

CHAPTER 4

ROLE OF STATE LEGISLATIVE ORGANS IN THE PROTECTION OF CIVIL AND ECONOMIC RIGHTS OF TRIBALS IN INDIA

An Overview

India is the largest democracy in the world and to cater the various needs of these people various laws have been made. The most significance of all is the law properly so called as has been propagated by Jeremy Bentham while defining law as the true source of law. Even when there are various limitations and criticism attached with the philosophy of written laws, it has been seen that the effort of written laws have been best felt on a society which is earmarked with huge population and great diversity.

India, in furtherance of the protection of the basic rights of the people belonging to indigenous and tribal communities has enacted a plethora of legislation. This chapter analyses some relevant acts along with their relationship with the tribals in India.

4.1. Constitutional Guarantees for Tribes and Tribal Peoples

The Constitution of India is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers, and duties of government institutions, and sets out fundamental rights, directive principles, and the duties of citizens.¹ It is the longest written constitution of any sovereign country in the world, containing 450 articles in 22 parts, 12 schedules and 94 amendments, for a total of 117,369 words in the English language version.²

When the United Nations was founded in 1945, some 750 million people, nearly a third of the world's population, lived in Territories that were dependent on colonial Powers.³ Today, fewer than 2 million people live under colonial rule. Since the creation of the United Nations, 80 former colonies have gained their independence, 16 of them were countries in Asia and Africa who gained their independence from the United Kingdom and, while remaining in the British Commonwealth of nations, gave unto themselves their Constitutions of Independence.⁴ Since then, while

¹ Indian constitutional law, Available at, <http://jabalpuradvocate.com/> (Accessed on December 5, 2015)

² Prof. Dias, "The Indian Constitution: the Vast Done; the Little as Yet Left Undone" unpublished.

³ Decolonization, Available at, <http://www.un.org/en/globalissues/decolonization/> (Accessed on December 5, 2015)

⁴ Ibid

Constitutions have come and gone at an astonishing rate, only one of those 16 Afro-Asian countries, India still has its Independence Constitution in place some 65 years later.⁵

The Constitution was drafted and adopted (over a period 12 days short of 3 years) by the 308 member Constituent Assembly, which was elected by the elected members of the provincial assemblies. The Constituent Assembly was a highly representative body with significant representation and participation of women, minorities and scheduled caste members.⁶

There are a few basic features of the Constitution of our country that establishes and tends toward a more human rights friendly constitution and also in the process safeguards the rights of the tribes in India. These features may be summarized as under:

- It enumerates a legally enforceable set of fundamental rights and freedoms in Part III of the Constitution. It also enumerates a set of “Directive Principles of State Policy” (containing human rights which are to be progressively realized) which while non-legally enforceable are nonetheless to be “fundamental in the governance of the country”.
- It provides for effective remedies (by way of the so-called high prerogative writs) for infringement of fundamental rights with original jurisdiction vested in the Supreme Court and the High Courts.
- It provides for extensive powers of judicial review of laws; as well as over administrative actions; with power to strike them down if inconsistent with the fundamental rights contained in Part III of the Constitution.
- Although it provides the State with extensive powers to deal with external and internal emergencies, including the power to temporarily suspend certain fundamental rights; it

⁵ Ibid

⁶ Jawaharlal Nehru, C. Rajagopalachari, Rajendra Prasad, Sardar Vallabhbhai Patel, Sandipkumar Patel, Dr Ambedkar, Maulana Abul Kalam Azad, Shyama Prasad Mukherjee, Nalini Ranjan Ghosh, and Balwant Singh Mehta were some important figures in the Assembly. There were more than 30 members of the scheduled classes, as well as representatives of the Anglo-Indian community, the Parsis, the Christians other than Anglo-Indians and the Gorkha Community. Prominent jurists such as Alladi Krishnaswamy Iyer, B. R. Ambedkar, Benegal Narsing Rau and K. M. Munshi, Ganesh Mavlankar were also members of the Assembly. Sarojini Naidu, Hansa Mehta, Durgabai Deshmukh, Rajkumari Amrit Kaur and Vijayalakshmi Pandit were important women members.

makes certain key fundamental rights “non-derogable” even in times of emergency and also makes them “non-waivable” even by the beneficiaries of the rights.⁷

The constitution of India has provided certain very important provisions to protect the rights of the tribes and tribal communities in India. The provision categorically incorporates the various rights that are essential for the sustenance and development of these communities. It shall be relevant in this regard to state that the provision incorporated in the constitution of India has got its source from a plethora of other constitutions. It must also be acknowledged that the United Nations Organisation has also played a very important role in providing rights to tribal and indigenous people of India. The Universal Declaration of Human Rights has been a key document that has many similarities to the rights granted to the people of India including the tribal peoples of the country.

The Constitution of India from time and again has played a significant role in protecting various rights of the tribals. As a matter of fact, it is the Constitution that provides a working definition of the term Scheduled Tribes. It also provides the procedural safeguards as to their creation and abolition through a public notification. The process of determination of a tribe or a tribal area still remains within the closed doors of the discretion of the President of India. However, this discretion is not arbitrary, it is still ambiguous as to the fact that a considerable number of people claim themselves within the purview of tribes and still they have not been given the status of scheduled tribes under the Constitution and are considered by many as political victims. The debate of declaring a tribe as scheduled tribe has been the subject matter of discussion in both national and international forum, where in the matter has been considered more of politics than of law. Again there has been instances of incorporating certain classes within the purview of Scheduled caste and Scheduled Tribe and has subsequent been rejected by the Honourable Supreme Court of India. The role of the Governor of respective states also call for a reasonable attention as the Constitutional provision also points out the need of the President to consult with the respective Governor of the state before declaring any group of part of any group as tribes.

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The position of the tribes in India as to their respective rights have been formally dealt with by various other provisions of the Constitution including that of Part III which deals with Fundamental Rights. In this regard a thorough study of the provisos and exceptions of the respective provisions calls for significant consideration. The Directive Principles of State policy also attracts special

⁷ Supra Dias

attentions while discussing the various provisions of the rights of tribes and tribal peoples in India. It must also be stated that a specialised agency in the form of National Commission of Scheduled Tribes for monitoring the rights of the tribal people plays a dominant role in protection of various rights of these subaltern groups and communities.

The term Scheduled Tribes have been formally taken up by Article 366 of the Constitution.⁸ The importance and dominance of the President of India is explicit in the provision. It is the President who has been empowered to specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes by notification. It shall be relevant to state in this regard that the Governor of respective states also plays an important role as the President is to consult with respective Governors before declaring a tribe in that state as notified.⁹

Land refers to heritage to tribals and this heritage is the primary source of livelihood to them. Land plays the most dominant role in their sustenance. As a matter of practice the land belonging to them is the basis of their social, economic, political and cultural platform. Alienating tribals from their land is at par with infringing their rights as granted by Article 19(1)(g) of the Constitution of India and not merely the violation of Article 19(1)(f) and Article 31(as it was then before the amendment of the Constitution deleting the said provisions).

The provisions inter alia in Part III, IV, X calls for special attention to the protection of Tribes and tribal areas. Schedule V and VI were specifically created for the Scheduled Tribes in India.

It is worth mentioning that the Executive and the Legislative power of the State to transfer Land under Article 298 and Article 245 respectively are subject to the provisions of Fifth Schedule. A

⁸ In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-

(23) "Schedule" means a Schedule to this Constitution.

(25) "Scheduled Tribes" means such tribes or tribal communities or parts or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution.

⁹ Scheduled Tribes— as has been stated in Article 342 is as follows.

(1) The President [may with respect to 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 the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State [or Union territory, as the case may be].

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

host of Articles in The Directive Principles of State Policy also refers to the responsibility of the state to protect and promote the welfare of the tribes in India.

The tribal population in India may be classified into the following four divisions on the basis of habitation and assimilation.¹⁰

1. Tribals or adivasis who confine themselves to original forest habitats and are still distinctive in their pattern of life. They may be termed as tribal communities;
2. Tribals who have more or less settled down in rural areas, taking to agriculture and other allied occupations. This category of people may be termed as semi-tribal communities.
3. Tribals who have migrated to urban or semi urban and rural areas and are engaged in civilized occupations in industries and other vocations and who have, with discrimination, adopted traits and culture of other population of the country. These may be classified as semi assimilated tribal communities; and
4. Totally assimilated tribals.

The Indian Constitution has vested the power to notify any community as schedule tribe upon the President of India which he does, with the consultation of the Governor of the respective states.¹¹ This notification may involve the entire community or parts or groups within the tribes or tribal communities, as Scheduled Tribes through the notification. Further, the parliament may include or exclude tribes specified in the notification by passing any law. But it must be mentioned that the economic and social condition of many tribes have not been addressed as many of them have not been provided with the status of Scheduled tribe to get the constitutional benefits and the protection of various other statutes.

4.1.1. Equality and Non-Discrimination

One of the interesting approaches of the makers of the constitution in providing equality to the unequals is by incorporating Article 15.¹² This article is of the prominent fundamental rights provided

¹⁰ Mahendra Mohan Verma, 'Tribal Development in India: Programmes and Perspectives' Mittal Publication, 2008 p 19.

¹¹ Article 342 in Part XVI of the Constitution of India

¹² Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth— (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, . (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children. 1[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the

for the protection of tribals is in Article 15 of the Constitution of India. This article is one of the most important and significant Fundamental Rights providing direction to protect the interest of tribal and indigenous people of India. Fundamental rights are justiciable and binding upon the state.

It prohibits any discrimination on grounds of religion, race, caste, sex or place of birth. It further protects all citizens from any disability, liability restriction or condition like access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public on grounds relating to religion.

In this provision there has been an incorporation of special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. This application of *generalia specialibus non derogant* is very important for not only the protection of tribal and certain specified class of people but also their social upliftment.¹³

4.1.2. Equality and Opportunity in Public Employment

Another important right granted by the Constitution is the right to equality of opportunity in matters of public employment. Equality of opportunity is needed for those who have been deprived of it for decades. In order to address the problem, Article 16¹⁴ of the Constitution has been incorporated.

advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes]

¹³ Ibid

¹⁴ Article 16: Equality of opportunity in matters of public employment— (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to class or classes of employment or appointment to an office 2[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment. (4) Nothing in this article shall prevent the State from making any 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

[4(A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favor of the Scheduled Castes and the Scheduled Tribes which in the opinion of the States, are not adequately represented in the services under the State].

[4(B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or Clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the

4.1.3. Protection against Untouchability

One of the fascinating creations of Hindu religion is the caste system and with it the creation of certain categories of people vested with certain specific derogatory functioning. It must be stated in this regard that the constituent assembly always wanted to put this discriminatory practice to an end. This led to the incorporation of Article 17 to the Constitution of India. “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law. Article 17 of Indian Constitution seeks to abolish 'untouchability' and to forbid all such inhuman and derogatory practices. It is basically a "statement of principle" that needs to be made operational with the ostensible objective to remove humiliation and multifaceted harassments meted to the Dalits and to ensure their fundamental and socio-economic, political, and cultural rights.¹⁵

Discrimination has been the customary practice of the upper caste people of India over the lower class people. Prohibition from entering certain places, using certain water resources, using certain passage even for walking, for religious or other cause are some of the few instances of discriminating behaviour that the lower caste people have been facing for centuries. The caste system in India has some inherent vices in it. Untouchability in various forms is some of them.

The people falling in the lower caste system of Hindu religious have been vested with certain jobs of lower profile like cleaning, scavenging etc; Mahatma Gandhi called these people as Harijans which means child of God.

4.1.4 Other Fundamental Rights

One of the major reasons for formation of a written constitution is to provide a set of written rights for the citizens of the country. Part III of the Indian Constitution, under Article 17 prohibits all forms of practices relating to untouchability. Abolition of the customary practice of untouchability confers relief and liberty of the people who once belonged to the untouchable categories. Apart from the constitutional guarantees, various other enactments have been passed by the Indian parliament to prohibit any practice of untouchability including making such practice an offence.¹⁶

ceiling of fifty per cent reservation on total number of vacancies of that year.] (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

¹⁵ This has been the standing of the Supreme Court of India.

¹⁶ The Protection of Civil Rights Act 1955 is one such Act which came with the primary objective to make any practice of untouchability an offence under that act.

4.1.5. Directive Principles of State Policy and Rights of Tribals

The objective of Article 39(b) provides “to minimise the inequality in income” and also “to eliminate inequalities in status, facilities and opportunities” among people in different areas.

Thus the government must look after the economic interest of those who are weaker in the society. Tribals are weaker economically. Although not by choice but by compulsion.

A lot of acts coupled together with the massive so called developmental projects have led to this irretrievable breakdown of tribal economy in various parts of the country. The major so called developmental projects like mining and construction of dams on big rivers have created a lot of economic imbalance amongst the tribals and adivasis who are solely dependent upon their natural resources of their land which they have been holding from time immemorial. Along with their economy a lot of their culture are also involved which are also in the verge of extinction. The practice of carrying on the family tradition in various professions amongst the tribes has been discontinued for the sake of sustenance of life and livelihood. Because of such uncalculated acts and risks taken by state has done things opposed to the directives of the Constitution of India and the time has come to control such an unnecessary creation of inequality in the status of the life of the people of adivasis and tribals in India. And parallel to this, the state in under direct direction of the constitution, to minimise the inequality in income and in the process, provide parallel income opportunities to the tribals and indigenous population of the country. The compulsive creation of inequality in status, facilities and opportunities are basic aspects of state created development consequences. Thus the state has also the moral obligation of protecting and preventing the inequality amongst the tribals in respect of status, facilities and opportunities. Other essential directive principles that have been incorporated in the Directive Principles of State Policy apart from Article 39 are Article 41, Article 42, Article 43, Article 46 and Article 47.

In order to protect the economic and educational interest of the tribals, Article 46 of the constitution has been provided for promoting such interests of Scheduled Castes, Scheduled Tribes and other weaker sections of the society. The provision directs the State to 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. The provision also directs the state to protect these vulnerable classes from social injustice and all forms of exploitation. The article particularly emphasises the responsibility of the state to promote special care towards the education and economic interest of the weaker section of the people particularly of scheduled castes and scheduled tribes. This provision in the Indian constitution also promotes various educational and vocational schemes to protect education to these communities. However special care must be taken to protect

their indigenous educational technique which is based on practical experience and exposure rather than through books.¹⁷

4.1.6. Constitutional protection as to the Administration and Control of Schedules Areas and Scheduled Tribes.

The constitution of India has provided for special provisions for the administration and control of Scheduled areas and scheduled tribes. The Fifth and Sixth Schedules of the Constitution have been incorporated to deal with the administration of tribal areas in India.

The term 'Scheduled Areas' specified in the constitution of India identifies the tribal regions to which either the Fifth Schedule¹⁸ or the Sixth Schedule applies.¹⁹ These two Schedules have separate and unique mechanisms for governance.

The Fifth Schedule was an entirely centralized system where the tribal communities were directed in their affairs by provincial governors.²⁰ The Schedule actually allowed the states to extend their executive power to these Scheduled Areas,²¹ which has a vast tribal population. The provision further granted necessary power and authority to the Governor of each state to make regulations for the peace and good governance of any area in a State which is for the time being a Scheduled Area.²² The Governor was thus the sole legislature for the Scheduled Areas and the Scheduled Tribes,²³ competent to make laws on all subjects enumerated in the Constitution's Union, State, and Concurrent²⁴ Lists.²⁵ This view appears to be incongruous with the colonial policy of allowing the Governor to act in his or her discretion only in Excluded Areas (present day Sixth Schedule areas).

¹⁷ It must be referred that the tribal knowhow must be preserved along with their language and folklore.

¹⁸ The Fifth Schedule covers tribal areas in nine peninsular states, namely, Andhra Pradesh, Orissa, Jharkhand, Chhattisgarh, Madhya Pradesh, Maharashtra, Gujarat, Rajasthan and Himachal Pradesh. The Sixth Schedule includes in its purview the tribal areas in the north-eastern states of Assam, Meghalaya, Tripura and Mizoram and is excluded from the purview of the Fifth Schedule.

¹⁹ The Fifth and Sixth Schedules are made applicable to their respective jurisdictions by Article 244 of the Constitution.

²⁰ PESA was incorporated in the Indian legal system and changed the existing setup of administration in the scheduled areas.

²¹ Constitution of India, 1950, Sch. V

²² *Ibid.*, Sch. V, 5(2)

²³ *Edwingson Bareh v. State of Assam*, A.I.R. [1966] S.C. 1220 p 47 (Justice Hidayatullah dissenting). See also Constitution of India, 1950, Sch. V 5(1).

²⁴ Tribal law and customs in India, Available at, <http://www.legalservicesindia.com/article/article/tribal-laws-&-customs-in-india-847-1.html>, (Accessed on December 5, 2015)

²⁵ See Justice Y.V. Chandrachud, V.R. Manohar & Justice Bhagwati Prasad Banerjee, eds., *Durga Das Basu: Shorter Constitution of India*, 13th ed. (Nagpur: Wadhwa, 2002) at 1709 [Durga Das Basu] (citing *Chhaturam v. Commr. of I.T.*, [1947] F.L.J. 92).

The term Scheduled Tribes” refers to those tribes designated as such through a process of identification based on the procedures and provisions made in Article 342 the Constitution of India.”In designating a tribe as a Scheduled Tribe, the government would consider their traits, distinctive culture, geographical isolation, level of contact with communities beyond their own and general social and educational development. Religion is not a consideration.²⁶The inclusion of a tribe in the list of Scheduled Tribes permits the government to take affirmative action in favour of such tribes.²⁷ The Governor could also preclude the application of any federal or state law in the Fifth Schedule areas.²⁸ Gubernatorial authority was “of a very wide nature²⁹ and subject to only two restrictions:³⁰ (i) that the Governor would consult a Tribes Advisory Council “before making any regulation;³¹ and, (ii) that all regulations would receive Presidential assent before taking effect.³²

The Sixth Schedule, unlike the Fifth Schedule has always given the tribes considerable autonomy. This Schedule divides the tribal areas in India’s north-eastern states into autonomous” regions, each allocated to a particular tribe.³³ The elected councils in the Sixth Schedule areas are vested with administrative authority,³⁴ make laws with respect to a variety of subjects,³⁵ and even exercise judicial authority through traditional legal systems³⁶ embedded with certain features of federal law.³⁷ The councils are also financially independent and do not labour under the executive authority

²⁶ Meenakshi Hooja, *Policies and Strategies for Tribal Development: Focus on the Central Tribal Belt* (New Delhi: Rawat Publications, 2004) at pp 19-20.

²⁷ Apoorv Kurup, ‘Tribal Law in India: How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better’, *Indigenous Law Journal*, Volume 7 Issue 1/2008 p 94

²⁸ See Constitution of India, 1950, Sch. V. 5(1)

²⁹ The Governor’s law-making powers permit even retrospective legislation. See *Ram Kripal Bhagat v. State of Bihar*, A.I.R. [1970] S.C. 951 at 958, and *V.S.S. Sastry v. State of Andhra Pradesh*, A.I.R. [1967] S.C. 71 at 74.

³⁰ *Edwingson Bareh v. State of Assam*, A.I.R. [1966] S.C. 1220 at para. 45.

³¹ Constitution of India, 1950, Sch. V 4.

³² The Governor’s authority remains unchanged even after PESA. The most reasonable interpretation would therefore be that the Governor can continue to make laws for the Fifth Schedule areas, subject to the powers of self-government guaranteed by PESA.

³³ Constitution of India, 1950, Sch. VI 1.

³⁴ *ibid.*, Sch. V 2(4).

³⁵ See *ibid.*, 1950, Sch. VI 3(1) (laws can be made to regulate social customs, land use, forest management, and cultivation; or to appoint Chiefs or Headmen, and administer villages or towns. These laws become enforceable after the assent of the Governor of the state is received.).

³⁶ *Supra* Note 22.

³⁷ The Councils are authorized to establish their own justice dispensation system with tribal courts that adjudicate disputes “between the parties all of whom belong to Scheduled Tribes.” See *ibid.*, Sch. VI clause 4(1) and (2). See also *State of Meghalaya v. Richard Lyngdoh*, [2006] 2 G.L.R. 328 at para. 17.

of the states.³⁸ Though the Sixth Schedule's scheme renders all exercise of executive and legislative authority by the councils subject to the approval of the provincial Governor, the superior courts have interpreted the Governor's authority to be considerably restricted.^{39 40}

The Supreme Court of India decided in *Pu Myllai Hlychho*⁴¹ clarified that even though the Sixth Schedule is not a self-contained code⁴² or a Constitution within the Constitution,⁴³ the courts must nevertheless refer to the legislative, administrative and judicial independence that the Schedule grants District and Regional Councils.⁴⁴ There were two reasons for the different treatment that the tribes received.⁴⁵ First, the tribes in Fifth Schedule areas were considered incapable of self-government.⁴⁶ Second, unlike the Sixth Schedule areas, some tribal communities in peninsular India coexisted with a minority non-tribal population, and autonomy for the tribes in such a case seemed impractical. These were considerations that had been settled well before independence,⁴⁷ so that by

³⁸ Paragraph 7 of the Sixth Schedule enables provincial Governors to establish District and Regional Funds. The District and Regional Councils also have the power to "assess and collect land revenue and to impose taxes" [para. 8]. Paragraph 9 authorizes the Councils to collect the royalties accruing each year from mineral licenses or leases granted by the state governments in respect of any area within an autonomous district.

³⁹ For instance, in *Cajee v. Siem* the Indian Supreme Court held that "the administration of an autonomous district shall vest in the District Council and this in our opinion [is] comprehensive enough to include all such executive powers as are necessary to be exercised for the purposes of the administration of the district." See *T. Cajee v. U. Jormanik Siem*, A.I.R. [1961] S.C. 276.

⁴⁰ *Supra* Note 22.

⁴¹ *Pu Myllai Hlychho v. State of Mizoram*, [2005] 2 S.C.C. 92.

⁴² *Contra Edwingson Bareh v. State of Assam*, A.I.R. [1966] S.C. 1220 at para. 11 ("the scheme of the Sixth Schedule ... purport[s] to provide for a self-contained code for the governance of the tribal areas").

⁴³ See *Pu Myllai Hlychho v. State of Mizoram*, [2005] 2 S.C.C. 92 at para. 21 ("The Sixth Schedule to the Constitution is a part of the Constitution and cannot be interpreted by forgetting the other provisions in the Constitution.").

⁴⁴ But see *District Council of the Jowai Autonomous District v. Dwet Singh Rymbai*, [1986] 4 S.C.C. 38 at para. 11 (The powers enjoyed by these District Councils cannot be equated with the plenary powers enjoyed by a legislature. Their powers to make laws are limited by the provisions of the Sixth Schedule).

⁴⁵ *Supra* at 20 p 94.

⁴⁶ Modern sociology has however extra-legally compelled a review of the "colonial theories and practices" that categorized the primitive and the civilized based on "modes of subsistence", "transformation of the physical environment", "literacy" and the presence of "codified laws regulating society". See Ajay Skaria, "Shades of Wildness Tribe, Caste, and Gender in Western India" (1997) 56 *J. Asian Stud.* 726 at 730-731.

⁴⁷ The Government of India Act 1935, which introduced special measures for the protection of the tribes in India, had earlier reclassified the tribal regions of the country into "Excluded" and "Partially Excluded Areas" based on the preponderance of tribal communities and the feasibility of introducing civil administration in those regions. See Indian Statutory Commission, *Report of the Indian Statutory Commission* (London: Her Majesty's Stationary Office, 1930). Thus, "where there was an enclave or a definite tract of country inhabited by a compact tribal population, [the area] was classified as an Excluded Area," while regions with a substantial tribal population, but a minority non-tribal population,

voting on the inclusion of the Fifth Schedule in the Constitution the founding fathers were, in a sense, continuing the colonial typecast that the tribes contentment depended not so much on rapid political advance as on experienced and sympathetic handling, and on protection from economic subjugation by the [non-tribal] neighbours.⁴⁸ Even the Supreme Court of India later endorsed this paternalist justification when it said that the tribals need to be taken care of by the protective arm of the law, so that they may prosper and by an evolutionary process join the mainstream of the society.⁴⁹

4.1.7. Right to Representation in the Legislative and other Bodies

There are certain political safeguards provided in the constitution of India for the tribal and indigenous peoples of India. These special provisions have been laid down in Article 330⁵⁰ in respect of reservation of seats in the Lok Sabha and Article 332⁵¹ in respect of State Legislative

were declared Partially Excluded Areas. J.K. Das, *Human Rights and Indigenous Peoples* (Delhi: A.P.H., 2001) at 135 (both regions “were excluded from the competence of the Provincial and Federal Legislatures,” but “the administration of Excluded Areas was vested in the Governor acting in his discretion” and that of the Partially Excluded Areas “was vested in the Council of Ministers subject ... to the Governor exercising his individual judgment”). After independence, the drafters of the Indian Constitution adopted the distinction between Partially Excluded and Excluded Areas and renamed them with minor modifications as the Fifth and Sixth Schedules respectively. See B. Shiva Rao, *supra* note 13 at 681-782.

⁴⁸ See Amit Prakash, *supra* note 10 at 122. See also Indian Statutory Commission, *Report of the Indian Statutory Commission*, vol. 2 (London: Her Majesty’s Stationary Office, 1930).

⁴⁹ *Amrendra Pratap Singh v. Tej Bahadur Prajapati*, [2004] 10 S.C.C. 65 at para. 15. The situation bears a striking resemblance to the United States’ belief that the Native American tribes “were the ‘wards’ of the government in need of protection.” See Joseph William Singer, “Lone Wolf, or How to Take Property by Calling It a Mere Change in the Form of Investment” (2002) 38 *Tulsa L. Rev.* 37 at 39.

⁵⁰ Article. 330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People-

1. Seats shall be reserved in the House of the People for - a. the Scheduled Castes; b. the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and c. the Scheduled Tribes in the autonomous districts of Assam.

2. The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.

3. Notwithstanding anything contained in Clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribe in the said autonomous district bears to the total population of the State.

⁵¹ Article. 332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the

Assemblies. The House of the People is the primary law making body of the parliament including the Rajya Sabha and the President. Reservation of seats in the House of the People is of special significance as it permanently allows tribal representation in the Parliament of the country. Not only do the tribals⁵² of the country get the benefits of this provision, the scheduled castes⁵³ also get their

States

1. Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the autonomous districts of Assam, in the Legislative Assembly of every State.

2. Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

3. The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved bears to the total population of the State.

[(3A) Notwithstanding anything contained in clause (3), until the taking effect, under article 170, of the readjustment, on the basis of the first census after the year [2026], of the number of seats in the Legislative Assemblies of the States of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland, the seats which shall be reserved for the Scheduled Tribes in the Legislative Assembly of any such State shall be,—

(a) if all the seats in the Legislative Assembly of such State in existence on the date of coming into force of the Constitution (Fifty-seventh Amendment) Act, 1987 (hereafter in this clause referred to as the existing Assembly) are held by members of the Scheduled Tribes, all the seats except one;

(b) in any other case, such number of seats as bears to the total number of seats, a proportion not less than the number (as on the said date) of members belonging to the Scheduled Tribes in the existing Assembly bears to the total number of seats in the existing Assembly.]

[(3B) Notwithstanding anything contained in clause (3), until the re-adjustment, under article 170, takes effect on the basis of the first census after the year [2026], of the number of seats in the Legislative Assembly of the State of Tripura, the seats which shall be reserved for the Scheduled Tribes in the Legislative Assembly, shall be, such number of seats as bears to the total number of seats, a proportion not less than the number, as on the date of coming into force of the Constitution (Seventy second Amendment) Act, 1992, of members belonging to the Scheduled Tribes in the Legislative Assembly in existence on the said date bears to the total number of seats in that Assembly.]

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district:

[Provided that for elections to the Legislative Assembly of the State of Assam, the representation of the Scheduled Tribes and non-Scheduled Tribes in the constituencies included in the Bodoland Territorial Areas District, so notified, and existing prior to the constitution of the Bodoland Territorial Areas District, shall be maintained.

⁵² Supra at 43 Article 330 clause 1(b) and (c).

⁵³ Ibid at clause 1(a)

numbers present in the elite legislative body. The provisions also take care of the proportional equation relevant in the representation of tribals and scheduled castes.

Special provision has also been incorporated in the constitution for reservation of seats in the Panchayats.⁵⁴ Article 243D was accompanied by Article 243T to extend the reservation of seats in the Municipalities as well. Similar to the provisions of reservation in the House of the People and the State Legislative Assemblies, Panchayats and Municipalities also secures the seats for the Scheduled Castes.⁵⁵

4.1.8. Agency for Monitoring Safeguards

Article 338A of the constitution of India established the much needed and much awaited monitoring agency in the form of National Commission for Scheduled Tribes. The monitoring agency has been vested with certain powers⁵⁶ including the powers of a civil court⁵⁷ and functions with certain

⁵⁴ Article 243D. Reservation of seats

1. Seats shall be reserved for- a. the Scheduled Castes; and b. the Scheduled Tribes, in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

2. Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

3. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

4. The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level

5. The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

6. Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favor of backward class of citizens.

⁵⁵ Article 243D clause 1(a) and Article 243T clause 1

⁵⁶ Article 338A clause (8) *inter alia*

constitutional duties⁵⁸. The commission has been vested with the power to regulate its own procedure.⁵⁹

Another interesting move on the part of this incorporation of the National Commission of Scheduled Tribes is to provide necessary consultations⁶⁰ to the Union and the State Governments on all major policy matters affecting the Scheduled Tribes.

4.2. Major Enactments passed in India to Protect Civil and Economic Rights of Tribals

The majority of statutes made for the tribals in India are in furtherance of the protection of their civil and economic rights. This has been a sharp contrast to the laws that was passed by the British colonial rulers. It is the advent of human rights that prompts the creation of these laws to provide basic protection of their life and liberty as has been guaranteed by the constitution of India.

Various enactments were passed by both the centre and the state to prevent large scale alienation of the lands of the tribals to non tribals.⁶¹ Some of these *inter alia* are worth mentioning; The West Bengal Land Reforms Act, 1955, Abolition of Zamindari Act, 1950, and various tenancy legislation.

The Transfer of Property Act, 1882, The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Orissa Gram Panchayat (Amendment) Act, 1997, Tripura Land Revenue and Land Reforms Act, 1960 *inter alia* have made their mark in the pages of Indian judicial system for being pro active for the protection of tribal people all across the country.

Some of these enactments are worth a discussion to identify the process by which the legislations are protecting these vulnerable groups and communities. The researcher has identified four major enactments intended to protect the civil and economic rights of tribals in India. As the study of various relevant provision of these enactments are done we must have a note on the various principal difference that exist between the Colonial legislation and its various trends that continued after India's independence and the later enactment which got their influence from international convention and the application of the 'specific adoption theory' in practice. The aforesaid enactments are discussed below *in seriatim*:

⁵⁷ Ibid at Clause (8).

⁵⁸ Ibid at Clause (5).

⁵⁹ Ibid at Clause (3).

⁶⁰ Ibid at Clause (9).

⁶¹ Attempts to subvert 'Samatha' judgement, Available at, <http://www.pucl.org/reports/National/2001/samatha.htm>, (Accessed on December 5, 2015)

4.2.1. The Schedules Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989⁶²

4.2.1.1. Overview

The Schedules Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 came up to protect the scheduled tribes and scheduled castes from various atrocities defined in the Act. The Act provides a territorial jurisdiction to the whole of India except the state of Jammu and Kashmir.

The enactment was passed by the Indian Parliament in 1989 on 11th of September as Act no. 33. The Act is divided in five chapters comprising of 23 sections. Chapter 1 is preliminary and comprises of section 1 and 2, where section 2. Defines various words used in the Act. The second chapter incorporates section 3 to section 9 and is headed as offences of Atrocities. This chapter comprises of six sections and describes various acts considered to be offences and the corresponding punishments. An amendment to this Act was passed on 26th January 2016.

Chapter 3 deals with the provisions relating to externment and includes within it section 10 to section 12. Chapter 4 of the Act provides the provision relating to the establishment of Special Courts which will deal with cases of Atrocities involved in this Act. Section 14 and 15 laid down the provisions there of.

Chapter 5 of the Act provides for miscellaneous provisions and incorporates section 16 to section 23.

4.2.1.2. Backdrop and Object of the Act

Tribals in India have been subjected to lot of deprivation for centuries. The process of urbanization has further forced these people to choose the remotest corner of human habitat at extreme weather conditions and to sustain a very hard life. Over and above this there has been a continuous influx of non tribal people in these regions as well for further exploitation of tribals and adivasis in India like in many other parts of the world. The growth of intolerance and torture on the tribals and the absence of legal and other safeguards have even made their life miserable.

Most places in India have witnessed growing intolerance and violence upon the weak and marginalised tribal people during the post independence period and that has substantially influenced the incorporation of laws to protect these people of their basic rights guaranteed by the constitution of our country.

The constitutional safeguards have been further supplemented with various enactments passed by the parliament of India. Apart from the constitutional promises, international obligation of India has

⁶² The Schedules Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act 33 of 1989).

been another promising reason for developing laws to protect various human rights of the indigenous and tribal peoples. India has been a member of the United Nations Organization and has also been a member nation to be a signatory of ILO Convention No. 107. It shall be relevant in this regard to specify that all the member states are obliged to submit a periodic review of the protection of human rights of their respective countries every four years known as the Universal Periodic Review. This UPR started from 2008 and is ready to submit its third report on the first quarter of 2016.

In the year 1989 a very important enactment was passed by the parliament for the protection of certain basic rights of the scheduled tribes and scheduled class in the form of The Schedules Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Act came up with the sole objective of protecting the SCs and STs from various unlawful acts including acts done by a non tribal in public office.

This act opens up the nude picture of the Indian behaviour with tribals and schedule castes. Moreover it shall be relevant to state in this regard that it is emotionally disturbing to read and study the nature of atrocities these vulnerable people faces everyday in their lived from the non tribals. The growth of intolerance and atrocities has been rightfully addressed by this Act to some extent.

The object of the Act is the prevention of commission of offence of atrocity upon the members of the SCs and STs.

The Act also provides for special courts for the trial of such offences of atrocities and to provide for the relief of SC/STs. The Act also provides necessary provision for the rehabilitation of the victims of such offences.

The Act also addresses necessary matters connected therewith and incidental thereto. The act extends to the whole of India except the state of Jammu and Kashmir.⁶³

4.2.1.3. Meaning of Atrocity

Atrocities have been defined in section 2(a)⁶⁴ of the act. Various offences as provided in section 3 of this act are considered to be atrocities in this act. The definition also states that the offences as laid down in the act are punishable. Thus atrocities are both offences and punishable in nature.

⁶³ Object, The Schedules Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

⁶⁴ (a) "atrocity" means an offence punishable under section 3

A brief study of the provisions stated in section 3⁶⁵ clearly identifies the various acts committed upon the indigenous and tribal peoples are gross violation of human rights. The various acts of atrocities may broadly be classified as:

1. Infringement of right to life and personal liberty,
2. Infringement of the right to property
3. Exploitation of the tribal peoples.

⁶⁵ 3. (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -

(i) forces a member of a Scheduled Caste or a Scheduled Tribe to drink or eat any inedible or obnoxious substance;

(ii) acts with intent to cause injury, insult or annoyance to any member of a Scheduled Caste, or a Scheduled Tribe by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighbourhood;

(iii) forcibly removes clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe or parades him naked or with painted face or body or commits any similar act which is derogatory to human dignity;

(iv) wrongfully occupies or cultivates any land owned by, or allotted to, or notified by any competent authority to be allotted to, a member of a Scheduled Caste or a Scheduled Tribe or gets the land allotted to him transferred;

(v) wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights over any land, premises or water;

(vi) compels or entices a member of a Scheduled Caste or a Scheduled Tribe to do 'begar' or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(vii) forces or intimidates a member of a Scheduled Caste or a Scheduled Tribe not to vote or to vote to a particular candidate or to vote in a manner other than that provided by law;

(viii) institutes false, malicious or vexatious suit or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe.

(ix) gives any false or frivolous information to any public servant and thereby causes such public servant to use his lawful power to the injury or annoyance of a member of a Scheduled Caste or a Scheduled Tribe;

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

(xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;

(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;

(xiii) corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or a Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used;

(xiv) denies a member of a Scheduled Caste or a Scheduled Tribe any customary right of passage to a place of public resort or obstructs such member so as to prevent him from using or having access to a place of public resort to which other members of public or any section thereof have a right to use or access to;

(xv) forces or causes a member of a Scheduled Caste or a Scheduled Tribe to leave his house, village or other place of residence,

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

4.2.1.4. Rights Guaranteed under the Act.

Right to life and personal liberty has been one of the most significant fundamental rights protected under the constitution of India. The act makes a similar effort in some of the prominent sections in it to uphold the right to life and personal liberty of the members of the scheduled tribes. A thorough reading of the provisions laid down in section 3 puts forward the following rights:

4.2.1.4.1. Right to Cast Vote and Access to Customary Right of Passage and Clean Water

1. Universal adult suffrage is the benchmark of any democracy and India is no different. The act categorically provides the right to cast vote⁶⁶ to the members of the scheduled tribes in scheduled areas declared under the schedule of the constitution of India. This right to choose their representative in the parliament and state legislations is in furtherance of the rights to enjoy life in the proper sense of the term.

2. Another right that has been provided under this provision of this act is the right to clean water, access to springs, reservoirs⁶⁷. This provision is very important for the sustenance of life. Without water and access to water bodies, no person can live their respective life in the simplest of ways. The law prohibits anybody who tries to infringe this right of tribals. The penal provision has done a commendable job where these people have been forced out of their respective resources.

3. The tribals have been denied their conventional ways and passages⁶⁸ by the non tribals in recent past. This hardship has led to a lot of conflict between the tribals and the non tribals and also against the administration. This conflict has witnessed bloodshed of many innocent tribals as well as non tribals including destruction of public property. There have been terrible instances of 'tribal-state' and 'tribal-non-tribal' conflicts due to the continuous exploitation of the tribals by the State as well as the non-tribals with Government showing blind eyes to the legitimate pleas of the tribals. The police firing on adivasis at Muthanga in Wayanad District of Kerala led to the death of adivasis and policemen, and with hundreds of adivasis including women and children getting injured. The incident occurred when over 2000 adivasis occupied the protected forest land and were there in temporary huts and tents for 45 days with the demand which the then Chief Minister has made to them two years ago in Trivandrum. When the police came to evict them, the activists captured one policeman and one forest guard and keep them in custody. A massive police force was

⁶⁶ Section 3 (1) (vii) of the The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

⁶⁷ Ibid at Section 3 (1) (xii)

⁶⁸ Ibid at Section 3 (1) (xiv)

subsequently diploid which unleashed a brutal attack on the innocent adivasis and opened fire resulting in the death of two adivasis.⁶⁹

This right to access to various roads, passage etc, has provided new ray of hope for these people. Those who obstruct such rights are considered to be offenders under this act and penal provisions have been created to punish the wrongdoer. This provision is very apt to the fact that untouchability has been a very inhuman practice.

4.2.1.4.2. Right against Exploitation

Some of the provisions created under section 3⁷⁰ of the act are in furtherance of protecting the tribals against exploitation by the non tribals. The tribals who were generally very simple minded and un-complicated were easy prey to the crooked non tribals. The growing loss of land of the tribals and adivasis has affected their economic conditions adversely. Adivasi live a life of economic sustenance which is very much dependable upon their land. The term sustainable with its various dimensions became an institution by itself.

However, very little has been thought about those who originated the concept and practiced it in the true sense of the term. The indigenous communities across the globe had a sustainable way of life. Whether it is their economy or attitude towards life, it is the term sustainable that perhaps suits them the best.

The forest has been the breeding ground of the tribal and it is this forest which teaches them the essential lessons of life and death. The customary practices and usages form an integral process of the education system of the tribals. The elderly from a very early stage teaches their toddlers, the usages of various plants in the forests and with that different method to protect and preserve them.

It has been evident amongst the tribal communities the medicinal use of various plants and shrubs of the forest. The origin of aurvedic medicine and unani that has gained much popularity in the modern urban communities restores its source in the indigenous way of healing. The various form of indigenous healing have continued and evolved through centuries and are still in practice in various tribal areas of India.

Because of the growing loss of land and other resources the tribals have been left with little ways of economic sustenance. The biggest number of displaced people in India is the tribal people and they have been affected mostly by the so called developmental projects in the form of Dams and

⁶⁹ Mathew Aerthayil, 'Muthanga Police Firing in Kerala: Tribal Reaction to Exploitation and Alienation of their Land', Mainstream, July 19, 2003 at p 28.

⁷⁰ Section 3 of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

barrages to generate electricity. Research suggests that only one project on the river Narmada has been the reason for displacement of populace as big as that of Australia.⁷¹ Such displacement has been the root cause of destruction of not only the tribal communities but also with them their entire culture, knowledge and education.⁷²

This mass displacement of tribals from their homeland has led to their involvement in the unskilled labor force of the country. Today, India is witnessing a large number of tribal people in various forms of labor including bonded labor. Section 3 of the act addressed this issue of labor exploitation and provides for penal measures against the practice of penal measures.⁷³

India has notices large scare violence upon women and children and tribal women and children are not an exception to this inhuman practice. Some of the instances of such sexual violence upon tribal women by non tribal men have been provided in chapter 5⁷⁴ of this research work. Section 354 of the Indian Penal Code, 1860 has categorically provided punishment for any person outraging the modesty of women. This enactment also in tune with the IPC has incorporated this heinous act of males over females.⁷⁵

There have been innumerable instances of physical violence by non tribals upon tribal people and in certain cases the entire non tribal community upon a tribal community. In order to prevent such act of violence like a penal provision has been incorporated to protect the right of tribal people against physical assaults.

The section also protects the tribals from any false harassment or false suits made against them with the object of exploitation. This act of non tribals has been addressed in the act⁷⁶ rightfully in the said provision along with sub section 2 of section 3 of this act.⁷⁷

4.2.1.4.3. Right to Property

The most significant rights of tribal and indigenous communities are their land and resources in the said property. Land is at the heart of tribal life. More than a thing of value, land to him is mother

⁷¹ Shambhu Prasad Chakrabarty, 'Tribals And Adivasis: Bearing The Light For A Brighter Future In Sustaining The Forests, Protection Of Health And Education: A Socio-Legal Reflection' JCC Law Review, 2014

⁷² Ibid at pg

⁷³ Section 3(vi) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

⁷⁴ Chapter 5 of this research work is titled 'Role Of Judiciary In Protecting The Civil And Economic Rights Of Tribals in India' at p.

⁷⁵ Section 3(xi) of The Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989.

⁷⁶ Section 3(viii) of The Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989.

⁷⁷ Section 3(ii) of The Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989.

earth, which satisfies both his material and spiritual needs. Hence depriving him of his land is to snap his continuation as a self respecting member of society. In fact, the root cause of all human right violations perpetuated on them can be traced to land alienation, since the tribals depend on land for their identity, existence, security and livelihood.⁷⁸

The importance of forest land to the tribes and tribal communities can be aptly compared as life to a human body. Without it the life of the tribes are mere body without *animus*. They consider their land as heritage. Forest is their habitat and the source of life. It is not only the source of fodder and food; it provides the fuel to make life easier for them. As a matter of fact, everything concentrates on forest and its produce when it comes to tribal life.⁷⁹

Tribes are ever dependant on the forest and its rich natural resources. It was because of these resources the tribes choose their habitat in the forest. The tribes gather their food and fuel from the forest. As a matter of practice the women in these communities spent a considerably long time to gather these from the forest. The economic system of these tribes is also forest centric. The product of the forest is being sold in the market either directly or with various modifications. The tools for convenient collection of forest produce are generally collected by the tribals out of these economic activities. The economy is greatly self-sustained.

Apart from the materials collected and created by these communities for their own use, they also use them for commercial gain even when it is very negligible.

All international instruments dealing with indigenous and tribal people have equivocally recognized this and so did this act. It is beyond any doubt that the tribals and their economy have largely been dependent upon their resources in their land. The large scale displacement has left most of the adivasis in no man's land and bereft of their indigenous economic and other practices. The act rightly protects this right to their land and property against the non tribal land grabbing vultures by making an act in furtherance of the same as an offence.⁸⁰

The provision of the act aptly makes an act which infringes the rightful use and enjoyment of land and various resources thereof as a crime punishable with penal consequences. Hence an act which forcibly dispossesses a tribal from his house or village or other place of residence and habitation has been prohibited by the act.⁸¹

⁷⁸ Lingappa Pochanna Appelwar v. State of Maharashtra. (1985) 1. SCC 481

⁷⁹ Shambhu Prasad Chakrabarty, 'Alienation Of Tribals From Land And Forest Vis-À-Vis Tribal Retaliation In India: An Analysis Through The Lens Of Human Rights Jurisprudence.' KIIT Law Review, 2014 at p .

⁸⁰ Section 3(v) of The Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989.

⁸¹ Ibid.

4.2.1.5.Efficacy of the Rights Guaranteed under this Act.

The beneficial changes that this act has brought are aplenty. Many instances of protection of tribals against atrocities of the non tribals upon the tribals have been addressed after incorporation of this enactment. The tribals can now after the incorporation and effectiveness of this act have a proper forum to redress their grievances as to the violation of their basic rights guaranteed by the constitution. Such variety of socio economic exploitation has been left unabated prior to the incorporation of this act that has caused a lot of social and economic distress to the tribal and indigenous peoples of India. The act addressed the problem of a tribal in person as well as a community as separate provisions have been laid down in this act to deal with these two situations separately.

The efficacies of this act lie in its object to prevent atrocities committed by the non tribal people upon the vulnerable tribals. This positive and commendable step taken by the parliament must be appreciated as this enactment has made such offences cognizable in nature. The act has by itself provides both substantive and procedural aspects to protect the tribals.

After the incorporation of this act there has been a constant growth in the sense of security of the tribals as it can be a handy weapon to ward off the inhuman practice of various atrocities which are coupled with violence in most of the times.

The efficacy of the act has further been enhanced with the recent amendment made to the act. On 26th January, 2016 the Amendment Act came into force with the accent of the President of India. Certain new offences have been incorporated in the act. Addition of certain IPC offences is accepted as offences falling under this Act.

Another interesting incorporation is the establishment of Special Executive Courts to exclusively try cases under this Act. This will definitely enhance the importance of offences under this Act.

The existence of presumption on the part of the offender as to the status of the victim is a very interesting move. This will certainly put the burden of proof on the part of the offender and relieve the victim from proving his case which is at times practically very difficult. This addition is a positive step in furtherance of the protection of these peoples from the acts of atrocities which is really a matter of disgrace not only for the society but overall the image of the nation in the international forum.

These set of amendments *inter alia* have truly made this act a very effective step on the part of the Legislature to address the plight of tribal rights in India. However it must be stated in this regard that the rights of tribals must be protected as far as possible.

4.2.2. The Protection of Civil Rights Act, 1955

4.2.2.1. Overview:

The Protection of Civil Rights Act, 1955 came up to protect the scheduled tribes and scheduled castes from various inhuman practices relating to untouchability elaborated under the Act. The Act provides a territorial jurisdiction to the whole of India.

The enactment was passed in 1955 on 8th of May as Act no. 22.

The Act is divided into 17 sections and one schedule. The schedule incorporates the list of 21 various state acts with the objective to repeal them to the extent to which they are or any of the provisions contained therein correspond or are repugnant to this act or to any of the provisions contained herein this enactment.

In the year 1977, a subordinate legislation came up in the form of protection of Civil Rights Rules, which consists of five sections and was objected in furtherance of the exercise of the powers conferred by section 16B of the Protection of Civil Rights Act, 1955.

The enactment provides punishment for enforcing religious disabilities in section 3⁸² due to untouchability. The act also provides for provisions prohibiting social disability. It provides for punishment for enforcing social disability in section 4⁸³ of the Act.

The act makes specific provisions for punishing those who prevents or refuses a person to be admitted in hospital because of the practice of untouchability.⁸⁴

The act provides and propagates social justice as well as economic justice to the member of any tribes or untouchables. The act specifically punishes those who exercise discrimination in certain trade practices due to untouchability. This statute also prohibits certain acts committed in furtherance of untouchability as offences punishable with penal consequences including compulsory labour⁸⁵, molestation, physical violence and injury, annoyance or boycotting a person belonging to so called lower untouchable class.⁸⁶

The act makes an interesting move in section 8 by providing the provision of cancellation or suspension of licences in certain cases of conviction. The act also takes the bold step of protecting

⁸² The Protection of Civil Rights Act, 1955

⁸³ Ibid

⁸⁴ Ibid at Section 5

⁸⁵ Ibid at Section 7A

⁸⁶ Ibid at Section 7(1) (b)

the community rights of tribals and other vulnerable classes being victims of untouchability. The act also provides the power upon the respective state governments to impose collective fine if the act done is by a community as a whole.

It shall be relevant to note in this regard that the offences incorporated in this act are cognizable and triable summarily.

Apart from the penal measures the act also provides the power and duty on respective state governments to ensure that the rights may be conferred upon the tribals and other so called untouchable classes who are victims of untouchability like legal aid etc.⁸⁷ This incorporation has been done through an amendment act.⁸⁸

4.2.2.2. Backdrop and Object of the Act

Tribals in India have been subjected to lot of deprivation for centuries. Over and above this there has been a continuous influx of non tribal people in these regions as well for further exploitation of tribals and adivasis in India like in many other parts of the world. The growth of intolerance and torture and practices like untouchability on the tribals and the absence of legal and other safeguards have even made their life miserable. At this juncture of time, the Protection of Civil Rights Act, 1955 came up.

In almost all places in India the practice of untouchability has been growing since the British era. The weak and marginalised tribal people have been victims of various inhuman practices of the non tribals. It is during the post independence period that substantial influenced steps have been taken to incorporate laws to protect these people of their basic rights guaranteed by the constitution of our country.

The constitutional safeguards against untouchability have been further supplemented with various provisions of the Protection of Civil Rights Act, 1955 which was rightfully passed by the parliament of India. Apart from the constitutional promises, international obligation of India has been another promising reason for developing laws to protect various human rights of the indigenous and tribal peoples including the abolition of the inhuman practice of untouchability. India has been a member of the United Nations Organization and has also been a member nation to be a signatory of ILO Convention No. 107.

It shall be relevant in this regard to specify that all the member states are obliged to eliminate untouchability in all forms against the indigenous and tribal peoples of the country.

⁸⁷ Ibid at section 15A

⁸⁸ Act 106 of 1976 w.e.f. 19/11/1976

With the international obligation and in furtherance of the protection of human rights, the Protection of Civil Rights Act, 1955 came up. The primary objective of the act as stated earlier is the abolition of untouchability.

The object of the act is to prescribe punishment for the preaching and practice of untouchability for the enforcement of any disability arising there from for matters connected therewith.⁸⁹

The preamble of the act reiterates the object of the act in very clear words of prohibiting untouchability and declaring any such practices as punishable with penal consequences. The Act also addresses necessary matters connected therewith and incidental thereto.

The act extends to the whole of India including the state of Jammu and Kashmir.⁹⁰

4.2.2.3. Meaning of Untouchability

Untouchability is basically the inhuman practice of ostracising a group by segregating them from the main stream by social customs or legal mandates. It may be considered to be the direct product of the caste system in India. The major causes of untouchability in India are racial discrimination, religious causes and social causes.

Under Article 17 of the Constitution of India, untouchability in all forms has been abolished. The primary objective of prohibiting this practice is to control the malpractice involved in caste system. The higher castes have been practicing this by showing some causes as aforementioned and exercise discriminatory practice to not only a person but a community as a whole.

The Protection of Civil Rights Act, 1955 has not defined the term untouchability but addresses the civil and religious rights which a person shall be entitled to enjoy and exercise because of abolition of this practice. The act also makes any effort made by members of the higher castes to carry on this derogatory practice as an offence punishable with penal consequences.

4.2.2.4. The Protection of Civil Rights Act, 1955 confers certain right to the people belonging to the scheduled class and scheduled tribes. They are as follows:

4.2.2.4.1. Right against Religious Disabilities

One of the primary causes of untouchability is religion. It has been the Hindu religious practices and custom that certain classes of people are supposed to perform certain functioning of lower strata or those related to unclean environment like sweeping, scavenging etc, which makes them

⁸⁹ Ibid at the Preamble

⁹⁰ Ibid

untouchable. Because of the stigma attached to them, they were not allowed to enter places involving purity and cleanliness like the place of worship. Thus these people are barred from entering temples and are considered to be outcastes.

The act provides punishment for enforcing religious disabilities due to untouchability. The rights granted to these people after the abolition of untouchability is considered to be the same as any other person who was not having such disabilities before the passing of this act. The rights conferred not only includes entering any place of public worship but also extends to worshipping or offering prayers or performing any religious service, or bathing in a sacred lake etc.

The act categorically provides the punishment to the person who imposes such religious disability upon the people belonging to such tribes or castes.

The punishment as laid down in section 3 of the act for such breach is that of imprisonment for a term of not less than one month and not more than six months and also with fine which shall not be less than one hundred rupees and not more than five hundred rupees.

4.2.2.4.2. Right against Social Disabilities

The other dominant cause of untouchability is social in nature. In furtherance to address this cause section 4 has been incorporated in this act, providing social rights to these people who have been subjected to social disabilities and discrimination for ages.

The list of social disability was aplenty and a handful has been incorporated in this provision of the Act.

- a. Right to use and access or enjoy: this right includes the right to access to any shop, restaurant⁹¹ etc or to use any service or goods⁹² therein. It also incorporates the use and access of any place of charitable nature⁹³ or public conveyance⁹⁴. The use of any river or stream⁹⁵ etc. This right also encompasses within itself the right to observe any social or religious custom or usage or ceremony⁹⁶ or the use of any jewellery⁹⁷ etc.

⁹¹ The Protection of Civil Rights Act, 1955 at Section 4 (i)

⁹² Ibid at Section 4(ii)

⁹³ Ibid at Section 4(v)

⁹⁴ Ibid at Section 4(vii)

⁹⁵ Ibid at Section 4(iv)

⁹⁶ Ibid at Section 4(x)

⁹⁷ Ibid at Section 4(xi)

- b. Right to freedom of residence and to profess any business or trade: this right allows any person to construct, acquire, or occupy for residential purpose or to practice any profession or business or trade.
- c. Right to medical aid: the act specifically incorporates the right of all to have the benefit of medical aid in hospitals. Section 5 of the act specifically incorporates the penal provision upon anyone who refuses admission to any person on the ground of exercising untouchability. The right also extends to admission to any dispensary, educational institution or any hostel established or maintained for the benefit of general public.⁹⁸

4.2.2.5. Efficacy of the Rights Guaranteed under this Act

The beneficial changes that this act has brought are aplenty. Many instances of protection of tribals against atrocities of the non tribals upon the tribals have been addressed after incorporation of this enactment. The tribals can now after the incorporation and effectiveness of this act have a proper forum to redress their grievances as to the violation of their basic rights guaranteed by the constitution.

Such variety of socio economic exploitation has been left unabated prior to the incorporation of this act that has caused a lot of social and economic distress to the tribal and indigenous peoples of India. The act addressed the problem of a tribal in person as well as a community as separate provisions have been laid down in this act to deal with these two situations separately.

The efficacies of this act lie in its object to prevent atrocities committed by the non tribal people upon the vulnerable tribals. This positive and commendable step taken by the parliament must be appreciated as this enactment has made such offences cognizable in nature. The act has by itself provides both substantive and procedural aspects to protect the tribals.

After the incorporation of this act there has been a constant growth in the sense of security of the tribals as it can be a handy weapon to ward off the inhuman practice of various atrocities which are coupled with violence in most of the times.

⁹⁸ Ibid at Section 5(a)

4.2.3. The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA)

4.2.3.1. Overview

The Bhuria Committee report, submitted before PESA was introduced, brought within the scope of village governance control over its surrounding natural resources like water, forests, land etc which is basically stressing upon the concept of participatory democracy. The concept of tribal community management was first thought of to settle village conflicts and also to administer law and order in these areas. The report also stressed upon the object of planning and implementation of development programmes along with accountability of bureaucracy to the tribal community. In short, the report provided the tribal people a chance to govern their own lives and shape their destiny. On this backdrop, PESA was enacted by Parliament in the Forty-seventh Year of the Republic of India as Act No. 40 of 1996. The main object of the Act has been incorporated in the preamble of the Act. The preamble specifically states that this act is to provide for the extension of the provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas. This step specifically extended the jurisdiction of the Part IX to the Scheduled areas.

The Act defines the term Scheduled Area in Section 2 of this Act. It states that in this Act, unless the context otherwise requires, “Scheduled Areas” means the Scheduled Areas as referred to in Clause (1) of Article 244 of the Constitution.

4.2.3.2. Backdrop and Object

The main object that is the extension of the Part IX of the Constitution of India has been specified in Section 3 of this Act. The section categorically states that the provision of Part IX of the Constitution relating to Panchayats is extended to the Scheduled Areas subject to such exceptions and modifications as are provided in section 4.

The relevance of PESA lie in the fact that this enactment to a great extent literally prohibits and limits the various powers of the government and its agencies in respect to the matters encompassing the rural and tribal life.⁹⁹

PESA is a beneficial legislation which intends to create specific rights for tribals as well as the collective rights. Proper implementation of PESA can do a world of great for tribal welfare.

⁹⁹ As stated in section 3, there are certain exceptions and modifications which have been stated in section 4 of this Act. The said exceptions and modifications are mentioned through a non obstante clause. It states that notwithstanding anything contained under Part IX of the Constitution, the legislature of a State shall not make any law under that Part which is inconsistent with many things laid down in the act.

4.2.3.3. Various Rights Guaranteed under the Act:

The act prohibited the state legislative bodies to make any laws which may be construed against the customary practices of such area. This is the first of its law since the colonial rulers took over and sealed the fate of tribals and their customary practices. With this came a lot of positive things for these people as well, like the right to religious practices and also the management rights over community practices. This is the first of its kind in independent India and truly brought with it the hope of millions of tribals of the country to regain their social freedom after five decades of political independence.¹⁰⁰ Thus, the legislation firmly upheld the importance of customary law, the social and religious practices and traditional management practices of community resources which were the most important aspect of tribal life and society. It shall be relevant in this regard to note that the international law in relation to tribal and indigenous peoples is also in tune to respecting the customary law and religious practices and traditional management practices of community resources.¹⁰¹

The law further vests the right to manage its own deliberations in the community they are in. The law states that a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs;¹⁰² The power of planning and management over minor water bodies has been the subject matter in clause 'j' of section 4 of this Act. It states that planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;¹⁰³

The need of having a Gram Sabha¹⁰⁴ got its recognition in the act as well. It states that every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level.¹⁰⁵ Apart from constituting the Gram Sabha the law further empowers it like never before and makes every Gram Sabha competent to safeguard and preserve the traditions and customs of the tribal peoples, their cultural identity, community resources and the customary mode of dispute resolution; thus this provision identifies four basic aspects namely, their

i. Traditions and customs,

¹⁰⁰ Section 4(a) of PESA 1996

¹⁰¹ ILO Convention No 107

¹⁰² Section 4(b) of PESA 1996

¹⁰³ Section 4(j) of PESA 1996

¹⁰⁴ Gram sabha includes all adult citizens of the village. It is empowered to elect the gram panchayat. It can even modify certain decisions of the panchayats in case of ambiguity and inherent weakness in them if any.

¹⁰⁵ Section 4(c) of PESA 1996

ii. Cultural identity

iii. Community resources and

iv. Customary mode of dispute resolution.¹⁰⁶

Gram Sabha is empowered by this act to approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level and also be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes;¹⁰⁷ In this way enormous powers have been vested upon the Gram Sabha and parallel limitation to the existing autocratic power of the state was invoked by this act. The right to economic liberty has also been achieved by this Act as the law categorically states that the economic aspect of the tribals in relation to utilization of funds etc and directs every Panchayat at the village level to required to obtain from the Gram Sabha a certification of utilisation of funds by that Panchayat for the plans, programmes and projects referred to in clause(e);¹⁰⁸ The prior recommendation of the Gram Sabha or the Panchayats at the appropriate level have been made mandatory for grant of concession for the exploitation of minor minerals by auction as well.¹⁰⁹

The act also uplifts the intention of the Constitution as it states that the reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution;¹¹⁰

The right to consultation with the natives to deal with the aspects of the natives was again the first of its kind after the colonial ruler left India. The act has not made this right of consultation an option to the government but has made it mandatory specially before any acquisition of land. The act states that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the

¹⁰⁶ Section 4(d) of PESA 1996 Interestingly, these objectives have already been founded and incorporated in ILO 107 where India was a signatory.

¹⁰⁷ Section 4(e) of PESA 1996

¹⁰⁸ Section 4(f) of PESA 1996

¹⁰⁹ Section 4(l) of PESA 1996

¹¹⁰ Section 4(g) of PESA 1996. There have been two provisos to section 4(g). The first proviso states that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats; and the second proviso states that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes;

State level;¹¹¹ Not only consultation but also implementation of the recommendations of the Gram Sabha or the Panchayats at the appropriate level has been made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas;¹¹² the Panchayats were empowered with powers and authority as may be necessary to enable them to function as institutions of self-government shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha.¹¹³

In furtherance of the rights vested upon the tribal people of India the act also makes necessary procedural changes to actually implement the provisions of this act. The act empowered the Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

- (i) The power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant;
- (ii) The ownership of minor forest produce;
- (iii) The power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;
- (iv) The power to manage village markets by whatever name called;
- (v) The power to exercise control over money lending to the Scheduled Tribes;
- (vi) The power to exercise control over institutions and functionaries in all social sectors;
- (vii) The power to control over local plans and resources for such plans including tribal sub-plans;¹¹⁴

It can be noticed from the provisions of the Act that the Parliament exercised the reserved legislative authority to extend the provisions of part IX of the Constitution exclusively to the 5th Schedule areas.¹¹⁵ This resulted in limited self governance to any habitation or hamlet which comprised a community and managing its affairs in accordance with customary laws.¹¹⁶

Post enactment, the communities of the 5th Schedule areas were directed to follow democratic process of election. In other words, to conform to the hierarchical Panchayat system stipulated in

¹¹¹ Section 4(i) of PESA 1996

¹¹² Section 4(k) of PESA 1996

¹¹³ Section 4(n) of PESA 1996

¹¹⁴ Section 4(m) of PESA 1996

¹¹⁵ Article 243 M(3A) (b) of the Constitution of India, 1950

¹¹⁶ Section 4(b) of PESA 1996

Part IX. In other words, this was objected to enable them to function as institutions of self governance. However, these powers were subjected to various exceptions and modifications.¹¹⁷

As the power in certain cases devolved upon the local communities, the State were to ensure certain legal directions prescribed in Section 4 of the Act.

Thus PESE may be considered as a logical extension of the 5th Schedule on one hand and part IX of the Constitution on the other.¹¹⁸ But as innocuous as it may seem, this top down model has in the last 10 years progressively denied tribal communities, self governance and rights to their natural resources.¹¹⁹

4.2.3.4. Efficacy of the Act.

The said enactment has got within its fold a lot of success in furtherance of its applicable extensions. But, there have been a lot of criticisms of this Act. The most important of which is the intention of the administrators to actually let the power transfer to the Gram Sabha and the Panchayat as intended by the act. In the absence of such will of these officials, the act remained a piece of legislation with very little change in the actual position of India at the grass root level. The lack of awareness also contributed to the non-fulfilling of the objectives of the act.

The government was however unaware at the time of passing of this act that it may be a cause of distress in subsequent vesting of tribal land. When in certain cases the Gram Sabha went against the approach of the government, the state had no other option but to question the constitutionality of this act. The Supreme Court of India however made the situation worse for the government by upholding the act as constitutional. This left the state to amend the provision of the act which the government actually did in 2012.

Still, the act has made its mark in its short span of its life so far as protecting the civil and economic rights of the tribals in various parts of the country. It is relevant to state in this regard that this act if properly implemented can go a long way in preventing governmental interference in tribal welfare.

¹¹⁷ Article 243 G of the Constitution of India, 1950

¹¹⁸ See India, Planning Commission, *Planning at the Grassroots Level: An Action Programme for the Eleventh Five Year Plan* (New Delhi: Planning Commission of India, 2006) at 84, online: Planning Commission, Government of India <http://planningcommission.nic.in/plans/stateplan/sp_scy2stat.pdf>. The Government of India Ministry of Tribal Affairs believes that “PESA ... clearly supports the fifth schedule and the rights of the Gram Sabhas in the scheduled areas.” See, India, Ministry of Tribal Affairs, *Fifth Schedule and Other Related Laws*, online: Ministry of Tribal Affairs <<http://tribal.nic.in/fifthschedule.html>>.

¹¹⁹ APOORV KURUP, *Tribal Law in India: How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better*, *Indigenous Law Journal*/Volume 7/Issue 1/2008 p

4.2.4. The Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006

4.2.4.1. Overview:

The Forest Conservation Act 1980 prohibits all the encroachments of the forest which dramatically affected the adivasis and tribal communities all across India. This enactment actually highlighted the tribals as the biggest enemy of the forest. It was a gross violation of justice to the tribal life and economy. Mass agitation followed with international pressure led to the 42nd Constitutional Amendment Act which shifted 'forest' from the State list to the concurrent list of the Seventh Schedule. Sustainable forest management through participatory approach was introduced for the very first time with due regard to the traditional rights of the tribal people on forest land, which did more injustice than remedying them.

This mass agitation and outcry from all corners ultimately led to a new enactment commonly known as the Forest rights Act.

The Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 came up to empower and strengthen local self governance.

It is objected to address the challenges of livelihood security of the tribal people with the intention to alleviate poverty and pro poor growth and protect the tribes both individually and collectively from various economic deprivations. The Act provides a territorial jurisdiction to the whole of India.

The enactment was passed on 29th December 2006 as Act no. 2 of 2007. It commenced from 31st December 2007. The Act went through an amendment in the year 2012.

4.2.4.2. Backdrop and Object of the Act

Tribals in India have been subjected to lot of deprivation for centuries and more recently over their own natural resources. This deprivation has basically imbalanced the tribal economy to a great extent as they primarily rely upon the various forest produce for their sustenance. Research shows that the tribal use of forest produce has been sustainable and it's the colonial use and annihilation of forest produce that has led to the extinction of thousand varieties of flora and fauna in India.

The act was objected to empower and strengthen the local self governance.

Another reason for the enforcement of the act is to address the issue of conservation and management of natural resources and conservation governance of India. The act also addresses the growing concern of poverty alleviation amongst the tribals and adivasis in India. To address the question of livelihood security is also one of the key objectives of this act.

However there has been a set of recognized developmental activities that can be made on traditional tribal areas, namely, building of schools, hospitals, anganwadis, fair price shops, tanks drinking water pipe lines, minor canals and roads.

However, there are two conditions that have to be complied with in order to implement the aforesaid developmental measures.

1. The land diverted is less than one hectare in each case and
2. Clearance of such development projects that is, the same is recommended by the Gram Sabha.

4.2.4.3. The Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 confers certain right to the people belonging to the tribes. They are as follows:

4.2.4.3.1. Title rights

The act set out a host of significant rights to the adivasis in India. The primary and most significant of them all is title rights. This right has been subsequently classified in the following rights:

- a. Right to hold and live: this right is given to both the tribal individually and the community or clan collectively. This right may be for habitation as well as for cultivation and in furtherance of livelihood. The community right in the name of nistar¹²⁰ or any other name so called is also provided by the act. It must be mentioned that these nistar produce are for the use of the tribas and cannot be used for sale or barter.
- b. Right to ownership, access to collect use dispose of certain minor forest produce which are collected traditionally within or outside village boundaries are provided expressly in the act.
- c. Right in and over disputed lands under any nomenclature in any state where the claims are disputed have been vested upon the tribals. This is another title right which has been the cause of many disputes and conflict between the tribals and the non tribals and the tribals and the state authorities.
- d. Conversion rights of pattas or leases or grants issued by any local authority or state government on forest lands or titles have been conferred upon the tribals through this act.

¹²⁰ Nistar rights include produce of the forest like bamboo, timber of specific class, timber poles, firewood etc.

4.2.4.3.2. Right to Use

a. The act extensively provides the right to use a large area of tribal land and resources to the tribals. Community rights have also been one of the benchmark of this act and this right of use and exploit is also available to the community as a whole. Certain basic resources like fishing, grazing and traditional seasonal resources like fruits, flowers and access to and by nomadic and pastoral communities have been specified by this act.

b. Community rights of tenures of habitat and habituation for primitive tribal groups and pre historical communities is yet another new development of this act. Recognition of such right to use is a boon for the tribals whose entire economy stands upon these practices which they have been continuing from centuries.

c. Right to access to biodiversity is another integral right of the tribes. This right has been vested on the tribals by this act very specifically. Right to access to biodiversity or community rights to intellectual property and traditional knowledge related to biodiversity and cultural diversity have been vested unequivocally upon the tribals. It must be prudent in this regard to refer to the various international instruments which India has been a signatory has recognised this right.¹²¹

d. Another important inclusion is the residuary rights upon the tribals. The act specifically includes the provision that reiterates that the tribals are vested with the rights which are traditionally and customarily been enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be whether or not those have been specified in clause 1 to 11 of the Act. The Act however makes the exception of certain practices like hunting or trapping extracting a part of the body of the species of wild animals.

4.2.4.3.3. Management Rights

The right to manage, the entire habitat have been vested upon the tribals collectively. The rights to settlement and conservation of the same are some significant measures that the act takes to involve the tribes in their own welfare measures. They are in charge of all forest villages including old habitation, which may include unsurveyed villages as well. It is imperative to mention in this regard that this right includes all the villages whether recorded or not, whether notified or not into revenue villages. The act also provides the right to protect, regenerate, conserve manage any community forest resources which the tribals have been traditionally protecting and conserving for sustainable use.

¹²¹ ILO Convention No. 107 and No 169

4.2.4.4. Efficacy of the rights guaranteed under this Act

This act has been the subject matter of many debates and discussions from the time of its enactment. Even a case on the constitutionality of this act has been evaluated by the Supreme Court of India. Many critics have suggested this act to be repealed as it is a bad law passed by the UPA Government.

The journey from its inception as to its implementation has been patchy and dependent upon the initiative of the individual district administrator.

The act provides rights over use and management of land, forest and minor forest resources upon the individual and the community as a whole. However, the tribals have been facing stern opposition in enjoying such rights by the state bureaucrats in almost every level as they are not interested in transferring their authority and power upon the tribals.

Some of the significant achievement of this act is the recognition of the habitat and there are 75 such groups including the Jarawas, Onges of Andaman and Nicobar islands.

According to Jual Oram, the Minister of Tribal Affairs, Govt of India, the country is big and knowledge of people living in interior forest area is limited and the state bureaucracy which is responsible for raising awareness is very slow. These are the main problems why Forest Rights Act is not implemented.¹²²

Some of the critics have identified a few lacunae of the act. They criticize the move of moving from the concept of individual rights and individual freedom to the concept of community trumping over individual. The power upon the Gram Sabha or Panchayat has been a cause of great discomfort for the Government as it has lost its autonomy because of the Act.

In the process of any specified development schemes, the decision of Gram Sabha must be taken has to some extent uplifted the panchayati raj. One of the primary objectives of the act was the upliftment of livelihood security. Such efforts of poverty alleviation could have done in an alternative and more effective way like that of implementing schemes like NREGA.¹²³

The act has again been criticised as an encroachment over the jurisdiction of other enactments like the issue of Conservation and management being the subject matter of Forest Conservation Act, the

¹²² Diptesh Narayanan, Economic Times Bureau 1st October, 2015.

¹²³ R Jagannathan 'Forest Right Act need to go: Tribals aren't part of Tiger Reserve', Economic Times, September 12, 2014.

Wildlife Protection Act and the Biological Diversity Act, amongst others.¹²⁴ Thus this act has been criticised to be more patronisation than protection.

Another critical view states that by enacting a separate and special law for tribals may essentially imply either,

- i. They are not amongst us and
- ii. Tribals are endangered species. Taking the second proposition, it must be relevant to state that tribal population in India has increased from 9.2 percent in 2001 to 9.6 percent in 2011.¹²⁵

It must be relevant in this regard that the question of constitutionality of the act has been challenged and the said was decided by the Hon'ble Supreme Court of India to be Constitutional.

India has a long history of local government. The term 'Panchayat', is now used to describe the democratic bodies which govern local areas, officially made part of the Indian Constitution in the 1990s in an effort to include small tribal communities in the democratic process of government. However, the word literally translates as 'council of five persons' (Mathew, 2003) and used to mean the small groups of elders that governed small towns and villages according to the ancient caste system, which still holds a lot of influence in parts of India. The new system of local government was designed to ease poverty in more remote regions and improve access to education and healthcare. Unfortunately, the clash of cultures has caused tension in tribal regions, particularly in those communities that have more contact with 'modernized' urban India.¹²⁶ The government approach has created widespread disaffection and several protests in the state. The kind of development government intends has created a feeling that it only means evicting tribals to make way for multi-nationals and big companies to exploit their land. Widespread impression is, the compensation offered in return for displacement is grossly paltry, transient and only to a few actual sufferers. The past experience of rehabilitation and resettlement does not inspire any confidence in them: particularly since, Gladson says, the government that lost no time in declaring its industrial policy has not yet formulated a policy for resettlement and rehabilitation of persons displaced due to mining or other projects.¹²⁷

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Mathew, G. (2003) 'Panchayati Raj Institutions and Human Rights in India' *Economic & Political Weekly* v.38:no.2(pp.155-162)

¹²⁷ By Rajesh Sinha, 'Trampling Tribal Rights Tribals protest in Orissa' Samay Live, June 8, 2010

4.3. Minor Enactments and Executive Functioning and Civil and Economic Rights of Tribals

4.3.1. An Overview

Apart from the major enactments protecting the basic socio economic rights of tribals in India, there are certain minor enactments which have come up with similar objectives. In furtherance of such enactments being passed by the legislature, various executive orders and published to secure various civil and economic rights of tribals. The primary object of providing certain civil rights like right to life, safety, ethnicity, right to religion, integrity to all the people of the country has been fulfilled by making various laws and the necessary executive orders in this regard. With the existence of the major tribal legislation like the PESA, there has been an immediate need to amend certain provision of the minor legislations affecting tribals and adivasis.

In terms of the PESA 1996, the Gram Sabha or the Panchayats at the appropriate level are required to be consulted before making any acquisition of land and before making any arrangements for resettlement and rehabilitation of displaced persons. No such provision exists in the Land Acquisition Act, 1894, which is a colonial hangover. This is a provision, which necessitates suitable amendments in the Land Acquisition Act, 1894. On similar lines, suitable amendments are also required to be made in the Indian Forest Act, 1927 to make it consistent with the provisions of the PESA Act. For instance, the PESA Act confers ownership of minor forest produce on the Gram Sabha and Panchayats.

On the contrary, the Indian Forest Act, 1927 does not make any distinction between major and minor forest produce and vests the ownership of the entire range of forest produce on the State, meaning thereby the Forest Department. Hence, this Commission is of the view that there is an urgent need for necessary amendments in the Land Acquisition Act, 1894 and the Indian Forest Act, 1927 to bring them in conformity with the provisions of the PESA Act to enable the effective functioning of the Gram Sabhas and Panchayats in terms of the PESA Act.¹²⁸

4.3.2. Economic Rights

There have been a few schemes made in furtherance of protection of economic rights of the tribals in India. These schemes are mostly intended to protect the economic interests of the tribals and are popular in various tribal belts. Some of these schemes are:

¹²⁸ National Commission for Scheduled Tribes

4.3.2.1. Nodal Agency Facilitating Tribal Economic Activities

The National Scheduled Tribes Finance and Development Corporation (NSTFDC) were established through the bifurcation of the National Scheduled Castes and Scheduled Tribes Finance and Development Corporation in 2001-02. The Corporation was set up as a company under Section 25 of the Companies Act, 1956 for providing financial assistance to schemes/projects launched with the aim of economically developing Scheduled Tribes. As such the Corporation has the following broad objectives:

- (a) Identification of economic activities of importance to the Scheduled Tribes so as to generate employment and raise their level of income;
- (b) Up gradation of skills and processes used by the Scheduled Tribes through providing both institutional and on the job training;
- (c) To make existing state/union territory Scheduled Tribes Finance and Development Corporations, that are nominated as State Channelising Agencies (SCAs) for the purpose of availing assistance from NSTFDC and other developmental agencies engaged in the economic development of Scheduled Tribes, more effective;
- (d) To assist SCAs in project formulation, implementation of NSTFDC assisted Schemes and in imparting necessary training to their staff;
- (e) To provide financial support for meeting the working capital requirement of Central/State government owned agencies, for undertaking procurement and marketing of minor forest produce, agricultural produce, and other products grown/made or collected by the Scheduled Tribes; and
- (f) To innovate, experiment and promote rather than replicate the work of the existing agencies. The NSTFDC finances viable income generating schemes/projects that cost upto Rs10 lakhs through SCAs. They also assist SCAs through grants to set up training programmes for skill and entrepreneurial development of eligible Scheduled Tribes.¹²⁹

4.3.2.2. Government Schemes Facilitating Tribal Economic Rights

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 was enacted to make restitution for historical injustice enacted upon Scheduled Tribes and

¹²⁹ NSTFDC (Source: <http://nstfdc.nic.in> , the section on “objectives of organization”)

traditional forest dwellers from colonial times onwards through the appropriation of their traditional land use and community rights on forest land. The key objectives of granting Scheduled Tribes and Other Traditional Forest Dwellers forest rights that secure them individual or community tenure or both on all forest lands, such as

- (a) The right to hold and live on forest land under individual/common occupation for habitation/self-cultivation,
- (b) Community rights that were formerly granted customarily,
- (c) The right of ownership, access to collect, use and dispose off minor forest produce which was traditionally collected within or outside village boundaries,
- (d) Other community rights of uses or entitlements to water bodies, pastures, etc.,
- (e) Right of protection/regeneration/ conservation/management of any community forest resource that they had traditionally adopted,
- (f) Right to *in situ* rehabilitation including alternative land in cases where they had been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation prior to 13 December 2005, and related rights. Such rights will be conferred subject to the condition that the beneficiaries had occupied forest land before the 13 December. Any displacement of rights holders for purposes of wildlife conservation until facilities and land allocation for resettlement have been provided and the permission of the gram sabha has been taken in writing. The gram sabha is the authority responsible for initiating the process of determining the nature and extent of individual and community forest rights or both of claimants under their jurisdiction. All registration of land titles will be in the names of both husband and wife. Further, it is the intention of the Act to involve beneficiaries in conservation of biodiversity and forest management.

4.3.2.3. National Rural Employment Guarantee Act, 2005

The Act, commonly referred to as NREGA, was enacted with the objective of enhancing livelihood security in rural areas by providing at least 100 days of guaranteed wage employment in a financial year to every household whose adult members volunteer to do unskilled manual work. The NREGA currently covers the entire country with the exception of districts that have a hundred per cent urban population. While Scheduled Tribes are important beneficiaries under the Act, importantly one of

the works permissible under the Programme is the provision of irrigation facility to lands owned by households belonging to Scheduled Tribes.¹³⁰

4.3.2.4. Distribution of Ceiling Surplus Land

Land ceiling legislation introduced land ceilings in 19 states and 3 union territories from 1972 onwards. The national guidelines recommended ceiling limits of 10–18 acres for irrigated land with two crops, 27 acres for irrigated land with one crop and 54 acres for dry land.

The surplus ceiling land is then distributed to Scheduled Tribes (among other specified beneficiaries). According to the Department of Land Resources, under the Ministry of Rural Development, that is the administering authority of the Scheme, the beneficiaries also include the Scheduled Tribes.

4.3.2.5. Legislations Protecting against Land Alienation

A key reason for the continued poverty and vulnerability of Scheduled Tribes is usurious money lending and land alienation. Several states have enacted laws to protect them from land alienation – some of the examples are the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Act, 1984, Andhra Pradesh (Scheduled Areas) Land Transfer Regulation, 1959, the Himachal Pradesh Transfer of Land (Regulation) Act, 1968, the Orissa Scheduled Areas Transfer of Immovable Property (Scheduled Tribes Regulation) 1956, etc. For instance, in the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Act, 1984, the Statement of Objects and Reasons states that this Act is meant to protect Scheduled Tribes from exploitation by ‘affluent and powerful sections’ who obtain sales or mortgages of land granted to Scheduled Tribes by the government for their upliftment either for a nominal consideration or for no consideration at all.

To fulfil the purposes of the grant, the Act aims to restore alienated land to the original grantee or his heirs. Section 4 renders null and void any transfer of granted land made either before or after the commencement of this Act and Section 5 provides for their resumption and restitution to the grantee or his heirs. Section 8 penalises any person acquiring granted land with imprisonment up to six months and/or fine up to Rs2000.

This law has also been included in the Ninth Schedule of the Constitution. Article 31B protects all laws in the Ninth Schedule from being struck down as violative or as abridging of any other right guaranteed in Part III. Other states have enacted similar laws.

¹³⁰ among other specified beneficiaries.

4.3.2.6. National Mineral Policy, 1993 and the Tribes National Mineral Policy, 1993

Certain economic aspects of the tribes have led to constitute the essentials of National Mineral Policy which has evolved over the years. The policy also emphasises certain new aspects and elements like mineral exploration in the sea-bed, development of proper inventory, proper linkage between exploitation of minerals and development of mineral industry, preference to members of the Scheduled Tribes for development of small deposits in Scheduled Areas, protection of forest, environment and ecology from the adverse effects of mining, enforcement of mining plan for adoption of proper mining methods and optimum utilisation of minerals, export of minerals in value added form and recycling of metallic scrap and mineral waste. Infrastructural Facilities & Regional Development Mineral deposits generally occur in remote and backward areas with poor infrastructural facilities which often inhibit their optimum development. Mineral bearing areas are also often inhabited by tribal population and exploitation of mineral resources has not always contributed adequately to their economic development. Contribution of mineral development to overall regional development has also not always been commensurate with the huge investment in large mining projects. A major thrust needs to be given for development of infrastructural facilities in mineral bearing areas following an integrated approach for mineral development, regional development and also social and economic upliftment of the local population including tribal population. Small Deposits Small and isolated deposits of minerals are scattered all over the country. These often lend themselves to economic exploitation through small scale mining. With modest demand on capital expenditure and short lead-time, they also provide employment opportunities for the local population. Efforts will be made to promote small scale mining of small deposits in a scientific and efficient manner while safeguarding vital environmental and ecological imperatives. In grant of mineral concessions for small deposits in Scheduled Areas, preference shall be given to the Scheduled Tribes.¹³¹

4.3.2.7. National Policy on Resettlement and Rehabilitation, 2003

The National Policy on Resettlement and Rehabilitation, 2003, is in the form of broad guidelines applicable only to projects that displace 500 families or more en masse in plain areas and 250 families en masse in hilly areas; the guidelines also cover areas mentioned in Schedules V and VI and Desert Development Blocks. The first barrier of exclusion in this policy is the clause which says that only 100 percent of their lands will be eligible for compensation. Secondly, criterion of displacement of 500 families and 250 families en masse in plain areas and hilly areas respectively excludes the families who have been displaced, yet do not conform to this clause. Thirdly, the

¹³¹ <http://mines.nic.in/nmp.html> (Visited on November 28, 2015).

policy also makes allotment of land ‘conditional to availability’, thus, putting no burden on the government to find land.¹³² It has to be understood that the policy has been one of its type meant for the people who have been suffering because of displacement and other various factors.

4.3.2.8. Scheme for Primitive Tribal Groups, 2008

The Scheme of Development of Primitive Tribal Groups (PTGs) came into effect from April 1, 2008. The name of these groups has been changed and a more effective term Particularly Vulnerable Tribal Groups (PVTG) has replaced it. The Scheme defines PTGs/PVTGs as the section of tribal communities among Scheduled Tribes who have declining or stagnant population, low level of literacy, pre-agricultural level of technology and are economically backward. PTGs are considered the most vulnerable among the Scheduled Tribes and the Scheme therefore seeks to prioritise their protection and development. It identifies 75 such groups in 17 states and 1 (Andaman and Nicobar Islands) union territory. The Scheme seeks to adopt a holistic approach to the socio-economic development of PTGs and gives state governments flexibility in planning initiatives that are geared towards the specific socio-cultural imperatives of the specific groups at hand. Activities may thus include housing, land distribution, land development, agricultural development, cattle development, construction of link roads, installation of nonconventional sources of energy, social security, etc. Funds are available only for activities essential for the survival, protection and development of PTGs and not already funded by any other Scheme of the central/state governments. Each state and the Andaman and Nicobar Islands’ administration is required to prepare a long term conservation-cum-development (CCD) plan valid for a period of five years for each PTG within its territory outlining the initiatives it will undertake, financial planning for the same and the agencies charged with the responsibility of undertaking the same. The CCD Plan has to be approved by an Expert Committee appointed by the Ministry of Tribal Affairs. The Scheme is funded entirely by the Central government.¹³³

4.3.2.9. The West Bengal Land Reforms Act 1955

An entire chapter of this state act deals with Scheduled Tribes. Chapter IIA of this act comprising of Sections 14A to 14I specifically relates to tribal areas. It shall be relevant to mention in this regard that this chapter has an overriding effect over other provisions of this Act. Chapter II of the act is named as “Restrictions on Alienation of land by Scheduled Tribes”. As stated earlier this act shall have an overriding effect has been specified in Section 14 A. This section vests the power to override any other provisions of this Act.

¹³² Rich Lands Poor People: Is ‘Sustainable’ Mining Possible?, Centre for Science and Development, New Delhi, 2008

¹³³ Supra Note 127

The act came up to prevent and restricts alienation of land by scheduled tribes.¹³⁴ This provision is in consonance with international standards of land rights of the tribal peoples. However in reality, this provision has been the subject of great debate and discussion for last few decades as the critics have identified the great number of lands that has been transferred from the tribals to the non tribals. Apart from making the said prohibition the Act lays down the various modes by which land may be transferred by a member of the scheduled tribe in the schedule area¹³⁵ exclusively through a registered instrument.¹³⁶

The act prohibits any transfer made in contravention of the provision of the Act and also vests powers on the Revenue Officer to set aside improper transfer by raiyat.¹³⁷ The act also prohibits Benami transaction¹³⁸ which was a common practice in Bengal for centuries. Section 14HH of the act vests the power upon the court to set aside any sale of land of a raiyat belonging to a schedule tribe.

Thus it can be seen from the aforesaid provisions of the west Bengal Land reforms act that the rights of the tribals are safeguarded to a great extent by this piece of legislation and along with this the economic rights are also protected.

4.3.3. Civil Rights Violation

Certain civil rights of the tribal people have been adversely affected by various enactments. Civil rights mean those rights which protect the right to freedom of individuals. The right to live, to live freely as a free man. Certain economic rights must also be addressed of the tribal at an urgent basis. For this a study of certain minor legislations and policies of the government have to be taken in the context of this chapter.

4.3.3.1. Criminal Tribes Act

The 1871 Act came into force, on 12 October 1871 with the assent of the Governor-General of India. Under the act, ethnic or social communities in India which were defined as "addicted to the systematic commission of non-bailable offences" such as thefts, were systematically registered by the government. Since they were described as 'habitually criminal', restrictions on their movements

¹³⁴ West Bengal Land Reforms Act, 1955, (Act No. X of 1956) at Section 14B

¹³⁵ Ibid at Section 14C

¹³⁶ Ibid at Section 14D

¹³⁷ Ibid at Section 14E

¹³⁸ Ibid at Section 14FF

were also imposed; adult male members of such groups were forced to report weekly to the local police.¹³⁹

However with the passage of time after the independence from the colonial rule, these tribes have been de notified. But the way by which they have been treated for decades have not changed. A mere change in name has not changed the fate of these 313 Nomadic Tribes and 198 Denotified tribes (DNT) in India. The legacy of the past continues to haunt the majority of 60 million people belonging to these tribes. This alienation has put these people under tremendous hardship both economically and socially. By and large DNTs have not been given land titles, neither agricultural nor homestead forcing them to continue their unsettled life. This has serious negative implications for their children's education, health status of the community in general, protection of family, adequate standard of living, etc.¹⁴⁰

4.3.3.2. Health

Health of tribals suffers as the tribal children and women health indicators reflect. Further, the tribals suffer from the diseases specific to typical living conditions. It is widely accepted that malnutrition among tribals is widespread, which is largely attributable to poverty, illiteracy, environmental conditions, difficult terrain, traditional beliefs and customs and, above all, the non-availability of basic health services. The ill-nourished tribals live in an environment, which has been degraded, and, as a result, diseases such as malaria, filaria, tuberculosis, and goitre are endemic in most of the tribal areas. The issues of tribal health are also intricately intertwined with tribal social conduct and issues of 'Inbreeding' and 'Genetic Disorders' like sickle cell anemia, etc. In many cases the tribal population is decreasing, and some tribes are on the verge of extinction. Infant Mortality Rate for Scheduled Tribes was 62 while it was 49 for the general population in 2001. Besides the mean body mass index for SCs, STs, and OBCs is 5–10% below that for the general population.¹⁴¹

One of the example of a scheme launched by the Government was Janani Suraksha Yojana. The Janani Suraksha Yojana is a safe motherhood intervention under the National Rural Health Mission, the objective of which is the reduction of maternal and neo-natal mortality among poor pregnant women. The funds are entirely sponsored by the Central government and the programme integrates

¹³⁹ Bates, Crispin, "Race, Caste and Tribe in Central India: the early origins of Indian anthropometry". In Robb, Peter. *The Concept of Race in South Asia*. Delhi: Oxford University Press. 227 (1995)

¹⁴⁰ ActionAid Thematic Group on Indigenous People and their Rights, Report: Economic, Social and Cultural Exclusion of Tribals/Indigenous People, 2008

¹⁴¹ Eleventh Five Year Plan 2007-2012, Vol.III, Planning Commission, Government of India, New Delhi, 2008, pp-82.

cash assistance with delivery/ post-delivery care. Scheduled Tribe women (among other specified beneficiaries) are entitled to assistance under this scheme.¹⁴²

4.3.3.3. Educational Schemes for the Benefit of Scheduled Tribe Students

There are numerous Scholarship Schemes that the Central Government through the Ministry of Tribal Affairs has notified in the educational interests of Scheduled Tribe students. They are:

- (i) Scheme of up-gradation of Merit for Scheduled Tribe Students – This Scheme aims at upgrading merit of Scheduled Tribe students by providing them remedial coaching (to enable students to master their curriculum) and special coaching (for competitive examinations to medical and engineering colleges) in classes IX to XII. The Scheme provides 100% assistance to State governments and Union Territory administrations and each student is given a package grant of Rs19500 per student per year. Of the total beneficiaries covered under this Scheme, 30% preference is given to Scheduled Tribe girls and 2% preference to disabled students. This Scheme is funded by the Ministry of Tribal Affairs and administered by the concerned state/UT government.
- (ii) Scheme of Post-Matric Scholarships to Students Belonging to Scheduled Tribes for Studies in India – This Scheme aims at providing financial assistance to Scheduled Tribe students enrolled within India in post-matriculation or post secondary courses at recognised institutions to enable them to complete their education. Those Scheduled Tribe students whose parents' annual income does not exceed Rs100000 per annum are eligible under this Scheme. The Scheme is a programme of the Ministry of Tribal Affairs and is implemented by state governments and union territory administrations.¹⁴³
- (iii) Central Sector Scholarship Scheme of Top Class Education for Scheduled Tribe Students – The objective of the Scheme is to encourage qualitative education for Scheduled Tribe students through the provision of full financial assistance for studies beyond Standard XII in 127 institutes of excellence spread out through the country, including IIMs, IITs, NITs, commercial pilot training institutes, medical and law colleges of repute and others. Scheduled Tribe students whose total family income is up to Rs. 2 lakhs per annum are eligible for the scholarship which covers tuition fees, living expenses, books and stationery, and a computer. The Scheme is implemented by the

¹⁴² Supra Note 129 at p 41

¹⁴³ Ibid at p 44.

Ministry of Tribal Affairs and the monies are released directly to the Institute concerned by the Ministry.¹⁴⁴

A Sum Up

Perhaps, it is too late today to bring the tribes back to the land and the environment they used to enjoy for hundreds of years. One of such effort was made in Kerala in furtherance of the Constitution.

Schedule V of the Article 244 of the Constitution of India make the State to ensure suitable legislation, total prohibition of transfer of tribal land to the non tribals. The Debar Commission appointed under Article 399 of the Indian Constitution, recommended that all tribal land alienated since 1950 should be returned to the tribals. But the Government of Kerala miserably failed to pass the necessary laws to protect tribal land. It passed the legislation in the year 1975.¹⁴⁵ But the rules needed to make it effective and operational was not passed. It took approximately 10 years to pass the Kerala Scheduled Tribes Restriction on Transfer of Lands and Restoration of Alienated Lands Act in 1986 providing the relevant provisions for restoration of tribal lands to the tribals who have been alienated from their land and forest dwellings. However, there has been no implementation of the act for a long span of time. This futile effort on the part of the executive and the legislation is yet another proof of tribal human rights violation.

According to Kurup,

"India's population includes nearly one hundred million tribal people. These numbers are matched only by the remarkable diversity of India's tribes. The two main regions of tribal settlement are the country's northeastern states bordering China and Burma, and the highlands and plains of its central and southern regions. The latter is home to more than 80 per cent of the tribes, which differ from the northeastern tribes in ethnicity...There are also differences in the extent to which the tribes interact with non-tribal communities. While the

¹⁴⁴ Ibid at Pp 44-45

¹⁴⁵ While piloting the Bill in the House, Sri. Baby John observed: "In a state which claims to be progressive, it is for us to think whether there is real progress or whether the so called progress is a fallacy. When one such segment of the population is suffering from and is in slavery, what is the point in boasting that we are progressing. It is on realization of all these facts that the said bill is introduced intending to prevent assignment of such land and to scrutinize and assignments already affected."

*northeastern tribes are usually isolated communities, the tribes in peninsular India may at times coexist with non tribal people."*¹⁴⁶

Thus, the tribals face an uphill task in the light of the various socio economic distress that the last few centuries have brought to them it is a small ray of hope today that has again given the hope to the tribals of India to survive.

Thus new legislative intervention must also be needed to provide adequate relief to these communities who have suffered unilaterally and consistently for centuries.

¹⁴⁶ Kurup, A. 'Tribal Law In India: How Decentralized Administration Is Extinguishing Tribal Rights And Why Autonomous Tribal Governments Are Better' *Indigenous Law Journal at the University of Toronto* v.7: no. 87-88 2008/9