‘semi-tribal’ represents a good example of penetration of social science understandings into the standard ascribed under the convention. These terms were technical t concept critical to anthropological discourse.

stage” than indigenous peoples. According to the Convention, ‘backwardness’ of these communities prevent them from ‘sharing fully in the progress of the national community of which they form part’.²²She further notes:

[t]he notions of inferiority and superiority serve as basis for the continuation of the oppression of indigenous identities; it is particularly unfortunate when such notions are included in human rights instrument. ²³

The second paragraph of the definition refers to groups characterised as indigenous because of their association with a distinct territory. The element of historical descent is central to this part of the definition. Thus, the paragraph, applies the more apparent, etymological sense of the term ‘indigenous’. This meaning, and the legal consequences therein, was the subject of debate during the deliberations of the ILO instruments on indigenous peoples– and still is.²⁴

The Language of Integration

Pursuant to the comprehensive theoretical foundation of the 1957 ILO instruments, the definition of ‘indigenous, tribal and semi-tribal population’ is conceptually conditional on the notion of ‘integration’.²⁵ Article 1 of the Convention provides a guiding information when defining ‘semi tribal population’ as ‘groups and

²² Preamble, ILO Convention No. 107.

²³ Alexendra Xanthaki, *Supra Note* 15 At 53.

²⁴ Patrick Thornberry, *Indigenous Peoples And Human Rights*, 35-40 (1953).

²⁵ Luis R. Pinero, *supra note* 1, at 164.

individuals who are not yet integrated in the notional community'.²⁶

This 'not yet integrated' represent the real pith and substance of the ILO definition of indigenous population. The component of non-integration as a definite benchmark of the definition of 'indigenous' is regularly found in the ILO's texts prior to 1956, enlaced with the concept of the 'indigenous problem'. In reference to the Office's report to the first session of the Committee of Experts on Indigenous Labour, the problem of 'indigenous workers' is the difficulties associated with a segment of population, which, due to historical reasons, are habitually not fully integrated into the social and economic life of national community.²⁷

The ILO thus linked the definition of 'indigenous' to the similar insight of an 'indigenous problem' that had spirited organisations involvement in this issue since 1930s, by which historical or cultural factors where actually sensed as signifier, in a condition of poor integration which precluded these groups from receiving the fruits of 'development'.²⁸

The conceptual dependency between the definition of 'indigenous' and the notion of 'integration' reflect

²⁶ Convention No. 107, art 1(2); Almost same design is found in the preamble, stating that "[t]here exists in various independent countries indigenous and other tribal and semi-tribal population *which are not yet integrated into the national community*", *Id.*

²⁷ *Report of the ILO Committee of Experts on Indigenous Labour, Indigenous Workers in Independent Countries: General Report*, ILO Doc CEIL/I.3.1950 at 5

²⁸ Luis R. Pinero, *supra note 1*, at 164.

temporal dimension of notion of ‘Indigeneity’, coherent with the perceived dynamic character of the process of ‘integration’ and the principle of temporality that circumscribed the protection programme in the convention.

The time dimension of the notion of ‘integration’, propounded as the benchmark yardstick for the definition of the personal scope of the benchmark established in the 1957 ILO instrument. Convention No. 107, argues Pinero, was thus meant to operate only to ‘indigenous’ population that were ‘not yet integrated’. Congruently, the convention shall be infructuous when, by reason of their becoming ‘integrated’ into the mainstream ‘national’ culture, these populations lost their ‘tribal essence’ —and by no means eligible to be qualified as ‘indigenous’ within the scope of the instrument.²⁹

The next obvious question is, what does ‘integration’ signifies in the context of indigenous rights discourse? The term ‘integration’ is capable of varied interpretation depending upon the specific circumstances in which it is used. Instead of homogenous content, the term has multiplicity of sifting, correlated content. Thus, for example, we speak for ‘social integration’, of ‘political integration’, of ‘economic integration’, or of ‘national’ and ‘regional integration’, labelling a multiplicity of social process routinely indicating a method of homogenization of divergent social groups.³⁰

The Conference Committee decided against defining ‘integration’, on the ground that “any definition of

²⁹ *Id* at 165.

³⁰ *Id* at 175.

integration would necessarily be restrictive and therefore might not cover all the many aspects of the problem”.³¹ The term ‘integration’ in the text of the ILO instruments on indigenous population talks of a process. The desired end of this process in the process referred to in the convention as “integration...into the national community”³² and ‘integration into the life of their [indigenous peoples] respective countries’, while the recommendation refers to a horizon of ‘adaptation...in modern society’. So understood ‘integration’ describes a process of socio-cultural change that can be either natural or induced.

Luis R. Pinero analyses the meaning of ‘integration’ in the ILO instruments on indigenous populations, according to three basic objectives that formed the basic normative consensus underlying those instruments: development, acculturation, and equality.

Firstly, he observes that if the ILO instruments on indigenous populations are subjected to close scrutiny, the perception rises that the means of ‘integration’ are not other than the means of ‘development’. Apart from the general statement of policy and the provisions concerning the protection of indigenous peoples, cultures and property, the main body of the instrument is devoted to the definition of general objectives of economic and social development in various fields, including the promotion of handicrafts and rural industries, health, and education—

³¹ ILO, *Report IV* (40th session 5 June 1957) cited in Alexandra Xanthaki, *supra note* 15 at 54.

³² Convention No. 107, art 2 (3).

all fields that would fall within the modern understanding of 'social' or 'community development'.³³

Second, tightly connected with the idea of 'development' is the idea of induced cultural change. He continues to observe that the objective of 'acculturation' was implicit in the entire anthropological conceptual ammunition incorporated in Convention, aimed precisely at promoting effectiveness of economic development programmes. The role of applied anthropology is critical in this sense.³⁴

The intention of 'integration' as a strategic acculturation is constructed in the convention by negative mention to two associated concepts, which draw line between scientific and unscientific ways of 'integration'. First, being *artificial assimilation* and second, of 'forced integration'. It is important to understand that more than specific concerns about the human rights of indigenous populations this provision was guided by anthropological concern on policy effectiveness: 'forced acculturation' was perceived simply as 'counterproductive'.³⁵ It should be

³³ Convention No. 107, art 2(2)(b); The broad aim of 'development' is reiterated in Article 6 of the convention, declaring that betterment of the status of life, work and degree of education of indigenous peoples shall be given *high priority* in programmes for the *overall economic development* of areas populated by indigenous peoples, See, Convention No. 107, art 6; Further, the objective 'development' is advanced by way of promoting handicrafts and rural industries which as per the convention, 'shall be encouraged as factors in the economic development of the population concerned'. See, Convention No 107, art 18 (1); Luis R. Pinero, *supra note 1*, at 164.

³⁴ Luis R. Pinero, *supra note 1*, at 164.

³⁵ Some of the resistance movement like Alcatraz, Wounded Knee, Longest Walk, see Paul Chaat Smith & Allen Warrior,

noted that the framers of the ILO standards on indigenous population limited the uses of force to integration measure but not to other state measures vis-à-vis indigenous population.³⁶

Thus, the whole idea of ‘integration’ is to foster gradual and irreversible cultural change in the society construed by indigenous population. In line with this objective Article 22 of the Convention requires ‘ethnological surveys’ prior to the ‘formulation of [integration] programme’.³⁷ This set up is also visible in the case of recommendation, which advocates that staff working among indigenous groups should be well versed with anthropological and psychological techniques as a prerequisite for reconciling their work to the cultural characteristics of indigenous population; and stressing the need to have scientific research with view to deciding the most suited pedagogy in education and related fields.³⁸

Lastly, Pinero associate ‘integration’ with the international norm of equality and non-discrimination. Article 2 of the Convention manifests the intention of making indigenous peoples “benefit on an equal footing from the rights and opportunities which a national laws or regulation grant to the other elements of the

Like A Hurricane: The Indian Movement From Alcatraz To Wounded Knee; Luis R. Pinero, *supra note* 1, at 188.

³⁶ See, Statement by Acland, Canadian delegate, International Labour Conference Committee on Indigenous Population, 40th session (Geneva, 1957): Minutes of the Conference Committee at ILC 40/CIP/V/4

³⁷ See, Convention No 107, art 22(2); The same understanding is required in the convention in connection with designing of vocational programme, health services, and educational programme, See Convention No 107 art 17(2), 20(3).

³⁸ Recommendation No 104, arts 27, 29(1), art 20(3) & art 16.

population”.³⁹ The author attempts to explain that ‘integration’ as equality has two different facets. First, a progressive proposition based on principle of non-discrimination against indigenous peoples, while the condition of ‘absence of integration’ symbolizes a situation of discrimination that result in compromising with ‘principle of equality’.⁴⁰ Article 15 of the Convention incorporates the principle of non-discrimination ‘between workers belonging to the population concerned and other workers’ in employment and remuneration; in access to public social services; and in rights of association. There are certain other articles of the Convention, which also provides non-discrimination qualification in particular sectors of government undertakings, as well as number of arrangements for positive action plan in some of these fields.⁴¹

Second, the principle of equality also bears a discrete structure in dealing cultural heterogeneity. In this context ‘equality’ has its connection with historical-

³⁹ Convention No 107, art 2(2)(a) (emphasis added).

⁴⁰ Convention No.107, art 15 (declaring the principle of non-discrimination “between workers belonging to the population concerned and other workers”). The convention identifies four premises of anti-discrimination as (i) equal opportunity in employment; (ii) equal pay for equal work; (iii) protection and safeguarding of social and health security and (iv)right to association and related rights.

⁴¹ Convention No 107, art (9) (denouncing the forced labour of indigenous populations “[e]xcept in cases prescribed by law for all citizens”); art 14 (“ National agrarian programmes shall secure to the population concerned treatment equivalent to that accorded to other sections of the national community”); art 16 (“Persons belonging to the population concerned shall enjoy the same opportunity to acquire education at all levels on a equal footing with the rest of the national community”)

normative discourse of the first UN human rights regime, a framework distinguished by the potent contention of the principles of equality and non-discrimination, pronounced overtly as a substitute to the League of Nation's minority regime. The motive behind the promotion of equality and non-discrimination principles was assimilation of diverse groups into majority dominant culture. Under this scheme, the understanding was that with focus on individual rights at global level will led to disappearance of minority groups in the due course of time. Hence, the issues of 'nationality' would desist to challenge world stability.⁴²

The aims and belief of the early international human rights course was in accordance with political plan of 'universal citizenship' advanced by classic Liberal theory, usually transforming the demand of equal right into the enforcement of an inflexible legal framework coupled with unitary mode of political governance structure, whereas divesting cultural distinctness of any institutional construct except for private realm.⁴³

Thus, the ILO Convention should be studied with the understanding that it is a part of international human rights regime for the 'prevention of discrimination' rather than 'protection of minorities', where discrimination is assumed to trigger schism in a unitary citizenry. Advancing the same ideology, an ILO report suggests 'integration' should ultimately be constructed as a process

⁴² Luis R. Pinero, *supra note 1* at 196.

⁴³ Iris M. Young, *Polity and the Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *Ethics* 250,250 (1989).

of “facilitat[ing] the access of [indigenous] populations to full membership in the national community”.⁴⁴

Protection of Indigenous Rights

In spite of its integrationist agenda Convention No. 107 declares the protection of many indigenous rights. There are number of provisions focusing on different aspects such as protection of cultural and religious rights of indigenous peoples; protection of customary law and political design; protection of indigenous land tenure etc.

Special emphasis is given in the Convention to rights related to life, liberty, and the prohibition of slavery. According to Alexendra Xanthaki, this was so, partly because these were core issues baffling indigenous population, partly because they are related with the mandate of ILO and partly because these were the least controversial rights.⁴⁵ Unfortunately these provisions are still material to indigenous realities. For example, Patricia Trindade observes that indigenous Amerindians were forced to work in unsafe environment. They are enslaved to work in sugar fields in the State of Mato Grosso do Sul.⁴⁶

Article 9 forbids compulsory service, whether paid or unpaid. This has been particularly relevant in countries where concept of ‘debt bondage’ still prevails. In Peru, lately a research has verified the existence of bonded

⁴⁴ *Report of the Committee of Experts on Indigenous Labour, Living and Working Conditions of Aboriginal Forest-Dwelling Populations* ILO Doc CEIL/II2, 1954 at 3.

⁴⁵ Alexendra Xanthaki, *supra note* 15 at 57.

⁴⁶ Patricia Trindade Maranhao Costa, *Fighting Forced Labour: The Example Of Brazil*, 45 (2009).

labour in relation with unauthorised logging activities in the country's Amazon basin and large number of indigenous peoples are forced to suffer.⁴⁷ The prohibition of Article 9 is in accordance with international instruments on slavery, including the 1930 ILO Forced Labour Convention.

Article 10 of the Convention No. 107 summarizes the primacy and frailty of the text. The article begins by indicating that indigenous peoples should not be arbitrarily arrested and they should have a right to legal recourse. In the Conference Committee, it was pointed out that this article 'merely affirmed that the general principle should apply to them...defending themselves against possible abusive practises by giving guarantees established by law'.⁴⁸ On the other hand one could hold that the pertinent provisions in general human right framework make Article 10 superfluous.

Rodolfo Stavanhagen observes that the State penalties are not invariably proper for indigenous people. Large number of indigenous cultures do not endorse the pre-eminence of state criminal justice system on punishment and imprisonment, but prefer to value restitution, indemnification, and restoration of communal harmony. Indigenous peoples would gain from these kinds of reparation modalities. Article 2 para 3, seek to propose positive action with respect to sanctions. The article

⁴⁷ Garland Bedoya & Silva-Santisteban, *El Trabajo Forzoso en la Extraccion de la Madera Amazonia*, ILO Working Paper No. 40, 2005.

⁴⁸ *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries*, Report VI(1), International Labour Conference, 40th Session (Geneva: 1957), p.17

becomes more relevant as indigenous people's representative were unsuccessful retain such provision in the UN Declaration of Rights of Indigenous Peoples, 2007. The Convention also suggest states to consider customary laws of indigenous peoples ⁴⁹ and to use the indigenous ways of social control and indigenous customs in punitive cases.⁵⁰ However, these provisions are subject to their agreeability with national system.

The Protection of Indigenous Lands

Part II of the Convention incorporates provisions recognizing land rights. The two central articles in this part are Article 11, which 'recognizes' indigenous peoples' 'right of ownership' of their traditional lands; and Article 12, systemizing situations of eviction of those peoples from their traditional land.

Article 11 of the Convention manifested the assertions of indigenous peoples right to the land in the ensuing manner:

The right of ownership, collective or individual, of the populations of the members concerned over the lands which these population traditionally occupy shall be recognised

The interpretation of individual and collective or cooperative ownership to indigenous peoples was highly debated during the *travaux*.⁵¹ The Western nations stressed on the significance of individual ownership. The

⁴⁹ Convention No. 107, art 7.

⁵⁰ Convention No. 107, Art 8.

⁵¹ Alexandra Xanthaki, *supra note* 15 at 60.

British government argued that the rights of non-integrated segment of the society and the economic prosperity of the non-integrated society in general may not certainly, or always, be optimally obtained by the construction or continuation of collective land ownership such as those which seem to be conceived in Article 11 of the Convention.

However, the Communist nations advanced the idea of collective ownership. For example, USSR argued that the Convention should incorporate provisions which enable indigenous peoples to acquire or lease lands in all parts of country; that in locations occupied by indigenous populations where there is inadequacy of land as a result of usurpation or colonisation, there should be arrangements for apportionment of lands in favour of indigenous populations.

Though the Convention mentions about—but does not underscore—the significance of community ownership. As a result of the provision draws major criticism from indigenous peoples and their patrons. Notwithstanding, one must always reckon that in 1957 the Convention incorporated collective land rights, while at present there are many countries, which show their reluctance in accepting collective ownership right for indigenous peoples. Moreover, the Article operates by using the expression ‘recognised’ rather than the expression ‘grant’. Consequently, it implies that the rights of ownership hitherto remained with indigenous peoples, and it was not bequeathed through the State action.

According to the provisions, if the land is ‘traditional’, occupation must turn into ownership. The CEACR has observed that occupation need not necessarily

be authorised by the government; the Committee in its report noted:

Traditional occupation, whether or not it has been recognised as authorised does create rights under [Convention No.107]. In, addition, use of forests or wastelands, title of which is held by the Government, or hunting and gathering –again, whether or not this has been authorised –satisfies the use of the term ‘occupation’, and if it is traditional, it meets the requirement of [Article 11 of the Convention]. The term ‘traditional occupation is’ is imprecise, but it clearly conveys the lands over which these groups’ land rights should be recognized are those whose use has become part of their life.⁵²

The quality and effectiveness of the declaration of indigenous peoples ownership right in the Convention is better exposed by Article 12, which explains dubious trait of this declaration by enabling the opportunity to remove indigenous peoples from their traditional lands by reason of state conventional policies relating to national security, or in the national interest related to economic development and health of the indigenous population.⁵³ The article also provides for compensation for forcedly removed indigenous individual either monetary or in kind or lands of quality equal to that of seized by the state.⁵⁴ However, the provision does not appear to care much about the unwholesome consequences of displacement

⁵² Committee of the Experts on the Application of Convention and Recommendations (CEACAR), *Individual Observation concerning Convention No. 107, Indigenous and Tribal Populations, India*, Publication: 1990, para 16 cited in Alexandra Xanthaki, *supra note* 15 at 62.

⁵³ Convention No. 107, Art. 12(1).

⁵⁴ Convention No. 107, Art. 12(2).

upon indigenous peoples or culture, rather it seems to branch from a desire for equality with non-indigenous segment of population and thus envisaged in wholly monetary terms.

The Convention also demands regard for indigenous customs in the transfer of proprietorship to the extent that such custom satisfy the needs of indigenous population and is not detrimental in their social and economic development. However, the power to decide as to what is detrimental to indigenous people lies with the State.

The above study indicates that the Convention has some substantive and significant propositions and guidelines concerning indigenous land rights. However, most of the articles are drafted with a paternalistic tone and the Convention itself provide escape route for states to compromise with rights of indigenous peoples.

Education and Language

The Convention No. 107 also lays down provisions dealing with education and cultural rights of indigenous peoples. However, in doing so, the primary objective is to integrate indigenous communities under the guise of 'equality' and non-discrimination rather than persevere and promote education and cultural aspects of indigenous identities. The general formula for the right to education is set up by article 21 which provides that indigenous peoples must "have the opportunity to acquire education at all level on an equal footing with rest of national community".⁵⁵ Noxiously, dedicated to its integrationist agenda, the Convention No.107 overlook to

⁵⁵ Convention No. 107, Art. 21.

institutionalise the education of indigenous culture as one of the goals of educational rights of indigenous peoples; instead, as per Article 22 (1) the main aim is “the process of social, economic and cultural integration into the national community”. Though Article 23 progressively attempts to recognise indigenous culture by observing that “appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language”.⁵⁶ Further, it emphasised on providing primary education in vernacular or indigenous language to the children of indigenous population. This is an important provision as studies shows that mother tongue-based instruction can boost a child’s confidence.⁵⁷ But, the scope of the provision if limited by addition of paragraph 2, which states:

Provision shall be made for the progressive transition from mother tongue or the vernacular language to the national language or one of the official languages of the country.

Such an addenda is part of larger linguistic imperialism⁵⁸ coupled with integrationist objectives.

⁵⁶ Convention No. 107, Art. 23.

⁵⁷ R. Appel, *The Language Education of Immigrant Workers’ Children in the Netherlands*, In *Minority Education From Shame To Struggle*, 57-78 (T. Skutnabb-Tangas, & J. Cummins eds., 1988); Stephen C. Wright & Donald M. Taylor, *Identity and Language of the Classroom: Investigating the Impact of Heritage versus Second Language Instruction in Personal and Collective Self-esteem*, 87 *J. Educ. Psychol.* 241-252 (1995).

⁵⁸ Phillipson functional definition of linguistic imperialism is that “the dominance of English is asserted and maintained by the establishment and continuous reconstitution of structural and cultural inequalities between English and

Generally believed that the Convention No. 107 has completely lost its relevance as study of handbooks resolved to support cause of indigenous people's rights often embody limited or misses out the Convention No.107 completely.⁵⁹ However, the present status of this Convention No. 107 is that it is still legally binding on eighteen states.⁶⁰ The Convention is a pioneering instrument, nevertheless its discourse was always on 'integration' than on rights. The history of emergence of Convention No.107 in international law also marks the beginning of *sui generis* regime under the modern international human rights discourse.

The ILO Convention No. 169

Resurrection of indigenous issues at global level in the late 1970s under the patronage of United Nations gave life to the possibility for the Office's resolution to rethink and revise the Convention No.107, which culminated in the enactment and adoption of the ILO Indigenous and Tribal Convention, Convention No. 169.

Swepton and Tomei, while analysing the historical reasons for revision of the Convention No. 107 notes that "[u]rged by the indigenous peoples and various bodies in

other languages", See, Robert Phillipson, *Linguistic Imperialism* 47 (1992).

⁵⁹ For example, S. James Anaya authoritative work, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2004) does not refer much about the Convention No. 107.

⁶⁰ Available at <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>. The eighteen countries are: Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, EL Salvador, Ghana, Guinea Bissau, Haiti, India, Iraq, Malawai, Pakistan, Panama, Portugal, Syrian Arab Republic, Tunisia.

the UN system, the Governing Body of the International Labour Office decided to begin the work that led to the adoption of a revised Convention in 1989”.⁶¹

Pinero contends that the decision for appraisal of the Convention No. 107 was basically an internal driven process motivated by events outside the ILO.⁶²

The interlinked external factors which played major role in setting the stage for reforms are, first, many indigenous groups had strong reservation against the integrationist agenda of the Convention No. 107 and they were not interested to be assimilated to the national culture. Second, there was emergence of voices within the discipline of anthropology where the next generation scholars of critical anthropology attacked the manner in which social science was used as a tool of governmental integrationist policies.⁶³The members of the academia were committed to reform the discipline so that it is not received as something “which relates to Indians [indigenous] as object of study, but rather that which perceives the colonial situation and commit itself to the struggle for liberation”.⁶⁴ Third, cases of atrocities on

⁶¹ L. Swepston & M. Tomei, *The ILO and Indigenous Tribal Peoples*, in indigenous peoples and international organizations 56, 58 (L. van de Fliert ed., 1994) cited in Luis R. Pinero, *supra note 1*, at 264.

⁶² Luis R. Pinero, *supra note 1*, at 258, 265.

⁶³ See, *Declaration of Barbodas*, World Council of Churches, Programme to Combat Racism PCR 1/71. The final Declaration was adopted by the anthropologist participating in the symposium on Inter-Ethnic Conflict in South America, Barbodas, 25-30 January, 1971, available at <http://www.nativeweb.org/papers/statements/state/barbados1.php> [accessed on 05.11.2014].

⁶⁴ *Id.*

indigenous peoples violating their human rights, successively spotlighted by global media, helped to generate public sympathy as well as consolidated indigenous peoples of the world as a new force with an opinion for taking indigenous rights movement to new level.⁶⁵

In 1983, accomplishment of the Martinez Cobo Report established to be promising for gathering UN support for the revision process. The Report supported the revision and concluded that:

[The] ILO should be supported in its effort to effect a revision of Convention No. 107 and recommended No. 104, so as to take into account the wishes and demands of indigenous population, and at the same time work , if competent bodies of the United Nation so decides, towards the adoption of UN Convention on indigenous populations.⁶⁶

The Governing Body's 1984 decision to call a Meeting of Experts on the Revision of Convention No.107, and eventually deciding to uphold the committee's opinion on the agenda of the 1988 and 1989 International Labour Conference pronounced the commencement of process resulting in the revision of the Convention No. 107.⁶⁷

⁶⁵ See, Alison Brysk, *From Tribal Village To Global Village: Indian Rights And International Relations In Latin America* 249-252 (2000)

⁶⁶ The Special Rapporteur on Indigenous Peoples José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, paras. 335 (1985).

⁶⁷ Luis R. Pinero, *Supra Note 1*, At 283.

However, the limited character of the revision was reflected from the very inception as the item on the agenda of 1988 session of the International Labour Conference renders “Partial Revision of the Indigenous and Tribal Populations Conventions Convention, 1957 (No.107)”.

Pinero, baptizes the process of birth of the Convention No. 169 as “original sin”⁶⁸ on the account of the facts that the ILO institutional setting was inadequate for dealing highly sensitive issues such as of sovereignty; self-determination; control over lands and over the use of ‘peoples’ and participation of indigenous peoples organization was restricted due bureaucratic attitude of the ILO officials they were not serious to build consensus with indigenous peoples in relation to revision of the Convention No.107.⁶⁹

It was on 26th of June 1989, the International Labour Conference adopted the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (Convention No.169), which came into force on 5th of September, 1991.⁷⁰

⁶⁸ *Id.* At 300.

⁶⁹ *Ibid.* At 312—313; Discussion On The Reserve Attitude Of ILO Officials Toward The Participation Of Ngo’s In Internal Matters, See, E. Haas, *Beyond The Nation-State: Functionalism And International Organization*, 206-208 (1964).

⁷⁰ Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 Okla. City U. L. Rev 677 (1990).

The Underlying Trajectory of the Convention No.169

In spite of born from DNA of the Convention No. 107 the new convention had certain distinctive characteristics which could be deduced from the scope revision of Convention No. 107 itself which read as:

- (a) modifying the basic approach of the Convention away from integrationism as the principal objective of programmes dealing with indigenous and tribal populations, and its replacement by the principles of effective involvement of these peoples in decisions affecting them and respects for their cultures, ways of life and traditional institutions.
- (b) re-examining the land rights provisions (Articles 11 to 14) in order to provide additional procedural safeguards in case where displacement from their traditional territories is being contemplated, in relation to the restitution of lands they have lost, to required demarcation of the lands to which they have rights, and to consider the extent to which they should have rights to sub-soil, water and other resources pertaining to these lands,
- (c) re-examining Article 15 of the Convention concerning protection of the labour of these peoples in order to determine whether additional safeguards are required.⁷¹

⁷¹ ILO, *Fifth Item on Agenda: Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention No. 107*: Addendum, ILO Doc/GB 234/5/4 Add, Governing Body 234th Session (Geneva, 1986).

In the midst of controlled change, the Convention No.169 was significant in the sense that it registered the fall of integrationist agenda. As the preamble to the Convention No.169 paragraph 4, goes to read that it is “appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of earlier standards”.

The ILO convention on Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) was endorsed by drafting committee by consensus, and eventually adopted by the International Labour Conference on 27 June 1989.⁷²

In spite of absence of ‘integration’ in the Convention No. 169, it was alleged by indigenous representatives that the convention fell short of indigenous peoples expectations.⁷³ The compromise, in reference to the indigenous peoples demand, reflected in the normative structure of the Convention No. 169 pertains to terminological issues. Firstly, non-use of ‘peoples’ as understood in terms of international law for the right of self-determination was tremendous blow from the indigenous peoples perspective.⁷⁴ Second compromise was on the use of the word ‘territories’ as the governments because of its inference in terms of ‘national sovereignty’

⁷² The Convention No. 169 was adopted with following vote pattern: 328 votes in favour, 1 against and 49 abstentions. *Ibid*, 32/6. See. P. B. Larsen & J. Gilbert, *Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future*, 24 *The Int’l J. Human Rts.* 83-93(2020).

⁷³ ILC, International Labour Conference, *Records of the Proceedings*, 76th Session 31/6ff (Geneva, 1989).

⁷⁴ The Convention No.169, Art 1(3).

vehemently opposed the term.⁷⁵ As a compromise formulae text adopted use of terms “lands and territories, or both as applicable” and the term ‘territory’ as the *Report*, does not carry the implication of legal titles, but only a geographical area subject to a particular jurisdiction.⁷⁶Third, the use of word ‘consultation’ instead of ‘consent’ in connection to any administrative or legislative operation encroaching on the rights of rights and interests of indigenous peoples.⁷⁷

Probably due to above mentioned contentious issues the indigenous scholars and activist were not hesitant of reproving the Convention No. 169 on the account of it being subtly assimilationist as “opposed to being blatantly assimilationist”.⁷⁸

The Provision of the Convention No. 169

Scope of the Convention

Instead of adopting bounded definition of indigenous peoples, ILO preferred to provide a statement of coverage⁷⁹

⁷⁵ ILO, *Fourth Item on Agenda: Partial on the Revision of the Indigenous and Tribal Populations Convention No. 107*, Report IV (2A)), ILC 76th Session, 30-33 (Geneva, 1989).

⁷⁶ *Id.*, at 35.

⁷⁷ *Id.*, at 5

⁷⁸ Statement by Mr. Sayers, Canadian Indigenous Worker’s Advisor, in the ILC, International Labour Conference, *Records of the Proceedings*, 76th Session 31/10 (Geneva, 1989).

⁷⁹ L. Swepston, *Economic, Social and Cultural Rights under the 1989 ILO Convention*, In *Economic, Social And Cultural Rights Of Sami, International And National Aspects* 38 (F. Horn Ed.,1998) Cited In Alexandra Xanthaki, *supra note* 15 at 70.

or rather a practical definition⁸⁰ thus describing the beneficiaries it aims to protect.

Article 1 provides that this Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs and traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations who inhabited the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provision of the convention applies.

The ILO Convention No.169 was the first international instrument, which pronounced indigenous groupings as 'peoples' because of the strong aspirations and emotions manifested by the indigenous groups

⁸⁰ Tanja Joona, *The ILO Convention No.169-with Special Reference to Articles 1 and 13-19*, 12 Int'l Comm. L. Rev. 213, 236 (2010). See also, Tanja Joona, *ILO Convention No. 169 and the Governance of Indigenous Identity in Finland: Recent Developments*, 24 The Int'l J. Humans Rts. 241, 241-256 (2020).

themselves.⁸¹ However, in doing so the Conference placed a rider, which took away the spirit attached with the term

‘peoples’—the right to self-determination.⁸² The Article 1(3) read as:

The use of the term ‘peoples’ in this Convention shall not be construed as having any implication as regards the rights, which may term under international law.

The ILO in the pretext of tactical manoeuvre passed the buck of incorporating right to self-determination by referring the UN as competent forum to decide on the issue.⁸³ Nevertheless, according to Anaya, “even the qualified usage of term *peoples* [in Convention No169]

⁸¹ ILO, International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (107)*, Report VI (1) 75th Session 1988, 31 (Geneva, 1988).

⁸² In every other occasion in which the phrase ‘peoples’ is used in international law, it is made in reference to an independent people, or one with right to aspire and avail freedom, free from foreign governmental subordination. See, Common Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966 and International Covenant on Civil and Political Rights 1966 reads as “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” See also, Kristina Roepstorff, *The Politics Of Self-Determination: Beyond The Decolonisation Process* 26 (2013).

⁸³ Note by International Labour Office, *Comment on the Draft United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/1995/119 para. 15 6 February 1995 Cited in Athanasios Yupsanis, *ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview*, 79 *Nordic J. Int'l L.* 433,445 (2010).

implies a certain affirmation of indigenous groups' identities and attributes of community".⁸⁴

The ILO Convention No. 169 statement of coverage revise the depiction of indigenous peoples and in the process opt to drop the term 'semi-tribal populations' as the term was considered both irrelevant and unsympathetic by several states.⁸⁵

The ILO Convention No.169 also became the first international instrument, which introduced a unique principle relevant to determine the Indigeneity by the process of 'self-identification'. The principle of self-identification has its own repercussion especially in the backdrop of political leverage due to politics of Indigeneity.⁸⁶ Jens Dahl, citing Friedman, puts an important observation that "Self-definition does not occur in vacuum, but in a world already defined".⁸⁷ Group identity cannot be ascertained on a precondition of rights and demands alone but has a temporal and spatial element involved with strong urge to preserve and protect distinct identity. Jens Dahl further argues that construction of self-identification as the only point of convergence may get in the way of a better understanding of identification as

⁸⁴ S. James Anaya *supra* note 59 at 49.

⁸⁵ Replies received and Commentaries in ILO, International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (107)*, Report VI (2) 75th Session 1988, 16-17 (Geneva, 1988).

⁸⁶ Andrew Canessa, *Who is indigenous? Self-Identification, Indigeneity, And Claims to Justice In Contemporary Bolivia*, 36 Urban Anthropol. Stud. Cult. Syst. World Econ. Dev. 195, 209 (2007);

⁸⁷ Jens Dahl, *The Indigenous Space And Marginalized Peoples In The United Nations* 196 (2012).

social categorization.⁸⁸The ILO therefore cleared the air, as many states opposed this principle, by stating that self-identification will not be the only criterion in determining indigenous status as per the Convention.⁸⁹

Collective Rights

Exemplified by the acknowledgement of indigenous peoples as ‘peoples’, Convention No. 169 endorses the collective nature of indigenous rights, reconstructing what the prior Convention construed as an ‘object’ of applied anthropological responsibility to a collective subject of rights.⁹⁰In the 1986 Meeting of Experts, the Report on the Meeting observed that:

The present concentration on individual rights [in Convention No.107] was therefore misplaced because it ignored the fact that indigenous and tribal peoples were struggling for their rights as collectivises.⁹¹

Along these lines ILO attempted to resolve the difference between modern political theory and human rights law on the issue of individual versus collective rights by candidly declaring that indigenous rights have

⁸⁸ *Id.* Social categorization can be understood as a “process of bringing together social objects or events in group which are equivalent with regard to an individual’s actions, intentions and system of beliefs”. See, Henri Tajfel, *Human Groups And Social Categories: Studies In Social Psychology* 254 (1981).

⁸⁹ *Partial Revision*, Report VI (2A), *supra* note 75 at 13.

⁹⁰ LUIS R. PINERO *supra* note 1 at 321.

⁹¹ ILO Working Document entitled *International Standards and Indigenous Tribal Populations*, presented to the ILO Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 10 (Geneva, 1986).

both collective and individual disposition and each set [collective or individual] of rights are equally important.⁹²

There are various provisions in the Convention No. 169 affirming the collective rights as a part of indigenous rights discourse: Article 8-9 provides the institutional rights and the right to have their [indigenous peoples] own legal system; the collective rights in reference to intuitional rights can also be inferred from language of Article 6 which says “Governments shall . . . consult the peoples concerned, through appropriate procedures and in particular through their representative institutions”; Article 12 points that indigenous peoples can bring legal reparation “either individually or through their representative bodies”; Article 13-18 incorporate collective factor of the connection of indigenous peoples with their lands.

The recognition of collective rights in no way undermine the prospect of individual rights pertaining to the members concerned: Article 3(1) affirms that the “provision of the Convention shall be applied without discrimination to male and female members of these peoples”; Article 4 refers to the safeguarding of persons from the indigenous community through adoption of special measures; Article 8(3) categorically mentions that operation of indigenous law “shall not prevent members of these peoples from exercising the rights granted to all citizens”.

The incorporation of collective and individual rights with same fervour in relation to indigenous rights discourse was certainly a new and welcomed step by the ILO.

⁹² Luis R. Pinero *supra* note 1 at 322.

Protection of Indigenous Culture

The ILO Convention No. 169 recognizes and provides a lay out to protect indigenous culture and their way of life, with an objective to provide an atmosphere where indigenous peoples distinct culture outlast. Article 2(1) assigns the duty on governments, in collaboration with indigenous peoples, to protect the “rights of these [indigenous] peoples and to guarantee respect for their integrity”. Article 2(2)(b) that action by the states shall include measures for:

Promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and their traditions and their institutions.

Article 5(a) states that in applying the provisions of the Convention No.169 “the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected”. Article 7 provides that indigenous peoples shall enjoy, to the maximum of scope possible, right to their cultural development. Article 23 recognizes traditional subsistence activities of indigenous peoples as “important factors of their cultures”.

ILO Convention No.169 attempts to incorporate notions of multiculturalism is echoed from the language of Article 28 which states that “the children of the [indigenous] peoples concerned shall, *wherever practicable*, be taught to read and write in their own indigenous language”. Unlike the previous convention, the Convention No. 169 does not claim indigenous language to be a mere bridge between dominant cultures but it does ensure that indigenous peoples are trained in the national

language. This might seem to be a subtle form of integrationist methodology but it may be helpful in a sense that it prepares indigenous communities to communicate with the other cultures and affirm their rights and demands in much effective way.⁹³ Article 29 also provides that the state shall take measures to ensure that the non-indigenous peoples in general and those living in the direct contact with indigenous peoples in particular must be educated in a manner which removes cultural biasness against indigenous peoples. To this end, “efforts are to be made to ensure that history textbooks and other educational material provide a fair, accurate and informative portrayal of the societies and cultures” of indigenous peoples.⁹⁴

The text also has certain limitations, Xanthaki highlights them and observes that framework cultural rights provided under the Convention No. 169 are quite general in nature; protection is nonspecific on the issues of cultural objects; and claims of intellectual property over traditional knowledge and traditional cultural expressions are missing.⁹⁵ Notwithstanding these criticism, ILO Convention No. 169 deserves praise for its admiration of indigenous culture.

Participatory Rights

The structural and behavioural characteristic emerging from the acknowledgment of participatory rights within the indigenous rights discourse is the special

⁹³ ILO Convention No.169, Article 28.

⁹⁴ ILO Convention No.169, Article 31.

⁹⁵ Alexandra Xanthaki, *Indigenous Cultural Rights in International Law*, 2 Eur. J. L. Reform 343, 347 (2000).

importance on their right to participate in, and to consulted on, all decisions capable of casting deep impact on their life, especially in the initiating and administering any developmental projects in their inhabited by indigenous peoples. The ILO Convention No. 169 adopts ‘participation-consultation’ principle in relation to State measures having its footprints in indigenous lands.⁹⁶

Article 6 is the key Article that lays down the ‘participation-consultation’ principle. Article 6(1)(a) provides that “whenever consideration is being given to legislative or administrative measures which may affect them directly” the States shall “consult the peoples concerned [indigenous peoples]”, Consultation is understood as:

the process by which a government consults citizens about policy or proposed actions. It is not consultation unless those who consulted have a chance to make their views known, and to influence decision.⁹⁷

At first instance it seems to be a strong provision providing functional autonomy to indigenous peoples strengthened further by Article 6(2) which lays down that consultation must be done in good faith with the aim of achieving “[t]he agreement or consent [of the people concerned] to the propose measure”.⁹⁸ However on the fear

⁹⁶ Luis Rodriguez- Pinero, *Political Participation Systems Applicable to Indigenous Peoples*, In *Political Participation Of Minorities: A Commentary On International Standards And Practice* 313 (Marck Weller and Katherine Nobbs eds., 2010).

⁹⁷ M. Tomei And L. Swepston, *Indigenous And Tribal Peoples: A Guide To ILO Convention No. 169 V (1996)* Cited In Alexandra Xanthaki, *supra note* 15 at 77.

⁹⁸ Athanasios Yupsanis, *supra note* 83 at 439.

expressed by some of the States that a veto power is incorporated in the text ILO secretariat clarified that “the Office had not intended to suggest that the consultations . . . would have to result in obtaining result or consent . . . but rather to express an objective for the consultations”.⁹⁹ This explanation certainly reduced the impact of indigenous voice in decision-making but nonetheless it does require honest and substantive communication between governments and concerned indigenous peoples.¹⁰⁰ This explanation falls in line with observation and opinion of the tripartite ILO *ad hoc* committees constituted to look into the cases concerning non-observance of the Convention. It notes that:

the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith and the sincere desire to reach a consensus. A meeting conducting merely for information purposes cannot be considered as consistent with the terms of the Convention. Furthermore, according to Article 6, the consultation must be “prior” consultation, which implies that the communities affected are involved as early on as possible in the process, including environment impact studies.¹⁰¹

⁹⁹ ILO, International Labour Conference, *Report of the Committee on Convention No. (107)*, Provisional Record 25 at para 74 76th Session 1989, (Geneva, 1989) cited in Lee Swepston, *supra note 70* at 691.

¹⁰⁰ Lee Swepston, *The ILO Indigenous Tribal Peoples Convention (No. 169): Eight Years After Adoption*, In *Human Rights Of Indigenous Peoples* 23 (C. P Cohen ed., 1998).

¹⁰¹ See, *Report of Committee Set Up to Examine the Representation on Alleging Non-Observance by Columbia of the Indigenous and Tribal Peoples Convention 1989 (No.169)*,

Thus what could have been the most powerful provision for indigenous peoples is somewhat diluted.

Article 7 further strengthens the participative right of indigenous peoples by granting indigenous peoples autonomy “to decide their own priorities for the process of development”. It also provides indigenous peoples right to “participate in the formulation, implementation and evaluation of plans and programmes” that have an impact on their life or culture. Commenting on the general impact of participative rights ensured by the ILO Convention No. 169 Swepston states that the indigenous peoples will be no more treated as silent spectators in the process of development.¹⁰²

Land Rights

The land rights under the revised Convention No. 169 was expected to be framed in such a manner which provide separate land rights regime for indigenous peoples within the national legal system.¹⁰³ This expectation of indigenous peoples was not so simple to turn into reality with ease. More than hundred amendments were submitted to protest reservation against the land rights provisions.¹⁰⁴

made under Article 24 of the ILO Constitution by the Central Unitary workers, para. 90 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507143,en [Accessed on 10.01.2015]

¹⁰² Lee Swepston *supra note* 100 cited In S. James Anaya, *International Human Rights And Indigenous Peoples* 140 (2009)

¹⁰³ Lee Swepston *supra note* 70 at 696.

¹⁰⁴ ILC, *Record of the Proceedings, Fourth Item on Agenda : Partial Revision of Indigenous and Tribal Populations Conventions*,

During the drafting process, one of the most contentious issues within the Convention No. 169 was to build consensus on the scope of term 'land'. The previous Convention No. 107 used the words 'land' and 'territory' interchangeably. Several States proposed to replace the word 'territory' with 'land' as they feared the term 'territory' may accrue 'sovereign rights' to indigenous peoples who are in conflict with States.¹⁰⁵ However, the Convention No. 169 did stick to a broader interpretation of the term 'land' as it includes the "concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use".¹⁰⁶

One of the most significant provisions on land rights is Article 14, its opening line states that: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised". The highlight of this provision is that it ensures what was already there by the virtue of 'traditional occupation' by making it obligatory on States to 'recognize' land rights of indigenous peoples. The use of word 'traditional' should not be misinterpreted as if the Convention No. 169 recognised historical claims of indigenous peoples. In order to claim land right it was required to have some linking with the present, at least recent expulsion or loss of title.¹⁰⁷ In doing so it does recognise the collective nature of land rights as it uses the term 'peoples'. However, what remained contingent was

1957 (No.107), available at
https://labordoc.ilo.org/discovery/delivery/41ILO_INST:41ILO_V2/1246525040002676

¹⁰⁵ *Id.*

¹⁰⁶ ILO Convention No.169, Article 13 para. 2.

¹⁰⁷ International Labour Office, ILO Convention On Indigenous And Tribal Peoples, 1989 (No.169): A MANUAL 31 (2003)

the nature of land rights. It could be either be ownership or possessory rights over ancestral lands or both.¹⁰⁸ Xanthaki, expresses her annoyance over dilution of land rights by introducing the concept of ‘possession’ which was not there in the ILO Convention No. 107. She maintains that it should be no less than ‘ownership’ rights for indigenous peoples.¹⁰⁹

Concomitantly connected with land rights is the right over natural resources. The Convention No. 169 takes reassuring step in the form of recognition of rights of indigenous peoples over natural resources. Article 15 (1) makes it clear that indigenous peoples rights over “natural resource” includes the right to “[p]articipate in the use, management and conservation” of natural resources.¹¹⁰ However, there is greater probability of the fact that several States may have already appropriated mineral and other natural resources and established their claim of ownership. In such case Article 15(2) comes with great relief for indigenous peoples as it provides that “[g]overnment shall establish or maintain procedures through which they shall consult these [indigenous] peoples, with a view to ascertaining whether and what degree their interest would be prejudiced”.¹¹¹ It shall be the responsibility of the governments to create conducive atmosphere so that indigenous people may freely express their concerns during consultation process. For instance,

¹⁰⁸ Lee Swepston *supra* note 100 cited in S. JAMES ANAYA *supra* note 102 at 140.

¹⁰⁹ Alexendra Xanthaki, *supra* note 15 at 82.

¹¹⁰ ILO Convention No.169, Article 15(1). See also, L. D. Drange, *Indigenous Peoples and Rights to Land and Water in 2019: How do Countries that Have Ratified the ILO-convention 169 Comply?* 22 J. Human Dev. Capabilities 577 (2021).

¹¹¹ ILO Convention No.169, Article 15(2).

they may put forward the justifications to why the government should refrain in exploiting natural resources or why certain land should not be disturbed for being sacred or what environmental concerns would the project bring and how it may have an adverse effect on their life.¹¹²

Article 16 of the ILO Convention No. 169 deals with critical issue of 'forced displacement'. It enunciates the basic principle that "indigenous peoples shall not be removed from their land"¹¹³, under normal situations. If there arises certain exceptional conditions, States may relocate indigenous population. However, any such relocation shall be made after free and informed consent of indigenous peoples. Even after having all the relevant information amidst continuation of exception circumstance, if indigenous peoples decides not to move than State can relocate them according to appropriate procedure established by law.¹¹⁴ In case of normalcy, indigenous peoples have a "right to return"¹¹⁵ and if the situation does not favour their return, they are entitled to have the rights to "lands of quality and legal status at least equal to that of the lands previously occupied by them".¹¹⁶ Moreover, such people who are permanently relocated shall be entitled for compensation for injury and loss suffered due to displacement.¹¹⁷

¹¹² INTERNATIONAL LABOUR OFFICE, *supra note* 105 at 107.

¹¹³ *Id.* at 98; ILO Convention No.169, Article 16(1).

¹¹⁴ ILO Convention No.169, Article 16(2).

¹¹⁵ ILO Convention No.169, Article 16(3).

¹¹⁶ ILO Convention No.169, Article 16(4).

¹¹⁷ ILO Convention No.169, Article 16(5).

Labour, Health, and Education Rights

Generally indigenous peoples have incorporated skills pertaining specialized occupations based upon conditions of their surrounding environment. Such traditional work includes “hunting, fishing, trapping and gathering”. In many cases traditional work of indigenous peoples also define their identity. Article 23(1) of the ILO Convention No. 169 acknowledges such work and demands respect for indigenous peoples indulged in such traditional occupation.

Article 20 deals with a burgeoning problem among indigenous societies due to increased pressure on their lands and resources. It is usually found that both parastatal and private companies have increased their venture, mainly extracting business, on indigenous people’s territories. As a result, many indigenous persons have to move outside their land leaving beside their traditional work. Even if they wish to stay, they are forced to adopt new occupations, primarily as a labourer. Article 20 categorically provides that governments shall ensure that indigenous peoples are not discriminated at workplaces and special provisions shall be made to protect rights of migrant indigenous labourers, to secure their life from hazardous working conditions, to protect indigenous women from sexual exploitation at workplace. Article 21 calls for the State government to impart vocational training to indigenous peoples without any discrimination.

Special provisions are made for the social security and health rights of indigenous peoples. Europeans adversely affect several indigenous peoples due to colonisation. Aboriginals in Australia suffer from high rates of mental health problem. Average suicide rate

among aboriginal youth are three to six times higher than general youths of Australia.¹¹⁸ Mental disorder due to racism is a quite common phenomenon in aboriginal peoples. They also bear high risk for cardiovascular diseases.¹¹⁹ For indigenous peoples health rights should not be seen as a minimum guarantee scheme ensuing hospital or doctors. Instead, health condition is linked with “control over their physical environment, of dignity, of community self-esteem, and of justice”.¹²⁰ Article 24 provides that social security schemes shall extend to indigenous peoples without any discrimination.¹²¹ Article 25 is significant in sense that in addition to regular health facilities, State government shall encourage community based indigenous medical practises.¹²²

Lastly, provisions ensuring indigenous peoples right to education are of significant importance because prominent reason behind social exclusion of indigenous community is lack of quality education.

Article 26 and 27 incorporates both the individual right to education and indigenous peoples collective right

¹¹⁸ Laurence Kirmayer, Cori Simpson and Margaret Cargo, *Healing Traditions: Culture, Community and Mental Health promotion with Canadian Aboriginal Peoples*, 11 *Australasian Psychiatry* S15, S16 (2003).

¹¹⁹ Tom Calma, *Social Detriments and the Health of Indigenous Peoples in Australia—A Human Rights Based Approach*, International Symposium on the Social Detriments of Indigenous Health (29-30 April 2007) available at <https://www.humanrights.gov.au/news/speeches/social-determinants-and-health-indigenous-peoples-australia-human-rights-based> [Accessed on 11.03.2014]

¹²⁰ *Id.*

¹²¹ ILO Convention No.169, Article 24

¹²² ILO Convention No.169, Article 25 (1) ; Article 25(2).

to education that cater their special requirements of protection and profession of their own culture. Article 27 explicitly lays that education programme for indigenous peoples shall inculcate “[t]heir histories, their knowledge, and technologies, their value systems and their further social, economic and cultural aspirations”.¹²³ The Convention No. 169 in addition to this ensures that non-indigenous peoples shall also be trained to develop respect for indigenous ways of life and text book should not incorporate any provision which is disrespectful of indigenous peoples’ dignity.¹²⁴

III. Conclusion

The question of indigenous peoples human rights first appeared in the UN in the context of the ILO as early as in 1920s wherein the invisible motive of the ILO was disciplining the exploitation of indigenous labour. However, the apparent intention was the protection of indigenous peoples labour rights on the pretext that they were ‘backward peoples’. Accordingly, paternalistic attitude towards them was justified. Against this backdrop, the first comprehensive set of international standards on indigenous rights appeared in form of ILO Convention No. 107.

The ILO Convention No. 107 attempted to confront the marginalization of indigenous peoples via gamut of special protective enactments but disturbingly echoes the domineering “integrationist and assimilationist” approach of the time in promoting indigenous rights. As time went

¹²³ ILO Convention No.169, Article 27.

¹²⁴ ILO Convention No.169, Article 31. See also, Elena Sychenko, *ILO Contributions to the Jurisprudence of International Human Rights Bodies*, 71 *Zbornik PFZ*, 897 (2021).

on, this approach met with sharp criticism. This was largely due to a growing consciousness for indigenous peoples rights, and increasing numbers of indigenous and tribal peoples participating at international fora, such as the UNWGIP. In response, the ILO brought a revised Convention No. 169 which formally rejected integrationist and assimilationist approach of its predecessor.

Convention No. 169 makes a considerable progress on Convention No. 107 in numerous capacities. Its most vital input not only to indigenous peoples rights but also to global human rights framework is perhaps multicultural outlook. Moreover, its insistence on distinguishing indigenous peoples as equal partner in the progress and evolution of national pluralistic culture. This is evident from the text of the Convention No. 169, which lays prominence on collective rights that recognises indigenous identities. Additionally, it also recommends States to observe the principles of participation and cooperation with indigenous peoples in every aspect of their life and culture. More explicit success of the Convention includes the solidification of land rights; the insertion of the question of natural resources; the creation of rule of self-identification; and several reference to collective rights.

Collectively both the Convention No. 107 and Convention 169 are the only international legally binding instruments on indigenous peoples rights. However, serious limitation lies in the fact that handful countries have ratified these Conventions only. Moreover, the ILO Conventions failed to ensure the most sought after right by indigenous peoples— the right to self-determination. In fact, it was ILO Convention No. 169 which categorically watered down the prospects of self-determination right

when its Article 13 laid that “[t]he use of term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term international law”.

CHAPTER-14

DOMESTIC VIOLENCE AND TRIBAL WOMEN EXPLORING GENDER-BASED VIOLENCE AMONG TRIBAL YOUTH IN JHARKHAND

*Kumari Vibhuti Nayak**

I. Introduction

Growing number of literature have established those tribal women in urban space face distinctive barriers in the workplace. Dhal (2018), for instance, identified the prevalence of emotional and physical violence against women in different tribal communities in Orissa. Likewise, due to colonization, militarism, racism, migration, displacement, urbanisation, and social exclusion, tribal communities residing in Jharkhand experienced numerous forms of gender-based violence, varying from verbal to non-verbal. Gender-based violence among the tribal communities was often considered a minor issue compared to the violence that tribal women face in public spaces (for example, violence by the dominant groups of people). Both studies depicted the

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impact of violence and its prevalence of gender inequality within tribal communities.

Within tribal communities, prevalence and instances of gender-based violence were also observed by Premi (2016). Premi found instances of domestic violence among the Pradhi and Gond tribes of Chhattisgarh state. Almost all Pradhi and Gond women experienced trauma or emotional torture due to quarrels or verbal spats at home, and a few women even reported physical violence by their husbands. Such instances illustrate the vulnerability of tribal women to bicultural stress, in which they must repeatedly switch their ways of thinking or behaving as they move between family and work domains to meet different cultural expectations from each.

Hence, the current study explores the disadvantages and challenges experienced by tribal women in their individual, family, educational level and at workplace. For this, the concept of intersectionality, as a theoretical lens, would provide the multiple identities of an individual, and the impact of these identities seems to be multiplicative and reinforce each other. Through the intersectionality approach, various researchers contend that an individual's experiences need to be understood through analysing the interdependent functions of multiple factors like gender, class, race, ethnicity, language, and sexuality; instead of explaining experiences through a single axis.

Based on the abovementioned approach, this study aims to uncover how tribal women residing in urban space experience the intersection of gender and tribal identity in their personal and professional lives. This research further attempts to contextualize tribal women's subjectivity within interpersonal context, societal

processes and organisational practices. Through this contextualization, the study demonstrates the participants' viewpoint on the social experiences that are determined not only by the location but in various contexts.

II. Tribal women in Urban Space

Tribal migration was observed, during the 1990s, due to the labour market regarding industry construction for economic development. The construction industry was found to be unique as 98% of women were employed as casual labourers in comparison to other industries. In pursuit of survival and better economic conditions, tribals tend to migrate to neighbouring urban settings and join there as physical or manual labourers. Later on, the prevalence of tribal migrant communities and their social network facilitated migration in general and particularly with families, including women. And hence, tribal women were introduced as unskilled labour who preferred manual work like making bricks, material loading and unloading, road construction, and soil digging jobs.

In recent years, tribal women from rural areas have been migrating to urban places for further studies and employment. Hence, their numbers increased. However, there is limited research on the experience of migrated tribal women living a city life and how they deal with gender discrimination and tribal identity in routine life, in their studies and at the workplace, especially among the younger generation, which needs to be documented. Another striking point was observed that the gender-based violence against tribal women was noted by non-tribal researchers. Research constantly points to tribal women experiencing an extra challenge.

III. Research Methods

The present study seeks to understand the tribal women's experience by exploring their interpretation of their experiences concerning discriminatory practices and violence at home and the workplace. For this, an interpretive approach was opted to understand the feelings and experiences of tribal women instead of the researcher. The current research is exploratory in nature, and data were collected through semi-structured interviews through chain-referral and purposive sampling. Initially, five tribal women were contacted through the personal network of the researcher through contact numbers. After completing the interview, the participants were asked if they were able to provide or refer eligible participants for the research. This process was repeated till the data reached the saturation point.

In total, semi-structured interviews with 35 women were conducted belonging to 15 Oraon, 11 Munda, and 9 Santhal tribes residing in the capital city of Ranchi, Jharkhand. Participants fall into the age group between 18-29 years. Out of 35 respondents, 14 were students (8 were in intermediate and 6 were pursuing graduation), and the rest 21 were employed in different organisations. Further, 13 participants were married (among them 2 had children) and 22 were unmarried.

Face-to-face interviews were conducted by the author between February to April 2022, as the author could relate to the respondents and draw experiences as a tribal woman residing in Ranchi. Hence, the researcher's standpoint was aligned with that of the research subject (Liu, 2018). All the interviews were conducted according to the convenience of participants that took nearby home,

college and office premises. The interview was conducted in two to three sessions that lasted for 50-90 minutes.

Before conducting the interview, a brief description of the research work with the consent form, confidentiality matters and data collection mode were illustrated to the participants. The interview was conducted in Hindi and *Sadri* (local language) as a researcher was a native speaker. The interviews were recorded as permission was granted by the participants. Participants were asked to sign a consent form before the interview to ensure their anonymity and data protection matters.

The interviews were transcribed into the English language from *Sadri* and Hindi by the researcher. From the transcripts' identifying information was removed, and all participants were assigned pseudo names to ensure anonymity. The researcher did a thematic analysis guided by intersectionality theory. In this way, predominant codes corresponded to the frameworks: views of discriminatory practices and violence at the individual level, family level, educational settings, and workplace were categorized.

Using these initial categories as the first coding stage, researchers coded all the transcripts accordingly. Codes were developed manually by the researcher. The present study explores views of discriminatory practices and violence in a population of urban tribal young women, trying to understand how it is shaped by their environment. During the process of analysis, variables like gender and tribal identity were explored to understand the discriminatory practices and violence that were intersecting factors. This analytical approach

allowed the content to be examined and summarized by categories.

To validate the data analysis, the researcher presented the findings to colleagues working in tribal communities. At the latter site, the facilitators convened their data analyses to compare with external analysis. Response from participants and colleagues (working in tribal communities) was incorporated into the study findings.

IV. Findings

The individuals' lives were marked by difficulties and setbacks, which were frequently attributed to character flaws or deficiencies that people thought were related to their tribal identities. The findings regarding the encounters with violence and discrimination in diverse settings, as well as how structural factors affect participants' individual degrees of exposure to these phenomena, are discussed in the sections that follow.

Discriminatory Practices Related to Gender

Women participants expressed less on gender-based concerning the family domain. When gender-based discrimination was later discussed in education and the workplace, female participants' perspectives varied according to what they had seen and experienced in real life, as seen in various contexts.

Everyone who participated in the discussion agreed that in their own homes, women and men had equal access to resources like education and employment. Women were respected in tribal societies because they were seen as valuable economic resources and given many

personal autonomy rights even after marriage. Saheli, one of the participating tribal women, said that because she is the most educated person in her family (she has an M.A.), her parents expect her to get a decent career. In this case, it appears that tribal parents make no distinctions between their daughters and sons when it comes to access to the pursuit of higher education and employment.

In addition, the women who participated in the survey assumed that the males in their families did their fair share of housework. However, there was evidence of gender discrimination at home. More often than not, tribal women did the interior work around the house. In contrast, men did the outside work (such as buying vegetables and other things) and sometimes preferred to undertake the inside work themselves.

When asked about gender roles in the home and the workplace, respondents in rural areas overwhelmingly said that they had yet to be defined. Tribal women living in urban areas have two full-time jobs—one outside the home and one within it—while yet managing to care for their families. For instance, Premi explained her mother's illness and responsibilities for both outside and inside work:

“... being a girl is not such a feeling...I can do all type of work...But I don't know that why I can't leave. For example, my brother will leave everything and will hang out.... But I can't do this. Just as now, my mother is ill, I have to take her to doctor. my brother will not think about it. He will never give a thought about it that who will look after. I can't even think of leaving...If my brother has to go, he will go... I don't know why a daughter has to be caring and she can't think of herself. A daughter thinks about her family

first but a son can leave his mother in pain but a daughter can't."

Family dynamics, research has revealed a shift in gender norms among tribal communities. All respondents experienced constraints on women's mobility, especially when going unescorted beyond the city, even for education and career prospects, again emphasising gender discrimination inside the family; conversely, men obtained easy permission. Priyanka remarked how her brother was allowed more freedom to pursue his education outside the house than she was due to safety concerns; she contrasted this with her own experience. Women's responses were split on whether or not parents should let their daughters go out alone. Parents typically accompanied their children on their first trip alone, but now they often leave them behind if they are old enough to go independently. Although tribal women reported experiencing bias because of their gender, no such discrimination was evident regarding access to higher education or employment possibilities. However, prejudice based on gender continues outside the home for tribal women.

Women still face several obstacles on the path to higher education, although they are increasingly able to do so. Malti, a student at the Mumbai Maritime Training Institute, was the sole woman who spoke freely about experiencing discrimination because of her gender. Being one of only two girls in a town of 900 boys gave her a unique perspective. She described how she felt as the sole girl in her class:

"...everyone around me made me feel that I am a girl.... I was termed "female cadet" by the faculty whereas they called the other students "cadet." I

was confused as to why the term "female" had been used prior to my being referred to as a "cadet."

When Malti went to her institute, she felt like the only girl. The scenario was worrying for her and the people around her. The scenario did not seem the same for the other women who took part, likely because girls' strengths were better developed at different schools. Gender-based discrimination persisted in the workplace for female participants.

Women in the workforce who participated in the interview discussed their experiences with and observations of discrimination based on their gender openly and honestly. As a woman in the nautical officer field, Malti faced sexism and was denied opportunities for advancement. She gave an example of the discrimination she had faced because of her gender, including the harsh words of one of the officers: "... what is this company doing? They have put the lamb in the wolf's jaws" - This was the most common criticism that Malti encountered as a young female. They are alluding to a hidden danger that lies under the surface.

After starting work at the office (in place of her father), Sima, another respondent, noticed inappropriate behaviour on the part of her co-workers and superiors and described some incidents that had occurred there, including *"...sharing image, videos... which was like borderline but it was creating a hostile work environment... Initially, everyone was nice to me, and I didn't turn anyone down for employment. However, as time passed, I realised they had other expectations of me."*

Sima went on to detail the harassment she had endured at the hands of her superiors, which included inappropriate touches, putting hands in a trouser pocket, among other things. Her claim that women would always be a target despite the existence of security measures and legislation is unarguable. She also spoke about the impact these events had on her skin, highlighting the myriad of problems they revealed. There were multiple recommendations that she try out new skin care routines or visit a beauty salon. Moreover, Malti and Sima both heard and saw co-workers commenting on her figure and attire.

These two female participants gave vivid examples of the gender-based discrimination and harassment they had experienced at work. They had to incorporate it, in one form or another, into their daily lives to cope and survive. Participants also discussed GBV, which follows this section, as several of them had experienced or witnessed it first-hand.

V. Reflections on Violence against Women

Based on their own experiences, media exposure, and cultural context, many people have a basic understanding of gender-related violence as physical, verbal, and sexual violence committed by a partner against themselves or another person. All participants ultimately opened up when asked to contrast the rate of gender-related violence in their tribal community with that of the broader population. Cases of gender-related violence that participants personally witnessed have been described below.

Many respondents' experiences with GBV stemmed from first-hand accounts of harassment and acts of violence committed by members of their own extended families. One respondent named Rene described the GBV she saw in her extended family, saying,

"...verbally abusing aunt when he wanted her back for home.... even uncle stole his younger kid from aunt." His temper is out of control.... Anyone can see from the uncle's actions that he is unfit to live with anyone.... Everyone is aware of his impolite ways. "

Rene described her aunt's effort to keep her sadness hidden in order to protect her niece's feelings. The sight of a lady being abused, she added, was too upsetting for her at such a young age. Rene argues that patriarchy and outside cultures contribute to the prevalence of GBV in tribal groups. Suman also spoke about the prevalence of openly visible instances of GBV in rural settings, saying:

"...here at night, especially, physical aggression can be seen... husband gets intoxicated, wife scolds him for being drunk... The husband becomes enraged and begins to beat his wife.... The mornings are different since this never occurs then. And I know this because my rural-dwelling relatives have told me about it. "

Observationally, respondents attributed perpetrators' male character weaknesses, like low self-esteem and domineering traits, to women's victimisation. Some of the ladies in the focus group discussed how they stayed in an abusive relationship so they could provide for their children. According to those surveyed, the

perpetrators' low self-esteem and domineering traits are to blame for their aggression against women.

There was a lack of commentary about gender-related violence in the classroom because almost no one had encountered it. Malti and Sima had heard some stories of gender-related violence in the workplace, but neither had seen or experienced it themselves against tribal women. In addition to gender-based discrimination and gender-related violence, another topic that emerged throughout the interview was prejudice based on participants' tribal identities, which was encountered by the vast majority of the interviewees.

Discriminatory Practices Related to Tribal Identity

Discrimination based on participants' tribal identity was observed and experienced in the classroom and the workplace. The following paragraph details the participants' experiences with discrimination and harassment on the job and in higher education, including subtle cultural micro aggressions, sub-concession bias on competency, and encounters with degrading tribal jokes.

The respondents' tribal backgrounds were a major factor in the challenges and discrimination they faced in formal schooling settings. Access to education and the methods used to teach were significantly impacted by respondents' tribal affiliation. All respondents said they had experienced discrimination that made it harder to feel comfortable while attending school or college. Rene, a young woman from a tribal group, described how she had been treated unfairly because of her heritage. Rene felt the need to share her thoughts on the topic, and she brought up the fact that professors already view tribal pupils as

behind the times and pay them less attention because of this stereotype. According to the student,

"teachers have perception...that I would not be successful in my studies because I am from a tribal background as from the name, they can identify us and do not pay attention towards us."

The same sort of thinking was seen in other people who took part. Nishu pointed out the biases created by teachers in the classroom and described a preference for students who were not members of a tribe, saying things like, *"...tribes.... was not seen in preference in class... when it came to making a group then... the group was constituted of the same kind or similar background of people."* It shows teachers making distinctions between kids who identify as part of a particular tribe and those who do not, either subconsciously or on purpose.

Veena, another respondent, noted that when professors know their students' backgrounds, they become more lenient and creative in how they teach the course material to their tribal pupils. Veena stated,

"Instructors were generous to us.... taught us in mixed language i.e., English and Hindi and.... offered numerous homework for each subject..." Our teachers and peer groups prepared us to communicate effectively in English on all course-related matters."

During the interview, participants discussed and agreed that their tribal identity had been a barrier to education, but that a small number of teachers (who shared their culture) had made a difference in their lives.

Even so, while announcing themselves as members of a tribal group, many participants experience a crippling sense of inferiority. Some Christians among the participants prefer to introduce themselves as Christians and play down their tribal background while interacting with their non-tribal peers. Riya, for instance, said

"...when I indicated that I came from a tribal background, I developed a sense of inferiority in my college years.... Now, I didn't want to come off as tribal when I first met you... Yet I have no qualms about identifying as a Christian when I introduce myself... I can feel it lingering inside me even now... It's not something I can take any pride in, being ST."

Some of the younger participants had this view; however, the employed individuals (i.e., Malti and Sima) were well-seasoned in life and had no qualms about coming out as members of a specific tribe.

As was the case in classroom, study participants reported bias towards tribal people in the job. Despite their skill, Anjana, one of the participants who just quit her job, claims that her non-tribal co-workers and staff cannot believe that tribals can hold such a position. The tribe instructors and staff she worked with were overworked, patronised, and unfairly branded as incompetent. These examples highlight the discrimination and mental harassment suffered by tribal employees due to their ethnicity.

Violence Associated with Tribal Identity

Participants with jobs experienced a more subtle type of tribal identity-related violence. They have had both

spoken and nonverbal encounters with it. In the following paragraph, we provide examples of how employed participants felt their tribal identities were a source of discomfort for their coworkers.

In the workplace, few people's tribal identities have been a hindrance. A few of the group members actually got their degrees and started working. But they nevertheless experience prejudice daily because of their tribal backgrounds. This takes several forms, including employers vocally reminding respondents of their tribal identification, tribal employees being routinely expected to perform the menial task, and occasionally being paid less. Malti used herself as an example, explaining how she would always be told that she was only able to succeed academically and professionally because she was a member of a minority group because of her reservation.

Malti, Anjana, and Sima further observed that, whether or not they were qualified for the position, non-tribal persons were given preference in the workplace. Most of their fellow tribal members felt similarly unrewarded despite their own merits. They believe it's their due time for a promotion. Tribal people are discriminated against based on their identity, and the fact that their opinions aren't being heard is evidence of this.

Malti also mentioned the negative impact that the stereotype of tribal women in the workforce has on their sense of self-worth and tribal identity. She recounted an instance where an elderly general's wife allegedly told her that "*tribe women are of loose character; they were accessible for sex.*" She claims that non-tribal people classify indigenous people into stereotypes and subject them to violence and other forms of humiliation. Sima recognised a similar connotation, and she speculated that

the males who weren't part of the tribe treated her with indifference because of it. Their antics were causing her concern. The participants' violent behaviour stems partly from the prejudice they witnessed and experienced depending on their tribe.

In this way, gender bias, gender-related violence, tribal bias, and tribal identity-based violence illuminate urban tribal women's understanding of discriminatory practices and violence. As was seen above, tribal women are particularly vulnerable to domestic violence in the home, the workplace, and their communities as a whole, and this vulnerability can be exacerbated by gender-based discrimination. It was also stated that tribal women experienced discrimination, harassment, and informal forms of assault because of their tribal status and the stigma attached.

VI. Discussion

The goal of this research was to learn more about the lived experiences of young people from urban tribal communities regarding GBV on a continuum from prejudice to violence. The results showed that women were subjected to two types of discrimination throughout their lives, one based on their gender and the other based on their tribal identity, making them more vulnerable to experiencing violence in a number of contexts (the home, the classroom, and the workplace).

Current research suggests looking at how gender and tribal identity interact rather than separately. More specifically, the research shows how prejudice and violence affect young people from tribal communities. Significantly, only tribal women showed gender differences

in how discrimination affected them. This is consistent with the findings of Dhal (2018), who found that the socioeconomic environment in which tribal women live is a key factor in the persistence or emergence of gender disparities. Circumstances meant that tribal women dealt with a wide range of challenges daily. And it's because of this that tribal women face a wide range of disadvantages and threats because of their gender.

There was evidence in the reviewed literature that tribal women enjoyed equal rights and freedoms (Manna & Sarkar, 2016). Research participants denied gender-based prejudice regarding household chores. However, the present findings showed otherwise. However, tribal women were assigned distinct domestic responsibilities based on their gender. Bhasin (2007) noted that tribal young women were educated by their moms on how to be excellent housewives and mothers and how to behave in ways consistent with obedience before they were exposed to the more liberal values of urban society. They learned to care for their homes and complete mundane tasks like cleaning. Such behaviour demonstrates the rise of gender norms and women's prejudice at home in primitive societies.

Women in primitive societies were also discovered to be working two jobs simultaneously. However, in traditional tribal societies, men were expected to labour outside the home, while women had more flexibility regarding whether or not they performed domestic tasks. The men of these societies could perform a wide range of tasks, and they often chose the simpler tasks for housework and yard work. These actions point to the increasing influence of modern ideas about gender roles and responsibilities within tribal societies, where men

played the role of breadwinners and were supposed to contribute the least to housework. These results contradict the research of Manna and Sarkar (2016) and Roy (2005), that women in tribal cultures were treated fairly.

Participants openly reported experiencing tribal discrimination when they adjusted to the formal education system, a problem that has been addressed by both Sujatha (2002) and Vijayakumar (2020). Young people in the tribe felt that discrimination made them feel unsafe and alone. Participants' low self-esteem and increased psychological stress were directly linked to their ethnic identities, contributing to poor academic performance. Consistent with the findings of Bhagavatheeswaran *et al.* (2016), they experience the difficulty approaching their instructors to get their questions answered. However, young tribal members who wanted to make something of themselves were determined to do so. Surprisingly, every participant claimed they were committed to doing well because they understood the value of a good education.

Tribal women in the workforce have spoken out about facing bias and even violence because of their gender and their tribal identity at work. Even if they were competent in their occupations and made pointed comments, their colleagues were reluctant to accept them due to their tribal identity. There is a lack of literature, though. Only Dhal (2018) observed that tribal women are exploited because of their socio-cultural condition, even though they are hardworking and trustworthy. The authors also found that emigrating women are often denied their fundamental human rights because they cannot prove their identities or are forced to labour in appalling conditions.

Earlier research on the topic of employment has focused initially on lower-level tribal vocations, such as unskilled and semi-skilled labour, as a result of migration and displacement (Sarin, 1993; Munshi, 2013), and it was shown that tribal women were reliant on men for financial support (Xaxa, 2004). To eradicate socioeconomic inequities and the practice of untouchability, the government granted tribals with reservations in education and jobs, as demonstrated by Deshpande and Ramachandran (2016). However, the study doesn't go far enough in explaining how tribes make it in the workforce or the challenges they face.

Recent studies have shed light on the challenges that tribal people, especially tribal women, face in the professional sphere. Participants who are employed indigenous women have noted the subtle cultural micro aggressions they confront (such as feeling outcaste at various occasions) and the sub-concession bias surrounding competency (such as accessing education and employment because of a reservation) they hear daily (such as tribals can eat anything and tribal women are always available). The tribal people are repeatedly taught by these ideas and attitudes that they are inferior or inferior to other people. As time goes on, the tribal person's beliefs transform into the overt acts of verbal or nonverbal violence that they suffer.

This study confirms previous findings that male tribal members face discrimination based on their ethnicity or place of origin in the workplace and schools. Contrarily, tribal women experience prejudice and violence based on their tribal identity and gender, from childhood into adulthood, in both the classroom and the job. Because of this, gender-related violence is a serious

issue for tribal women. As a result, a continuum of discrimination and violence based on tribal identity and gender were identified, with discrimination being at one end and violence in the form of harassment at home, at school, and in the workplace at the other. Many problems commonly affect tribal adolescents. (Mane, 2010). According to Sujatha (2002) and Vijayakumar (2020), tribal youth are disproportionately affected by multiple forms of discrimination, harassment, and violence.

Tribal people face discrimination from the standpoint of "others," or those who are not members of the tribal group. This leads to various forms of discrimination and violence. Individuals, institutions, and systems of the dominant culture mistreat them across multiple dimensions of their lives. There may be a correlation between discrimination and negative outcomes for young tribal members. The effects of prejudice and violence on the lives of indigenous youth deserve more study.

VII. Limitation

Young people of urban tribal backgrounds were the sole subjects of the study. As with any study, the sample size was a caveat here. However, the significance of this study lies in the impression that discriminatory practices and violence against tribal women, as observed and experienced by survey participants, can assist in direct future work on discriminatory practices and violence with the tribal group in various areas.

VIII. Conclusion

This study results highlighted the fact that discriminatory practices and violence among urban tribal

young women are a serious and significant problem. The survey results show that young people's experiences of discriminatory practices and violence ranged from discrimination based on gender within the home to acts of violence committed because of a person's gender and/or tribal identity in the workplace. When women's gender was added to their tribal affiliation, they experienced discrimination and harassment. This illustrates a disparity axis showing tribal women were in worse places on both the gender and tribal identification dimensions. Therefore, it would be necessary to take preventative steps and use a multifaceted strategy to address discriminatory practices and violence among urban tribal young women.

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CHAPTER-15

WORLD-VIEW OF INDIGENOUS PEOPLE: RIGHTS OF NATURE REVISITED

*Manju Chellani**

I. Introduction

“Heatwaves, storms, floods, an increase in water and airborne infections, and even mental health difficulties are all consequences of disturbed ecological balance and climate change” & “To ensure life on this planet, all of these ecosystems must work together in harmony”.¹

In the past some decades, global problems related to natural environment (NE) around us have claimed the attention of researchers, policy-makers and activists alike. While some regions of the world have succeeded in maintaining or even improving the indices of their NE, most regions have been swamped by the degradations and changes which are now looming as threats to the very existence of the ecosystems existing since millennia. Their increasing intensity and spread across the globe make their imminence and impact inevitable. Furthermore, the complex web of the inter-relationships between the

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¹ “Why climate crisis also means health crisis” *The Shillong Times*, April 9, 2022.

different elements of NE lead to unforeseen results as a result of actions taking place in very different parts of the planet.

Numerous models of both assessment and protection of NE been generated by individuals and institutions alike. Succeeding theories have been analyzed and applied. They have met with only partial and temporary success. In the past decade or so, the realization has seeped in that there may be a fundamental error in the development of ever-more complicated and sophisticated paradigms. They may be leading us away from the actual genesis of the problem which may be quite simple. After all, the conservation of NE is not a new phenomenon for us humans. Till the past few centuries, humans and non-humans had been co-existing – problematically sometimes – but sustainably. The negative impacts of humans on their NE had never reached such unprecedented proportions as of today; so much so as to lead to something as unimaginable as climate change. So what is this simple truth?

This simple truth lies in the traditional knowledge, convictions and practices which had regulated human activity during past some decades. This had prevented the living with greed instead of need; eschewed neglect of respect for basic natural facts. All activities were balanced towards a harmonious co-existence of all elements of nature. To find out more, we can go back to the memories and records of these. Alternatively, we can turn towards those traditional communities and peoples who still practise them or, at least, have memories of them. Many of them still retain those activities and convictions; and their lifestyles are based on a healthy relationship between themselves and NE around them. It is true that they may

be exposed to and may have adopted modern developments and modes of living. But they have not forgotten the universal truth that all relationships involve respect, give-and-take, restraints and limitations. This universal truth applies equally to the relationship of humans with the nature. The rampant disregard by a major part of the world of this crucial relationship and this inalienable universal truth is now getting acknowledged as the real reason for the current plethora of environmental issues.

Indigenous people (IP) form a significant part of these traditional communities. Their relationship with the earth and all the elements of nature is characterized by respect and not its domination. They attempt to live with them, rather than against them.² The earth whom they generally call: “mother”, across the communities separated by regions, is a palpable entity for them. As such, the idea that it has rights does not sound alien to them. It is inculcated in their collective consciousness that the nature has the rights for its well-being to be respected; its integrity to be deferred to; and its compositeness to be defended. They may not express “rights” of nature in a technical legal fashion, but this is the underpinning of their entire environmental belief system. Objectively, the perception that nature has rights, is the bulwark of the protection they ensure to it. This perception is fundamental to the IP but it is a relatively new phenomenon in the legal jurisprudence of the non-indigenous people (NIP). It may be hoped that its

² Rights of Nature, Thiele, Leslie Paul (2011). *Indra's Net and the Midas Touch: Living Sustainably in a Connected World*. Cambridge, MA, U.S.: MIT Press. ISBN 978-0262016094.

popularity and dynamics of evolution show promise for its eventual acceptance.

This chapter attempts to examine the relationship between IP and NE. The focus of such an examination would be the determination of what is missing in the relationships between NE and NIP; and which proves to be a roadblock in the path to environmental balance of the planet. The following Section II will briefly discuss the defining characteristics of IP which distinguish them from other traditional communities. Section III will discuss their relationship with NE, analyzing what makes it a healthy, sustainable and thriving one. The discussion would analyze the belief-system of the IP, along with the international legal developments in the area. The evolution of the movement of Rights of Nature (RoN) will also be introduced. Section IV will examine more fully the developments in international thought in the area of RoN and its significance in the burgeoning of an environmental value-system which is truly sustainable and down-to-earth. Section V will delineate some conclusions and attempt to offer some suggestions for the way forward.

II. Indigenous People

“We must also recognize that Indigenous peoples are more than just victims in the destruction of their territories. Across the globe, Indigenous communities are quite literally our last line of defense to save the biosphere upon which we all depend. Their land stewardship, moral principles around leadership and relationship with the surrounding ecosystems is what we need to learn from and act upon. Supporting Indigenous-led organizations is

especially important, as they could help drive rapid conservation of both land and sea.”³

The term: “indigenous people” refers to the people who can trace their descent from the original and earliest inhabitants of a particular region. They are culturally distinct ethnic groups who are directly descended from the earliest known inhabitants in a particular geographical area. Generally speaking, their traditions, culture, habits, practices etc. have been relatively unbroken and they have maintained a good level of the characteristics of their ancestors. There are approximately 370 million IP in the world, belonging to 5000 different groups in 90 countries all over the world. They are found in every corner of the world and are very diverse from each other. About 70 % live in Asia. They constitute about 5% of the population of the world. However, they compose of about 15% of the poor people of the world.⁴

In different places and contexts, the IP are also referred to as First Peoples, First Nations, Aboriginal Peoples, Native Peoples etc. There is no accepted definition for IP which is accepted everywhere but as per the United Nations, they share some common characteristics such as:

³ “Why protecting Indigenous communities can also help save the Earth” *available at:* <https://www.theguardian.com/climate-academy/2020/oct/12/indigenous-communities-protect-biodiversity-curb-climate-crisis> (last visited on April 2, 2022).

⁴ Indigenous Peoples, *available at:* <https://sustainabledevelopment.un.org/majorgroups/indigenouspeoples> (last visited on April 2, 2022).

- (i) Their population is small as compared to the dominant culture of their country or region;
- (ii) They usually have their own language; or had in the past;
- (iii) They practice distinctive cultural traditions;
- (iv) They have or had their own land or territory to which they are connected at various levels;
They self-identify as indigenous.⁵

There is, as yet, no definitive definition of the IP but many instruments have sought to clarify this. For instance, the International Labour Organization Indigenous and Tribal People’s Convention, 1989⁶ was the first international convention which addressed the human rights of the IP. It talks about the responsibilities of governments in promoting and protecting their human rights. It has given a realistic and comprehensive definition of IP in its Article 1 (1) (b) which says: “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”. Article 1 (3) clarifies that: “The use of the term *peoples* in this Convention shall not be

⁵ *Id.*

⁶ C169 (No. 169 of 1989), *available at*: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314 (last visited on March 27, 2022).

construed as having any implication as regards the rights which may attach to the term under international law”.

In 1982, the Working Group on Indigenous Populations (WGIP) was established as a subsidiary organ to the Sub-Commission on the Promotion and Protection of Human Rights. This gave IP the opportunity to share their experiences and express their concerns at the United Nations⁷. United Nations Permanent Forum on Indigenous Issues was established in 2000 by the United Nations Economic and Social Council⁸. It is the only international body in the United Nations to have indigenous persons as its members. It acts in an advisory capacity to the Economic and Social Council on indigenous issues related to economic and social development, culture, environment, education, health and human rights. In 2007, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was formulated⁹ and it provides the Human Rights Council with expert advice on the rights of IP. It assists the member states in achieving the goals of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁰ It also conducts studies to advance the promotion and protection of the rights of the IP. It is the most comprehensive declaration of the rights of the IP

⁷ All the information about the work of the United Nations for indigenous people is *available at*: <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (last visited on March 27, 2022).

⁸ The description of its work at all its sessions is *available at*: <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html> (last visited on March 27, 2022).

⁹ Vide HRC Resolution 6/36, *available at*: *id.*

¹⁰ Adopted by the United Nations General Assembly on September 13, 2017, *available at*: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. (last visited on March 27, 2022).

ever and emphasizes on collective law. It safeguards minimum standards for “survival, dignity and well-being” of IP.¹¹ It is not a binding instrument but it does provide the issues which are part of the evolving jurisprudence on IP.

The various definitions may try to unify the IP all over the world. However, across the regions, life could be different for the IP living there. Some IP may share with their ancestors only the fact of residing on this region. This is because of the multiple arrivals of newer people in the region. Whenever this started happening, whether centuries back or more recently, the IP of the region may have faced threats to their sovereignty, culture, economic well-being, original lifestyle, access to land and so on. with their culture modified. More often than not, the newer arrivals have been in numerical majority and also hold much of the land which was hitherto the residence of the IP. They may have got this land from the IP via claims of racial and/or religious superiority, economic opportunities, military might, technology etc. Thus, the new majority also started holding the reins of governance of the region. At times, this may lead to the assimilation of the original culture of the IP with that of the new majority. However, this may also be one of the major factors of the IP being more vulnerable and exposed to subjugation and discrimination. This could be because their cultures, ways of life and other practices are generally quite different from those of the dominating/powerful population. This makes them relatively marginalized in the regions they live in. Along with this, their human rights are vulnerable to getting limited; their knowledge of world they live in is likely to be

¹¹ Article 43.

ridiculed and even challenged. They are also more vulnerable to forced evictions from the lands they have been living on traditionally for centuries and are dependent on them for most necessities of life. It is imperative for their physical and cultural integrity. If the State does not realize the right of ancestral lands of the IP in their territory, then it becomes difficult as the State may see it as possession.

However, whether they move away from the land; or get assimilated with the newer arrivals on their land, it does not change the value-system of the IP which they have inherited from their culture almost unbroken since millennia. This includes many facets of life. However, for the purpose of the present discussion, we will focus on their inheritance of relationship with earth and indeed, all NE which is inextricable from their identity, physical and spiritual well-being¹². One of the most comprehensive and yet clearest documents of this relationship has been written by Robin Kimmerer. She is a plant ecologist and biologist, belongs to the indigenous Potawatomi people of North America and is an enrolled member of the Citizen Potawatomi People. A well-known academic with internationally acclaimed scholarship, her book: *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants*¹³ is generally regarded as a definitive narration of the relationship between IP and nature. This book combines elements of her indigenous heritage and professional orientation. In this, Kimmerer

¹² Available at:

<https://www.worldbank.org/en/topic/indigenouspeoples#1>
(last visited on March 26, 2022).,

¹³ Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Milkweed Editions, 2015).

has pointed out that the native people across the world may differ in many other cultural factors, but their cultures are rooted in gratitude to God and nature; it is also to the web of interdependence with other people for the care taken and for the work carried out in the course of one's duties. It includes taking only what we need and also from what is given. If we take something which is not readily given, then this will mean wounding Mother Earth (ME) who is the mother of all NE including the human and non-human components. The ME gives away for free the power of wind and sun and water. However, we don't get satisfied and break it open to take out more things like fossil fuels. "Had we taken only that which is given to us, had we reciprocated the gift, we would not have to fear our own atmosphere today".¹⁴

This articulation is an imperative one in the face of the fact that most of the "modern" theories and models of environment sustainability have not been able to provide a satisfactory answer to the prevailing problems of the environment today. Fortunately, this has lately led to the realization that our perspective on them may be mistaken and over-complex. We should be seeking the answer in much simpler, but older, phenomena. This appears to be the correct view since the NE and all its components have co-existed safely till fairly recently in history. The monumental changes in industrialization, technology and globalization have been in tandem with the large-scale environment disturbances which are the focus of our concern now. Along with those changes had gone a change of attitude towards all NE. So, a look at our own past and its remnants in the world today readily reveals the idea that we have to go back to some of our earlier-held

¹⁴ *Id.* at 383.

convictions. In fact, Ramakrishnan goes further and says that the modern society has to perceive how historically, cultural and religious traditions were interconnected in the minds of ordinary people. The same people also valued nature and natural resources around them as an extension of culture and religion in daily life. For example, the sacred groves would be associated with a number of deities. Nature – both tangible and intangible – would be a sacred entity to them. These beliefs and practices would be passed on through generations as a rich spiritual heritage in the forms of folklore, songs, poetry, music and rituals¹⁵

Many elements of the environmental philosophy of the IP have commonalities with that of many communities of ancient times which felt awe and gratitude towards nature. They viewed nature as a nurturing goddess with whom they have a mutual relationship. Humans have to do the “right” things in order to maintain the harmony and symbiosis. In the practices and culture handed down since time immemorial, most nip of the world too have a stock of this knowledge. But as time went on, most NIP got caught up in mass-scale industrialization, colonization, technology-explosion, urbanization, globalization etc. and slowly forgot their importance. The IP, being relatively isolated, have retained far more of that knowledge, culture and practices; and also the reverence towards them. This is the primary reason for the environmental jurisprudence and thought in the non-indigenous world having some similar themes and perceptions running through them. As and when they

¹⁵ P. S. Ramakrishnan, *Primer on Characterising Biodiversity: Trans-Disciplinary Dimensions* 34-37 (National Book Trust, India, New Delhi, India, 2010).

have come in touch with the indigenous philosophy, they have been fortified.

One of the most logical routes to going back to our previous convictions and attitudes would be to open our perception and understanding towards the IP philosophy of their NE. This would now prove to be key to approaching the real solution towards many wrongs of today, including the environmental wrongs. This is because it is this inbuilt value-system which made the man-nature relationship such a symbiosis that it could preclude and prevent any environmental wrongs from going beyond a certain limit which was easily irreversible. This eco-centric attitude has managed to maintain some of the most thriving relationships between the NE and humans which are still surviving. Since this relationship is a symbiotic one, it includes implied duties and rights towards each other. In fact, the belief that nature has rights is the fundamental paradigm over which the rest of the environmental value-system of the IP is built. However, this belief may not be inherent in the value-system of NIP; nor in their legal systems. But it is now getting acquired in both, as its acute significance is getting clearer.

The next section will analyze the environmental world of the IP. Furthermore, it will also examine the Rights of Nature (RoN) which are inherent in the relationship between the IP and the nature. It will also be demonstrated how this acceptance informs their short-term and long-term interactions with the nature and environmental health of the earth.

III. Indigenous People And Environment

“Indigenous peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live.”¹⁶

Developments in technology and globalization produce a closeness that is comforting at times, as it exudes a sense of inter-dependence and security. However, the very same globalization and developments in technology have also resulted in much easier transfer of the changes occurring in one part of the world to another. The practices and effects related to environment are also quickly exchanged and imbibed. This follows activities in one part of the world and will display repercussions in many other parts of the world, sooner or later. The present environmental degradation and undesirable changes, exemplified in the rapidly manifesting climate change, warn us that all of us on the planet will have to drastically change our activities which have the slightest impact on the NE around us. So what kind of changes are required? They may require the world to stand still for some time and think about the kind of attitude and practices followed by our ancestors. Many traditional communities, whose culture has been unbroken through the centuries, have kept up many of these. However, the IP are the foremost representatives of this repository as their culture has, generally speaking, been the most intact and unhampered by outer influences.

¹⁶ *Supra* note 7.

Despite some similarities between the IP and NIP, the differences, especially in the arena of attitude towards the NE, are far more. As a basic starting-point, it may be said that the value-system of the IP is eco-centric and internalized as such. It is totally dominated by the conviction that everything in the world is connected to each other. To nourish or to hurt one thing is to impact everything in the world in some way or the other. Humans and non-humans are equally a part of the eco-system in which they reside and are inter-dependent on each other. The eco-system, with its systemic inter-workings, is larger than its components. They don't view any element of the NE as "resources". Since they feel that they have a one-to-one relationship with nature, they feel that the nature is giving them a gift for their sustenance which they should revere and use carefully. As all relationships have the characteristic of give-and-take, the IP feel that they should receive the gifts with gratitude and use them only when necessary. And they feel that these gifts are for every human and non-human and not just those who have the power to snatch them. Moreover, they should give back to Mother Nature in equal measure what she may need, in terms of reverence, care and defence.¹⁷

However, not all humans share this kind of relationship with their NE. The majority of NIP have

¹⁷ See "How Indigenous Peoples Contribute to Sustainable Development?" *available at:* <https://www.activesustainability.com/sustainable-development/indigenous-peoples-sustainable-development/> (last visited on March 19, 2022) for a beautiful delineation of the philosophy and practices of indigenous people across the world. There is also an interesting discussion of the interaction between the indigenous environmental philosophy and the Sustainable Development Goals.

changed over the decades; and anthropocentrism has been the mainstay of the development of their environmental philosophy since a very long time back. In fact we have come to a point when most of us humans “take” far more than we “give”. This gives rise to a lot of damage and deterioration. And in any relationship, there is a limit to the damage which can be inflicted without serious consequences. After a point, the damage may become irreversible and get out of hand. And we don’t seem to realize that the survival of environment is not different from our survival. Most of us view NE as resources, being driven by economy. Instead of looking at eco-centric well-being, the focus is on anthropocentric well-being. Furthermore, our environmental laws have developed piecemeal. Hence, they fail to protect the environment effectively. Instead of being proactively preventive in nature, they are formulated generally only when there is threat of endangered extinction or harm to the humans.

This is why the attitude of the communities who have been carrying on relatively unbroken traditions of interacting with the NE around them is very important. This is clearly demonstrated by the indisputable fact that the land which is governed by the IP, even as compared to other traditional communities, has generally retained more sustainability and health. A recent landmark study¹⁸conducted in Canada, Australia and Brazil, has reported that both indigenous land and the conventional protected lands have high levels of biodiversity with the

¹⁸ Richard Schuster and Peter Arcese, “Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canada equals that in protected areas” 101 *Environmental Science & Policy* 1-6 (2019). doi: <https://doi.org/10.1016/j.envsci.2019.07.002>.

former having equal or higher levels of biodiversity as compared to protected areas. It is established that it is the decline in global biodiversity due to human activities which is responsible for the environmental problems of today. The report has suggested that since many countries are lagging behind in meeting their targets for stopping this decline, they can learn from and form partnerships with indigenous communities to increase their biodiversity protection.¹⁹

It goes without saying that the knowledge of IP is totally balanced and this is why it is so effective. It includes the perception that the intervention of the humans is important. Though the IP across the world have different cultures and practices, they do share some views in common. One of them is the human-inclusive view of nature which governs their activities on land. It includes protecting sacred lakes or forests. It may also forbid killing of certain species of flora or fauna. Otherwise, they do alter habitats in sustainable ways. The same kind of knowledge should apply to the formally protected areas. One of the examples is the growth of invasive species in these areas and no on to kill them. The same goes for the agricultural practices which are part of their cultural heritage. Together these go a long way towards biodiversity.²⁰

¹⁹ For an in-depth discussion of this topic, see “What we can learn from Indigenous communities about safeguarding the environment?”, *available at* <<https://www.euronews.com/green/2021/11/06/what-can-we-learn-from-indigenous-communities-about-safeguarding-the-environment>> (last visited on March 19, 2022).

²⁰ Benji Jones, “Indigenous people are the world’s biggest conservationists, but they rarely get credit for it” *Vox*, *available at* <<https://www.vox.com/22518592/indigenous->

In the past few decades, the special relationship which the IP have with the land and all elements of nature has been recognized and applauded by the international (NIP) community. It has also been formally acknowledged in many international instruments which serve to cement it in the environmental jurisprudence. For instance, it was discussed in the Rio Declaration on Environment and Development, 1992 (Rio Declaration)²¹ which says that the IP play a very important role in environmental management and development because of their traditional knowledge and practices²². To make full use of that knowledge, they need to have greater control over their land, self-management of their resources, and should also be able to participate more in the development decisions affecting them. However, the Rio Declaration had begun with the assertion that: “Human beings are at the centre of concerns for sustainable development...”²³ Agenda 21 of the United Nations Conference on Environment and Development, 1992 (Agenda 21)²⁴ says that IP have a historical relationship with their lands and are generally descendants of the original habitants of the land. They also mention that over many generations, they have

people-serve-nature-icca> (last visited on May 6, 2022); and Indigenous peoples and the nature they protect, *available at*: <https://www.unep.org/news-and-stories/story/indigenous-peoples-and-nature-they-protect> (last visited on May 6, 2022).

²¹ United Nations General Assembly A/CONF.151/26 (Vol. I), *available at*: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (last visited on April 29, 2022).

²² Principle 22.

²³ Principle 1.

²⁴ *Available at*:

<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (last visited on April 29, 2022).

developed a holistic, traditional scientific knowledge of their lands, natural resources (though “resources” may not be the term which IP would use generally) and environment.²⁵ There should be consultation with the IP and partnership with them at all levels.²⁶ Convention on Biological Diversity, 1992 (CBD)²⁷ also says that its signatories should respect the traditional knowledge and lifestyles of the IP which are relevant for the sustainable use and conservation of biological diversity, and try to promote their wider application. Its benefits should be shared equally with the IP. The dependence of traditional lifestyles on biological resources was also recognized.²⁸ Other substantive provisions of the CBD also reiterated equitable sharing and consultation with indigenous communities²⁹ and sustainable use of the components of the biodiversity, in accordance with conservation and traditional cultural practices.³⁰ As a result of these developments, the IP have also become more conscious of their rights. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, 2010 (Nagoya Protocol)³¹ also emphasizes on the inseparable connection between genetic resources and traditional knowledge for the sustainable livelihoods of IP and also the diverse circumstances in which the diverse knowledge is owned and held by the IP, reiterating the provisions of the CBD.³²

²⁵ Chapter 26.1

²⁶ Chapter 26 generally.

²⁷ *Available at:* <https://www.cbd.int/convention/text/>

²⁸ Preamble.

²⁹ Article 8 (j).

³⁰ Article 10.

³¹ *Available at:* <https://www.cbd.int/abs/text/>

³² See especially Articles 7 and 12.

These acknowledgements may be tantamount to saying that protecting the environmental rights of the IP is tantamount to protecting the environment itself since the traditional practices of the IP are conducive to the general environmental protection and sustainable development.³³ The implementation and practical effect of such an acknowledgement are, as yet, limited, as discernible from the increasing and looming environmental degradations.

It has been clearly demonstrated that the NIP has much to learn from the IP: not only in environment management but also in the belief-system. However, experts have warned repeatedly that to form a partnership with the IP is desirable. However, this partnership should not be limited to learning or copying the practices of the IP. This can lead to substantial long-term harm because of lack of requisite knowledge and experience. For instance, many indigenous communities combine rearing of wild and domestic species in their home. This makes for a much more diverse habitats as compared to the vast tracts of land with the same crop, which may be commercial in nature. But this practice is not born of theoretical or hearsay knowledge. It is the result of the intimate and spiritual connection of IP with the lands who have seen the interactions of hundreds of species with one another, over generations. Furthermore, it is not a single piece of land which is regarded, but an area as a whole.

³³ For a compelling argument about the positive influence on the development of environmental human rights, see Ninian Nijhuis, *Indigenous Peoples and the Protection of their Ancestral Lands* Capita Selecta Public International Law – Human Rights and the Environment, *available at*: https://www.academia.edu/41570727/Human_Rights_and_the_Environment_Indigenous_Peoples_and_the_Protection_of_their_Ancestral_Lands (last visited on May 7, 2022).

Those who live close to the land, have their senses attuned to what is happening with it, as compared to those who have mere factual knowledge.³⁴

There is one more aspect of the relationship of the IP with the NE. While it is clear that proximity to their NE is the primary reason for the wisdom of the IP, it is also the reason for their vulnerability. While the entire humankind is at risk in the long-term, in case of a major change in the environment, the immediate victims are the indigenous communities because of their very closeness to nature. Also, if they are not part of the decision-making groups, their views on any actions affecting the environment may not be sought. Their knowledge and skills may not be accorded the respect due to them. The resulting damage may affect them far more and far earlier, as compared to the non-indigenous communities living further away from the NE, both physically and emotionally. Also, with time, other factors may intervene which were hitherto not important. Poverty along with a sense of alienation are two of the most of these, making them vulnerable to outside influences. This may result in the slow loss of the knowledge of time immemorial.³⁵

The provisions of the international instruments mentioned previously notwithstanding; after the crisis of

³⁴ Annie Sneed, "What Conservation Efforts Can Learn From Indigenous Communities" *Scientific American*, May 29, 2019, *available*

at<<https://www.scientificamerican.com/article/what-conservation-efforts-can-learn-from-indigenous-communities/>> (last visited on May 6, 2022).

³⁵ Tommy Orange, *There There* (Knopf Doubleday Publishing Group, 2018) for a poignant and contemporary account of the dilemmas attending the lives of present-day Native Americans all over the United States of America.

climate change has been looming over the international horizon, the IP's wealth of skills and acquired knowledge about the climate change adaptations have been acknowledged officially in even stronger terms, especially by the United Nations. United Nations Educational, Scientific and Cultural Organization (UNESCO) has said that the knowledge of IP can be better than science.³⁶ Bill Gammage has reported in his book: "The Biggest Estate on Earth: How the Aborigines Made Australia"³⁷ that IP used "cool" fires to control everything. The five stages of their use of fire are: control wildfire fuel, to maintain diversity, to balance species, to ensure abundance, to locate resources conveniently and predictably. The NIP struggle with the first one. Also controlled fire averts uncontrolled ones. Also, the Skolt Sami people of Finland have participated in a study which adopted indicators of environmental changes based on traditional ecological knowledge (TEK). The project was part of a co-management process between the Sami and the government of Finland.³⁸ UNESCO also describes that the IP are challenged since many reside in high-risk environments such as nomadic pastoralists living along

³⁶ Oluwatobiloba Moody, "Climate action and sustainability: Indigenous peoples are part of the solution" *WIPO Magazine* March 2020, available at<https://www.wipo.int/wipo_magazine/en/2020/01/article_0007.html> (last visited May 4, 2022).

³⁷ 13-14 (Allen & Unwin, 2012) as reported in *id.*

³⁸ Gretta T. Pecl, Miguel B. Araujo, et al, "Biodiversity redistribution under climate change: Impacts on ecosystems and human well-being" 355 (6332) *Science* 31 (March 2017) as quoted in Jim Robbins, "Native Knowledge: What Ecologists Are Learning from Indigenous People" *YaleEnvironment360* April 26, 2018, available at<<https://e360.yale.edu/features/native-knowledge-what-ecologists-are-learning-from-indigenous-people>> (last visited May 4, 2022).

desert margins, fisher-people in low-lying islands, hunters and herders across the circumpolar Arctic. And these environments are impacted by the slightest changes in the environment or other changes in the ecosystem. But simultaneously, in these very areas, the experienced and knowledgeable IP begin to apply their in-depth knowledge of the territories where they live and work at “finer spatial and temporal scale than science” in coping with and adapting to such changes. It is no wonder that their value in making an important contribution to the Sustainable Development Goal 13 on climate action and on global mitigation efforts has been highlighted by UNESCO³⁹, including the knowledge of agro-forestry, biodiversity conservation, traditional medicine and so on.

A very ready and pertinent instance of the give-and-take imperative of the relationship between the human and non-human elements of nature was demonstrated very recently. The entire humanity, including the IP, has been undergoing one of the most difficult phases in the recorded history; the COVID-19 pandemic (as of May 2022). The land has protected the IP in these times. Though the livelihoods of many were destroyed, the IP could find food and medicinal plants so they could survive, despite the economy being almost at a standstill.⁴⁰

It is obvious from the foregoing that the human and non-human elements of nature are actually in tandem with each other. They nurture and protect each other much in the same way as members of a family do. In

³⁹ Indigenous Knowledge and Climate Change, *available at*: [https://en.unesco.org/links/climate change](https://en.unesco.org/links/climate_change) (last visited May 4, 2022)

⁴⁰ *Supra* note 21.

almost all civilizations of the world, across time, the nature has been regarded and articulated as “mother”. If we follow this thought-process to its logical path, we will not find a discussion of RoN to be odd. RoN is part of the jurisprudence which says that the ecosystems and species have inherent rights. They are the same as fundamental rights for humans. Recognizing and respecting these rights would fulfil the human right to have the right kind of life. The jurisprudence of the RoN is similar to the environmental thought of the IP.⁴¹ The next section will look at the evolution, convergence and relevance of RoN to the environmental crises of today.

IV. Rights of Nature: The Indigenous and Non-Indigenous Perspectives

“The fear for me is that the world has been turned inside out, the dark side made to seem light. Indulgent self-interest that our people once held to be monstrous is now celebrated as success. We are asked to admire what our people viewed as unforgivable. The consumption-driver mind-set masquerades as “quality of life” but eats us from within. It is as if we’ve been invited to a feast, but the table is laid with food that nourishes only emptiness, the black hole of the stomach that never fills.”⁴²

A scientific finding that the world is inter-connected and the systems depended on each other have long been known to scientific and legal communities. The ecosystem is a web of interconnections and sustainable development

⁴¹ *Supra* note 2 for a detailed discussion.

⁴² *Supra* note 14 at 308.

should not ignore this ethic. Its aim should be thriving communities of both human and non-human inhabitants of nature. Notwithstanding this, they were not reflected in the domestic and international environmental laws of the past decades which have been formulated in great numbers and with great efforts.

RoN is not a new or a radical notion. If we look at the developments in legal jurisprudence through centuries, its seeds have always been there. However, the trajectory of progress has not always been in the direction which is desired by its proponents of today. Basically, they advocate that ecosystems and species have inherent rights which are the same as the fundamental rights of humans and as such, flow from the very fact of existence.

In the United States of America, RoN began to be talked about in the 1960s. But it is generally held that the RoN was most clearly articulated in the academic circles with Christopher Stone's very well-known article: "Should Trees Have Standing? Toward Legal Rights for Natural Objects"⁴³ which was published in 1972. It raised some novel and original issues about RoN as Stone felt that there was no logical reason to draw any ethical boundaries and the tradition of natural rights should extend ever further. He had been prompted to write this article because of a suit filed by the Sierra Club⁴⁴, an organization dedicated to environmental issues, against the development of a valley called Mineral King into a massive ski-resort. The U.S. Court of Appeals of California ruled that since the Club was not itself injured, it had no "standing", or legal reason to sue against the development.

⁴³ 45 (2) *Southern California Law Review* 450 (Spring 1972).

⁴⁴ *Sierra Club v. Hickel*, 433 F. 2d 24 (9th Cir. 1970).

As he felt that the nature was getting injured, Stone wrote his article quickly, hoping to influence the Supreme Court by his arguments, when the case came up for review on appeal made by the Sierra Club. He argued that society should give legal rights to forests, oceans, rivers and the natural environment as a whole. This would give it more legal weight as compared to the traditional human modes of justice. He defined "injury" not merely in human terms but also with regard to nature. It argued for giving natural objects absolute rights comparable to the Bill of Rights for the humans. Even categories of human were deprived of rights and thought of as "property" earlier, which is unthinkable now. RoN should be viewed in the same manner. If entities such as corporations could be given legal rights and represented by humans in the court, so could nature. Humans will be trustees and stewards of the RoN.⁴⁵ In the review⁴⁶, the majority-opinion rejected the Sierra Club's appeal for standing, mainly because the Club had suffered no economic injuries.

Stone's arguments resound, both for their acumen about RoN and the issue of standing to sue. In the present

⁴⁵ Cristina Espinosa, "The Advocacy of the Previously Inconceivable: A Discourse Analysis of the Universal Declaration of the Rights of Mother Earth at Rio+20" 23 (4) *The Journal of Environment and Development* 391 (December 2014) for a thought-provoking and extensive analysis of the genesis of the movement of rights of nature. See also Oliver A. Houck, "Noah's Second Voyage: The Rights of Nature as Law" 31 (1) *Tulane Environmental Law Journal* 1 (Winter 2017) for an equally gripping advocacy of the rights of nature and eco-centrism.

⁴⁶ *Sierra Club v. Morton* 405 U.S. 727 (1972).

context, Kersten says that society's and humans' potential perspective for RoN can be summed up in five ways:⁴⁷

1. The legal status of nature as a normative reflex of human rights. As such, nature has no rights of its own, but it is protected indirectly by the subjective rights of humans. If nature is damaged in a way that would impact a human right, the aggrieved human would have the right to take preventive measures. This is how nature gets protected indirectly.
2. The legal status of nature as a common heritage of humanity. This concept was developed in international law with respect to the ocean floor and the Antarctic. But since such protection was limited, the international law evolved towards the concept of common concern of humanity which was first talked about in the United Nations Convention on Biodiversity in 1992 and it was meant to encompass a many more areas of natural resources than the former concept.
3. The legal status of nature as a constitutional objective to protect the environment. This constitutional objective may be directed towards all nature or elements of nature. For example, the Article 20a of the German Constitution says that: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive

⁴⁷ Jens Kersten, "CAN NATURE HAVE RIGHTS? Legal and Political Insights" 6 *RCC Perspectives* 9 (2017) at 10-13.

and political action, all within the framework of the constitutional order.” However, it does not create any separate laws to address the special and different needs of the non-human nature.

4. The legal status of nature as a human right to a favourable environment. Nature may be entwined in the legal system, but the approach is anthropocentric, and the nature is nurtured so that humans get as healthy an environment as possible. For instance, as late as April 2022, a Decision on a General Union Environment Action Programme to 2030⁴⁸ says that it “...shall have the long-term priority objective that by 2050 at the latest, people live well, within the planetary boundaries in a well-being economy where nothing is wasted, growth is regenerative...A healthy environment underpins the well-being of all people and is an environment in which biodiversity is conserved, ecosystems thrive, and nature is protected and restored...The Union sets the pace for ensuring the prosperity of present and future generations globally, guided by intergenerational responsibility.”⁴⁹ It is true that such laws would ensure a healthy and favourable environment. But the motivation behind them is human-centric; not for the intrinsic worth of nature for its own benefit as fellow-inhabitant of our common planet.

⁴⁸ L 114/22 Official Journal of the European Union 12.4.22, *available at* <https://wecoop.eu/wp-content/uploads/2020/04/8EAP.pdf> (last visited on May 7, 2022).

⁴⁹ Article 2 (1).

5. The legal status of nature as a legal subject and person. In this, the nature itself is a legal entity with its own rights which are for nature's integrity and protection. The countries which have adopted such laws have been inspired by their acceptance of nature as a non-passive agent. It is true that these countries require the RoN to be enforced by human agents. However, that is only realistic and pragmatic given that human systems are very different from those of nature. Furthermore, any conflicting interests of human and non-human nature would have to be balanced. Inspiring examples are the Constitutions of Ecuador and Bolivia and they will be discussed later in this section.

A similar view of the relationship between humans and nature was that of Thomas Berry whose system of "Earth Law" later gave rise to "Earth Jurisprudence" by his successors. He said that any component of the earth community should have three rights, namely: the right to be; the right to habitat; and the right to fulfil its role in the ever-renewing processes of the Earth community. Universe is the primary law giver. Humans should only make those laws which are derived from the natural laws governing the earth.⁵⁰ In the same manner, Houck also suggests that nature should have three basic rights under

⁵⁰ Jan Darpo, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament PE 689.328-March 2021, "Can Nature Get It Right?: A Study on Rights of Nature in the European Context", available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU\(2021\)689328_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf). (last visited on May 7, 2022) at 15.

environmental ethics: the right to exist, the right to continue to exist, to be restored if degraded. All living things show the will to exist, continue to exist and to be restored⁵¹. Houck and Espinosa both observe that RoN are most popular in the countries with large indigenous populations⁵² and that the IP as the primary advocates for the RoN is the most significant factor in the success of achieving both the UDRME and RoN.⁵³ This is also emphasized upon in an in-depth study of the RoN undertaken by the European Union recently.⁵⁴ It says that one of the ways to describe RoN is as a means for indigenous peoples to uphold their rights to traditional use of natural resources, while still preserving biodiversity. Espinosa also describes how the natural expansion of rights should take place towards RoN in the same way as human rights historically expanded to include women, children, slaves and other groups of humans.⁵⁵ This was because of progress and the RoN will also slowly become as inalienable as human rights. The way they are enforced will be dependent on the legal system of the various countries.

Many of the past, present and future efforts for bringing recognition to the RoN have been undertaken by international non-government organizations (NGOs). The Global Alliance for the Rights of Nature (GARN) is one of these.⁵⁶ It establishes that in order to ensure an

⁵¹ *Supra* note 47: Houck, at 33.

⁵² *Supra* note 47: Houck, at 48.

⁵³ *Supra* note 47: Espinosa, at 391-392.

⁵⁴ *Supra* note 52, at 13.

⁵⁵ *Supra* note 47: Espinosa, at 402.

⁵⁶ Its work can be seen at: <https://www.garn.org/about-garn/> (last visited on April 2, 2022). Its work is also examined at length in *supra* note 52; *supra* note 47: Espinosa.

environmentally sustainable future, a system of jurisprudence must be created that sees nature as fundamental and right-bearing entity and not as mere property to be exploited at will. GARN was born in 2010 and started to coordinate activities of NGOs all over the world. It comprises of individuals and organizations from Australia, Bolivia, Ecuador, India, Italy, Romania, South Africa, Switzerland, United Kingdom and the United States of America. It organized the first RoN tribunal in Quito, Ecuador in 2014.

Many representatives from GARN participated in the 2010 World Peoples' Conference on Climate Change and the Rights of Mother Earth in Bolivia⁵⁷ where the Universal Declaration of the Right of Mother Earth (UDRME) was adopted. The UDRME sought to connect different issues which affected the earth differently as they represented the fact that humans see earth as different from themselves and feel that the nature exists for the humans to dominate. The traditions of the IP and traditional communities support ME and they are the role models for a balanced relationship with nature.⁵⁸ It is no wonder then that the first country to enshrine RoN in its Constitution was Ecuador, which has substantial IP population. The General Assembly of the United Nations also proclaimed 22 April as the International Mother Earth Day. The first report of the Secretary General on "Harmony with Nature" was already published in which the United Nations also said that: "Rights of Nature is grounded in

⁵⁷ "World Peoples Conference on Climate Change and the Rights of Mother Earth", April 19-22, 2010, *available at*: <http://sdg.iisd.org/events/world-peoples-conference-on-climate-change-and-the-rights-of-mother-earth/> (last visited on May 7, 2022).

⁵⁸ *Supra* note 47: Espinosa, at 397-399.

the recognition that humankind and Nature share a fundamental, non-anthropocentric relationship given our shared existence on this planet” and “Furthermore, educational activities on the rights of Nature are on the increase in the professional and public spheres to advance Earth Jurisprudence worldwide”.⁵⁹In 2008, the RoN or Pacha Mama (Mother Earth) started to getting recognized in Ecuador’s Constitution and in 2012, Bolivia also enacted the Law of the Rights of Mother Earth (*Ley de derechos de la Madre Tierra*)⁶⁰. The country has also adopted the principle of *Vivier Bien* which means to “live well”. It is by living in harmony with the Mother Earth in equilibrium with all form of life. It opposes the consumerist paradigm that leads to unthinking exploitation of the environment and the IP of Bolivia. If the government fails to uphold their required obligations, any individual or group of IP may take up legal action in defense of the environment⁶¹. It was in 2012 also that the International Union for the Conservation of Nature (IUCN) adopted a policy to incorporate the RoN in their own decision-making process.⁶²

The process of recognition of RoN continued in a very inspiring manner in another country which has a

⁵⁹ Available at:

<http://www.harmonywithnatureun.org/rightsOfNature/>

⁶⁰ Katie O’Bryan, “Giving a voice to the river and the role of indigenous people”. 20 *Australian Indigenous Law Review*, 48 (2017) at 49-50.

⁶¹ Sascha Dov Bachmann, Ikechukwu P. Ugwu, “Hardin’s ‘Tragedy of the Commons’: Indigenous Peoples’ Rights and Environmental Protection: Moving towards an Emerging Norm of Indigenous Rights Protection?” 6 (4) *Oil and Gas, Natural Resources, and Energy Journal* 547 (May 2021) at 575-576.

⁶² *Supra* note 52, at 14.

sizeable IP population which is highly regarded, both socially and legally. In this way, New Zealand became the first country to give legal personality to a specific natural object. A new type of governance structure was introduced which was focused on the concepts and values of Maoris. It acknowledged the intrinsic relationship which the Maoris have with nature and environment. This is the significance of the Whanganui River Treaty Settlement. The Whanganui River is the longest navigable river in New Zealand and it is of great significance to the Whnaganui Iwi (part of Maori people) and they have been struggling for over a century to have their rights and interests in this river recognized. After much struggle and various types of legal recourses despite defeat many times, the Deed of Settlement was signed in 2014. The Te Awa Tupua (Whanganui River Claims Settlement) became law in 2017. Katie O'Bryan says that this recalls Stone's guardianship model in that a western model has been combined with Maori characteristics but it goes further in that it incorporates the Maori worldview who see rivers as the embodiment of their ancestors "tupuna". The guardians are *Te Pou Tupua* who are comprised of two persons: one nominated by the Crown and the other by the Whanganui Iwi. Once appointed, they would act on behalf of Te Awa Tupua and not on behalf of their nominators. The most important provision is that Te Pou Topua has the standing to bring an action for damage to Te Awa Tupua. It does not ensure that they will succeed. But it does succeed in Maori standing to protect the values of the River. The Maori have a part in the decision-making process in anything which affects the river and its catchment. It also increases the scope of heritage protection. This is indeed a shining demonstration that RoN and the IP environmental thought converge naturally.⁶³

⁶³ *Supra* note 62, at 53-69.

V. Conclusions and Way Forward

“Knowing that you love the earth changes you, activates you to defend and protect and celebrate. But when you feel that the earth loves you in return, that feeling transforms the relationship from a one-way street into a sacred bond.”⁶⁴

This chapter attempted to examine the relationship between IP and NE so as to be able to gauge what is missing in the relationships between NE and NIP. The prevailing environmental crises do prove that something very urgent and imperative is missing. It is hoped that this chapter could demonstrate adequately that this urgent and imperative element is the anthropocentric attitude which informs most NIP activity. It gives rise to the assurance that humans are at the centre of the universe; and their interests take pre-dominance over those of all of their co-inhabitants on this earth. These interests may not even be essential – such as development of a new cosmetic – and yet they could override the basic right of the relevant plants to be sacrificed in the industry-trials for its manufacture. Furthermore, this anthropocentric attitude makes us sure that the fundamental rights: of life, of liberty, of not being made to suffer without a rightful cause, and of being part of the flourishing of an ecosystem, are handed down as natural rights for only one small component of the nature i.e. the humans. This anthropocentric attitude has caused us to take from the nature with impunity. When we humans do not see our NE to be as vibrant and living as us, we see no need for a relationship which presupposes give-and-take, reciprocity and respect, let alone legal rights. Naturally then the

⁶⁴ *Supra* note 14, at 124.

imbalance is caused because actually, there is an integral relationship between all the components of nature. It is this relationship which is the basis of biodiversity of our planet's ecosystems. When this imbalance becomes untenable, as it appears to have at the present time, it is apparent in the ill-health of the NE causing crises. As we attempt to find the solution, we have to be at least aware of the real problem. Our ancient knowledge, which had stood by us till relatively recently, is not easily accessible to us. This is where the IP and other traditional communities can help. They are the repositories of the knowledge, wisdom and value-system which are balanced and in keeping with the natural workings of the universe. Learning from these, internalizing their attitudes and inculcating their reverence for Mother Earth: all will show us the path to a genuine sustainable development. This is the kind of development which ensures that all components of the NE flourish and are healthy: as themselves and as part of the chain of biodiversity. This is the primary right of nature which the IP, UDRME and many others are advocating for. Scientifically too, it has been proved that each component of nature actually thrives only if all components thrive. This includes us humans.

This is also the basis of the concept of Sumak Kawsay which has now becoming very popular especially in the South American continent. It denotes living in harmony with our communities; living and breathing environment and ourselves; and ensuring a good life to everything on this earth.

I would like to conclude by hoping the RoN jurisprudence soon develops to encompass strategies which can ensure implementation. One example would be

a recent case in the Indian legal system which has given rise to huge literature. This is *Mohd. Salim v. State of Uttarakhand and Others*⁶⁵ in which the rivers Ganga and Yamuna were declared by the Uttarakhand High Court to be legal entities with rights which had to be protected by citizens as benefactors. This judgment was later overturned by the Supreme Court⁶⁶ on the grounds of difficulties of implementation. The recognition of personhood of rivers is a highly progressive step.

⁶⁵ (Writ Petition (PIL) no. 126 of 2014 (March 20, 2017).

⁶⁶ *The State of Uttarakhand and Others v. Mohd. Salim*, SLP (C) 16879/2017.

CHAPTER-16

EDUCATING THE TRIBAL WOMEN IN INDIA: AN ANALYSIS OF EDUCATIONAL FACTOR RESPONSIBLE FOR WOMEN EMPOWERMENT IN INDIA

*Kaushal Pandey**

I. Introduction

There are various factors working for the empowerment of women in India like the geographical location (rural/urban), educational status (literate/illiterate), social status (caste/class), and the age of the women.¹ Despite the various laws and policies of the government at various levels for the advancement and protection of tribal women, there seems to be a leakage in the implementation of these laws and policies.² The existence of the patriarchal structure of the Indian society is one of the key factors responsible for the gap between policy advancement and actual practice at the grass root

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¹ Mandakini Naik, Birendra Suna, Tusarkanta Pattnaik, Role of Tribal Women in Panchayati Raj: A Study of Keonghar District of Odisha, 7 JCR 8819, 8825 (2020).

² Ramu Bhukya, Empowerment of Tribal Women in India, 4 IJR 4, 4 (2015).

levels.³ The other factors like the limited mobility of the women, negligible access to education, limited access to health care facilities, and restricted decision-making power are some of the disadvantages associated with the tribal women.⁴ In spite of the existence of the reservations in favour of the tribal women, their political representation is also meagre in contrast to the men and women of other classes/strata.⁵ The Constitution of India also incorporated special provisions for the protection and advancement of tribal society.⁶ The constitution of India under Article 14 also incorporates the provision for the establishment of an egalitarian society on the basis of the twin concept of equal treatment to equals and unequal must not be treated equally.⁷ The Ministry of Tribal Affairs has been separately established for giving a focused approach to the development of tribal peoples.⁸ From the date of the establishment of the Ministry, the Ministry of Tribal Affairs, the Government of India considered education as one of the mediums for “*upliftment of the Scheduled tribes*” that have focused on the educational development of the tribal population. Educational

³ Swaleha Sindhi, Prospects and Challenges in Empowerment of Tribal Women, 6 JHSS 46, 53 (2012).

⁴ Ramu, supra note 3, at 3.

⁵ Palmu Kaleon, Women in Politics: A Study of Tribal Women’s Participation in Local Governance, 5 Indian J. Soc. & Pol. 37, 43 (2018).

⁶ India Const. Art. 342, Art 366 cl. 25, Art 15, Art 16, Art 19, Art 46, Art 355, Art 330, Art 332, Art 334, Art 243D, Art 243T, Art 338A.

⁷ Rouf Ahmad Bhat, Role of Education in the Empowerment of Women in India, 6 JEAP 188, 190 (2015).

⁸ Ministry of Tribal Affairs Government of India, Annual Report, GOI, 7 (2021).

development can also be considered a turning point toward economic and social development.⁹

II. Status of Tribal Women within and beyond Society

The tribal women are found to be industrious so they are regarded as an “Economic Asset” in their society, but the level of their control on tangible economic resources is negligible.¹⁰ In the social, cultural, and religious functioning, they received good heed in their society.¹¹ However, they are found to be lagged in other realms of their life like access to education; having better employment opportunities; availing better health care facilities, and enhancement of the economic lives of the tribal women. “*The tribal women should be educationally empowered for their all-round development and to suppress the kind of inequality, discrimination, and exploitation they are facing in their daily lives.*” Empowerment could only be possible to achieve through a sustained struggle for obtaining freedom from the bondage of the patriarchal system which exists in India. The real empowerment could lie in a social environment that is free from inequalities i.e., political, social, economic, and educational inequalities. Hence, empowerment is not only the process of creating social and political space for these tribal women but the process of liberating them from the persecution of inequalities that exists there in a patriarchal society. Hence, education is the only medium to liberate them from the bondage of patriarchal society.¹²

⁹ *Id* at 14.

¹⁰ Ramu, *supra* note 3, at 2.

¹¹ Neera Gautam, Education of Scheduled Tribe in India: Schemes and Programmes, 4 JEAP 7, 8 (2013).

¹² Soti Shivendra Chandra, Amit Sharma, Sanjivani for Primary Education: APJ Abdul Kalam’s Educational Thoughts, *The Primary Teacher* 25, 30 (2007).

III. Nature and Dimension of Socio-Economic Disempowerment of Tribal Women In India

In the tribal community, there are various factors/obstacles which affect the empowerment of tribal women among them are:

- a) lack of education;
- b) absence of skills and training;
- c) lack of property rights;
- d) social isolation and segregation from the mainstream Community
- e) control of the male over tangible economic resources.

Thus, the tribal women's quality of life is miserable because of their being socially backward and poor economic conditions.¹³ Undernourishment, food insecurity, hunger, and malnutrition are some of the greatest difficulties being faced by tribal women. They are also facing difficulties in connecting with the mainstream community in rural/urban areas due to vast differences in their language, culture, and stigma of social status.

IV. Constitutional Safeguards for Tribals In India

The Constitution of India (referred to as Constitution hereafter) defined the expression Scheduled Tribes to mean "*such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the constitution.*"¹⁴ The President of India shall declare and specify the tribes or tribal communities or parts of or group within tribal

¹³ Ramu, supra note 3, at 3.

¹⁴ Constitution of India, Art 366 cl. 25.

communities as Scheduled Tribes in relation to that State or Union territory.¹⁵ Such declaration shall be made in consultation with the Governor of that particular state or union territory. Therefore, the President in the exercise of the power conferred by Clause (1) of Article 342 and in consultation with Governors of the states passed an order of 1950 wherein “*Parts I to XIV of the Schedule to the Order shall, in relation to the states to which those parts respectively relate, be deemed to be Scheduled Tribes.*”¹⁶ The order of 1950 has been amended several times to include or to exclude tribals or tribal communities from the specified list of Scheduled Tribes contained in the Constitution Order, 1950.

The Constitution embodies “*the various constitutional provisions safeguarding educational & cultural rights, social economic and political rights and service rights of socially and educationally backward classes of citizens and especially SC and ST’s.*” In order to achieve the constitutional aspiration of social justice to the scheduled caste and the scheduled tribes and to the socially and educationally backward classes of citizens, the framers of the Constitution have adopted various mechanisms like “*reservation of post in public employment*”, “*seats for admission in educational institutions*”, and setting apart of “*seats in electoral bodies.*” Therefore, the state only gets the power to provide for reservation in the matter of employment, upon the satisfaction of compelling reasons like backwardness of the class and inadequate representation in employment.¹⁷

¹⁵ Constitution of India, Art 342.

¹⁶ The Constitution (Scheduled Tribes) Order, Notification No. S.R.O 510, Ministry of Law, 1950 (India).

¹⁷ U.P. Power Corporation Ltd. v Rajesh Kumar (2012)7 SCC 1.

The Constitution provides that the State shall abide by the principle of equality enshrined in the Constitution,¹⁸ therefore, the one facet of equality is that *“the state shall not discriminate against its citizen on grounds of religion, race, caste, sex or place of birth.”*¹⁹ However, the state is permitted *“to make special provisions for the advancement of any socially and educationally backward classes of citizens or for scheduled caste and the scheduled tribes.”*²⁰ Another facet of the principle of equality shall also be extended to equality of opportunity in matters of public employment. However, the state, here too, shall make a provision for *“the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state.”*²¹ Therefore, in order to redress the *“social exclusion, economic deprivation and political alienation”* of the socially and educationally backward classes especially the scheduled caste and the scheduled tribes, the framers of the Constitution had conceived an affirmative action through reservation. The state is also mandated with the duty to take special care, in accordance with the economic capacity of the state, for the promotion and advancement of *“educational and economic interest of weaker sections of the people”*, and in particular, of the scheduled caste and the scheduled tribes. The state shall also protect them from *“social injustices and all forms of exploitation.”*²²

For the purpose of political participation of scheduled tribes at the Central level, the Constitution

¹⁸ Constitution of India, Article 14 (the principle of equality).

¹⁹ Constitution of India, Article 14 cl. 1.

²⁰ Constitution of India, Article 15 cl. 4.

²¹ Constitution of India, Article 16 cl. 4.

²² Constitution of India, Article 46.

provides for the reservation of seats in the House of the People.²³ In the House of the People, out of 543 parliamentary constituencies, 47 seats have been reserved for scheduled tribes.²⁴ Similarly, the reservation of seats for the scheduled caste in the legislative assemblies of each state,²⁵ in panchayat²⁶ and municipalities²⁷ of the states are envisaged under relevant provisions of the Constitution. In order to abide by the golden principle embodied in the Constitution for the advancement of socially and educationally backward classes and for the SC's and the ST's, the parliament has enacted various laws and policies. The Protection of Civil Rights Act, 1955 has been enacted which prescribes punishment for practising untouchability, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been enacted with a mandate to prevent the commission of offences of atrocities against SCs and STs. the Panchayats (Extension to the Scheduled Areas) Act, 1996 has been enacted which provides for the extension of Panchayati Raj system to the Scheduled Areas. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 has been enacted to recognize the forest rights in forest land in forest-dwelling scheduled tribes. The various schemes that have been launched by the Ministry of Tribal Affairs for the promotion and advancement of Scheduled tribes are: "*Special Central Assistance (SCA) to Tribal Sub Scheme (TSS) (hitherto known as SCA to Tribal Sub Plan (TSP))*,"

²³ Constitution of India, Article 330.

²⁴ The Delimitation of Parliamentary and Assembly Constituencies Order, Election Commission of India, 2008 (India).

²⁵ Constitution of India, Article 332.

²⁶ Constitution of India, Article 243D.

²⁷ Constitution of India, Article 243T.

Grants under Article 275 (1) of the Constitution of India, National Fellowship and Scholarship for Higher Education of ST students, National Overseas Scholarship for ST Students, Pre-Matric Scholarship for ST students, Post Matric Scholarship for ST students, Girls & Boys Hostels for STs, Ashram Schools in Tribal Sub-Plan Area, Vocational Training in Tribal Areas, Equity Support to National / State Scheduled Tribe Finance and Development Corporations, Institutional support for Development and Marketing of Tribal Products / Produce, Support to Tribal Research Institutes, Development of Particularly Vulnerable Tribal Groups (PVTGs), Grants-in-Aid to Voluntary Organisations working for the welfare of STs, Mechanism for Marketing of Minor Forest Produce (MFP) through Minimum Support Price, Tribal Festival, Research, Information and Mass Education, Development Programmes in the Tribal Areas(EAP), Van Bandhu Kalyan Yojana.”

V. Educational Drive for the Upliftment of Tribal Women in India

This paper tends to discuss two schemes namely the Scheme of Strengthening Education among Scheduled Tribes Girls in Low Literacy Districts and the establishment of Eklavya Model Residential School for ST's students.

Scheme of Strengthening Education among Scheduled Tribe (ST) Girls in Low Literacy Districts

Education is a prerequisite for the socio-economic development of tribal women in India. On this basis, the government at various levels introduces schemes and policies in the educational sector for the benefits of the

tribal community more particularly for the benefits of tribal girl's/women. This scheme has been launched by the "*Central Government under the flagship of Ministry of Tribal Affairs*" keeping the following objectives in mind:

- "bridging the gap in literacy level between the general female population and the tribal women;
- to ensure the cent percent enrolment of the tribal girls in low literacy districts more particularly in naxal affected areas and the areas inhabited by Primitive Tribal Groups;
- to reduce the drop-outs of the tribal women at the elementary level by creating an ambience for education"²⁸

The coverage of this scheme has been extended to the 54 identified districts²⁹ on the basis of ST population

²⁸ Scheme of Strengthening Education among Scheduled Tribes (ST) Girls in Low Literacy District, No. 2204/10/2006/NGO/Education, Ministry of Tribal Affairs Government of India, 2006 (India).

²⁹ Districts identified for the scheme of strengthening education among ST girls in low literacy districts – In Andhra Pradesh one district named Khammam identified, in J&K two districts named Rajouri and Punch identified, in Rajasthan three districts named Dungarpur, Banswara, Udaipur identified, in Arunachal Pradesh four districts named Tawang, East Kameng, Lower Subansiri, Tirap, in Nagaland one district named Mon identified, in Tripura one district named Dhalai identified, in Jharkhand six districts named Sahibganj, Pakaur, Dumka, PaschimiSinghbhum, PurbiSinghbhum, Lohardaga, in Orrisa twelve districts named Japati, Kandhamal, Naupada, Kalahandi, Rayagada, Nabarangapur, Koraput, Malkangiri, Deogarh, Keonjhar, Mayurbhanj, Balangir identified, in Chhattisgarh five districts named Surguja, Korba, Bastar, Dantewada, Bilaspur identified, in Madhya Pradesh 13 districts named Umaria, Shehdol, Sidhi, Ratlam, Jhabua, Dhar, West Nimar, Barwani, East Nimar,

of 25 % or more and ST female literacy rate below 35 % as per the 2001 census. This scheme has also been extended to other blocks,³⁰ other than the 54 identified districts, in which the tribal population is 25 % or more and the tribal female literacy rate below 35 %. In addition to the above, the scheme will also cover the Gram Panchayats areas inhabited by notified Primitive Tribal Groups (PTG's).

Under the scheme, there are various components stressed by the Central Government for improving the literacy rate of the tribal girls:

- The schemes stressed providing hostel facilities, in hired premises or in the implementing agencies own building with a maintenance grant of 30 % of the notional annual rent assessed by the Public Work Department, to the tribal girls at the block and

Betul, Harda, Dindori, Mandla, in Gujarat three districts named Dahod, Panchmahals, Vadodara identified, in Dadar& Nagar haveli one districts named Dadra & Nagar haveli identified, in Maharashtra two districts named Nandurbar and Dhule identified.

³⁰ Following are the blocks identified by the Ministry of Tribal Affairs Government of India, other than 54 identified districts, which are: in the state of Karnataka, Devadurga block has been identified in Raichur district, Molakalmur block has been identified in Chitradurga district, Sandur and Kudligi blocks have been identified in Bellary district; in state of West Bengal, Phansidewa block has been identified in Darjiling district and blocks Mal, Matiali, Nagrakata, Madirihat, Kalchini, Kumargram have been identified in Jalpaiguri districts, Habibpur block has been identified in Maldah district, Sandeshkhali-I block has been identified in North 24 Parganas district, Hirbandh block has been identified in Bankura district, block Santuri, Hura, Balarampur, Manbazar-II, Bundwan in Puruliya district, block Gopiballavpur-I, Nayagram, Kharagpur-II, in west Medinipur district.

panchayat level for enabling them to attend the regular classes in middle school and primary school respectively;

- The hostel and the school must not be distanced more than 0.5 km in hilly areas and 2 km in plain areas to facilitate the tribal girls to attend the daily classes at their prescribed schools.
- However, in case if there is no availability of regular schools run under the scheme of Sarva Shiksha Abhiyan or other schemes of the Education Department within a 5 Kms radius of tribal inhabited areas, then schooling along with the hostel facilities shall be considered under this scheme.
- No hostel facility under this scheme shall be opened within a 5 Km radius wherever Kasturba Gandhi Balika Vidyalaya's are operating.
- The primary level and middle/secondary level tribal girl students are given a cash stipend of Rs. 200/- and Rs. 400/- respectively for coaching/tuitions classes and to meet their daily requirements.³¹
- The tribal girl students will also be motivated for attending regular classes by giving them periodical awards like bicycles, watches, etc, as would be decided by ministries, on passing Class VIII, X and XII exams.

³¹ Scheme of Strengthening Education among Scheduled Tribes (ST) Girls in Low Literacy District, No. 2204/10/2006/NGO/Education, Ministry of Tribal Affairs Government of India, 2006 (India) (Division of the cash stipends to the Tribal Girls are as follows: For the purpose of coaching classes, cash stipend of Rs. 100/- will be given to primary students and Rs. 200 will be given to secondary students. For meeting the daily requirements, the cash stipend of Rs. 100 will be given to primary students and Rs. 200 will be given to secondary students.

- For triggering the curiosity of students in studies, primers will be prepared in at least 5 major tribal languages selected in coordination with the Ministry of Human Resource Development, for the use of children up to Class III.
- The scheme provides for, the constitution of the Mother's Committee by every fundee organisation, also represented by villagers to which inmates belong. Such a committee meets once every month to supervise and suggest improvements for the proper implementation of the scheme in those particular areas. A register must be required to be kept to maintain the decisions of the committee in each meeting.

Every state and UT's administration has been mandated under this scheme to establish "District Education Support Agency (DESA)," which would be NGO's or federation of NGOs in each of the 54 identified low literacy districts whose main responsibilities shall be:

- To promote 100 % enrolment in each school per class wise;
- To reduce drop-outs at the primary/middle school level;
- To monitor the status of hostels/accommodation;
- To make payments, grant of awards etc, as may be prescribed by the ministry;
- To arrange a regular meeting between the tribal girl students and ANM's to promote preventive health care education among them;
- To sensitize and promote awareness among the parents of tribal girl students about the importance of girl's education;

- To develop connections with the potential recruiters to help tribal girl students to be placed in jobs immediately after their education or for self-employment;
- Establishment of Eklavya Model Residential School for ST Students

The “Ministry of Tribal Affairs, Government of India” in the year 1997-98 initiated a scheme for establishing quality residential schools for imparting quality education among the scheduled tribe students³² which include within it the schooling of tribal girl students. The Ministry developed the concept of Eklavya Model Residential School (EMRS) in 15 acres of land in which the cost incurred on each child will be Rs. 1,09,000/- per year, Eklavya Model Day Boarding School (EMDBS) in 5 Acre of land in which the cost incurred on each child will be Rs. 85,000/- per and the Centre of Excellence for Sports for Scheduled Tribes students as well as “Particularly Vulnerable Tribal Group” (PVTG).³³

The Ministry of Tribal Affairs, Government of India proposal to establish EMRS in each block where there is more than 50 % ST population and at least 20,000 tribal persons by 2022.³⁴ Around 564 sub-districts have been identified by the Ministry of Tribal Affairs, Government of India, having 50 % or more than 50 % of ST’s population

³² Ministry of Tribal Affairs Government of India, <https://tribal.nic.in/EMRS.aspx>.

³³ Revised Scheme of Development of Particularly Vulnerable Tribal Groups, F. No. 22040/37/2012-NGO, Ministry of Tribal Affairs Government of India, 2012, <https://tribal.nic.in/ST/StatewisePvTGsList.pdf>.

³⁴ Ministry of Tribal Affairs Government of India, <https://tribal.nic.in/EMRS.aspx>.

and a minimum of 20,000 tribal persons.³⁵ The EMRS have been sanctioned in 102 sub-districts while the remaining 462 districts will get the EMRS by the year 2022.³⁶ The purpose of the EMRS is to preserve the local culture and arts apart from imparting skill and training programmes to the tribal students and the facilities of these schools will be similar in standard which has been adopted for Navodaya Vidyalaya. The proposal for the establishment of twelve Eklavya Model Day Boarding School (EMDBS) has been given in sub-districts which is having more than 90 % of ST's population in order to provide an additional opportunity to the ST's students to get the schooling with residential facilities. The EMBDS will be established on the demand of the concerned states/UT's. The quality and the prospects of the EMBDS will be similar in a standard adopted for EMRS, however, certain exceptions have been noted here: (1) students enrolled in EMBDS will not be given hostel facilities as the very foundation of EMBDS is to provide schooling to those students who wish to continue their studies without letting in the hostel; (2) in comparison to EMRS, only 5 acres of land is required for the construction of EMBDS; (3) EMBDS will have canteen facilities which is responsible to provide morning and evening snacks and lunch in the afternoon. Centre of Excellence for Sports will also be set up in each State/UT's with all related infrastructure. This centre will have specialized facilities to promote one individual sport and one group sport. The centre of excellence for sports will have certain features of its own

³⁵ Guidelines for Eklavya Model Residential School, Eklavya Model Day Boarding School, Centre of Excellence, Nov.13,2020,<https://tribal.nic.in/downloads/EMRS/Guidelines/EMRS%20Guidelines%20November%202020.pdf>.

³⁶ Ministry of Tribal Affairs Government of India, <https://tribal.nic.in/EMRS.aspx>.

which have been listed as follows: (1) as per the norms of the Sports Authority of India students enrolled in the Centre of Excellence for Sports are provided with equipment, specialized training, accommodation facilities, sports kit, medical and insurance facilities, and competition exposure; (2) both the centre of excellence for sports and existing or proposed EMRS will be co-located; (3) the sports facilities at the centre of excellence for sports will not only be limited to ST's students but will also be provided to other students on the payment of nominal charges as decided by NEST's. The rules and regulations for the management of the Centre of Excellence for Sports will be framed by NESTs in deliberation with the Sports Authority of India.

The management and administration of the school shall be governed at three levels:³⁷

- At the central level, the National Education Society for Tribal Students also called NESTs shall be registered as an autonomous body under the Society Registration Act, 1860.
- The society at the central level called NEST shall be responsible for the planning, construction, establishment, endowment and administration of the school; and it is also mandated to do all acts which are/will be conducive for tribal education.
- The Secretary to the Tribal Affairs shall be appointed as a chairman to the executive committee of the

³⁷ Guidelines for Eklavya Model Residential School, Eklavya Model Day Boarding School, Centre of Excellence, Nov.13,2020, <https://tribal.nic.in/downloads/EMRS/Guidelines/EMRS%20Guidelines%20November%202020.pdf>.

National Education Society for Tribal Students which shall be responsible for the functioning of the society.

- At the state/UT's level, all the states and union territories are mandated for the establishment of EMRS Societies within 30 days of issue of guidelines either registered under the "Society Registration Act or Indian Trust Act or any corresponding States Act".
- The responsibilities of the state-level society are to maintain and manage the EMRS, and other responsibilities, in accordance with the norms and guidelines issued by the Ministry of Tribal Affairs, Government of India or NEST's.
- At the district level, District Level Committee is to be formed which will be responsible for supervising the functioning of schools in the district. The composition of the District Level Committee shall consist of:³⁸
- The Chairman, presided over by District Magistrate/Collector/Deputy Commissioner of the district concerned;
- The member presided over by Project Director/District Rural Development Agency/Chief Executive Officer/Zilla Panchayat;
- The member, presided over by Project Officer/Administrator/Integrated Tribal Development Agency/Deputy or Assistant Commissioner/ Tribal Welfare or equivalent Officer dealing with Tribal Affairs of the district concerned;
- The member, presided over by District Education Officer of the District concerned;

³⁸ Guidelines for Eklavya Model Residential School, Eklavya Model Day Boarding School, Centre of Excellence, Nov.13,2020,
<https://tribal.nic.in/downloads/EMRS/Guidelines/EMRS%20Guidelines%20November%202020.pdf>.

- The member, presided over by District Social Welfare Officer of the district concerned;
- The chairman shall nominate two eminent educationists from the district concerned;
- The member, Chief District Medical Officer of the district concerned;
- The principal of the school shall also be appointed as a member of the District Level committee; if there is more than one school in a district then the principals shall be nominated as the member secretary of the District Level Committee on an annual rotation basis.
- Power and function of the District Level Committee⁻³⁹
- The District Level Committee has been bestowed with the supervising power in respect to the school functioning such as academic performances, development of infrastructure, advancing the co-curricular activities, proper mess facilities, etc;
- The District Level Committee shall also work towards seeking assistance and cooperation from the locals for the betterment and growth of the organization;
- The District Level Committee shall work towards organizing various cultural activities for the personal and professional growth of the students;
- The District Level Committee shall work towards the improvement of quality of school education;
- The District Level Committee shall monitor the infrastructural development activities in the school;
- The District Level Committee shall provide the suggestions and mechanism for improving the quality

³⁹ Guidelines for Eklavya Model Residential School, Eklavya Model Day Boarding School, Centre of Excellence, Nov.13,2020,
<https://tribal.nic.in/downloads/EMRS/Guidelines/EMRS%20Guidelines%20November%202020.pdf>.

of school education to the State EMRS Society and the required changes which need to be brought in the academics;

Enrolment in School

As per the Ministry of Tribal Affairs, Government of India dashboard data record, a total of 632 EMRS have been sanctioned out of which 367 schools are functional. The records contain that the total ST's students enrolled in EMRS are 85700 out of which total ST's male students are 41,245 and total ST's female students enrolled are 44,455. The state/UT's wise data for the availability of school along with the total enrolled students and number of female students have been provided herein below in the chart:

According to the chart, Madhya Pradesh state is having the highest number of ST's female students enrolled for education that is 12,250 while the second-highest state in Chhattisgarh has 5,711 female ST's students enrolled and the third-highest state is Gujarat having 4,386 female ST's students enrolled in school for education. While Bihar and Jammu & Kashmir is having no data for ST's female student enrolment in schools. Even Bihar and Jammu & Kashmir do not have any EMRS functional even though Bihar alone have 5,18,230 (Five lakh Eighteen Thousand and Two Hundred Thirty) ST's population out of which male ST's population is 2,64,314 (Two Lakh Sixty-Four Thousand Three Hundred Fourteen) while female ST's population is 2,53,916 (Two Lakh Fifty-Three Thousand Nine Hundred Sixteen)⁴⁰.

⁴⁰ Dashboard, Ministry of Tribal Affairs, Government of India.

VI. Conclusion

The 29 states/UTs, 483 districts, 701 blocks, 21,198 village panchayat, 1,17,047 villages comprised of tribal population. The total tribal population of India is around 6.76 crores out of which the male ST's population is around 3.39 crores and the female ST's population is around 3.37 crores. For the benefit of these tribal populations all over the country, the Constitution has enshrined golden provisions for promoting and advancing the interest of Scheduled Tribes and in Scheduled Tribe areas. *“In pursuit of the constitutional goal of substantive equality, reservations/schemes/policies have been provided as a means of enabling Scheduled tribes to realise, in its true sense, dignity, freedom and liberty which the Constitution guarantees as to its basic philosophy.”* However, the problem which has confronted legislatures, administrators and court is “a capture of the benefits of affirmative action programmes by persons who do not genuinely belong to the Scheduled Tribes”. “This kind of capture poses a serious dimension, when a person who does not belong to a caste, tribe or class for whom reservation/schemes/policies are meant, seeks to pass off as its member, such a stratagem constitutes a fraud on the Constitution”. To provide direct benefits to the targeted scheduled class population, various schemes and policies have laid down strict administrative guidelines and parameters which must be fulfilled by the schemes and policies implementing organizations. The proper balance and check provisions have been provided under all the beneficial schemes and policies to hit the target scheduled tribal population.

On the analysis of the abovementioned policies about the promotion of education of scheduled tribes’

girls, as per the data available on the official website of the Ministry of Tribal Affairs, Government of India, there are around 1,03,546 schools and 9,366 vocational training centres running across the villages for the benefit of rural students. The data for each category of schools like primary school, middle school, high school and senior secondary school has been arranged in tabular form in the chart herein below:

Primary School	61,230 (52.31 %)
Middle School	26,155 (22.35 %)
High School	10,642 (9.09 %)
Senior Secondary School	5,519 (4.72 %)

Source: Ministry of Tribal Affairs, Government of India (Accessed on 16/10/2021)

However, there are still 13,501 villages having no school facilities for the educational benefits of the students. These 13,501 villages are having a total population of 3,125,151 (Thirty-One Lakh Twenty-Five Thousand One Hundred and Fifty-One) out of which the total ST's population is 2,236,182 (Twenty-Two Lakh Thirty-Six Thousand One Hundred Eighty-Two). The ST's male and female population is 1,119,200 (Eleven Lakh Nineteen Thousand Two Hundred) and 1,116,982 (Eleven Lakh Sixteen Thousand Nine Hundred Eighty-Two) respectively. Therefore, the inference may be drawn that despite various policy frameworks framed by the government there are around 1,116,982 ST's female population which are deprived of basic school facilities.

CHAPTER-17

FROM DISSENT TO DIFFERENCE: THE PARADIGM SHIFT IN TRIBAL MOVEMENT IN TRIPURA

*Gourishwar Choudhuri**

I. Introduction

The State of Tripura is claimed to be one of the oldest Kingdoms in Ancient India ruled by Princely rulers, who were believed to be descendents of King Yayati, belonging to the lunar dynasty in the Mahabharata era (Mackenzie 2005, 269). According to *Rajmala*, a Bengali chronicle of the Tripura kings, about one hundred fifty kings had ruled Tripura for an uninterrupted period of about 1350 years. As far as the geography of Tripura is concerned it is a small land locked North-eastern State of the Union of India, which covers an area of 10,477 sq. km. It is bounded on the North-West, South and South-East by Bangladesh with a long border of 839 Km. On the north, west, south and south-east border of Tripura are the Bangladeshi districts of Sylhet, Comilla, Noakhali and Chittagong Hill Tracts respectively. It shares a boundary with the district of Karimganj in Assam in the North and on the East with the State of Mizoram. The topography of the Western part of Tripura is almost the

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same as the Eastern part of Bangladesh, with six hill ranges of varying heights ranging from 1000 feet to 3000 feet, emerging from Bangladesh and traversing through Tripura in a west to east direction. The principal hill ranges are Bara-Mura, Athara-Mura, Deota-Mura, Longtharai, Jampui and Sakhan.

After the independence of the country Queen Kanchan Prava Devi signed the Instrument of Accession on 9th September 1949 and with effect from 15th October 1949, Tripura became part of the Indian Union. The state was administered by a Chief Commissioner as a Part C state. However, the transformation of this monarchy to its present democratic State as part of the Union of India ushered in substantial social, economic and political changes which in turn engendered many socio-political movements. The present essay is an attempt to survey the tribal movements and rebellions in Tripura from the pre-independence period to the ethnic and tribal movements of the late 1990s which not only gave rise to modern political consciousness among the tribal populace of the state but also led to the rise of ethno-centric movements. The essay is also intended to analyse the roots, course and nature of the movements so as to bring out the changing character of the movements in terms of its goal and pattern of mobilisation.

II. Classification of Tribal Rebellion

The state of Tripura has been rocked by a number of tribal rebellions and movements since the imposition of colonial rule which continued even in the post-colonial period. These rebellions can be classified under different heads. The increasing revenue burden on the royal rulers of Tripura due to the incursion of the colonial rule often

percolated down to the peasants which in turn engendered many tribal rebellions often directed against the immediate oppressor i.e. the revenue collector of the Tripura rulers leading to a large number of tribal uprisings. The introduction of forest regulations which encroached upon the traditional lifestyle of Tripura tribes also led to a number of revolts. The exactions imposed by the Tripuri ruling class during the World War II and the acute shortage of food led to tribal revolts of 1943-1944. The years immediately preceding India's independence saw the rise of a number of progressive movements as the state made the torturous transition from princely state to a democratic state. In the post-independence period Tripura witnessed the growth of a powerful movement led by *Mukti Parishad* against all forms of feudalistic oppression.

At the same time the tribes of Tripura were faced with an existential crisis in the post-independence period due to unprecedented migration from East Pakistan and later Bangladesh which reduced the tribes to a hopeless minority in their own homeland. It led to the rise of more radical movements demanding autonomy and constitutional safeguard for tribes with the movement sometimes taking the form of aggressive political agitation. In other words tribal movement began in Tripura in the colonial period as an act of dissent or defiance against incidents of injustice committed by the royal administration sometimes on its own or sometimes at the behest of colonial authorities but later it assumed the form of a movement of tribal autonomy as visible differences developed between the tribals and the non-tribals. In fact, the sea change in the demography of Tripura was responsible for this shift in the nature of tribal movement which also destroyed the age-old relation of peace and

amity among these two sections of society. It is pertinent to note that India has witnessed three kinds of exclusionary politics: based on Caste, Religion and Ethnicity. Tribal movement in Tripura from the late 1960s falls in the third category as differences between the tribals and non-tribals were harped upon which resulted the state being caught in the vortex of ethnic mobilization and conflict.

III. Tribal Rebellion in the Colonial Period

In colonial India, the tribes have revolted more frequently than other community not because violence was endemic to the tribal way of life but because it was the last resort available to them. The tribals have revolted not only for concrete economic demands but also for protecting their identity which was at stake when confronted with the forces of modernity. In fact, as Ranajit Guha points out, “there existed throughout the colonial period another domain of Indian politics in which the principal actors were not the dominant group of the indigenous society, or the colonial authorities, but the subaltern classes and groups” (Guha 1982, 1-9). Tripura was not outside this general trend as the advent of the East India Company and its policy towards the king created conditions of rebellion among the tribes of Tripura, particularly on the issue of revenue collection as the East India Company greatly enhanced the revenue demand from the *Zamindari* of *Chakla* Roshanabad which was situated in the plain areas of the Tripura State. The term ‘rebellion’ is used here to mean- ‘organised armed resistance to established authority’.

During the period from 1761 to 1765 the East India Company increased the amount of rent payable by the

Zamindari of *Chakla* Roshanabad from Rupees 66,695 to 1, 05,000 which was a very heavy burden on the king of Tripura, who in turn passed it to the peasants. The condition was so bad that the peasant of the *Mog* community revolted against this subjugation which was suppressed brutally by the king (Bhattacharya 1993, 102). In the second half of the 19th century, the king Ishan Chandra Manikya (1849-62) took the ill-advised decision of choosing his religious Guru, Bipin Bihari Goswami, a Hindu Brahmin, to supervise the administration of the State and Balaram Hazari as *Dewan* to augment revenue collection. These appointments were made at the insistence of British Government but the heavy-handed measures taken by the *Dewan* to collect more taxes from the Tripuri community ended in a revolt in 1857 (Bhattacharya 1993, 105). The repressive and ruthless policy adopted by *Goswami* to collect more taxes from the *Reang* tribals, in spite of two successive droughts lead to a revolt by the *Reangs* in 1860.

In between the period from 1860-63, the issue of succession to the throne came to the fore as following the death of Ishan Chandra Manikya (1849-62), he was succeeded by his brother Maharaja Bir Chandra Manikya (1862-96) instead of the sons of the former. It sent confusing signals to its citizens leading to another revolt by the *Jamatia* tribes. The *Jamatias* apprehending that they may have to pay twice the tax due to the succession problem blatantly refused to do so. They also revolted against the forced labour system adopted by the tax collectors during their tours to the tribal areas. It is pertinent to note that the *Jamatia* tribe served the Tripura State in various military capacities from 1240 to 1757 particularly against Afghan and Mughal intrusions. *Sri Rajamala*, the chronicle of Tripura states that the

Jamatias were the important fighting tribes of Tripura and formed the core of the royal army. The army constituted by the Tripura kings was known as *Jamat* and from that they came to be known as the *Jamatia*. But according to the *Jamatias* themselves, the word *Jamatia* is derived from the word ‘*Jama*’ and ‘*Twia*’. ‘*Jama*’ means tax and ‘*Twia*’ means ‘not to bear the burden of’. Thus, the word *Jamatia* means a person who does not bear the burden of taxes. However, following the accession of Bir Chandra Manikya (1862-96) in 1862 he decided to impose taxes known as ‘*Taitun*’ on the *Jamatia* community. *Taitun* may be compared with forced labour or *Corvee* of feudal Europe and *Vishti* of ancient India. In Tripura the free labour by the *Jamatia* community was used for cutting, cleaning or construction of a path in order to ensure a smooth passage for the king and his entourage. The imposition of *Taitun* was one of the major reasons for the *Jamatia* revolt of 1863. The king inflicted severe punishment on the revolting *Jamatias* and subsequently let the leader of the *Jamatia* tribe Parikshit free, after converting him into Vaishnavism (Bhattacharya and Acharjee 2015, 54). The *Jamatia* rebellion was the outcome of a number of complex factors but was launched mainly against the tax collectors of the Tripura rulers.

All these revolts led the British administration to appoint Ambrose William Bushe as the political agent in 1871 to assist the King in improving his administration (Mackenzie 2005, 256). However, C.W. Bolton the political agent of Tripura frankly admitted in his reports for the year 1877-78 that he had tried to do away with the abuses of administration of the state but that his advice had produced no effect (Chaudhuri 1999, 251). On the basis of reports from the political agency the Bengal government in July 1878 made it known to the Maharaja that unless

he acted on the advice of the British political agent the Bengal Government might make a representation to the Government of India, “to the effect that the system under which Hill Tipperah is allowed to remain outside the jurisdiction of British court should be modified (Political Department ASAR, 1889).” The Maharaja realised his mistake and apprehended that the *Zamindaris* of Chakla Roshanabad which were his main source of income might be lost to the British. He now proposed the name of Umakanta Das, the Assistant Political agent as his minister with full powers. The Bengal Government approved of the proposal and thus Umakanta Das became minister in 1890 (Chaudhuri 1999, 251).

The penultimate phase of the 19th century saw the enactment of the Tenancy Act in 1885-86, whereby the British compelled the princely rulers of Tripura to provide Bengal subjects tenancy rights at a very low cost to attract cultivation and boost the revenue. Following this a settlement of Plains people was made on 30,000 hectares (Chakraborty 2004, 36). Apart from this the banning of shifting cultivation or *Jhum* in the forest areas in 1887 and the *Jhumia* Rehabilitation Scheme of 1889 attracted more non-tribals to Tripura, making land a scarce commodity for the tribal populace of Tripura. In this way economic measures taken by the king based on British instructions, to augment his revenue resources, only resulted in aggravating the condition of the tribal population by the end of 19th century and a break in Tripura’s traditional mode of production based on shifting cultivation.

IV. Forest Regulation and Tribal Uprisings

The early 20th century saw the introduction of Forest Regulation as severe restrictions started being imposed on *Jhuming* in forest lands by declaring more and more forest areas as reserved and restricting the rights of the *Jhumias* from carrying on *Jhuming* in the reserved forests in order to increase the revenue earned by the Maharaja from the forests of Tripura (Chakraborty 2004, 51-56). The forest rule of 1903, declared 3861 sq. miles as Reserve Forest in 1908-07, thus further limiting the access of land for the tribals in interior areas who were dependent on minor forest produce for their livelihood (Mohanta 2004, 8). Considering the sorry plight of the tribal populace, orders were issued in 1913 allowing them to use forest products but it in no way helped to alleviate their problems. Sensing this, 28,490 hectares of land in 1939 and 5,05,053 hectares in 1941 were reserved for the six tribes of Tripura, leaving nothing for the remaining 12 tribal communities which was a testimony to the short-sightedness of the land policy of the king (Menon 1975, 160-161). All these resulted in three major tribal revolts, spurting venom against the king, which were ruthlessly crushed.

V. Tribal Revolts during World War II

An unrest surfaced in the hills of Tripura in the 1940s as food scarcity which was a chronic problem in the tribal areas worsened after Maharaj Bir Bikram Manikya (1923-47) decided to support the British war effort in the Second World War. The consequence of this on the hill tribes of Tripura was destructive as it created an extreme scarcity of food and famine like conditions prevailed in the

state. During 1938-43 there occurred a steep rise in price of rice the main staple of the people.

Rice Prices

Year	Price in Rupees per Quintal
1937-38	6.25 to 12.50
1942-45	20.00 to 70.00

Source: Omesh Saigal, Tripura: Land and its People, New Delhi, 1980, p.50.

Moreover, the involvement of the Tripura State in the Allied war effort resulted in imposition of more taxes and also forced conscription. This resulted in the growth of tribal resistance movements. The first revolt was by the *Reang* tribe under the leadership of Ratanmoni Reang who refused to provide man power for the Second World War and also pay tax, which was the highest among all the tribes of Tripura (Bhattacharya 1993, 115). It is pertinent to note that in the traditional Tripuri society, the Reangs had an inferior socio-cultural status and were discriminated by the Tripura rulers. They were predominantly dependent on shifting cultivation land for which was becoming increasingly unavailable due to the land reservation policies of the rulers. Moreover, they were the worst sufferers of the Tripura ruler's discriminatory taxation policy. The subjects of the Tripura state were subjected to a tax called *ghar-chukti* calculated family-wise. The Reangs shared most of the burden of this tax as they were subjected to a much higher rate than the ruling Tripuris. This unequal tax regime was the most potent factor behind the Reang rebellion.

Ratanmoni was an ascetic who migrated to Tripura from the Chittagong Hill Tracts in 1937 and soon became the rallying point of the oppressed tribal's, who began defying the Raja's revenue collectors and refused forced conscription. The revolt started against 'Roy Kanchan' Debi Singh Roy and Khagendra Choudhury who acted as tyrant exploiter against the Reang community. The movement of Ratanmoni also showed signs of tribalism. His followers drove away the Bengali Brahmins from the *Pous Mela* in the Tirthamukh, which was a winter festival where the tribals came to pray for the departed souls of their loved ones. In 1941 they chose to perform the rites by themselves, long performed by Bengali Brahmins. It is difficult to pin point the exact date of the Reang rebellion but by July 1943 the rebellion was its climax. The activities of the rebels included looting of properties of the Reang Chiefs including rice from the granaries, setting up *dharma golas* for distributing food to the poor tribal populace. The rebels also set up a parallel government under Ratanmoni and organised extensive resistance against monarchical forces. In the rebel affected areas, the princely rule virtually disappeared as the rebels established an alternative regime and proclaimed Ratan Moni as Maharaja with a bamboo chair serving as the throne. A Council of Ministers was also established with five ministers who were all Reangs. The rebels greeted each other with 'Victory to Ratan Moni' which revealed the depth of anti-monarchical feeling among the rebels. The Reang rebels had a definite political agenda as their activities were based on the repudiation of authority of the existing Tripuri monarch. The revolt lacked the necessary organisational structure and fire-power to stand against the Tripura state machinery. Nevertheless, the revolt continued for up to a year mainly because of the personal charisma of Ratanmoni and the religious mystique which

had grown around him as the movement acquired a millennial character. After the fall of the Tuinani camp, Ratanmoni along with his followers fled to Chittagong but were arrested by the British police while crossing the border to Burma (Sen 1970, 18). He was lodged in the Agartala jail and from there to the palace prison where he died in mysterious circumstances. The rebellion was ultimately crushed in 1945.

The nature of the Reang rebellion has given rise to a lot of controversy. The official accounts of the Tripura Royal Government portray the rebels in a very negative light as dacoits or dacoit party. On the other hand the rebellion of Ratanmoni has been hailed by the later day ethnic leaders as they consider him as the first great champion of tribal rights and a great tribal reformer. A number of works have been written by Communist writers in Bengali such as *Reang Krishok Bidroho o Shahid Ratan Moni* (1954) by Aghore Debbarma, *Ratan Moni O Reang Bidroho* (1974) by Tarit Mohun Dasgupta and *Bidrohi Neta RatanMoni: Ekti Bitorkito Charitra* (1973) by M. Debbarma. All of these consider it to be the first major peasant struggle of the state and describe it as a 'spontaneous' revolt which revolved around the following issues- 'enough rice for the people' and 'no more taxes to the oppressor'. The movement, according to these views, contained undeniable traces of class consciousness though in an embryonic form.

It is a stereotypical interpretation of the rebellion. The Reang rebellion was an independent movement which developed within the peasant society of Tripura. It developed autonomously from the Communist movement in Tripura which in turn represented the domain of modern 'elite' politics in the state. The Reang rebellion was

representative of an indigenous tradition of mass politics with its own methods of mobilisation, idioms and symbols. The greatest constraint of the Reang rebellion was that although it paralysed the existing monarchy but it did not envisage any structural change in Tripura. In any case the rebellion contributed to the disintegration of existing monarchical political order and socio-economic structure and paved the way for rise of more powerful political movements in Tripura. The Reang rebellion was thus a true precursor to the mass movement led by *Tripura Rajya Ganamukti Parishad*.

VI. Progressive Movements in Princely Tripura

Apart from the tribal revolts which occurred in different parts of Tripura during the pre-independence period, the closing years of colonial rule witnessed the growth of progressive movements. The term 'Progressive Movement' is used to mean a political movement that seeks reform in all levels of government, education, society and economy. In Tripura it also meant an agitation for "Responsible Government" in place of a monarchical form of the government. The first tribal organisation to be set up was the *Janamangal Samity* (People's Welfare Organisation), a mass organisation set up by a prominent group of liberal and politically conscious youths in 1938. It demanded inter alia "Responsible Government by popular vote" and the abolition of oppressive royal taxes. In fact, progressive movement among the tribes received an indirect fillip in the 1930s when Maharaja Bir Bikram set up two boarding houses for tribal students- one in Umakanta Academy Agartala and the other in Khowai High School, 60 Kilometres away from the capital Agartala. Thus, by the end of the 1930s a new generation of educated tribal youths had made their appearance,

challenging the hegemony of the old elites patronised by the court. These youths played a pivotal role in the setting up of *Tripura Rajya Janasiksha Samity* (Mass Literacy Movement) in 1945 under the leadership of Biren Dutta. Aghore Debbarman one of the pioneers of Mass Literacy Movement was the moving spirit behind the organisation. The group brought about a sea-change in the educational landscape of Tripura as it established schools in remote tribal hamlets throughout Tripura. It questioned the tribal's absolute allegiance and faith in institutionalized kingship. The *Janasiksha Samity* strongly demanded compulsory education for the tribes in order to bring them out of the twin curses of illiteracy and poverty and also free them from the clutches of monarchical rule. This was followed by the *Rajyo Praja Mandal* (Citizens' Assembly) set up in 1946 by the liberals to press for responsible government in Tripura. Birchandra Debbarman, a leading lawyer was the first secretary of the *Praja Mandal*. They started publishing a bulletin, *Tripura Rajyer Katha* edited by Biren Dutta.

VII. Tribal Movements in the Post-independence period

Following Partition, Tripura was bordered by Chittagong, Noakhali, Comilla and Sylhet districts of East Pakistan (present day Bangladesh). In fact, about 83% of Tripura's 1,001 km long frontier was shared with erstwhile East Pakistan. But it was only an imaginary line drawn by Cyril Radcliffe in 1946-47 as the border remained open and porous till the early 1980s. It was because of this close proximity to the districts of East Pakistan and unguarded frontiers that Tripura received waves upon waves of migrants after partition in 1947 and the formation of Bangladesh in 1971 which upset the entire demographic balance of the state. The tribes of Tripura were reduced to

a position of minority within three decades of India's independence. Partition played havoc with the demographic structure of the region as it may be pointed out that in between 1901-1970; the rise in population for the entire country was 129.6% but the corresponding figure for North-eastern India in general was a whopping 358.4% and for Tripura in particular was a mind-boggling 797.9%. The tribal natives, who constituted a dominant 64 percent of the total population in 1874, formed a dwindling component of the population in successive Census enumerations: 52 percent in 1931, 37 percent in 1951, 28.44 percent in 1981, 29.59 percent in 1991 and 26.74 percent in 2001. This unbridled migration led to the marginalization of the tribal peasants and elites and created the inevitable psychological trauma of being reduced to a minority in their own 'state' which in turn engendered several tribal movements.

The economy of Tripura has traditionally been dependent on agriculture, forestry and fishing. In other words, for the tribal people of Tripura, land was their only means of subsistence and hence losing this natural resource was unthinkable for them. But the first impact of the refugee influx into Tripura was the opening of the state's land resources for the settlement of refugees. The government in order to settle this burgeoning immigrant population indiscriminately gave away forests, low hillocks and even wasteland. In Hatileta about 12.80 acres of forest land were allotted to a few refugee families who cleared it and reclaimed the land for settled agriculture (Tripura State Archives). The appalling condition of the tribes was borne out by the government reports itself as the Ministry of States noted the pitiable condition of the tribes in South Charilam and Khas Brajapur of Bishalgarh Sub-division in the following words- "It will be noticed that

there is some trouble over the requisition of cultivable land by the government for the purpose of rehabilitating the displaced persons, with the result that rightful owners are being deprived of the land which is their only means of livelihood” (National Archives of India). In this way the unprecedented influx of refugees in the wake of partition dispossessed the tribes of their home and hearth and pushed them to the brink of existence.

This process of land alienation in turn provided a stimulus for the rise of new movements among the tribes of Tripura. The indigenous people of Tripura became apprehensive of the sweeping change in the demographic pattern that not only undermined their majority but also had grave economic and political implications. In the face of a demographic invasion of unprecedented scale new political movements were launched in post-independence period by the autochthons to protect their traditional land tenure system, customary laws and the tribal way of life. Thus, tribal movement in post-independence Tripura was the inevitable manifestation of a socio-psychological fear of outsiders which in turn was the result of a process of marginalization that saw the tribal people of Tripura being deprived of the bulk of their land and also excluded from the State’s economic and political decision-making apparatus. But tribal movement in Tripura in the post-independence period also passed through a several distinct phases it began as a democratic movement, graduated towards a demand for political autonomy and finally assumed the form of an aggressive power struggle.

The most important tribal organization in the post-independence period was the *Tripura Rajya Mukti Parishad* established in May 1948. In fact, in the years following India’s independence it was decided to form a

tribal organisation committed to the advancement of the tribal people and helping them realise their political aspirations. It is out of the twin needs one of the most important tribal organisations the *Tripura Rajya Mukti Parishad* was born in May 1948 (Debbarma, 1953). Dasarath Debbarma was appointed its President, Aghore Debbarma became its Secretary and Hemanta Debbarma its Treasurer. The *Mukti Parishad* rapidly gained strength in the state as it promised to bring about a regeneration of tribal society by freeing them from ages of oppression and deprivation. In support of its demands the *Mukti Parishad* organised a massive demonstration on Independence Day 1947 in Tripura. Around 15,000 marchers' mostly tribal peasants marched to the grounds of Umakanta Academy where Aghore Debbarma delivered a strong speech which outlined the demands of the tribal peasants. The procession and the demands it raised sent a wakeup call throughout the princely administration of Tripura and it decided to intensify repression in order to nip the popular tribal movement in bud.

In fact, it was an incident of police firing by the police of the princely state at Golaghati Village in the Bishalgarh block of West Tripura district on 10th October 1948 which provided the spark for the armed conflict in Tripura (Dhar 2012, 6). The incident occurred when the royal police opened fire to prevent a tribal group from seizing boatloads of paddy belonging to Hari Saha, a rich *mahajan* (trader), who had granted *dadans* (loans) to the local tribal peasants and had returned after the harvest to seize the bulk of produce as a way of reclaiming his credit with interest. However, in the autumn of 1948 these poor peasants organised by the *Mukti Parishad* were determined to prevent the trader from seizing their produce as the area was reeling under acute food

shortage. Twelve starving peasants were gunned down and ten others were seriously injured in that firing. The then regent tribal Queen, however, took no action against either the police or the *Mahajan*. The Golaghati incident not only led to a groundswell of opinion against the royal administration of Tripura but also led to a surge in anti-Bengali sentiments among the tribes. The *Mukti Parishad* decided to channelize the discontent of the tribes against the royal administration but at the same time it was to the credit of the *Parishad* that it prevented the movement from taking the easy path of sectarian or communal politics.

In 1949, *Mukti Parishad* held its first annual conference at Patni in the Sadar Sub-division where it was decided that landholders possessing more than two drones (One drone is approximately 7 Acres) of land would not be allowed to acquire any more *Khas* (Government) land; instead the land would be taken over by the *Parishad* and distributed among the landless tribals. The local committees of the *Parishad* were empowered to undertake these redistributions and also issue *patta* or title deeds. The *Parishad* also fixed the rate of interest for loans as the money lenders sometimes charged up to 200% interest on loans forwarded by them- the *Mukti Parishad* fixed an upper limit of 25% for the credit advanced on a crop. In this way the *Parishad* established a sort of parallel government in large swathes of Tripura as it also developed a guerrilla organisation to act against oppressive Mahajans and their backers. However, by the early 1950s the *Mukti Parishad* leadership realised that it would no longer be possible to carry on its campaign for the alleviation of tribes all by itself. It needed the protective umbrella and the organisational network of a national level political party. All these prepared the ground for the *Mukti Parishad* joining the Communist Party of India.

Dashrath Deb and other tribal leaders formed the District Organising Committee (DOC) with forty-one members at Budhraipara in the Baramura hills in March 1950. In this way the *Mukti Parishad* gradually integrated with the mainstream of Indian left politics. The activities of *Mukti Parishad* therefore played a vital role in not only bringing about a consciousness among the tribal populace of Tripura but also played a pivotal role in growth of democratic polity in Tripura.

The activities of the *Mukti Parishad* laid the basis for the growth of Tripura Communist Party. In fact, in the General Elections held in 1951-52 two members of the Communist Party of India were victorious from Tripura. They were Dasarath Deb and Birendra Chandra Dutta elected from Tripura East and Tripura West constituency respectively. Following their electoral victory the *Mukti Parishad* continued to demand land rights and other safeguards for the indigenous people of Tripura through parliamentary means in face of unprecedented migration of Bengalis from East Pakistan. In fact, in the National Conference of the Scheduled Castes and Scheduled Tribes, convened by the Prime-Minister of India Jawaharlal Nehru in 1952, Dasharath Deb the Communist Party of India, Member of Parliament submitted a memorandum and pointed out that: "some area or areas of Tripura should be set aside for the tribals alone and no other person's belonging to the non-tribal community should be allowed to settle there" (Deshar Katha, 1983, 1).

However, the most significant aspect of the *Mukti Parishad* led tribal movement was that it did not allow it to degenerate it into an ethno-communal sectarianism. Although fighting for the rights of the tribes it was free

from any communal passion. It believed that the democratic movement in Tripura could not succeed unless there was strong unity among the tribal and non-tribal people. The *Mukti Parishad* therefore called upon its workers not to regard all refugees as its foes. But this attitude of the *Mukti Parishad* was held against them by the later generation of tribal leaders as they were considered weak protectors and incapable of upholding tribal interests. In fact, a prominent tribal leader Dhananjoy Reang in an interview with the veteran journalist Subir Bhaumik declared-

“If the *Parishad* had resisted the refugee influx at that point of time and said Tripura is not a dumping ground for the liabilities of partition, we might have been spared the marginalisation that the tribals of Tripura had to undergo. They had the strength and the mass base in the tribal areas to fight off the massive influx and the large-scale alienation of tribal land” (Bhaumik 2008, 100)

VIII. Radicalization of Tribal Movement and Demand for Autonomy

The apparent failure of the *Mukti Parishad* to safeguard the interests of the tribes of Tripura led to the rise of more radical tribal organizations and they began demanding constitutional safeguards particularly autonomy to protect the interests of the tribes. It is pertinent to note that in 1960 the U.N. Dhebar Commission appointed to look into the problems of the Scheduled Tribes and the Scheduled Castes suggested the formation of Tribal Reserves under the Fifth Schedule of the Constitution. Later the Administrative Reform Commission headed by K. Hanumanthiya also recommended the setting up of Tribal Councils in

specified tribal compact areas in Tripura. The suggestions and the recommendations of the two Commissions in the early 1960s created a sense of hope among the tribal populace of the state. The Communist Party of India (CPI) which had since independence led progressive movements among the tribes of Tripura also supported the creation of a Tribal Council under the Fifth Schedule. But the Bengali migrants viewed the Tribal Council as a potential threat to the land they had turned fertile with their toil and voted *en masse* for the Congress. The results were visible as in the entire country the Congress suffered serious reverses in the 1967 General Elections but in Tripura the Communists, lost both the Lok Sabha seats of Tripura West and Tripura East to the Congress although they had won it in 1952 and 1956. The Congress also bagged 27 Assembly Constituencies out of a total of 30. In fact, since the independence of the country, which had resulted in unprecedented refugee influx in Tripura, the Congress had emerged as the greatest supporter of the refugees as it hoped to blunt the electoral advantage that the Communists enjoyed among the tribal populace of the state by cultivating the refugee vote bank.

The election results dashed the tribal hopes for a Council that the tribes thought would save and protect the interest of the indigenous populace. The year 1967 thus forms a watershed in the tribal politics of Tripura as sections of the indigenous tribes grew frustrated over the failure of the two principal political parties to safeguard genuine tribal interest. The Congress-led administration since 1947 had done precious little for tribes in Tripura and so expectation from the Congress government was virtually nil. The failure of the Communists also to address the legitimate concerns of the autochthons created a vacuum in tribal politics and the need was felt for a strong

political party which would defend the interests of the tribes. It is in this backdrop that a meeting was held at Kainta Kobra Para in the Sadar (East) Sub-division on 10-11 June, 1967 in presence of tribal people from all walks of life. In this meeting it was decided to establish a political party which would fight for tribal rights. Thus, the *Tripura Upajati Juba Samity* (TUJS) came into existence under Sonacharan Debbarma (Paul 2009, 56). The TUJS blazed a new trail in the tribal politics of the state as it announced a policy of maintaining equidistance from both the national parties.

The TUJS organised a big tribal rally at Agartala on 22nd June 1967 and demanded involvement of the tribes in running the affairs of the state. It further demanded that the tribes should be allowed to determine their own political future and wanted substantial autonomy which could be realised only by the setting up of Tribal Autonomous District Council (ADC) under Schedule VI of the constitution. The strong assertion of tribal identity by the TUJS became amply clear in its adoption of the rallying cry- "*Kachak Koofor Chung Chia, Buni Tala Tanglia*" (We are neither reds nor whites, but we stand for the tribal cause).

The TUJS soon after its formation submitted a Memorandum to then Prime Minister Indira Gandhi outlining its major demands which were reproduced in the newspaper *Karam* on 15th July 1967. These included the following major demands:

- The immediate reclamation of Tribal lands lost to the non-tribals since 1960 and reconstitution of tribal reserve land as created by the King of Tripura in 1943.

- Establishment of Autonomous District Councils for safeguarding tribal interest.
- Extension of Inner Line regulations in Tripura.
- The recognition of Kok-Borak as the official language for carrying out the business of the state. It further demanded that Kok-Borok written in the Roman script should be introduced as the medium of teaching in schools.

In this way the unprecedented migration of Bengali refugees from East Pakistan hastened the process of tribal land alienation feeding into their collective sense of loss and marginalization on all fronts and it in turn united the tribes of Tripura on a common platform. In fact, scholars of all hues are unanimous in their opinion that land alienation amongst the tribes was the major, if not the sole cause that fuelled demands for autonomy in the state of Tripura. What was more distressing for the tribes was that this economic disempowerment was accompanied by the loss of political power as well as in democracy numbers mattered the most and the tribes of Tripura had been reduced to a hopeless minority due to migration from East Pakistan and Bangladesh.

IX. Tribal movement in the 1970s to till date

In 1978 the *Tripura Upajati Juba Samity* (TUJS) upped the ante and started a state-wide movement for the immediate introduction of Tripura Tribal Areas Autonomous District Council (TTAADC) under the Sixth Schedule of the Constitution of India. The failure to secure the legitimate interests of the tribal populace led the TUJS and by extension the indigenous community to pin its hopes on the provisions of the Schedule VI of the

Constitution which provided for the establishment of Autonomous District Council (ADC) as institutions of local self-governance. The Left Front government after coming to power in 1978 decided to set up a Tribal Autonomous District Council under Schedule VI of the Constitution (Election Manifesto 1977, 4). However, there were certain difficulties to the setting up of the ADC under the Schedule VI to Indian Constitution as it was applicable only to the states of Assam, Meghalaya and Mizoram. In view of this the state administration was forced to introduce in the State Assembly “The Tripura Tribal Areas Autonomous District Council (TTAADC) Bill, 1979”- a bill in accordance with Entry 5 List II of Schedule VII of the Indian Constitution (www.constitution.org). The Bill was passed unanimously in the House on 23rd March 1979 and received the Presidential assent on 20th July 1979 (Law Department, Government of Tripura). An ADC for the administration of tribal inhabited areas under the Seventh Schedule was formed following a vote by secret ballot on 15th January 1982 and the elected members were administered oath on 18th January 1982, thus ensuring for the first time a semblance of tribal self-government. The TTAADC covered an area of 7,131 square kilometers out of a total area of 10, 447 sq. kms.

But it unfortunately failed to satisfy the aspirations of the tribal people who wanted an Autonomous District Council (ADC) under Schedule VI of the Indian Constitution as it ensured greater amount of autonomy and the freedom to manage the internal affairs of the tribe. The groundswell of public opinion in favour of establishment of ADC under Schedule VI of the Constitution led the state Assembly to take pass a unanimous resolution on 16th December 1983 urging the Union Government to set up ADC under Schedule VI of

the Constitution. The Union Government also decided to move a bill for the amendment of the Indian Constitution so as enable the introduction of Schedule VI for administration of the tribal-dominated areas of Tripura. The Bill proposing the amendment was passed unanimously on the floor of Parliament on 23rd August 1984. Thus, the ADC under Schedule VI was introduced replacing the 39-months old Tribal Council under the Seventh Schedule of the Constitution.

The initial years of the establishment of the ADC were full of hope but soon the process lost its momentum and vigour. The creation of Autonomous Council was not able to solve all the problems confronting the indigenous populace as the problem of land alienation persisted due to unabated illegal migration from Bangladesh. Hence, the tribes lost faith on the so-called 'autonomy' and democratic process and the tribal movement in Tripura took a more aggressive form and also descended into acts of mindless violence from the late 1970s which continued till the mid-1990s. However, governmental intervention helped restore order and usher in a semblance of normality by 2000. The State Government concentrated its energies to destroy the ethnic gulf that separated the tribals and non-tribals in the state. The administration laid stress on implementation of developmental projects in tribal inhabited areas and ensured that the benefits percolated to the real beneficiaries. The creation of Tripura Tribal Areas Autonomous District Council (TTAADC) fulfilled a long-standing demand of the tribes of Tripura. Initially the ADC in Tripura was confronted with a number of problems but later on the government empowered the ADC so that it has emerged as the major instrument of tribal welfare. The introduction of cash crops, particularly the large-scale commercial rubber farming, led to the

emergence of a new class of entrepreneurs among the native population and brought economic benefits to the tribal community. The tribal cultivators, who mainly practised *jhum* (slash-and-burn cultivation), enthusiastically took to rubber cultivation which helped improve their economic status. Rubber Cultivation not only encouraged the tribes to give up the unviable slash-and-burn cultivation (*jhum*) in favour of productive and remunerative cash crop cultivation but also weaned them away from the path of aggressive political movement. All these measures ultimately helped to restore peace and stability in the tiny state of Tripura.

X. Conclusion

Thus, it is seen from the above discussion that Tripura has had a long tradition of tribal rebellion and peasant movement in the pre-independence period. All these movements paved the way for progressive movements which were aimed at bringing about a structural change in the polity of Tripura by replacing the monarchical government with responsible government. In the years immediately after independence under a different socio-politico context a mass struggle was launched against all forms of feudalistic oppression by the *Tripura Rajya Mukti Parishad*. The *Mukti Parishad* also addressed itself to the socio-economic problems confronting the tribes due to large scale migration in the post-independence period. The apparent failure of the *Mukti Parishad* to solve the problems of the tribes led to the emergence of ethno-centric outfits demanding autonomy and emphasising differences between the tribals and the non-tribals which ultimately gave way to more aggressive political movements in the state. In this way the nature and character of the tribal movements changed from a very limited objective of

protesting against an oppressive monarchy to bringing about transformation from monarchy to a modern democratic polity in post-independence India to a radical movement for tribal autonomy and rights.

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CHAPTER-18

ETHNICITY AND CONFLICT: A STUDY OF MANIPUR

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I. Introduction: Conflict and Ethnicity

Conflict has been considered as inevitable aspects of human life. It has been a feature of human society since time immemorial which affects the overall development of society as well as of human being.¹ Since the end of the Cold War, 95 per cent of the world's conflicts have been intra-state, and tribal or communal differences have also played a role in terms of underlying causal factors in many conflicts.² 'Conflict' is an ambiguous word that carries different meanings to different people in different contexts. As described in the Cambridge dictionary, 'conflict' is "an active disagreement between people with opposing

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¹ Murshed, S. Mansoob. (2002). Conflict, Civil War and Underdevelopment: An Introduction. *Journal of Peace Research*, 39 (4). pp. 387-393

² UNESCO (2010). *Guidebook for planning education in emergencies and reconstruction*. Paris: International Institute for Educational Planning. Retrieved from <http://unesdoc.unesco.org/images/0019/001902/190223e.pdf>

opinions or principles”, “fighting between two or more groups of people or countries”. The definition of conflict can be extended from single people to groups (such as nation) and more than two parties can be involved in the conflict. The principal remains the same. According to the International encyclopaedia of Social Science, conflict results from competition between at least two parties, a party may be a person, a family, a lineage, or a whole community, or it may be a class of ideas, a political organization, a tribe or a religion. In general term, conflict occurs when two or more parties believe they have incompatible objectives in power, resources, wealth, and status. The major impetus can range from ethnic and social divisions, failure of government institutions and so on. The term conflict also differs from dispute as the former being a long-term, deep-rooted problem, and the latter being a short-term, more superficial difference that can usually be resolved through simple negotiation. Conflict in society has many bases or causes. It may be based on value differences, clashes of interests, unfulfilled needs, misinformation, past relationships, or structural situations, or any combination of these. Through the period nature of conflict is changing from interstate to intrastate with an emphasis on resurgent nationalism, ethnic conflict, and civil wars. In “Why Men Rebel” Gurr (1970) explained that people become angry when there occurs a gap between the valued things and opportunities they feel entitled to and the things and opportunities they actually get – a condition known as “relative deprivation”. According to theory of Relative Deprivation, one of the most violent expressions of conflict i.e. war comes not from the nature of the nation state and its external relations but from the way in which the environment acts upon the individual. In more general term, a gap between

expectations and satisfaction is the basic condition for participation in collective civil violence.

Ethnicity is defined as a set of cultural characteristics that connect a particular ethnic group or groups of the people of various ethnicities. The term sometimes used to refer a minority group or a race. The concept of ethnicity is rooted in the idea of societal groups, marked especially by shared nationality, tribal affiliation, religious faith, shared language or cultural or traditional origin and common ancestry.³ The term ethnicity is taken synonymously with the term tribe. A tribe is defined as more or less a homogenous group of people having a closely-knit way of life, with relatively simpler means of production, to be somewhat falling under a close or communicable speech community, while ethnic community is defined as politicized tribe with certain ideological construction as a goal.⁴

Ethnic conflict is still in news till today and all the ethnic conflicts do not necessarily lead to violence. Societies that are ethnically divided are plausibly more prone polarization and social conflict.⁵ Manipur continues to account for the bulk of incidents of violence in the North Eastern Region. One of the main reasons is ethnic clashes

³ Khobragade, Vinod. Ethnicity, Insurgency and Self Determination: A Dilemma of Multi-Ethnic State. *The Indian Journal of Political Science*. Vol. IXXI, No.4. 2010

⁴ Nameirakpam Bijen Meetei, *Ethnic Diversity and Conflict in North-East India: A Comparative Study of Manipur and Meghalaya*, unpublished thesis submitted to Centre for Political Studies, Jawaharlal Nehru University, New Delhi, 2010, p. 22

⁵ Pamei, Stephen. *Perspective of Ethnic Conflict in the North-Eastern India*. *International Journal of Current Research*. Vol.3, Issue II, 2011, pp.450-457

among various communities. There is history of differences between the *Meities*, *Naga*, *Kukis* and other tribal groups.⁶ The hill districts of Manipur like Ukhrul, Senapati and Tamenglong are inhabited by *Nagas* who share the aspirations of a greater Nagaland. They face opposition from the *Meiteis* of Manipur Valley who are opposed to the greater Naga Nation concept. The *Naga-Kuki* conflict and later between the *Kuki-Paite* demonstrate identity conflict have been waged not merely on questions of land, immigration and settlement but also on the overweening fear of loss of identity itself.⁷ It may be stated that almost all the communities or tribes in the states have their so called “armed outfits”. While some insurgent organizations are fighting for an ‘independent Manipur’, there are some other underground outfits demanding formation of ‘smaller states’ by dividing the state’s territories. Some of the tribal underground groups had also been formed to what was termed ‘protect’ themselves from ‘rival tribes’.⁸

II. Understanding Conflict Situation in Manipur

Situated in the eastern most corner of northeast India, Manipur is a state of multi-ethnic with a population of around 3.1 million residing in 22.327 Sq. Kms of land. Geographically the landscape of Manipur is divided into valley and hills sector. Nearly 59% represent the valley population and 41% represents the population of hills. The major communities are Meiteis, Naga and Kukis. In

⁶ Sanjay Hazarika, *Strangers of the Mist*, New Delhi: Penguin Books, 1995

⁷ Oinam, Bhagat. Patterns of Ethnic Conflict in the North-East. *Economic and Political Weekly*. 2003.

⁸ Phanjoubam, Tarapot (2005). *Bleeding Manipur*. New Delhi: Har-Anand Publication

total there are 33 recognized tribes in Manipur namely *Aimol, Anal, Chiru, Chothe, Gangte, Inpui, Hmar, Kharam, Khoibu, Koirao, Kom, Lamkang, Liangmai, Mao, Maram, Maring, Mate, Monsang, Moyon, Paite, Poumai, Purum, Ralte, Rongmei, Simte, Suhte, Tangkhul, Tarao, Thadou, Thangal, Vaiphei, Zeme and Zou*. Muslim known as *Pangals* are about 8 percent of the population. There is also a small population of migrants from other parts of India who are called *Mayang* (Outsider).⁹

The conflict situation in which Manipur has been caught in is not just one clear cut conflict but conflicts of different kinds and in its multiple. In fact, Manipur can be considered as 'India's ethnic minefield' and 'conflict hotspots'. The conflict between the state and the non-state armed opposition groups, ethnic conflict between and among different communities and fratricidal factional infighting between different armed groups are the specificities that gives Manipur a stamp of being in conflict situation.¹⁰ The primary generators of armed conflict are ethnicity and religion. The present day inter-intra community conflict and their polity are still influenced by the past events of their ethno-history.¹¹ The various types

⁹ R. Upadhyay, "Manipur-In a Strange Whirlpool of Cross-Country Insurgency," Paper No. 1210, South Asia Analysis Group, 2005, <http://www.southasiaanalysis.org/papers13/paper1210.html>

¹⁰ AheibamKoireng Singh & Maibam Ratankumar (2010). *Conflict Situation in Manipur and Women*, Paper presented at Two-Day UGC Seminar 'WOMEN IN THE ARMED CONFLICT AND THEIR ROLE: THE EXPERIENCE OF MANIPUR'24-25 December, 2010 at Seminar Hall, S Kula Women's College, Nambol. Manipur

¹¹ A Koireng Singh. *Ethnicity & Inter-Community Conflicts: A Case of Kuki-Naga in Manipur*, Akansha Publishing House, New Delhi, 2008.

of conflict occurs in Manipur in the last few decades namely Intra-ethnic conflict which occurs between the tribes constituting a generic group (Kuki and Hmar clash in 1960), inter-ethnic conflicts between two or more tribes from different ethnic groups (Nagas and the Kukis in 1992 and Meitei-Pangal clash in 1993), the Ceasefire crises in 2001 which occurred due to signing of the Indo-Naga ceasefire agreement without territorial limits between the government of India and the Nationalist Socialist Council of Nagalim (NSCN-IM) resulted in mass unrest in Manipur. The state is home for numerous ethnic base underground groups – few demanding complete secession from India, others fighting for ethnic identities and homelands.

Ever since 1948, the state of Manipur is characterized by a high degree of political, social and economic instability. One of the paramount factors responsible for the instability is the problem of insurgency. Insurgency in Manipur was started around 1960s against the forceful merger of the princely state with the Indian Union by the Meitei youth who were dissatisfied with governments both central and state. Some of these groups were United National Liberation Front, People's Revolutionary Party of Kangleipak, Kangleipak Communist Party. The demands of National Socialist Council of Nagaland for the sovereign homeland *Nagalim* triggered conflict with insurgent groups of Manipur. The agendas behind the insurgencies are multiple and varied such as secession from India; greater political and economic cohesion; and defence of tribal identities. At one level, there is a strong feeling of alienation from mainland India, further exacerbated by the problems of scarce natural resources, lack of development and severe unemployment- all of which feed into the secessionist movement against the Indian union.

At another, there have been violent clashes between the different ethnic groups within the State, often alleged to be fuelled by the larger conflict. The agendas behind the insurgencies are multiple and varied such as secession from India; greater political and economic cohesion; and defence of tribal identities. Since September 9, 1979, most of the areas of Manipur have been declared as 'disturbed area' to facilitate the operation of AFSPA Act to curb the problem of insurgency. Thousands of armies and paramilitary forces assisted by heavily armed personnel of Manipur Police and Manipur Rifles are deployed in the name of maintaining law and order. The army, paramilitary forces and state police take every opportunity to terrorize the general mass by way of combing operation, illegal detention, custodial killing, indiscriminate firing, fake encounters, torture, rape and killing of women, etc. Many innocent people have lost their lives through such acts of the armed forces. The state has witnessed numerous counter insurgency killing innocent civilians, security forces, and terrorist over a decade. However, after a massive protest the Armed Forces (Special power) Act, 1958 was lifted from Imphal Municipal areas in August 2004, currently in six districts and 15 police stations from where the AFSPA has been revoked in the State.¹²

These conflict problems are further compounded by economic backwardness, lack of development and basic infrastructures, and socio-political instability. Over the period the region has seen increased armed forces be it in the name of countering insurgency, combing operation or on the streets, breakdown of governance, gross violation

¹² Imphal West (Imphal, Lamphel, City, Singjamei, Sekmai, Lamsang, Patsoi), Imphal East (Porompat, Heingang, LamlaiIribung), Thoubal, Bishnupur, Kakching and Jiribam

of people's human rights and dignity, rise in ethnic nationalism. The impact of varied form of violence has affected day- to- day life and human security of people. The obvious consequences are destruction of life and livelihood, leading to chronic poverty.¹³ There are about 50 general strikes every year over the last few decades. These have caused acute economic and social problems to the population in conducting normal life leading to lack of public peace and security disrupts normal life.¹⁴ Women and children turn traumatized by displacement resulting of ethnic flights, security measures of the armed forces, broken families, losing a family member in a fight with armed forces. The common people now feel the impact of armed conflict in every aspect of their life – social, economic, political, public and private. The state witnesses a period of transition marked with day light murders, abduction, kidnapping, robbers, lootings, arm snatching, street fighting's, ambush and consequential army operations and alleged torture on the civil populace. There was not a day, for a considerable span of time in the recent past, that the front pages of many national and local papers missed reports on such ugly scenario, which simply made law enforcing authorities a force. The whole functionary of the state was sometimes seemed to have been paralyzed. Crimes were also committed even in the very centre of the city and security zones, which is the worst occurrence and regular phenomenon in Manipur. People no longer felt

¹³ Kumar, Anand. Kamei, Aphun. Thangjam, Homen& Singh, Bijoykumar. (2006). Situating Conflict and Poverty in Manipur. *Margin Volume*, 38 & 39. Number 4 & 1. New Delhi

¹⁴ Centre for Organisation Research & Education (CORE) (2007). *How many wards have been in my brief years: children and armed conflict in India*. Imphal: CORE.

secure in the presence of law-and-order enforcing agencies like the police and security forces.

III. Ethnic Conflict- war for identity and territorial ownership

Ethnic conflict between two or more groups of people is an old phenomenon and also the consequences of various issues occurred in contemporary times.¹⁵ Ethnic conflict has been discussed under various labels: 'the politics of difference', 'identity politics', or 'politics of recognition'.¹⁶ Manipur is a land which shows several ethnic communities and tribes having multi-lingual, multi-cultural, multi-religious and multi-sub-national identities. The state also witnessed the eruption of extremely violent ethnic clashes resulting in the death of thousands of innocent people. During the 1990s, in Manipur three violent clashes took place namely *Naga-Kuki* in 1992, *Meitei-Meitei Pangal* (Manipuri Muslim) of 1993 and *Thadou-Kuki* of 1997. Among these three major conflicts, *Naga-Kuki* conflict has the highest casualties. Thousands were massacred, entire villages erased and populations dispersed beyond hope of rebuilding and rehabilitation.

The relationship among the various ethnic groups' remains strained due to various factors. Factors responsible for ethnic conflict in the state are both historical and contemporary. Traditional rivalries, unresolved inter-village land disputes, colonial policy of

¹⁵ Sharma, Ankita. Ethnic Conflict in North East India. Journal of Critical Reviews. Vol.7, Issue 4, 2020

¹⁶ Kymlicka Will, Contemporary Political Philosophy: An Introduction, Oxford University Press, New Delhi, 2008, p. 327.

using one group of people against the other, sporadic and systematic violence committed by one group to another group, fight for control over land and resources, antagonistic assertions for separate homelands, lack of political will on the part of the government to solve the problem, inefficient administration, ineffective law and order enforcing agencies of the state etc. all have played a role in the conflict. Persistent efforts to bring those tribes who are not immediately identified with any of the major groups, within the fold of the different major groups, have also resulted in certain strains and uncertainties among these tribes, especially in cases where they prefer to maintain their own individual identities.¹⁷ Whenever ethnic conflict happened, it is not confined at one place but spreads over all other areas where both tribes cohabit.

Intra-ethnic Conflict

Intra-ethnic conflict occurs between the tribes constituting a generic ethnic group. The first recorded intra-ethnic clash in Manipur occurred between the Kuki and the Hmar in 1960, both groups belong to Kuki tribe. The problem arises when the Kukis attempted to impose the term Kuki to create larger 'ethno identity' on the smaller tribes within the same ethnic group. But the Hmar group objected this as they preferred to use their own tribe's name to designate themselves. For instance, to reiterate, the Thadou, numerically largest tribe demanded the use of the term Kuki whereas the smaller group such as Zous, Simtes, Vaipheis, Paites and Tedim-Chin are group under Zomi. The ensuing conflict witnessed involvement of armed opposition groups. This marked the

¹⁷ Singh, Mangi (2009). Ethnic Conflict and Demand for Contiguous Homelands. *Yojana*, Vol.53. New Delhi.

beginning of a modern form of conflict in Manipur. Similar conflict erupted in 1997 between Thadou- Kukis and Paite-Zomis in Churachandpur district. The causes of conflict were ethnic tensions and armed terrorism. At that time, Kuki National Front militant groups started terrorizing the villagers belonging to minor groups and started imposing taxation on the Zomi/Paites which escalated the tensions. On June 24, 1997 Kuki National Front militant lined up 20 villagers in Saikul and shot them, killing nine and wounded four.¹⁸ The conflict continued for more than two years and considered as biggest conflict in terms of casualties. According to the project report prepared by inter church peace committee, Manipur, in the ethnic clash between 1997 and 1998 more than 400 lives were lost, 6000 houses were burnt or destroyed. With the effort of State Government and civil organizations the conflict was solved within a month and signed memorandum of understanding.

INTER-ETHNIC CONFLICT

Naga-Kuki Clash, 1992

Inter-ethnic conflict can occur between two or more tribes from different ethnic groups. One of the biggest inter-ethnic conflicts was highlighted in the enmity between the Kuki and the Naga. The clash which started in 1992 continued till the end of 1997. Reasons behind Naga-Kuki clash are: (i) control and occupation of Moreh,

¹⁸ Hangmi, Peter Zamhen (2010). The Paite Kuki Clashes and restoration of Normalcy. khawvaiphei.com. Retrieved from https://en.wikipedia.org/wiki/Kuki%E2%80%93Paite_ethnic_clash_of_1997%E2%80%931998.

(ii) tax on Kuki residents in Naga territory by the Naga militants and refusal by the Kukis, and (iii) refusal to renew the land agreement by the Nagas to the Kukis.¹⁹ The Kukis support the demand of a separate *Kukiland* that would include the Kuki tribes of Burma.²⁰ Regarding the inquiry report of 1992 Naga-Kuki clash, the state government states that the Naga-Kuki violent ethnic conflict is due to the insurgent's activities 'like heavy extortion of money'.²¹ The conflict was over territory occupied and claimed by both groups. The clash was not confined to one district but spread to various places where these tribes cohabit. Through a chain of fraternity feeling, the conflict spread to adjoining states of Nagaland and Assam. The effect of the conflict spilled over the international border to Myanmar in Sagaing Division where NSCN-IM insurgent group burnt down a Kuki village called Wet Yu on April 13, 1993. The conflict fanned by armed groups, caused collateral damage of both communities. Although the physical violence formally ended in 1997, relations between the two groups remain tense.²²

According to a memorandum of Kuki Innpi, the representative body of the community submitted to the Prime Minister on January 19, 2001, over 900 people were killed, 350 Kuki villages were burnt, 50,000 people were internally displaced, and many more suffered from severe

¹⁹ Laba, Yambem. 1994. Manipur: Ethnic Clash. NEAT Plan Consultation (Unpublished). Guwahati

²⁰ <https://www.hrw.org/reports/2008/india0908/2.htm>

²¹ Enquiry Report of the Officer on Special Duty (Law and order), Government of Manipur, 1st August 1991.

²² Unnithan, Sandeep & Deka, Kaushik. Armed and Dangerous in Ceasefire Country. India Today International, 2012, pp. 20-35

hunger and disease. Similarly, the memorandum submitted by the Naga Baptist Church Leaders Forum to the Prime Minister on June 15, 1993 claimed that 20 Naga villages were burnt, 17 villages were totally uprooted, and more than 7,000 persons were internally displaced.²³ In between 1992-1999, the Naga-Kukis conflict killed in total 900 people (534 Kukis and 266 Naga), 480 people were injured (257 Kukis and 223 Naga) and 5724 houses were set fired (3110 houses of Kukis and 2614 of Nagas).²⁴

Both central and state government tried to control conflict through military means by deploying police, paramilitary force and army. However, government lack the effort to involve civil society bodies or others, or through dialogue and consultation. Instead of implementing a people centric solution, Manipur was placed under Presidential rule on December 31, 1993. Simultaneously Armed Forces Special Power Act, 1958 was adopted.

Conflicts between Nagas and Kukis of Manipur led to the emergence of a number of Kuki armed opposition groups such as Kuki National Army, Kuki National Front, Kuki Revolutionary Army, and United Kuki Liberation Front. The Nagas back National Socialist Council of Nagaland-IM, which is led by a Manipuri Naga called Thuingaleng Muivah.

²³ *Id.*

²⁴ Phanjoubam Tarapot, *Bleeding Manipur*, Har Anand Publication, New Delhi, 2004, pp. 186-187.

Meitei-Meitei Pangal Clash, 1993

In Manipur nearly nine percentage of total population are Muslims. They are known as *Meitei Pangal* and got settled in Manipur in the seventeenth century. They follow their own tradition and religion. The first ever conflict between Meitei and Pangal occurred in 1993. Though clashes erupted in Thoubal district between three extremists and a gun-runner in Lilong Bazar, most of the killing was reported from Imphal city, and violence soon spread to another district. The conflict was resolved within a week. According to State Government report, in total 100 people including women and children were killed among which 4 were Meitei and 96 were Meitei Pangal and 146 people were injured. Many people were left homeless and displaced.

After clashes between Meiteis and Muslims in 1993, Islamist groups such as the People's United Liberation Front, North East Minority Peoples Front, Islamic National Front, Islamic Revolutionary Front, and United Islamic Liberation Army were formed.

Meitei-Naga Tension over Ceasefire Agreement

The signing of the Indo-Naga ceasefire agreement 'without territorial limits' between the Government of India and the National Socialist Council of Nagalim (NSCN-IM) in June 2001 resulted in mass unrest in Manipur. The non-Nagas regarded the agreement as official recognition by New Delhi of the NSCN-IM's demand for a 'Greater Nagaland'. The anti-ceasefire agitation left the state assembly in ashes with 18 protestors losing lives.

The basic aim of entering into a ceasefire agreement is to enhance the conditions for peace and create an opportunity for dialogue. However, the mismanagement of the same resulted in a situation of unrest and violence, leading to destruction of property and loss of human life. The state assembly building was burnt down, ministers were beaten up, and roads were blocked, resulted in shortages of food and other essential goods.

Once the Naga tribes in Manipur began to support the separatist groups in Nagaland in their demand for a sovereign “Nagalim”—a large swathe of Naga majority areas that include parts of Manipur, Assam, and Burma—the Meiteis began to form organizations to demand independence and protect their territories from Naga claims. In 2001 widespread protests broke out when Meitei Manipuris feared that a peace agreement between Naga insurgents and the Indian government would lead to the truncation of Manipur. In the riots that followed, a number of government offices came under attack and the Manipur State Assembly building was burned down.

Meitei-Kuki clash, 2007

The ethnic conflict between Meitei and Kuki occurred in Moreh in 2007. Moreh is a small commercial town located in Indo-Myanmar border and considered as important town in Manipur as it is seed of international trade since a long time. This Moreh incident of 2007 can be taken as the finest testimony to the ruptured relationship between the Kukis and the Meiteis.²⁵

²⁵ Arambam Lokendro, “Land and Territory in the Northeast: Politics of Ethnicity and Armed Violence in Manipur”, *Eastern Quarterly*, Vol. IV, Issue II, July- September 2007

IV. Conclusion

Manipur state has exhibited several conflicts in the past and experienced several issues and problems which still persists in some form or the other. There are two types of conflict which is going on - firstly ongoing armed-conflict between the armed opposition groups and the Indian State, and secondly the conflict between ethnic communities. Discontentment of Manipuri with the merger of India, and diverse ethnicity never found its way to peaceful co-existence has set ground for conflict. Ethnic conflict is widespread in the state due to demographic composition and identity formation as it is territory having multi-ethnic, multi-lingual, multi-culture, multi-religious and multi-sub-national identities. The ethnic conflicts are not confined at one place but spreads over all other areas where both tribes cohabit. In the state, first the long years of Naga-Kuki clash started over control of Moreh town; followed by the Kuki-Paite Clash which started because of fear in the Paites of being demographically overshadowed, land being snatched, and politically dominated by the increasing Thadou Kuki migration in the so-called Kuki homeland; Meitei-Naga tension over ceasefire agreement.

The conflict between the state and the non-state armed opposition groups, ethnic conflict between and among different communities and factional infighting between different armed groups are the specificities that gives Manipur a stamp of being in conflict situation. As consequences there has been large scale displacements and disruption of normal life patterns. These conflicts have led to violation of human's rights such as right to life and survival. In addition, there are other derivatives of conflict in the form of bandhs, economic blockades, strikes etc. that cause destruction to private and public

properties, shortages of food supplies and essential commodities. Ethnic conflicts need to be viewed as part of an ongoing process which needs to be accommodated in the society, but which cannot be resolved once and for all. Assimilation or subsumption of a particular group is also not the best way forward. There is also an aspect which needs to be addressed that is modernization which is taking place rapidly in the world. Modernization with uneven levels of development has spread into cultural differentiation. The unethical expansion of markets and technological advancement has created disparity in sharing resources. Continuous dialogues recognizing diversity in unity is an impetus for establishing peace and harmony. This has also resulted in modernizing the conflict itself rather than eliminating conflict. Distorted economic policies, violation of human rights, corruption, and failure in talks have caused most of the violent conflicts to sustain in the world today. Substantial efforts have to be made by state and civil society to foster continuous and on-going dialogues which becomes an impetus to peace.

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CHAPTER-19

CRITICALLY UNDERSTANDING MATRILINEAL SYSTEM: A STUDY ON CONFLICT OF LAWS ARISING IN KHASI MATRILINEAL SYSTEM

*Pulak Symon**

I. Introduction

The traditional matrilineal societies which have survived for centuries can be juxtaposed for instance as 'living organisms'. They have proved themselves dynamic with the constant time evolution at par with the patriarchal system. The beauty lies with the 'common consent' of both the genders to promote the richness of the women centric society and their rights of inheritance as their social customs. On the other hand, it is necessary to take with caution that the fancy covering of matrilineality to the patriarchy which lies underneath is not something to romanticise from a distance.

The realization of matrilineal society needs a deep plunge to decode the recent liberatory grounds fielded by the women reformers demonstrating the dominant patriarchal powers pervasive today. It also extends to a penetrative understanding and synthetic inquiry of

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motherhood to be central and encircling of the society recognizing supreme rights of women. The road map to the advent of such societies is difficult but it mirrors the riches of an alternative social structure that respected women by dispelling stereotypes for more than a millennium and still functions in various pockets all over the globe.

'Poewe' stated matrilineal societies are coalescence of 'Matrilineal ideology' and the meaningful 'social actions and relations' that are informed through it.¹ The ideology of matrilineal societies reflects the 'folk-cultural theory of politics and economics and jam packs itself in hierarchy three ideational phenomena. It includes;²

- The idea of kinship which is pivotal and the descent principles,
- Categories of kins,
- The attached norms and values which follows.

The historic matrilineal concept has perpetually degraded from its earlier glory of being accepted and respected. The academicians, activists with time have brought to plate the "gender inequality" issue that is debilitating the society. Meghalaya which prides itself with the lineage system and inheritance favoring women folk are at crossroads witnessing emergence of movements challenging the age-old matrilineal system. "*Ka Syngkhong Rympei Thymma*" (SRT) a Khasi men group, have started a movement that contradicts the women's

¹ Volume 58, Ladislav Holy, 'Strategies and norms in a changing Matrilineal Society' (Cambridge University Press 1986).

² *Ibid*,54.

Matrilineal pattern, as they claim men are devoid of their rights of inheritance.³

Learning simultaneously, Matriarchy on the other hand has no straight jacketed definition. Critics claim that Matriarchy is criticism of patriarchal ideology and their methods. In “*Das Matriachat Bei Den Alten Albaren*” (book) it discerns the idea that Matriarchy upholds a structural pattern at the economic, social and political layers. The idea extends to the level of culture. ⁴

Matriarchy brings mothers to the centre of the society and the community powers are absorbed by the women or mothers of such communities. The definition has bulldozed through times but the relentless fight from patriarchy has gradually modified the definition in various aspects to stay alive.

Thus, the paper *firstly*, moves with an agenda to analyse matriarchy and matrilineal societies within India and International nations for a focused conclusion to decipher the societies’ functionalism in the pre-historic and the evolved era. The understanding will aid to narrow down the issues of Meghalaya’s matrilineal society under threat from patriarchy that it faces as it slowly dissolves with time. The need to realise the functioning of other Matriarchal or Matrilineal societies will help realise the fallout of the present state of crisis in the Matrilineal system of Meghalaya. The beauty of this system can be

³ Heide Goettner-Abendroth, ‘Towards a Methodology for Women’s Studies, exemplified by a Theory of Matriarchy’ 15 (Peter Lang 2013).

⁴ Genevieve Vaughan, ‘The Gift, II dono, A Feminist Analysis’ 21 (Meltemi 2004).

streamlined to that of a 'cultural thread' of India which is at stake.

Secondly, the conflict of law arises when the laws are implemented disregarding the ancient cultural tradition. The oral traditions of the Matrilineal system is still not codified which allows the system suffer to accommodate the passing generation. The constant mushrooming of the mainstream laws over the Matrilineal laws realises the obsolete state of this system which is in a messy state of confusion. Protection and preservation of this system are at the hands of law makers at present.

Thirdly, the archaic Khasi Bill of 2018 which was tabled for acceptance depicts the unmasking of the patriarchal truth in the Khasi Matriliney. Male dominated law-making authority in a matrilineal system makes the voices of the fairer sex less heard.

The Constitution of India provides Article 14 and 15 with 'equality' and 'non-discrimination' to all its citizens but under Article 15(4) allows 'advancement' to the tribal institutions to protect without any yardsticks chalked which is a predicament to the growing arbitrary laws without consonance with the fundamental rights of the Constitution.

II. Understanding The Architecture of Matriarchal and Matrilineal Societies: A Study on International & National Framework

Understanding matriarchal and matrilineal studies can illuminate knowledge of these societies' existence all around the globe with a varied history to learn. A famous

American world-renowned feminist Gloria Steinem states the understanding;

*“In some earlier times, the varied cultures of the world were central to the gynocritic age. The discovery of paternity was still un-traceable and it was assumed that women were identical to trees bearing fruits. The birth of child was a mystery and was envied. Women were worshipped because of the mystery of child birth. The knowledge of paternity as part of child birth proved cataclysmic for the women society. The evolved knowledge gradually tilted towards male ownership of children. It was for more than five thousand years that the Gynocritic age scintillated and flowered itself with peace and harmony enjoying the superior position. The later phase degraded the importance of women to a mere under class society with visible differences.”*⁵

The reflection through statement shadows the past glory of the women societies which could be seen analogous to the customs of the present dying women societies. The insight of spreading awareness of rich cultural identity can aid protecting and preserving the society.

A. Khasi matrilineal system of Meghalaya

The word “Khasi” means “born from a mother”. The mother in Khasi has a strong role to play in the family and

⁵ Cynthia Eller, ‘The Myth of Matriarchal Pre-history, Why an Invented Past won’t give women a future (Beacon Press 2000).

society.⁶She is not only the progenitor but also plays the spiritual role as a family priest and does funeral rites of her clan. Her role demands to guide distribution of the common wealth, taking care that it is shared out equally, and according to the needs of each, in a give-and-take economy that could well be called a clan internal “gift economy”.⁷

The Khasi Matrilineal system is divided into clans. The property of the clan stays with the mother and rolls down from mother to daughter. There can be some adjustments with slight variation in different subgroups. “Ka-Khatduh” (youngest daughter) has to take over the responsibility of the entire ancestral property and also extends to spiritual responsibility for the clan. The position of “Ka-Khatduh” is a high respectable and a privileged position. She begins to take over her duties by conducting her revered dead mother’s funeral rites as the head priestess of the clan. Her maternal uncle plays a crucial role in aiding with her duties by actual management and execution of the clan property. The responsibility of “Ka-Khatduh” includes finance to be done by her. If she is not rich than she is obliged to take help from distant relative to help with the finances.

Recent studies draw attention that not much of a difference can be witnessed by the Khasi women of being a privileged community as the rights of decision making are with the males in the society. The administrative

⁶ Vimal Kumar, ‘Khasi Society: India’s Largest Matrilineal Society’, Observer Voice (21 April 2022 3:45pm), <https://observervoices.com/khasi-society-indias-largest-Matrilineal-society-401/>.

⁷ Geneveive Vaughan, ‘For Giving a Feminist Criticism for Exchange’, (Plain View and Anomaly Press 1997).

council or the dorbar is ruled by the adult male. It is divided into four levels. It is exclusive of males as women has no right in it. The women who speaks out in the public forum are considered hens that crow. In Khasi there is a saying “*wei la kynih ka ‘iar’ kynthei la wai ka pyrthei*”. It means the world will come to an end when the hens crow.

The dismal picture of women’s participation in the present law-making is saddening with numbers hardly in single digits. The Matrilineal women are supposed to be custodians to preserve the system but strives to be at the backseat accepting the patriarchal dominance which will soon destroy the whole fabric of Matrilineal system to patriarchy.

B. Garo Matrilineal System of Meghalaya

Garos are considered tribal groups from the State of Meghalaya. They are also known as ‘A-chik’ in North East India and ‘Mande’ in Bangladesh. The roots of Garo contemporary laws are ingrained and openly accepted by all the Garos. It is learnt that even after about 150 years of western education, the Garos still look up to their oral traditions and their contemporary laws to access justice.

The Garo society is divided into certain clans or “chatchis”, for example Marak, Momin, Sangma, Shira and Areng. The clan known as the “chatchis” are exogamous. They are not allowed to marry from within their own motherhood or “machong” as it leads to being socially ostracized. There have been many dialective groups which branched off from the original Garo tribe. They consider themselves independent exogamous subdivision of their clan such as Awes, Ambengs, Atongs. Each of these clans or “chatchis” are further broken down

into lineages known as “Machongs”. A Garo is identified from their “machongs” after they are born.

In Garo family the head of the family is identified as “Nokgipa” The term “Nokgipa” means one who owns the house. In the Matrilineal Garo society, the wife or the mother of the family is not the head of the household but it is the father or the husband who is the head of the household. The wife is below the “nokgipa”. The role of the women is to take care of the daily chores as well to help the husband during the harvesting. The husband has the right to punish the wife but the wife in no circumstances can raise her hand against her husband as it is learnt to be a serious matter and an insult to the “Mahari” of the husband. In such a scenario the wife is even liable to pay fine to her husband.

A woman is not allowed to walk along with the footsteps of her husband. She can walk few steps behind the husband and only in times of insecurity that she is allowed to walk along with her husband.

The concept of divorce in Garos has a twist in it. The wife cannot divorce her husband from her own will. She has to consult her “chra” or the male elders of the “machong”. It is learnt that they have to consent to it after which the procedures can take place. The “chra” takes the final decision which needs to be abided by the women. She has no right to raise her head against her “chra”. The concept of “chra” creates bias in the system because “chra” being a male may deny justice to the aggrieved woman

As Garo men do not have the right to ownership of property thereby he also does not have the right to remove or dispose of any property. He cannot even dispose of his

own dwelling house without the prior permission of the wife. In such a case if his wife has passed away then permission has to be obtained from his daughter if she is of appropriate age, mother or sister as the case may be. He can only dispose of the property under certain necessary circumstances or for the benefit of the family. But it is that he must have acted in good faith. And if such act is committed otherwise then it is regarded as theft.

Men in this society are also affected by presence of the customary rules. This can be specially said with regard to Garo men. As men in Garo societies do not have the right to dispose of any property till this date. Such transaction would be void in law. Although “The Meghalaya Succession Act to Self-Acquired Property Act, 1984” has been enacted by the Meghalaya government, this act applies to only Khasi and Jaintia tribe and not the Garo tribe. This act saves the Khasi men a little and allows them to dispose of their self-acquired property.

C. Alam Minangkabau: Matrilineal Society of Indonesia

Even though the Khasi tribe is famous for its Matrilineal system but Minangkabau tribe from Indonesia topples it to be the world’s largest Matrilineal society. These societies can be traced to the highlands of West Sumatra, Indonesia. The stories to the origin of the society is presumed to lay its seed in the 12th century when the King Maharaja Dirao of the Koto Batu Kingdom died leaving three infant child to his three wives. One among the wives Puti Indo Jalito (first wife) took responsibility to take care of the children and the kingdom.

The curiosity as to why they have persisted such a long history can be broken down to their unique tribal

laws “Adat” or “Matriarchal Tribal Law”. It works to the society as a living system and not just a mirror to reflect their ancient glorious social order.

The role of “Adat” in guiding matrilineal system conflicts with the dominated Islamic religion where the idea is that the sons get more property to that of the daughters. To bring a harmony to this idea Minangkabau brings a distinction of “high and low ideas of inheritance”. The “High Inheritance” means the property which includes lands and homes where women are the only partakers whereas the ‘Low Inheritance’ means what the father gifts to his children from his professional earnings. This latter pattern of inheritance goes hand in hand with the Islamic concept of law.

Economic strength in the hands of women distinguishes Matriarchal societies from merely Matrilineal ones. Women’s economic strength serves the greater well-being of the community, for in Matriarchal ‘gift economy’ the goods benefit everyone. Keeping the necessities of life in women’s hands and maintaining strong solidarity between women, is the basis for Matriarchal societies’ long- term ability to resist patriarchal influence (as with the Minangkabau).

D. Musuo women: Matriarchal society of China

The Musuo women are known as “the kingdom of women”. It is learnt that they are the only few remaining Matriarchal societies in the globe. Their presence is scattered over the Yongning basin and the adjoining areas namely the Lugu Lake of Yunnan Province and blankets through the west of Yanyuan District in Sichuan Province.

The pattern of Matriarchy and Matrilineality prevails in this society wherein the women are the head of the household and makes every decision necessary. They control all the property and finance.

This community is also termed as “The land of walking marriage”. The marriage is not based on the normal marriage pattern where the couples stay together but it is more civil in nature. It can be termed as a sexual relationship which base itself on mutual affection. Men visit their lovers at night and return to their respective maternal house early morning. The offspring’s which are born through the union are taken care solely by the women and the clan. The couple never share their residence nor are they tied in any sort of economic relations. Their religions are concentrated on two types which includes Buddhism and their native religion Daba.

The Mosuo women takes care of the agricultural work and ensures distribution of food among the clan. It is her duty to take responsibility and manage the clan’s communal property which descends through the lineage both material and liquid. She takes care of the guests and is the house priestess at all family ceremonies. She has, however, no special privileges that would contravene the principle of equality on which these societies are based, since she works just as hard as other family members do, and they all discuss the important events together. She can make no unilateral decisions about the community’s wealth. She not only arbitrate in clan conflicts, but also, until recently, the matriarchs of the different clans held important positions in the village councils as well.

III. Conflicts of law in the Khasi Matrilineal system

The link between 'gender' and 'matriliny' cohesively creates a standpoint to realize women's role as a mere custodian of property and on the other hand being subjugated by the male decision making. The constant men's lust for power by totally alienating women from decision making is a travesty to the Matrilineal system. To counter the steamrolling effect of modernization and its related changes the Khasi men have utilized the state machinery to advance their prospects of distorting the Matrilineal system and bring patriarchy which lied dormant to the forefront.

A recent furore regarding the 'Khasi Inheritance property Bill 2021' by the women of Meghalaya highlights the future darkness for the Matrilineal society as the age-old customary tribe with such changes will come to a mere extinction. Firstly, the bill proposes and disregards the ancient form of inheritance which was prevalent in the Matrilineal system of Meghalaya. The age-old practice will be ruled out and an 'equal distribution of property' between male and women will be brought into place where then the parents will have the right to decide with whom to share the property.

The SRT which was founded in 1991 reflects the failure of Matrilineal society and that the men in the society does not have any identity and are suffragettes in the system. They pitched the idea of 'equal distribution of property' since their formation and constantly revolts to bring patriliney in the society.

A Khasi woman activist, Angela Rangad questions the jurisdiction of 'Khasi Hill Autonomous District

Council' (KHADC) over the bill and further demands explanation as to how did they invent new customs to destroy old customary rules. The bill not just focuses on 'equitable rights' but if turned into law will destroy the lineage, custodianship of ancestral property which upholds the whole Matrilineal system.

Secondly, the bill puts forward the issue of a Khasi marrying a non-Khasi as they lose the privilege of claiming the ancestral property and Khasi identity altogether.

The idea is argued that it is an attempt to protect the Khasi women from being exploited by non-Khasi men. These cross-cultural marriages demean the social customs of Matrilineal system and violates their ancestral, personal and traditional right. Also, the lawmakers believe that they have absolute rights granted through Indian Constitution under the sixth Schedule to safeguard 'cultural identity' of their unique tribe and under Article 29 of the Indian Constitution to protect the interest of the minorities.

KHADC while drafting the bill strengthens its stand that the cross-cultural marriages is purely for 'economic exploitation'. This stand does not hold true because there are many non-Khasi husbands and fathers who are far off in performing duties compared to the Khasi gentleman.

The bill actually limits the rights of the Khasi women to marry only within its tribe which is a violation of Article 21 of the Indian Constitution. The right cannot be just snatched away from someone who happens to be born in a tribe not by choice. A law should be substantively fair, just and reasonable to uphold the rights of its people.

The Khasi Social Custom of Lineage (Amendment) Bill, 2018 focuses on prohibiting mixed marriages and introducing to take father's surname. This bill was being termed by the women residents as a patriarchal rule, unconstitutional and partial. The difference was made between the KHADC and Khap Panchayats as that they don't have much of a difference in their working.

The bill laid down various conditions that strips away the rights of Khasi women. It includes her identity which is at a vulnerable state if she marries someone outside of her tribe and also by being an ethnic minority.

The issue is that this amendment bill is a backlash to the Matrilineal system. How can someone be removed from his or her tribe when she is born in that tribe? It can be observed in the case of 'Goolrukh Gupta' which has similar factual situation hitting closer to home. One question which was dealt by the Hon'ble Court is that whether a Parsi women will lose her right to be part of the community after marrying someone to which the Court ruled in favour of the petitioner. The Court stated that marrying outside the community will not force to 'evaporate a person's DNA'.

The fundamental rights of the Indian Constitution under Article 14 mentions that the State cannot take away or deny the rights of any person's 'equality before law' or 'equal protection of law' and stretches under Article 15 of the Constitution regarding non-discrimination of any citizen on religion, race, sex, caste, place of birth or any of them. However, Article 15 (4) mentions that State can take certain special measures to protect the tribe for its 'advancement' of the Scheduled tribe. The question arises whether Article 14 and 15(1) are sidelined to accommodate

Article 15(4)? Further what is the yardstick covered under ‘advancement’? Is it such amendment bills that destroys the fabric of the Matrilineal system?

IV. Conclusion

The paper reveals the nearing failure of their women in protecting and preserving an age-old culture which had its own beauty and uniqueness. The 2011 census reveals that women in Meghalaya are prey to high rate of separation and divorce in the country. It is the males who leave their wife midway which creates doldrums. The predicament is the Matrilineal fabric slowly vanishing with patriarchy being dominant. The issues need to be addressed soon to cope up with the recent booming modernization and its emerging laws.

The compare and contrast being done between the National and International Matriarchal and Matrilineal systems realizes the point that the Matrilineal societies should learn from each other. The problem of inheritance in the Khasi tribe is learnt to be a solution in Alam Minangkabau system of Indonesia. The fight for equal rights of inheritance in one hand of Khasi system and the Minangkabau’s distinction of ‘high and low ideas of inheritance’ provides an ultimate solution for the Khasis. The “High Inheritance” means the property which includes lands and homes where women are the only partakers whereas the “Low Inheritance” means what the father gifts to his children from his professional earnings. This harmony can be adopted by the Khasi Matrilineal system to protect the unique system of Meghalaya.

The Matrilineal or the Matriarchal society lacks proper preaching about it. It is observed that the people of

the clan travel far away to study and do jobs. Long duration gaps from the clan sometimes leads to the ignorance of its culture and traditions. The contemporary laws were of much glow at the past but as it could not cope up with the new accepted norms of society; laws are becoming obsolete which calls for necessary steps to bring amendments to its old laws and the current patriarchal hegemony destructs it by side-lining the woman centric system.

The female oriented structure has passed through various generations which depict the interest of the institutions to protect it. It shows the idea that our society respects and encourages such uniqueness. The rich culture that these societies embody with itself realizes the female's role to be a custodian of a property and have a say in decision making. It is important to preserve, protect the historical cultures as it signifies how rich our history was at some point of it.

CHAPTER 20

**CUSTOMS RELATING TO MARRIAGE OF THE
TAMANG TRIBAL COMMUNITY OF SIKKIM**

*Panila Theengh**

I. Introduction

The Tamangs migrated to India, particularly to the north-eastern part of the country, from Tibet via Nepal. They practice Buddhism and there is no existence of the practice of the Hindu caste system, however, there are numerous different clans and family-sects. The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act of 2002 included the Tamangs from Sikkim in the Scheduled Tribes list and added them to the Constitution (Sikkim) Scheduled Tribes Order 1978, as a Scheduled Tribe. The culture and traditions of the Tamang people are extremely rich. They have a distinct language, culture, dress and social structure. An important aspect of Tamang culture is marriage. The Tamangs happily engage in it, performing many rites in the process. This paper briefly discusses the history of Tamang community and also examines and discusses the marriage/divorce system of the Tamang tribe of Sikkim.

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Originally a Tibeto-Mongoloid group, the Tamangs migrated to India, particularly to the north-eastern part, from Tibet via Nepal.¹ It is believed that the word 'Tamang' is derived from the Tibetan word 'Tamag', which means "horse-rider." In Tibetan language 'ta' means 'horse' and 'mag' means 'rider.' There are six different categories of Tamang societal leaders: they are *Tamba*, *Ganba*, *Bonbo*, *Labonbo*, *Lama* and *Choho* and each of these leaders has a specific function to play in the advancement of Tamang society. The *Tamba* culture is a representation of Tamang ethnic culture. *Tamba* is a person who is well-versed in Tamang history. Also, he is familiar with the common traditional values, behaviours, and lifestyles, as well as poetry, folktales, and oral traditions and declarations. *Tamba* is a historian with a distinctive personality who plays an important role in Tamang community. The *Lama* performs death rituals (Ghewa) and keeps track of Buddhist religious activities. The sick and poor are treated by *Bonbo*, who also worships the local deities, *Labonbo* (*Laptaba*) preserves the clan's genealogy and its heritage through the worship of clan deities and the *Choho* investigates cases and administer justice while preserving social order, safety, and wellbeing. The *Ganba* takes part in various social, political, and religious activities and keeps track of them. He also checks to see if the other leaders have carried out their duties.

There are 12 main original caste and 18 sub caste in the Tamang community. The Tamang are an endogamous group and are divided into number of exogenous clans. These are *Moktan*, *Yonzon*, *Lopchan*,

¹ Mukta S. Tamang, *Tamang Activism: History And Territorial Consciousness*, 269-290, (Gellner Ed. 2009) (2009).

Theengh, Bomjan, Bal, Pakhrin, Grangden, Syangbo, Waiba, Thokar, Jhinba, Dong, Titung, Gyabok, Domjan, Brophan, and Negi are the original rus and are 18 clans. There are some other clans like *Golay, Kalden, Ghising, Singon, Remba, Nyasum, Chungma, Syangden*, which seem to have been added later.

Tamang men dress in long pants called *surlung*, a shirt called *khenjar*, a waistcoat called *khenjo*, and a cap called a *Tagi*. Tamang women typically wear a blouse known as *hangrey*, with long clothes like saree called *ssyama* which has a *kitel* (a multicoloured apron) on the back. Similar to the men, women also wears *tagi*, but with distinct patterns. The women's jewellery includes coin necklaces known as *tangamhar*, enormous red beads, and necklaces made of *Biru* and pearls. They wear *chyap* for finger rings, *namhar* for nose ornaments, *mathie* for bangles, and *botil* and *aalong* for earrings. Men wear garlands of *totola* flowers which is considered sacred and used in all the rituals and functions.

Nyingma, the oldest of the four major schools of Tibetan Buddhism is followed by the different clans of Tamang community in large. They also engage in ancestral reverence and worship a variety of gods and guardians like the deities of *Khappa soong, foop shang, mraap soong*, family deity, place deity and clan deity, etc. The main festivals that the Tamang community observes are *Sonam Lochhar* (New Year) and *Buddha Jayanti*, also known as *Saga Dawa* in their native language. They speak and write with the Sambhota script. The *damphu drum*

(tambourine) is their primary musical instrument, and *Tamang Selo*² is their most well-known traditional music.

The Tamangs live primarily in Nepal, although some live in Sikkim, Darjeeling, Assam, Nagaland, states of India. They are believed to have migrated from Tibet about 3,000 years ago. Tamang language is the largest Tibeto-Burmese language in Nepal.

The Sikkim Official Languages (Amendment) Act 1995 (Act No. 5 of 1995) made Tamang the official languages of Sikkim vide State Gazette No. 76 of 1995.³ The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act of 2002 (No. 10 of 2003) acknowledged the Tamang as a tribe⁴ and added them to the Constitution (Sikkim) Scheduled Tribes Order 1978 (C.O. 111), as a scheduled tribe.⁵

II. Marriage System

Marriage (*Brelsaang*) is an important cultural aspect. The Tamang practice it joyfully while adhering to certain customs. The Tamang social structure is still

² Tamang selo is a folk-dance style of the Tamangs that includes songs about humor, satire, joy and sorrow. It has a quick movement and a rhythmic beat which is quite unique. The traditional songs are called Hwai. These songs are ritualistic and hold tremendous importance in Tamang rituals.

³ The Sikkim Official Languages (Amendment) Act 1995 (Act No. 5 of 1995).

⁴ The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act of 2002 (No. 10 of 2003).

⁵ The Constitution (Sikkim) Scheduled Tribes Order 1978 (C.O. 111).

governed by the traditional patrilineal paradigm and its sociological norms.

Marriage is regarded by the Tamang people as an essential ritual, just like it is in other communities. A Tamang man can marry a female from any clan. But he cannot marry a girl from another caste. This is different from the Hindu caste system. Cross-cousin marriages are preferred, as is the case with some other hill tribes. However, marriages within the same clan (Thar/Gotha (sub-caste) For e.g. marriages between *Yonjan*, *Bomjan*, *Dumjan*, *Mikchen* and *Lopchan* clans are prohibited because it is believed that they are from the same ancestors. Marriage between a man and his father's brother's daughter or mother's sister's daughter is strictly prohibited.

According to tradition, the couple is required to plan a lavish feast for the entire community. The Tamang people place greater value on the girl's side than that of the boy's. In Tamang community, Tamba, Ganba, Banbo, and Lama have significant roles to play in the performance and success of a marriage. In addition, a boy or girl's maternal uncle has a significant role. Tamang people confer with the Lama (priest of Buddhism) before deciding on a certain date for marriage. The Lama fixes a specific date after viewing the 'Chi'(religious text of birth and death). In addition, there is the custom of matching 'Lho'and 'Kham'. There are five *Kham* which are the five elements of this universe and have both male and female effects.⁶They are *Mey* (Fire), *Sha* (Soil), *Cha* (Iron), *Kui* (Water) and *Sin* (Wood). Their social, cultural, economic

⁶ Ajitman Tamang, *A Brief history of Lhochhar and Tamang Calendar*, Nepal Tamang Vidyarthi Ghedung, Kathmandu, Nepal, 10 (2005).

and religious practices are, in one way or other, linked to plants and animals. For example, in the 'Loh' (age calculation calendar), twelve different animals have been used. Each *Loh* always starts from 'Magh Suklapratipadha' and continue till a year. The animals associated with the twelve *Lohs* are: *Jhiwa* (Mouse), *Lang* (Ox), *Tak* (Tiger), *Hyuie* (Rabbit), *Dug* (Dragon), *Dhrul*(Snake), *Ta* (Horse), *Luk* (Sheep), *Tay* (Monkey) *Chyu* (Bird), *Khi* (Dog), and *Fak* (Pig).⁷ It is considered best to match *Lho* and *Kham* before arranging a marriage.

Types of marriage system in Tamang Community⁸

There are different types of marriages prevalent among the Tamang community, *Maagi Biwaha* (arranged marriage), *Chori Biwaha* in Nepali and *Hyo laba* in Tamang language or *Prem Biwaha* (elope marriage or love marriage), *Anterjatia Biwaha* (Inter-Caste Marriage), *Dhansing Biwaha* (marriage through purchase) *Balsing Biwaha* (capture marriage), *Biduwa Biwaha* (widow marriage) and *Jaari Biwaha* (compensatory marriage).

a) *Magi Biwaha (Arranged marriage)*

Arranged marriage, or *Whiva Brelsaang* (in Tamang dialect), is the marriage system where the approval of the parents of the bride and bridegroom is more significant than that of the boy and girl. This kind of union is traditional. The practice of sending the lami, or matchmaker, who represents the boy's family, to the girl's home is

⁷ G. Tamang, *Ethnobiology of Tamang Tribe* (unpublished thesis), M.Sc.Thesis, Tribhuvan Univ. Kirtipur, KTM, Nepal (1998).

⁸ Sudash Lama, *A Review of Tamang Marriage System*, 4 Karatoya: NBU J. Hist. 45-51 (2011).

known as magi biwaha. Due to his expertise in areas relating to old rites and family history, the Tamba serves as the lami. The Tamba represents the boy side of the family and takes bread, hen and alcohol as an offering to the girl's side of the family for marriage proposal known as *Karjel Pong*. The acceptance of the offering denotes an affirmative answer while returning the offering denotes the opposite.

The groom side brings an offering consisting of a twelve of any required elements to the bride's side of the family. There is a requirement of 12 Mohar paisa (1 mohar = 50 paisa and 100 paisa = Rs. 1), 12 dharni goat, (1 Dharni = 2.4 kg), 12 paathi rice (1 paathi = 4.5 kg) 12 paathi chyang (chyang is local alcohol) and 12 Bisa roti (bread) to perform marriage rituals.⁹

According to the tradition, the *janti* (bridegroom's procession) leaves for the girl's home on the fixed date. Exotic beats are played on the *Damphu*¹⁰ (Tamang's musical instrument), as the Janti moves closer to the girl's home. The Tambas on both sides begin the marriage by extolling the virtues of their ancestors and lineages, recounting feats and incidents, misadventures, bravery, and other such things.

Then, in a duet, the Damphu beaters of each side ask and receive responses to questions from the other side while maintaining a particular rhythm (*bhaka*) or tune.

⁹ The Rich Culture of Tamang Community, 2018 (Nov. 22, 2022, 10:04 PM), <https://www.buddhaair.com/blog/the-rich-culture-of-the-tamang-community>.

¹⁰ Damphu (drum) is an essential part of Tamang culture and lifestyle. It is made up of goat's skin. It is used at every Tamang event. They are played at weddings, funerals, special occasions, rituals and festivals.

The *Ratri Bhoj*, or night feast, which includes the bride, groom, and everyone else present, is the next phase of the wedding. As the wedding ritual progresses and the bride's parents give her away to the groom, four different kinds of witnesses must be deemed present and duly honored.

1. *The omnipresent divine spirits*
2. *A Rooster to represent the Himalayan Munal and the Peacock of the plains*
3. *Fish, to represent the holy waters*
4. *All the guests present to witness the wedding*

These witnesses are called *Chhongkhor* or *Chardam* and serve as reminders that the markers of a legitimate marriage also require the blessings of all realms, physical and spiritual. The ritual consists of 1 mana (a pot of bronze to measure grains) rice, 1 paisa, drinks like jaad, raksi (local alcohol). A pair of pigeons is represented as family ancestors and the *Chardam* is performed. The pigeons are free to fly after the ritual is complete. It is believed that the marriage ceremony of the couple is not fully accepted until the *Chardam* is performed. The *Kanyadan* rite in Tamang culture is deemed complete once the *Chardam* is performed.

Before the *janti* (bridegroom's procession) leaves the following morning, the groom and *Samdhi-bhoj* (the in-laws feast) are served. This is to commemorate the occasion when in-laws from both sides meet and have *dhog-bhet* (bowing down to each other). It indicates that all the introductions have been made and that all the connections have been made. In front of everyone present, the Tamba has the groom's parents swear at this point that they will always keep the bride happy, and he also makes the groom make a similar pledge. First, the couple's

heads are gently beaten three times. Next, they feed each other with their leftovers or *Jutho khuaune* and switch places in the ceremony. The Tika (made of rice and curd) is applied to their foreheads as part of the last rite, after which they are blessed by the elders.

b) *Prem Biwaha* (love marriage) or *Chori Biwaha* (mock captured marriage) (*Rang Tangba* or *Hyo Laba*)

Although it is not given much emphasis in Nepali society, love marriage is accepted among the Tamang community. A boy and a girl can get married if they fall in love. In a love marriage, the girl leaves her home and elopes with the boy. *Sagun* (gifts) are sent to the girl's parents, known as *Chor Ko Swar Pong*, within three to five days of the girl moving into the boy's home. If it is accepted, their relationship is recognized, otherwise, the girl can be sent back to her home. When Ganba or Tamba visits a girl's home with *Sagun*, they let the girl's parents know not to worry as their daughter is secure in her husband's home. Gamba or Tamba then offers *Saguns* to the parents.

The act of "mock capturing" the bride involves the bridegroom or his friends pretending to steal her or forcibly removing her from her friends. Even though the marriage had permission, the next act of theft or kidnapping requires a purposeful formality in order for the marriage to be deemed genuine. Real capture would entail an actual kidnapping, but ceremonial capture also entails preventing the groom from capturing the bride so that negotiations can take place once the bride's family has met certain expectations.

The groom's father sends the bride's father a wooden jar (*Thegaan Pong*) which symbolizes honour and promise filled with alcohol (wine) as a request for discussion once the mock capture is complete and the bride begins her life with her groom.

c) *Biduwa Biwaha (Widow marriage)*

The Tamang community equally respects widow marriage. They encourage the widow to remarry the brother of her husband. The decision to remarry remains in the hands of the widow. She can also wed the man she chooses without worrying about her social standing in Tamang society. Earlier, it was customary for the younger brother to wed the sister-in-law of a deceased husband. A widow can wed her husband's younger brother, but not his older brother.

d) *Anter-jatia Biwaha (Inter-caste marriage)*

Marriage between different castes is accepted in Tamang society and is highly common among Tamang people. Inter-caste unions, especially those involving the Newar, Chettri, and Rai, etc., have given rise to new castes like Nharba and Chiri.¹¹ Rituals such as *Rit Bhat* and *Chardam* must be observed in order to make such a

¹¹ Tradition holds that a Tamang cannot wed a Newar caste because the two communities were formerly religious brothers. Whoever marries acquires a new caste called Nharba, and can become pure only after three generations and if a Tamang marries a Chettri, Bahun, or other higher caste woman, their child will inherit the Chiri caste.

Rudra Sing Tamang, *Tamang Sanskarra Sanskriti*, Tamang Society Research and Development Centre, Nepal, 158, (2004).

marriage pure. The girl had to first find Tamang community parents with whom the boy could establish a marriage relationship and have a social feast. Then, after finding religious parents, they had to undergo the sacred ceremony called *Chardam*.

e) *Dhanshing Biwaha (marriage through purchase)*

This type of marriage is typically done by wealthy families, and because of the significant costs involved, it is known as Dhanshing (Dhan means wealth). These marriages are uncommon because the majority of Tamangs are not wealthy. In such unions, the wedding is discussed and decided upon by the parents of the bride and groom. It is performed with a lot of fanfare and extravagance.

f) *Balsing Biwaha (Forced or captured marriage)*

A girl is forcibly taken or carried away from a local fair where she goes to have fun or when she is wandering along the road or any other opportunity that may be available in the event of Balsing Biwaha or forced marriage. As can be seen by how it is carried out, this is solely a marriage by capture. The kidnapped girl is brought directly to the boy's home or to a friend's house and kept hidden there. The next step is to send the girl's parents and family the *Sagun* (gifts), which typically include *Rakshi* (local liquor) and cash. In such cases, the *Sagun* (gifts) may range from Rs. 5 to Rs. 50, and if these are accepted by the girl's parents, the marriage is seen as having been approved. Despite this approval, the girl's parents are still entitled to request a *Hazranaa* (compensation) in exchange for their daughter being taken against their will. It can be observed from this that the

name *Balsing* comes from the Nepali word 'Bal,' which means 'force.'

g) *Jaari Biwaha (Compensatory marriage)*

Jaari Biwaha, or compensatory marriage, is the practice in which a man, whether already married or not, marries a woman who is already married. In Tamang community, such marriages are not shunned, but in order to advance socially, they must pay compensation, such as wedding costs or payment required by a prior husband.

III. Divorce or Parpachuke

The Tamangs have a relatively easy access to divorce or *parpachuke*.¹² If a couple decides to divorce, or if the husband develops feelings for a different lady, or if it is the wife, they can do so with mutual consent or by bringing the issue before a *Pancha* (a committee of elderly people formed to address societal issues). This completes the divorce process. As a formality, a very small price must be paid to the *Pancha* in exchange for the thread to be severed. Couples who have been divorced are free to get married again without fear of social rejection or embarrassment.

IV. *Ghar-Juwai* System (Husband Living With His Wife's Parents)

Ghar-juwai is the term for a person who uxorilocally lives (in the wife's home). Polygamous marriage is not permitted for him. As a result, a boy who lives with his wife's family as a *Ghar-juwai* is not allowed to wed another

¹² Tamang, *supra* Note 4.

woman while he resides in his wife's house. Such a *Ghar-juwai* forfeits his claim to his first wife if he marries someone else or if his first wife moves in with another man, the former husband (the *Ghar-juwai*) will no longer be allowed to live there.

V. Polygamy System in Tamang Marriage System

A person is allowed to have multiple spouses at once since polygamy is common among Tamangs.¹³ The practice of polyandry, in which two or more brothers were married to single women, was also once common. However, it is now extinct.

VI. Conclusion

This research has focused primarily on the marriage system of the Tamang community and the above-mentioned narrative makes it evident that Tamang community has unique marriage customs and traditions. What makes the Tamang marriage system distinctive from other communities is that the Tamang woman cannot change her last name after marriage. Tamang women do not take on their husband's last name after marriage, unlike in Hindu society. The woman lives her entire life in the same *gotra* or *thar* (*sub caste*), which does not alter. When she passes away, her family must be there and give their consent before the body can be cremated. It denies a woman's husband the right to accompany her in her funeral; instead, granting the rights to her parents or her brother. Tamang daughters have a long-standing custom of engaging in small-scale economic activity (Pewa), such as raising goats, chickens, and other livestock. In doing

¹³ *Id.*

so, the daughter gains independence and the ability to stand on her own.

In Tamang community, women's rights are highly valued. The right to property is given not only to the men but also to the women as well. After marriage, woman lives with her husband but she has legal right over the property of her parents and she also has property right to her husband's property. Even if her relation is cut off with her husband, in that condition also she doesn't lose her property right. So, there is dual right of women over property in Tamang community.¹⁴

The Tamang community in Sikkim has a social and cultural blending with the other ethnic tribal populations, but they consciously maintain their distinctive ethnic identity, and there are initiatives to revitalise their cultural representation in daily life. The globalisation process aids people in becoming more technologically sophisticated and knowledgeable, but it can occasionally change in many ways, resulting in the loss of traditional knowledge, culture and traditions and many other changes. When it comes to differentiating one ethnic group from another, cultural markers like food, religion, dress, language, and daily customs and traditions play a key role. Revivalism has been a process the community has been going through in an effort to maintain an appropriate historic past through their culture.

The different rituals practiced like the birth rites, marriage and the death rites are the most important in the social institutions of the Tamang community. These are the institution where, the changes in culture are observed

¹⁴*Id* at 8.

and understood the reason for such transformation within the community. The Tamang community, however, has realised the need of restoring their unique cultural heritage and is making every effort to maintain its rich culture and traditions.

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