CHAPTER 5

ROLE OF JUDICIARY IN PROTECTING THE CIVIL AND ECONOMIC RIGHTS OF TRIBALS IN INDIA

An Overview

Today there are two sets of laws in practice almost all across the world. One the colonial legal system and its existing structures incorporating substantive and procedural laws which have been in existence ever since the colonial rulers took over the major part of the world through the doctrine of discovery[1]. The other is Humanitarian Law or the law most commonly known as Human Rights. Laws meant for the people by the people and accepted by the people world over without any prejudice. This has been propagated by the United Nations Organization (UNO) and its various organs with the people who have been facing the hardships during the last few hundred centuries. The United Nations (UN) has been playing a very important role since its inception after the fall of League of Nations. Lately the various principles developed by this international organization have been the guidelines for the majority of the peoples living in various socio economic conditions. The standard of research and quality of assessment has made this Organization the most favoured amongst many communities mostly vulnerable to various modern and colonial conditions of law and justice.

These two set of laws are practically poles apart in a number of aspects including the upliftment of the condition of living of the vulnerable section of the society. But it must be admitted that both these two sets of laws are indispensible in the modern legal system even when neither of their applicability is possible *stricto sensu* in the absence of the other.

[1] Sir Robert Miller identified 10 features that he has perceived through the case of Johnson and Graham's Lessee v. McIntosh 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823). The 10 elements are:

1. First Discovery
2. Actual Occupancy
3. Pre-emption European Title
4. Native Title
5. Sovereign and commercial rights
6. Contiguity
7. Terra nullius
8. Conquest
9. Christianity and
10. Civilization

It must be understood that no radical view of the existence of either of these legal setup is practically possible in today's world. It is a fact that all the existing courts[2] cannot be eliminated and a new set of courts be established which will hold key the principle of Human Rights to the utmost benefit of mankind. Neither the existing colonial legal principles be abandoned to embrace the principles of Human Rights because of the sheer legal philosophy and acceptance of most of the countries in their legal frame work. On the other hand the infrastructures needed for the implementation of Human Rights in most countries are very volatile. Till date many countries have not adhered to the policy and principles laid down in the Universal Declaration of Human Rights 1948. In its absence, the courts can do very little to protect the vulnerable population of the society from being further affected adversely by the state activities. Such is the condition of the majority of indigenous and tribal peoples of the world.

As it is not possible today to have an elimination of one to the existence of the other, the only thing that comes up is the need of a harmony between the two (the colonial principles and the human rights principles). In the perception of Dugait the Social Solidarity theory is what is needed today. And in furtherance of this endeavour, the apex court of a country through judicial activism has tried to bring various important principles propagated by the UN in the domestic arena. This judicial activism has been the characteristics of the supreme court of the country. This incorporation of international human rights laws in the domestic forum has been commendable. Whether in uplifting the issues of vulnerable section of the society or the rights of the environment to be protected from adverse approach from human beings, court has played a commendable role for bringing international laws in the fore.

At the time when the Constitution of India came up, the Constituent Assembly firmly affirmed the idea of Parliamentary Supremacy. However, the Parliamentarians themselves failed to live up to the expectation the Constituent Assembly vested upon them. In the turn of events, the inefficiency and inefficacy merged with personal satisfaction and greed for power and money has left the national interest on the back foot. This has to a considerable extent obliterated the faith of common man over our Parliamentarians (as well as the executives) and overturned the concept of Parliamentary Supremacy. To put it another way - and give but one example, examine this National Law: "Tribal Lands are not to be sold or leased to non-tribal peoples"... 'Officially' ... sounds pretty straight forward. But rampant corruption and bribery (not to mention 'legal loopholes') that has infected all aspects of Indian Civil Service - to the point where it has become a 'National Malaise' and this consequently; results in this law (and many others) being circumvented and openly flouted daily all

[2] Which is the outcome of the colonial legal system based on common law principles

across India.[3] Today this lost faith upon democracy has been restored to a great extent by the Judiciary and has to a considerable extent made India in tune of 'Judicial Supremacy'.

The Indian Judiciary in the 20th century has tried to come out of the shackles of the colonial prowess through Judicial Activism. Upliftment of Human Rights in the modern world structure has been one of the promising roles played by the judiciary today. Not only India but the world is witnessing today the role of judiciary in many commonwealth countries and also the European and American counterpart as to how the human rights of the people can be uplifted and protected. More importantly to those who have been deprived through ages and for centuries together in the realm of darkness and discrimination. The judiciary has felt this need to provide justice and equality to those who have not got justice throughout. These vulnerable classes have to a considerable extent been recognized by the judiciary as being a part of the bigger society[4] and also their right to get justice like any other person of the society.

Indigenous and tribal peoples are one of such categories that have been pushed to dark by the advent of colonial empowerment in most of the countries. Continuous pushing of these peoples from their original habitat has led to a complete imbalance in their socio economic conditions. The colonial system of oppression has been carried out by the post colonial era. As these peoples are in the minority in the literal sense of the term, little could they do to prevent their conditions from turning from bad to worse and ultimately to the verge of extinction. It is at this junction when the judiciary has taken up the challenge to protect these peoples from being further deteriorated and also to understand the international obligation of the nations to provide justice to these peoples.

Indigenous and tribal peoples have got their long waited recognition of being subject to disrespect and unequal treatment. This recognition of being the deprived one has brought them to the fore, where justice shall prevail.

The diversity and the plethora of practical rules and procedure have also reflected these peoples vulnerability in the society. The ways by which they are cheated, discriminated and tortured by their non tribal brothers and the state is stunning in many respects. This tyranny to say the least had overwhelming impact over the miserable life of these peoples both short term and long.

The people of these communities lost their land, resources and livelihood to the non tribal and largely to the European settlers who being outsiders to these peoples decided how these people

[3] Damon Gerard Corrie, "The India You Do Not Know' People Land Truth", Intercontinental Cry, 24 (2012).

[4] This assimilistic approach was taken from the ILO Convention No 107 which India ratified. However the ILO Convention No 169 has corrected the limitations of the earlier convention but still many countries including India has not yet ratified this altered aspect of the international community.

would live their life, earn their livelihood and the profession they would take. Through the doctrine of discovery,[5] the colonial settlers established their legal right over their newly discovered land. This doctrine of discovery was more of religion than of law. Pope Nicholas V issued to King Alfanso V of Portugal the bull Romanus Pontifex, declaring war against all non-Christian nations and their territories.[6] The non Christian states or people were declared by the Catholic to be enemies. These non Christians were considered as less than humans. Pope Alexander VI in an Inter Cetera document stated the desire that the 'Discovered' people be subjugated and brought to the faith itself.[7] Thus when Columbus sailed west across the Sea of Darkness in 1492-with the express understanding that he was authorized to 'take possession' of any land he 'discovered' that were not under the dominion of any Christian Rulers- he and the Spanish of Aragon and Castile were following an already well established tradition of discovery and conquest.[8] They imposed their legal right over the land and the existing inhabitants were provided with the secondary right, as trustees[9]. Not only did these Europeans impose their vested rights over the property of others by force and in most cases only by deemed force, they even decided upon the international relations of these indigenous peoples. With whom they would trade in, with whom they would not was also decided by these colonial rulers. This was a very brutal step in furtherance of the socio economic conditions of these peoples[10]. The only thing that was thought about by this intruding fleet was about their own development at the cost of others. The consistent economic empowerment of some places like England and France was evident at the cost of colony states. This view of earth as a place where resources are in abundance and is meant for the enjoyment of the masses is exclusively European and absolute opposite to that of these inhabitants. With this view of their superiority in terms of technology and science, they wasted a sea of knowledge that the indigenous communities has been carried along through centuries. Ignoring these treasures of indigenous knowledge has a price of its own. Global warming, population explosion, various incurable diseases are to name a few.

The new world has a lot of questions to ask and too far and few were answered. The concept of civilization was challenged in various international forums. A lot of debates took place over the concept of development as well. The European model of development which was followed by the

[5] Supra note 1.

[6] Steve Newcomb, "Five Hundred Years of Injustice: The Legacy of Fifteenth Century Religious Prejudice", Fall, Shaman's Drum 19 (1992).

[7] Davenport:61

[8] Thacher:96

[9] Campbell, Kenneth, "Legal Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed.), available at, http://plato.stanford.edu/archives/fall2013/entries/legal-rights/ (Accessed on December 4, 2015)

[10] Ibid

post colonial governments was also a very volatile issue which is yet to be addressed. The very basis of taking a religion as superior than the other is another aspect that has to be addressed in the ongoing debate between indigenous and tribal peoples on one hand and the settlers on the other. Adherence of these colonial and pre colonial principles by the modern judiciary has raised yet another debate as it did with the judgement of Johnson Macintosh. [11]

One of the telling example of the attachment of indigenous peoples are the refusal of accepting an amount as huge as $400 million as compensation in lieu of the famous Black Hills of South Dakota, USA.

The growing movement of these peoples in the modern world has got its momentum from the judiciary itself. For instance the famous Australian case of Queensland where the Australian supreme court rightfully restored the entire area back to the aboriginal peoples of Australia. The Indian counterpart to this is the case of Samatha where the Hon'ble Supreme Court of India acknowledges the right to land and natural resources of the tribal peoples in India. In a very recent development in England where the Queen's Bench in 2012 has accepted the rights of Kenyan people and provided them monetary compensation.

It is true that there has been a lot of discrimination and abuse that did engulfed the tribals and indigenous peoples across the globe for centuries by the colonial settlers and the post colonial non tribal regime. The ways by which these people have been subjected to cruelty has also a very significant place in the ongoing debate. The acceptability of the truth over the pre existing notions and philosophy created and imposed by the colonial rulers have been subjected to open debate in international and national judicial forums to decide. This remarkable development has brought forward the actual position of these peoples and the need to protect them in every possible way to provide them with the minimal relief possible.

Indian courts have pressed hard to redeem this position in a number of cases but the intention of the legislature and the executive to provide relief has been far from satisfactory. The directions given by the High Court and the Supreme Court of our country has not been adhered in a number of cases and the lack of persuasion by the tribal communities due to the lack of modern education and financial capacity has left them with the continuing degradable conditions. The number game in Indian political scenario is another contributory factor as the total number of tribal population in India is around 8% amongst whom a majority does not participate in the Electoral College. The tribals believe in self determination and self governance. Their absence or minimalistic presence in

[11] Johnson and Graham's Lessee v. McIntosh 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823)

the modern election system has its adverse effects as well. In such a situation the responsibility again vests upon the judiciary to protect these peoples from being subject of abuse and exploitation.

5.1. The Principles of Common Law

By the mid-20th century it was a generally held view that Native title was not part of the common law.[12] This view was further confirmed by Cooper v. Stuart[13] even when the subject matter did not directly concern the issue of Native title. In this famous case the English law heritage of the English Common Law did not always accept that native title should be acknowledged, in this 1889 Privy Council case the court considered that in 1788 on settlement by Europeans there were 'no settled inhabitants or settled law' in Australia. This provided the basis to ignore native title in subsequent authorities. This view was confirmed, when the issue was raised directly in yet another landmark case of Milirrpum v. Nabalco Ply Ltd.[14] The subject matter of the case was an action by a group of Australian Aborigines who claimed native title in regard to land on the Gove Peninsula in the Northern Territory. Mr Justice Blackburn held against the Aboriginal plaintiffs on the basis of his view that for a communal native title to be acknowledged by the common law it would be necessary for the native title to demonstrate that it constituted a proprietary interest. This would necessitate that interest to demonstrate the outward indicia of proprietary interests such as the right to use and enjoy land, the right to exclude others and the right to alienate. In his view the plaintiff's claim did not demonstrate those attributes existed in that case. In addition, based upon the Privy Council decision in Cooper v Stuart, he considered that the common law of Australia did not acknowledge the concept of native title. Mr Justice Blackburn stated that even if communal native title did exist, then in the circumstances of that case these rights had been extinguished.[15]

Justice Blackburn while providing this historic judgment categorically stated "the doctrine of [Native title] does not form, and never has formed, part of the law of any part of Australia".[16] He also went on to re-state what was accepted as established law when he said "(O)n the foundation of New South Wales... every square inch of territory in the colony became the property of the Crown"[17]. Despite the fact that, according to Blackburn J, "the evidence showed a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a

[12] Attorney-General NSW v. Brown [1847]

[13] [1889] 14 App Cas 286

[14] [1971] 17 FLR 141

[15] Weir, Michael, "The Story of Native Title," Vol. 8: Issue. 1, The National Legal Eagle 1 (2002)

[16] Ibid at 244-245

[17] Ibid at 198

stable order of society and was remarkably free from the vagaries of personal whim or influence"[18] and despite the fact that J Blackburn thought that "if ever a system could be called 'a government of laws, and not of men', it [was] that shown in the evidence before [him]... "he was unable to conclude that the Yolngu people from Yirrkala on the Gove Peninsula of the Northern Territory held proprietary rights. According to Blackburn J, the claims of the Yolngu did not sufficiently resemble recognised understandings of property for those claims to be so categorised.[19]

Thus, the first major decision relevant to Aboriginal land rights prior to the Mabo decision in Australia, was the decision of Mr Justice Blackburn of the Federal Court in Milirrpum & Others' v Nabalco Pry Ltd. This decision of Justice Blackburn has been criticised in many cases including the Canadian case of Calder et al. v. Attorney-General for British Columbia.[20] The court in this case declared that some of Blackburn J's propositions were "wholly wrong"[21]. Under this situation the Honourable High Court was willing to review the law on the existence of Native title.[22] This case originated in 1969, when one Frank Arthur Calder and the Nisga'a Nation Tribal Council brought an action against the British Columbia government for a declaration that aboriginal title to certain lands in the province had never been lawfully extinguished. During the trial of this case and also during the appeal, the court was of opinion that if there ever was aboriginal title in the land, it was surely extinguished. The judgement during these stages was in tune of the famous Cooper judgement given by Justice Blackburn. When the matter was referred to the Supreme Court, it was found that there was indeed an aboriginal title to the land which was in existence at the time of the Royal Proclamation, 1763.

However, the Court was split 3 to 3 on whether the claim to land was valid. One group claimed that though title existed it had been extinguished by virtue of the government's exercise of control over the lands, while the other group stated that mere exercise of control over the land is not sufficient and something more was needed in furtherance of the mere exercise of control. It is at this point the judgement of Justice Blackburn was criticised.

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[18] Ibid.

[19] Janice Gray, "The Mabo Case: A Radical Decision?", XVII, The Canadian Journal of Native Studies 36 (1997).

[20] This historic case was brought by the Nisga'a Indians of British Columbia, Canada. The argument was based on the possession of land rights to their traditional territory since time immemorial. And that such right had never been surrendered or lost. In their verdict, the judges of the Supreme Court of Canada recognized the existence of Aboriginal rights to land for the first time.

[21] [1977] SCR 313; [1973] 34 3DLR [3rd] 145

[22] Administration of Papua v. Dera Guba ([1973] 130 CLR 353:397), Coe v. Commonwealth ([1979] 53 ALJR 403)

The question was again raised in the famous Australian case of Gerhardy v. Brown.[23] Gerhardy v. Brown was the first opportunity for the Court to pronounce on the validity of active, positive measures aimed at the protection of Aboriginals, and the Court gave an affirmative answer to the question about the validity of such measures.[24] It is encouraging because the Court gave its unanimous "go ahead" (though some Justices were less enthusiastic than others) to a measure aimed at the protection and advancement of the most disadvantaged and most unfortunate group in a generally affluent and prosperous society: to Australia's original inhabitants.[25]

The right of the tribal and indigenous people has again got recognition in a recent case in Canada.[26] In this case, which was brought by the Gitxsan and Wet'suwet'en tribes of British Columbia, Canada, the Supreme Court stated that native people have a constitutional right to own their ancestral lands and to use them almost entirely as they wish. The Court also confirmed the continuation of the ownership of the indigenous people continued to own their lands unless the government had explicitly 'extinguished' their ownership. The court also emphasised the importance of oral history as evidence of indigenous peoples' long ownership of their territories.

In a similar case in Malaysia in 2005[27], the court gave verdict in favour of the tribal peoples. The Temuan people of Bukit Tampoi village in Malaysia fought a ten-year battle to stop their land being used for the construction of a road link to a new airport. The authorities had claimed that the Temuans and other 'Orang Asli' or 'first peoples' were merely tenants on state land and therefore not entitled to any compensation. Malaysia's Court of Appeal affirmed the Temuans' rights to ownership of their land, and ordered a developer, the Malaysian government and a government agency to pay the tribe substantial compensation.

The position in South Africa is not much different as the country's apex court has acknowledged the long deplorable condition of tribal and indigenous people of the country. In this case[28] 3,000 Nama people[29] took the South African government to court after they were evicted from their diamond-rich land in the 1950s. This case had a close resemblance to the famous case of the Botswana Bushmen.

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[23] In this case, Justice Deane stated that Australia was not yet in the same position as America where there had been a "retreat from injustice" brought about by the acknowledgment and recognition of Native title ([1985] 57 ALR 472,532).

[24] Wojczech Sadurskz, 'Gerhardy V. Brown V, "The Concept Of Discrimination: Reflections On The Landmark Case That Wasn't" 1 Sydney Law Review 6 (1986).

[25] Ibid. at p.5.

[26] 'Delgamuukw', Canada, 1997

[27] 'Bukit Tampoi', Malaysia, 2005

[28] Richtersveld', South Africa, 2003

[29] An indigenous group related to the Bushmen.

The country's highest court, the Constitutional Court, ruled that the Nama people had both communal land ownership and mineral rights over their territory. Furthermore, the failure to respect indigenous peoples' land ownership under their own traditional law, even if it is unwritten, amounts to 'racial discrimination'.[30]

In a fascinating change of events in Nicaragua in 2001, the tribes of Awas Tingni village filed a case in the Inter-American Court of Human Rights when a Korean company was granted a logging concession over their traditional lands. The Sumu Indians of the village of Awas Tingni contended that their right to their ancestral land has been compromised by the arbitrary act of the government. In this case the court upheld the existence of indigenous peoples' collective rights to their land, resources, and environment, and also declared that the community's rights were violated by the government granting the concession without either consulting with the community or obtaining its consent.[31]

The situation in India was not much different as being a colony of England, India inherited all the common law principles till the Constitution of India was framed and even thereafter. Tribes in India were in a deplorable condition as these people are guided by their customary rules and regulations. As a matter of practice criminal justice system amongst the tribes and non tribals were completely different. In case of a dispute between tribals, the tribal customary laws were the guiding principles. But when the offender is a non tribal, the situation was completely different to deal with. Because of their presence in the rural belts and the hills, the British administrative and judicial system was far away from these people. The non tribals were in a deciding position and continued their torture over these poor people. Study of some basic cases during this phase would make the situation very clear.

Case 1. The case is about a physical assault on tribal women by caste men in drunken state.

A female daily wage labourer belonged to Kandh Community in the district of Phulbani. Two men belonging to general caste were residents of the same village at a little distance from the victims' house.

On 27th June, 1984, at around 1:30 am, the two men belonging to generl caste being severely drunk came and kicked the door of the tribal girl. They were abusing her with slangs. But the girl didn't open the doors out of fear. One relative opened the door to enquire about the noise made by the two drunken men. Suddenly both the men attacked her and dragged her to the middle of the village by

[30] Supra Richtersveld

[31] Awas Tingni', Nicaragua, 2001

pulling off her sari and paraded her nude. They apart from their verbal assault slapped the girl. When the husband of the girl tried to intervene he was warned with dire consequences. When the drunken men left the spot, the girl with her husband went to the police station to file a complaint. However, the police didn't take any complaint and asked them to come the next morning. The next day on the basis of the complaint an FIR was drawn. The girl was advised by many persons not to go for medical examination as this would complicate the case and would force her into unnecessary harassment by the police and the court. Even at the time of investigation no adverse statements were recorded against the culprits.

The final judgement was as follows:

> *"On basis of the above facts and circumstances and after taking all other incidents into consideration it was held that the accused persons were not to be considered as guilty under section 341/294/354/34 IPC and to be acquitted under Section 255 Code of Criminal Procedure 1979[32], for the benefit of doubt."*

Thus the case was proved to be a misrepresentation of facts and the accused were left scot free.[33]

Case 2. The case is about the rape of a tribal school girl by non tribal teacher.

In this case a non tribal teacher with the help of a cook raped the school girl who was studying in class three. However, the cook helped to burn the blood stained clothes of the victim and also asked others not to speak about the incident to protect the chastity of the young girl. And no police report was made. However, the entire incident took a political turn after six months and a case was opened. However due to the delay and loss of vital evidence the non tribal teacher was not convicted under Section 376 IPC.[34]

Thus from the above two cases depicted and many more like this, a clear picture can be drawn to portrait the miserable situation of tribal peoples in most of the tribal localities in India.

5.2. Constitutional Guarantees and Judicial Remedies

The Constitution of India has borrowed Part III from the Bill of Rights of the American Constitution[35] which provides for basic fundamental rights. The provisions *inter alia* in Part III, IV,

[32] Act No. 15 of 1979

[33] S.Mohanty, N.Mishra et. al., "Violence Against Tribal Women: A Sociological Analysis of some selected cases in Phulbani District, Orissa", 4 ICFS 17-18 (1993).

[34] Ibid at p 16-17

[35] America was also once a colony of England and the common law principles was very much a part of their jurisprudence.

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 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.

5.2.1. Pre Commencement Period

Prior to the commencement of the Constitution, the need was felt to have a separate administrative setup for these areas for their uniqueness and distinctiveness from the rest of the country. The Government of India Act 1935 has made special provisions for these areas. The Governor was vested with special powers and responsibilities for their administration of justice. The areas were designated as 'Excluded Areas or Partially Excluded Areas'. The uniqueness of these areas was that no federal laws or the provincial legislation was applicable in these areas without the direction of the Governor. The power to administer these areas was solely the responsibility of the Governor and they are to act not under the advice of the ministers but on his own discretion.

The Constituent Assembly had also set up various sub committees and on the basis of the report of these sub committees provided the essential reservations for these areas for justice administration system.

5.2.2. The Constitutional Provisions.

The Indian Constitution has taken up the idea of equality and justice both in the social and political fields. In furtherance of the aforesaid principles, there has been abolition of any sort of discrimination to any class of persons on the ground of religion, race or place of birth. The constitution of India has specifically adopted certain provisions for the upliftment of tribals and to protect them from oppression caused by the other section of the society. The protective rights granted may be summed up as under:

1. Educational and cultural rights.

2. Social rights

3. Economic rights

4. Political rights

5. Employment rights

Apart from the aforesaid rights envisaged in various Articles, the Fifth and Sixth Schedule was completely dedicated for the tribals. In addition to these two schedules through the 89th Constitutional Amendment Act 2003, there has been the establishment of National Commission for Scheduled Tribes. The commission consists of a Chairman, Vice-chairman and three other members all of which shall be appointed by the President of India.

The notion of scheduled[36] and scheduled tribe[37] was established long before its nomenclature. Tribe was defined to identify people who among other things sang, danced and drink together. More formally, these groups have a distinct culture, fairly isolated and generally backward.

Irrespective of identifying these traits among a group of people scattered all around the country, the term scheduled tribe has not been defined in the Constitution of India. The term tribe has a typical notion and specific indices[38] attached to it. There are two parameters that is mostly taken into consideration to identify a tribe first, the relative isolation and second, backwardness. At times the notion of territoriality has also been taken into consideration in identifying a tribal community.

The Indian Constitution has vested with 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.[39] 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. It shall be relevant to put up the case of Amrendra Pratap Singh v. Tej Bahadur Prajapati[40]. The Supreme Court in this case observed that 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."

The right to livelihood of the tribals as a constitutional right has been acknowledged by the Supreme Court in the famous case of Banwasi Seva Ashram vs State of Uttar Pradesh.[41] In this case the Supreme Court accepted a letter written by Banwasi Seva Ashram, an NGO working for the protection of the rights of the tribal peoples, to the court. The primary issues raised by the NGO was questioning the acquisition proceeding initiated by the State of U.P. to locate a thermal Power Plant of National Thermal Power Corporation (NTPC). Consequently, the adivasis and the tribal people

[36] "Schedule" means a Schedule to this Constitution.

[37] "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 the Constitution of India.

[38] Indices like their place of abode, economic and social development etc

[39] Article 342 in Part XVI of the Constitution of India

[40] (2004) 10 SCC 65

[41] (1987) 3 SCC 304

who have been habituating there for ages have to be displaces from their motherland, which was their only source of survival and livelihood. It was alleged that the forest officials, being the authority responsible for the protection of the people are involved in encroaching upon the land and obstructing the free movement of tribal people in their own motherland.

The Public Interest Litigation was taken up by the Supreme Court and observed that,

> *"Forests are much wanted national assets. On account of the depletion thereof ecology has been disrupted; climate has undergone a major change and rains have become scanty. These have long term adverse effects on the national economy and also on the living process. Further, it is common knowledge that the adivasis and other backward people living within the jungle used the forest area as their habitat....for generations they have been using the jungles for collecting the requirement for their livelihood-fruits, vegetables, fodder, flowers, timbers, animals and fuel wood."*[42]

The court however accepted and recognised the need for industrial growth and the need of energy to deal with future need of electricity. However, the Supreme Court passed the order to protect and safeguard the tribals and their habitat. The interest of the adivasis were protected so as their right to livelihood. In its direction the Supreme Court permitted the acquisition subject to certain condition to be met by NTPC. The conditions included rehabilitation, monetary compensation for crops and land and legal aid to the ousted forest dwellers.[43]

The problem of tribals not being able to raise their voice in the courts directly have been addressed by invoking the concept of PIL and the same has been referred to in the famous case of S P Gupta Vs. Union of India.[44] Thus it will be possible for any member of public, a social activist, an anthropologist, an economist to institute legal proceedings on behalf of the tribals. The Supreme Court also observed that through the instrumentality of Public Interest Litigation, it is possible to bring all parties together and discuss the problem face to face under the direct supervision of court of law. Thus Judiciary may become a forum for addressing and ventilating the problems of distributional equality with respect to tribals.[45] The aforesaid case of Banwasi Seva Ashram v. The State of U.P. is a solution and a positive outcome of such *locus standi* related problem.

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[42] Ibid 376

[43] Anna Grear, Evadne Grant (eds.), *Thought, Law, Rights and Action in the Age of Environmental Crisis* 133-134 (Edward Elger Publishing, UK, 2015)

[44] AIR 1982 SC 149

[45] 1987 3, SCC 304

A similar situation relating to mines related dispute was reflected by Jacqueline Hand in the article 'Government Corruption and Exploitation of Indigenous Peoples. It was noted that some 30 tribes in the US for example own roughly one third of the surface accessible coal in West of Mississipi as well as 15% of all the coal reserves, 40% of all uranium ore and 4% of all oil found in the country.[46] These holdings along with mining and timber holdings are managed by Bureau of Indian Affair (BIA), and the agency's incompetence and corruption of the process has led to perhaps the world largest trust litigation.[47] This citation represents only the tip of the iceberg of the litigation that has continued for years. The government's records are so bad that it does not know how many individual accounts are charged with administering funds for Indian beneficiaries. The Interior Departments system contains over 300,000 accounts covering approximately 11 million acres, but it acknowledges that this number is not well supported. The plaintiff asserts that the actual number is nearer to 500,000. In addition to lacking knowledge of the number of accounts, the government has no clear idea of their value. This case represents an almost unimaginable mix of corruption and incompetence going back to 19th Century.[48]

Instances of courts role in settlement of disputes between tribes and non tribal peoples are not new. There are many instances of the role played by the courts in settling long standing disputes. An important American case was the dispute that led to The Gila River Indian Community Water Rights Settlement. Establishing tribal water rights is a crucial step in building the economic and other capacity of tribes including building their homes. The water rights of tribes are protected along with much-needed resources for tribes to develop and use those rights through these settlements. Some of the instances of successful settlements are as follows:

Case 1. General Adjudication of All Rights of Water Use in the Little Colorado River System and Source (Ariz.)

The Zuni Indian Tribe, Arizona and non Indian communities in the Little Colorado basin entered into a settlement regarding the water right claims in the Little Colorado Basin. The settlement was an outcome of long standing dispute over water rights which the tribals could not afford to leave. The said settlement was later approved by the Congress and the court issued the final judgement approving the settlement in 2006. It shall be relevant to state that the majority of judgements in the US are guided by the principal that the laws of the tribes in tribal areas are excluded from laws outside their territory as the tribes enjoy their own sovereignty in those areas. It must further be

[46] Miavan Clech Lam, *At the Edge of the Stat: Indigenous peoples and Self-Determination* 19 (Transnational Publication, Inc. New York, 2000)

[47] Cobell vs Norton, 240 F.3d 1081 (D.C.Cir. 2001)

[48] Ibid

noted that it is only when the Congress pass an order surpassing the rule, the tribals fail to exercise jurisdiction.

Case 2. United States v. Washington Department of Ecology (Lummi) (W.D. Wash.)

This case involved the tribes of the Lumni Nation in the State of Washington. The dispute relates to underground water rights of the Lumni Reservation. The settlement was a success as it resolved the long standing dispute between the Tribes and the private water users in furtherance of a lawsuit.

Case 3. In Re Warm Springs Tribe Water Negotiations (D. Ore.)

A settlement was entered into successfully after a long standing lawsuit of 15 years on water rights of the Confederated Tribes of the Warm Springs Reservation. The settlement was recorded and a large scale confrontation was avoided.

Case 4. In re Snake River Basin Adjudication (Idaho) – The Nez Perce Tribe and the State of Idaho, and water users crafted an historic settlement of the Tribes' water rights claim. Congress ratified this settlement in the Snake River Water Rights Act. In 2007, the Idaho courts approved the entry of the settlement.

5.3. Tribal Courts and Justice System

Tribal courts have played a very significant role in dealing with the law and order system of the tribals for a considerable period of time. The tribal courts have a limitation in its jurisdictional aspect as it was limited to tribals only. Later this jurisdiction was changed to incorporate the non tribals as well. Some of the important features of the Tribal Courts are as follows:

1. In suits or proceedings in the tribal courts, the code of civil procedure or the code of criminal procedure does not apply.

2. The tribal courts does not jurisdiction to try serious criminal matters like murder, rape etc. For these heinous offences the tribals are treated at par with the non tribals under special laws.

3. It was however the Governor who may even extend jurisdiction on such matters to the tribal courts conferring such power under CPC or Cr.PC.

4. In the year 1969 certain amendments to the Sixth Schedule to the Constitution of India was made. The primary objective of the said amendment was to enable the tribal Courts to function more or less like Nyaya Panchayats as to the rest of the country and to make

provisions for appeals from these courts to regular courts. The main aspects of the said amendment are provided herein below:

a. Extending the jurisdiction of the tribal courts to the non tribals

b. Taking away the appellate jurisdiction of the Regional Council and the District Council.

c. Curtailing the power of the Governor to confer the power to the trial courts under CPC or CrPC.

A 2011 report by National Crime Records Bureau (NCRB) shows that Jharkhand, with a population of 3.29 crore, has reported only 35,838 cases under the Indian Penal Code whereas states, like Kerala[49], Haryana[50] and Assam[51], with similar or less population, have recorded more than double the number crimes commenced. This establishes the faith of tribal people in traditional dispute redress system like Panchayats and kangaroo courts.
The development comes at a time when the state police are making every effort to reach out to the common man. This reduction in the recording of cases comes even when in the past 12 years, 95 police stations have come up in different districts of Jharkhand, which is one of the worst Maoist-affected states in the country and ranks 27th in NCRB's national crime index. At present, there are 426 police stations in the state. These statistics shows the faith of tribal people upon their customary dispute settlement mechanism and also their apprehensive towards modern justice system.
T N Sahu, lecturer at the department of tribal and regional languages, Ranchi University, said tribal people prefer panchayats to police. The primary reason behind this practice is that, he quoted,

> *"It is part of their culture. If we have a look at the cultural shift, we will find that only those tribals who live in towns and cities go to police. People living in villages still prefer panchayats to solve their problems,"* [52]

In tribal-dominated areas, like Simdega, Khunti, East Singhbhum, West Singhbhum, Gumla and Lohardaga, panchyats play a crucial role in solving local problems.
Human rights activist Shashi Bhushan Pathak said kangaroo courts are organized mostly in Maoist-hit regions. *According to him,*

> *"People fear police and CRPF and avoid going to police stations."* [53]

[49] Kerala, with a population of 3.3 crore, has reported 1.72 lakh cases

[50] Haryana (2.5 crore) 60,000 cases

[51] Assam (3 crore) 66,000 cases.

[52] Alok K N Mishra 'Tribal courts prevail over cops' TNN | Mar 2, 2013, 02.16 AM IST

Former Jharkhand DGP B D Ram agreed that presence of kangaroo courts and powerful tribal tradition are behind such poor reporting of criminal cases in the rural pockets.[54]

5.4. The Judicial Awakening

The Human Rights jurisprudence relating to the protection of tribal rights flourished in India with the aid and influence of the judgments of the Supreme Court and the High Court of different states. Some of the remarkable decisions relating to the protection of rights and recognition of certain rights within the ambit of Constitutional Rights have helped the tribals to a great extent to retaliate in the Courts through a series of legal battles leading to further declaration of rights for the tribals. The most influencing aspect of these judgments is the right to use Article 32 and Article 226 to retaliate against the state administration. The case of Olga Telis[55] needs special reference in this regard as the apex court declared that right to livelihood is an integral part of the right to life as has been enshrined in Article 21 of the Indian Constitution. The Apex court declared "It would be great injustice to exclude the right to livelihood from the context of the right to life."[56]

Another landmark judgment came in the case of NCERT vs. State of Arunachal Pradesh[57]where the Supreme Court ordered the rehabilitation of displaced tribals. Again the Supreme Court in N.D.Jayal v.. Union of India stated that rehabilitation of the tribals displaced is within the right of life under Article 21 of the Indian Constitution.[58]

The Gujarat High Court made a commendable effort in the protection of the right of the tribes in Bipinchandra Diwan v. State of Gujarat.[59] This case is commonly known as the Gujarat earth quake case where a number of eminent members of the society have put forward their disappointment in the governmental approach towards the utilisation of the funds and resources given for the relief of the quake affected victims. The PIL was taken up by the court to provide the necessary steps that have to be taken in this regard and what rights the state has towards their subjects and more importantly the vulnerable classes.

The doctrine of *parens patriae*[60] creates the obligation and the duty of the state to help and support the victims. This obligation may arise out of the Constitutional provisions, statutes, contract or

[53] Ibid.

[54] Ibid

[55] Olga Telis Vs Bombay Municipal Corporation AIR 1996 SC 180.

[56] Ibid

[57] NCERT v. State of Arunachal Pradesh 1996 (1) SCC 742

[58] N.D.Jayal v. Union of India (2004) 9 SCC 362 at p 394

[59] Bipinchandra Diwan v. State of Gujarat AIR 2002 GUJ 99 at p 103

[60] Literally means father of the country

quasi contractual obligations arising out of torts. This obligation which does not fall in the said categories has been described by Salmond on Jurisprudence, 12th Edition by PJ Fitzgerald at Pp 127 as "In Nominate Obligations". This obligation is explained as recognition of final and residuary laws having comprehensive and distinctive title. The state has the inherent power and authority to provide protection to the person and property of persons *non sui juris*, such as minor, insane and incompetent persons. The indigenous and tribal peoples also to a considerable extent falls within this category of non sui juris enabling them to create the duty and obligation of the state in furtherance of parens patriae. In other words to protect those who have no rightful protector. The constitution makes it imperative for the State to secure to its citizens rights guaranteed by the Constitution and where the citizens are not in a position to assert and claim their rights, the state can be activated and approached to effectively come over the scene and protect the Human Rights of the victims.[61] The Supreme Court has held that the Preamble of the constitution read with Articles 38, 39 and 39A of Directive Principles of State Policy, enjoins the state to take up this responsibility.[62] It is the protective measure to which the social welfare state is committed.[63]

There have been some famous cases both national and foreign that uplifted the tribal rights and acknowledging the State inefficacy towards providing justice to these communities. One of the interesting decisions came in the famous case of Mabo,[64] given by the Australian High Court. It was with the background that Native title was not part of the common law; the application in Mabo v The State of Queensland was heard. The Court's decision was handed down on 2nd June 1992. It is one of the most significant decisions the High Court has ever delivered. The case was heard by a Full Bench of the High Court comprising seven Justices namely Mason C J, Brennan J, Deane J, Toohey J, Gaudron J, McHugh J, and Dawson J. Only Dawson J dissented from the decision to acknowledge the existence of native title. As is the case in many decisions of the Australian High Court although six judges supported the concept of communal native title the majority differed in their reasoning. A useful summary of the ratio decidendi of the case is found in the short judgement of Mason CJ and McHugh J where they state: 'In the result, six members of the Court (Dawson J, dissenting) are in agreement that (1) the common law of this country recognises a form of native title which, (2) in the cases where it has not been extinguished, (3) reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, (4) subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of

[61] Bipinchandra Diwan vs State of Gujarat AIR 2002 GUJ 99

[62] Ibid

[63] Ibid

[64] Mabo and Another v. The State of Queensland and Another (1989) 166 CLR 186 F.C. 88/062

Queensland'. Australia was one of the last western countries to acknowledge native title. For many years native title has been acknowledged in New Zealand; the USA and Canada by Native Title Act 1993. As a response to the Mabo decision, just before Christmas 1993, the Federal Government passed the Native Title Act 1993. Legislation reflecting the model provided by the Commonwealth legislation has since been passed in all other states to regulate the acts of State governments whose activities often impact on native title. Main Objects of Native Title Act Section 3 sets out the four main objectives of the legislation. These objectives are: 1. Provision for the recognition and protection of native title; 2. Provision for the validation of past acts potentially invalidated because of the existence of native title i.e. where government has granted interests in land that impacted upon native title and did not pay compensation; 3. Establishment of a mechanism for determining claims to native title and; 4. Establishment of how future dealings effecting native title may proceed and setting standards for those dealings.[65]

Later to the Mabo decision Croker Island Case the question as to native title apply to the seabed? If native title can extend to the sea bed what are the extent of the rights enjoyed? Can native titleholders stop ordinary marine transport or control commercial or recreational fishing? Certainly most people thought that native title could exist over the sea bed and it was contemplated in the definition of Native Title Act S 223. These issues were discussed in 2001 in The Commonwealth of Australia v Yarmirr (the Croker Island case) The case is significant for its further general discussion of the nature of native title and its elucidation of the applicability of native title to the sea. The facts involved an application for native title by a number of clans of aborigines to an area of the seabed surrounding Croker Island in the Northern Territory. The application incorporated a claim for exclusive possession of the area. If granted this would presumably mean that native titleholders could regulate or control fishing and navigation in the native title area. The Trial judge confirmed in accordance with the Native Title Act that native title is capable of being recognized in relation to the sea. He found the native title fights included the right to fish, hunt and gather for personal and non-commercial needs and right of access for travel and to protect places of cultural or spiritual significance. He said the evidence did not support the view the right was exclusive and could not exist because of the public rights of navigation and fishing at common law and Australia's obligations under international treaties. The Commonwealth argued that as the common law did not extend to the sea native title could not be recognized by the common law. The High Court of seven judges provided a joint judgement of Gleeson CJ, Gaudron Gummow and Hayne and separate judgments of McHugh; Callinan and Kirby. The court supported the native title claim subject to the public fights of navigation and fishing at common law and Australia's obligations under

[65] Weir, Michael, "The story of native title," Vol. 8: Iss. 1, The National Legal Eagle 8 (2002)

international treaties. This meant that the native title fights enjoyed did not extend to exclusive use of the area claimed.[66]

Later the famous case of Samatha[67] gave rights to the tribal in furtherance to their forest land. Samatha was a triumph for the tribals struggling to protect their constitutional rights to life and livelihood. Legislative intervention must also be needed to provide adequate relief to these communities who have suffered unilaterally and consistently for centuries.

In September 1997 the Supreme Court passed a landmark judgement in the Samatha case that established that government lands, tribal lands, and forestlands in the scheduled Areas cannot be leased out to non-tribals or to private companies for mining or industrial operations. Consequently, all mining leases granted by the State governments in V Schedule Areas therefore became illegal, null and void and the State Government was asked to stop all industries from mining operations mining activity should be taken up only by the State Mineral Development Corporation or a tribal co-operative if they are in compliance with the Forest Conservation Act and the Environment Protection Act at least 20% of the net profits should be set aside as a permanent fund as part of business activity for establishment and provision of basic facilities in areas of health, education, roads and other public amenities after the 73rd Amendment and the Panchayat (Extension to Scheduled Areas) Act, under the Gram Sabha are competent to preserve and safeguard community resources and reiterated the right of self-governance of Adivasis. In cases where similar Acts in other States do not totally prohibit grant of mining leases of the lands in the Scheduled Area, similar committee of Secretaries and State Cabinet Sub-Committees should be constituted and decision taken thereafter. Before granting leases, it would be obligatory for the State government to obtain concurrence of the Central Government which would, for this purpose, constitute a Sub-Committee consisting of the Prime Minister of India, Union Minister for Welfare, Union Minister for Environment so that the State's policy would be consistent with the policy of the nation as a whole.[68] It would also be open to the appropriate legislature, preferably after a thorough debate/conference of all the Chief Ministers, Ministers concerned, to take a policy decision so as to bring about a suitable enactment in the light of the guidelines laid down above so that there would emerge a consistent scheme throughout the country, in respect of the tribal lands under which national wealth in the form of minerals, is located.

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[66] Ibid at p.10

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

[68] Samatha v. State Of Andhra Pradesh And Ors on 11 July, 1997 available at, http://indiankanoon.org/doc/1969682/ (Accessed on December 4, 2015)

Subsequent appeals by the Andhra Pradesh Government, and Union Government were, dismissed by the Supreme Court. Unbridled commercial interests and plunder by private and global capital has thus been legally kept out of the Scheduled Areas. However, with globalisation and liberalisation, private corporations and MNCs have put pressure and the secret note from the Ministry of Mines of 10 July 2000 (No.16/48/97-M.VI) is the result. The note clearly puts the interests of "foreign corporate bodies" to be superior to the interests of the people belonging to the scheduled tribes at that, and suggests that the SC judgement can be effectively be subverted by effecting "the necessary amendments so as to overcome the said SC judgement by removing the legal basis of the said judgement". This is now sought to be accomplished by making an amendment to Article 244, clause 5 (2) removing the prohibition and restrictions on the transfer of and by Adivasis to non-Adivasis for undertaking any non-agricultural operations including prospecting and mining.[69]

This famous Samatha judgement raised several substantial questions of law as to the interpretations of the Indian Constitution, which may be summed up as follows *in seriatim*:
(i) The Constitutional Provisions (Fifth Schedule and Article 244) empower the Governor of a State to regulate and make regulations for Scheduled areas and for Scheduled Tribes so that what rightfully belongs to the tribals cannot be taken away by any means. The majority decision in the Samatha Case has held that the granting of mining lease to non-tribals in Scheduled Area is volatile of the Fifth Schedule. However, it is felt that Fifth Schedule and Article 244 cannot purport to take away the sovereign right of the government to transfer its land in any manner. Justice Pattanaik in his dissenting view has observed that "A combined reading of Article 244 and Fifth Schedule of the Constitution would indicate that there is no constitutional obligation on the Governor to make regulations prohibiting transfer of Government land in favour of a non-tribal within the Scheduled Area".

(ii) The majority decision has directed for all States where similar Acts do not totally prohibit grant of mining leases to non-tribals in Scheduled Area, mining leases in such areas can be granted by the State Government only after formation of Committee etc, (para 129, 130). Such a direction raises fundamental interpretation issue relating to the Constitution on the applicability of a Central Act Mines and Mineral (Development & Regulation) Act, 1957 - (MMDR Act) which was enacted under the Constitutional Provisions of the Seventh Schedule of the Constitution (Entry 54 - List 1). The MMDR Act, 1957, which extends to the whole of India, empowers the State governments to grant mining leases and the Fifth Schedule to the Constitution does not fetter the operation of the

[69] Attempts to subvert 'Samatha' judgement, available at http://www.pucl.org/reports/National/2001/samatha.htm (Accessed on December 4, 2015)

Parliamentary Law.[70] Further, the Fifth Schedule empowers the Governor to make regulations, which he may not exercise, while the majority judgement at para 50 states that the Fifth Schedule 'enjoins' the Governor to make necessary regulation in furtherance of the benefit of the deprived tribals.[71]

(iii) The decision in the Samatha case that the 1959 Regulations are retrospective in intent is a conclusion diametrically opposed to a binding decision (of September 1995) of a Bench of three Judges of the Supreme Court - Dy. Collector vs. S. Venkataramaniah 1995 (6) SCC 545.[72]

(iv) The 1959 Regulations were made by the governor under Paragraph 5(2) of the Fifth Schedule to regulate transfer of land in the Scheduled Areas specifically mentioned in the Regulation.[73] In the making of this Regulation, the Governor obviously did not intend to specifically affect any of the provisions of the MMDR Act, 1957 in the Scheduled Areas in the State, much less to add to repeal or amend any of its provisions.[74] The MMDR Act 1957, which extended to the whole of India, continued to apply to Scheduled Areas in the State of Andhra Pradesh in so far as they related to mining leases and prospecting licenses granted by the State Government under the provisions of the MMDR Act, 1957.[75] In making the 1959 Regulations the Governor has not purported to add, to repeal or amend any part of the word "persons" in Clause 3 of the 1959 Regulations could not possibly have meant the State Government (as the authority empowered under the MMDR Act, 1957, to grant mining leases/prospecting licenses) as this would otherwise involve an amendment of the provisions of the MMDR Act, 1957, as applicable to the Scheduled Areas.[76]

It may be noted that Justice J.Pattanaik recorded in the minority Judgement in the Samatha Case that

> *"in my considered opinion the expression 'person' used in Section 3(1)(a) of the Regulation should have its natural meaning throughout the Section to mean a 'natural person' and it does not include the State".*[77]

He further continued,

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[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Ibid.

"Mabo and Samatha are two remarkable judgments of the 20th Century on the rights of tribals. On 3rd June 1992, the High Court of Australia decided to declare that all land, which belongs to the aboriginals, had been wrongly misappropriated by the settlers and had to be returned to the aboriginals. Two centuries of colonial history was reversed. The colonial assumption of res nullius was nullified."[78]

However, as mentioned earlier in this regard there has been very little implementation of these orders. The judicial decisions have been disrespected by the government in a series of cases. As Vidhya Das in an article quoted,

"...Why otherwise would the Orissa Government consider amending the PESA Act, and force consent on a gram Sabha through the district collector, why otherwise should the Supreme Court judgment on Samatha case be declared null and void in this state? And it is not Orissa where such steps are being taken. A Supreme Court ruling restraining the government from regularizing encroachments on forest lands has led to a circular from the Ministry of Environments and Forests for the eviction of encroachers through a time bound action plan."[79]

The administration has offered deaf ears to the legitimate demand of the tribals. There are innumerable instances of violation of fundamental rights of tribals in every form in the past 100 years. The poor and the uneducated of the modern civilization have been brutally humiliated day in and day out by the rich and the famous. The simplicity of tribal communities are used to exploit them and to rebut them with the armor of state machinery in case of tribal usurp. Unfortunate but true various analysis of laws for the welfare of the tribes are made by various legal experts, anthropologists, economists, politicians and judges, but the outcome is massively disturbing when it comes to the implementation of those legal provisions. The very basis of the rights as provided by the constitution is unknown to these millions of people. Modern education is far away from them. Among the few thing that they know about is the law of nature, the law of responsibility and reasonability. The law that has been acknowledged by Professor Hart and which led to the revival of the natural law theory in the 20th Century. The need of reason as the basis of law has been appreciated in all modern societies and India should not lag behind to protect that segment of the society who lives a life of poverty and oppression just because they are non-commercial in their approach. The progress of a country must not only be judged by its economic progress but also the

[78] Dr.Rajeev Dhavan, "Mabo and Samatha", 10.The Hindu, March 9, 2001.

[79] Ibid

rights the citizens enjoys in their motherland.[80] The author carried on and cited the example of the Coca Cola factory as quoted….

> *"this link between the government and the corporate is becoming increasingly clear today, and it is not just in the tribal regions. Everybody knows of the struggle of the local people against the Coco Cola factory which has polluted ground water and surface water reserves in Plachimada, Kerala. Here, people has been waging a peaceful struggle for more than two years, but the Kerala government has chosen to arrest more than 300 local people including the leaders of the movement, rather than look at issues of pollution, and the way peoples livelihood has been affected. If the Orissa government is talking of amending the panchayati raj act, the Gujarat government is thinking to introduce a new mining policy that would enable mining in parks and reserve forests. While it has ordered eviction of tribal communities from these areas following the MoEF circular to this effect."*[81]

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.[82] 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. Even the right to speak for tribals may be a case

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[80] Shambhu Prasad Chakrabarty & Rathin Bandhopadhyay, "Alienation of Tribals from land and Forest vis-à-vis Rehabilitation in India: An analysis through the lens of Human Rights Jurisprudence", 2012 KJLS, 1:1, Vol 2, No. 1.

[81] Vidhya Das, 'Democratic Governance in Tribal Regions, A Distant Dream', EPW, October 18, 4432 (2003)

[82] 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."

of going against the nation.[83] The court must play its part to provide justice to the tribals and also those who speak for them.

In a recent judgment the Honorable Supreme Court has uplifted the right of land. The apex court stated that the tribes have right to maintain relationship with land which is their most important asset. In this famous judgment passed by Honorable Justice Aftab Alam, on April 2013, stated that it is the land on which the tribal life is sustained. It further stated that, the social status, economy, and social equality, permanent place of abode, work and living depends upon the land. Consequently, tribes have great emotional attachment to their lands. The apex court bench also reflected that the Scheduled Tribes and other Traditional Forest Dweller residing in the Scheduled Area have a right to maintain their distinctive spiritual relationship with their traditionally owned or occupied and used lands. The court also referred to the Forest Rights Act and stated that the law intends to protect customs, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers. [84] In the judgment, the apex court stated that "The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbolic relationship with the entire ecosystem."[85]

A brief study of certain eminent cases in India certainly provides a ray of hope to the poor and deprived tribals in India. The court has acknowledged the rights of the tribals and adivasis in relating to their right over land and forest resources. In Fatesang Gimba Vasava v. the State of Gujarat, the Gujarat High Court ruled that the forest department's action to prevent the transport of bamboo for sale to tribals at concessional rates was unwarranted.[86]

Therefore, bamboo being a tree would certainly fall within Cl. (b) of the definition of 'forest produce', but toplas, supdas, and palas made out of bamboo chips would not fall within the definition of forest produce.[87]

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[83] In a recent case the government of India justified the decision to stop Greenpeace activist Priya Pillai on January 11th 2015 from travelling to London for a meeting of the British all party parliamentary group. A matter was raised before the Delhi High Court, that the act of the Government (Intelligence Bureau) was simultaneous violation of the right to free speech, right to freedom of association and personal liberty of movement. Justice Rajiv Shakdher has reserved the order till date.

[84] Case on mining in Niyamgiri Hills of Orissa.

[85] Ibid.

[86] Fatesang Gimba Vasava and others vs State of Gujarat and Others, AIR, 1987, Gujarat, 9.

[87] Ibid.

The court ruled that once there is a conversion of bamboo to any other form due to human labour and skills, it no longer remains under the provision of the Indian Forest Act, 1927.[88] The court stated that,

> *"We may also state that according to us the view taken by the Gujarat High Court in Fatesang's case is correct, because though bamboo as a whole is forest produce, if a product, commercially new and distinct, known to the business community as totally different is brought into existence by human labour, such an article and product would cease to be a forest-produce. The definition of this expression leaves nothing to doubt that it would not take within its fold an article or thing which is totally different from, forest-produce, having a distinct character. May it be stated that where a word or an expression is defined by the legislature, courts have to look to that definition; the general understanding of it cannot be determinative. So, what has been stated in Strouds' Judicial Dictionary regarding a "produce" cannot be decisive. Therefore, where a product from bamboo is commercially different from it and in common parlance taken as a distinct product, the same would not be encompassed within the expression "forest-produce" as defined in section 2 (4) of the Act, despite it being inclusive in nature that bamboo mat is taken as a product distinct from bamboo in the commercial world, has not been disputed before us and rightly.*
>
> *In view of all the above, we hold that bamboo mat is not a forest-produce in the eye of the Act, and so, allow the appeal, set aside the impugned judgment[89] of the High Court and state that the order of confiscation passed by the Conservator of Forest was not in accordance with law."*[90]

A study of the aforesaid judgement clarifies that a bamboo mat prepared from bamboo is not a forest produce under Section 2(4) of the Indian Forest Act 1927. It is held that the expression 'forest produce' does not take within its fold an article or thing which is totally different from forest produce, having a distinct character. In the case of Suresh Lohiya v. State of Maharashtra, 1996 A.I.R., SCW, 4111, the Apex court was considering as to whether bamboo mat is a forest produce or not and the court has held that bamboo mat is not a forest produce in the eye of law.[91] In this case it was decided that bamboo carpet is not a forest produce under the definition of the term under

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[88] P Leelakrishnan, *Environmental Law in India*, 20-21(Lexisnexis, Gurgaon, 3rd ed., 2005)

[89] Suresh Lohiya vs State Of Maharashtra And Another on 23 August, 1996, available at http://indiankanoon.org/doc/155648/ (Accessed on December 4, 2015)

[90] Suresh Lohiya vs State Of Maharashtra And Another, (1996) 10 SCC 397

(By the Bench of Justice. G.N.Ray and Justice. B.L.Hansaria)

[91] Mahadeo and Others v. State of Maharashtra and Others, A.I.R. 2001, Bombay, 434

section 2(4) of the impugned Act. Mere change in the state of the forest produce does not make an article outside the scope of The Forest Act, 1927. Even factory made kattha, which is catechu, is a forest produce within the meaning of the definition of the word 'forest produce' as defined under Section 2(4) of the Indian Forest Act.[92] Thus it may be noted that it is the tribal art and knowledge that converts a forest produce and not the intervention of mechanical process. This is a way tribal livelihood has been honoured and protected by judicial decisions and activism.

In another case that reached the apex court was Sanjay Lodha vs State of Jharkhand and Others.[93] This case was to determine whether 'Chiraunji' or 'gond' which is commonly used by the tribal and adivasi population in Jharkhand falls within the purview of the definition of forest produce. In deciding the matter, the court came to the conclusion that, "On bare perusal of clauses (b) and (c) of sub-Section (4) to Section 2, it will be evident that if the trees, leaves, flowers, fruits and all other parts are produce when found in or brought from a forest then only it is included within the definition of 'forest produce'. In the instant case there being nothing on the record to suggest that the Chiraunji or Gond, in question, seized from the premises of petitioners were found in or brought from a forest, even as per clauses (b) and (c) of sub-Section 4 to Section 2 of the Indian Forest Act 1927, seized materials cannot in any way under the said facts and conditions of the case be held to be 'forest produce'.[94] Thus it may be understood that all forest products are not necessarily forest produce.

Apart from protecting the right of forest produce within the reach of tribals, the courts in India has played a dominant role in protecting the land rights of these peoples. One of the leading cases in this regard is Sri Machegowda v. State of Karnataka.[95]

In this case, the petitioners are purchasers of lands which had been originally granted by the State to persons belonging to Scheduled Caste or Scheduled Tribes. Such lands had already been transferred to the members belonging to and Scheduled Tribes under the provisions of Law or on the basis of rules or regulations governing such grant. After the passing of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands Act), 1978, notices have been issued by the appropriate authority to the transferees of such lands to show cause as to why the lands transferred to them should not be resumed in any way for being restored to the original grantees or their legal heirs or for distribution otherwise to the members of Scheduled Castes and Scheduled Tribes in accordance with the provisions of the Statute, as the transfers in their favour are in view of the provisions of the Act now null and void. The appellants, who were aggrieved by the said

[92] M/S. Indian Wood Products Co. Ltd. vs State of U.P. and another, AIR 1999, Allahabad, 222

[93] A.I.R. 2003, Jharkhand, 64

[94] Ibid

[95] 1984 AIR 1151

notices, challenged the *vires* of the Act. According to them, ss. 4 & 5 of the Act violated the provisions of Arts 14, 19 (1) (f), 31 and 31A of the Constitution. The High Court for reasons recorded in the Judgment upheld the validity of the Act and dismissed the petitions. However, the High Court granted certificates under Arts.132 & 133 of the Constitution and hence the appeals.

It was contended by the court in this case that,

> *"Granted lands were intended for the benefit and enjoyment of the original grantees who happen to belong to the Scheduled Castes and Scheduled Tribes. At the time of the grant a condition had been imposed for protecting the interests of the original grantees in the granted lands by restricting the transfer of the same. The condition regarding the prohibition on transfer of such granted lands for a specified period, was imposed by virtue of the specific term in the grant itself or by reason of any law, rule or regulation governing such grant. It was undoubtedly open to the grantor at the time of granting lands to the original grantees to stipulate such a condition the condition being a term of the grant itself, and the condition was imposed in the interests of the grantee. Except on the basis of such a condition the grantor might not have made any such grant at all. The condition imposed against the transfer for a particular period of such granted lands which were granted essentially for the benefit of the grantees cannot be said to constitute any unreasonable restriction. The granted lands were not in the nature of properties acquired and held by the grantees in the sense of acquisition, or holding of property within the meaning of Art. 19(1) (f) of the Constitution. It was a case of a grant by the owner of the land to the grantee for the possession and enjoyment of the granted lands by the grantees and the prohibition on transfer of such granted lands for the specified period was an essential term or condition on the basis of which the grant was made. It has to be pointed out that the prohibition on transfer was not for an indefinite period or perpetual. It was only for a particular period, the object being that the grantees should enjoy the granted lands themselves at least for the period during which the prohibition was to remain operative. Experience had shown that persons belonging to scheduled castes and scheduled tribes to whom the lands were granted were, because of their poverty, lack of education and general backwardness, exploited by various persons who could and would take advantage of the sad plight of these poor persons for depriving them of their lands. The imposition of the condition of prohibition on transfer for a particular period could not, therefore, be considered to constitute any unreasonable restriction on the right of the grantees to dispose of the granted lands. The imposition of such a condition on prohibition in the very nature of the grant was perfectly valid and legal."*

Eventually, the Supreme Court by dismissing the appeal ruled in favour of the adivasis and nullified the purchase of such land by private purchasers.

Another case of uplifting the right to tribal people upon their land was P. Rami Reddy v. The State of Andhra Pradesh.[96] Section 3(1) of the Andhra Pradesh Scheduled Areas Land Transfer Regulation 1959 (Regulation I of 1959) prohibited transfer of immovable properties situated in the scheduled areas from a member of scheduled tribe to non-tribals without previous sanction of the State Government. In order to facilitate effective enforcement of the said 1959 regulations, the Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1970 was introduced. Regulation 1970 inter alia brought the following changes namely (i) transfers of land in scheduled areas in favour of 'non-tribals' were wholly prohibited in future and (ii) non-tribals holding lands in the scheduled areas were prohibited from transferring their lands in favour of persons other than tribals. The appellants who owned lands in the scheduled areas having acquired them from tribals and 'non-tribals' were affected by this amending Regulation of 1970. They filed writ petitions in the High Court challenging this regulation being unconstitutional. The High Court dismissed the writ petitions. Hence these appeals by Certificate under Article 133(1)(a) of the Constitution. The main contention of the appellants was that the impugned provisions were unconstitutional as being violative of Article 19(1)(f) of the Constitution as it obtained at the material time till it was repealed by the Constitution (Forty-fourth)Amendment in 1979 because they imposed unreasonable restrictions on the non-tribal holders of properties in the scheduled areas. Dismissing the appeals and while tracing a short history of the legislation, this Court.[97] While delivering judgement in the said case, the Supreme Court was flawless in delivering justice to the tribals. Apart from showing the legal paradigm based on exploitative history, the court provided justice for which it is famous for.

The apex court observed,

> *"As a matter of fact it would be unreasonable and unfair to hold that the impugned provisions are unreasonable on this account. Surely it is not unreasonable to restore up to the 'tribals' what originally belonged to them out of which they were deprived as a result of exploitative invasion on the part of 'non-tribals'. In the first place should lessons not be drawn from past experience to plug the loop-holes and prevent future recourse to devices to flout the law? The community cannot shut its eyes to the fact that the competition between the 'tribals' and the 'non-tribals' partakes of the character of a race between a handicapped*

[96] (1988) 3 SCC.

[97] Ibid at Headnote.

one-legged person and an able bodied two legged person.[98] *True, transfer by 'non-tribals' to 'non-tribal would not diminish the pool.*[99] *It would maintain status quo.*[100] *But is it sufficient or fair enough to freeze the exploitative deprivation of the 'tribals' and thereby legalize and perpetuate the past-wrong instead of effacing the same?*[101] *As a matter of fact it would be unjust, unfair and highly unreasonable merely to freeze the situation instead of reversing the injustice and restoring the status-quo-ante.*[102] *The provisions merely command that if a land holder voluntarily and on his own volition is desirous of alienating the land, he may do so only in a favour of a 'tribal'.*[103] *It would be adding insult to injury to impose such a disability only on the tribals (the victims of oppression and exploitation themselves) and discriminate against them in this regard whilst leaving the 'non-tribals' to thrive on the fruits of their exploitation at the cost of 'tribals'.*[104] *The 'non-tribal' economic exploiters cannot be installed on the pedestal of immunity and accorded a privileged treatment by permitting, them to transfer the lands and structures, if any, raised on such lands, to 'non-tribals' and make profits at the cost of the tribals.*[105] *It would not only be tantamount to perpetuating the exploitation and injustice, it would tantamount to placing premium on the exploitation and injustice perpetrated by the non-tribals.*[106] *Thus it would be the height of unreasonableness to impose the disability only on the tribals whilst leaving out the 'non-tribals.*[107] *It would also be counterproductive to do so. It must also be emphasized that to freeze the pool of lands available to the 'tribals' at the present level is virtually to diminish the pool. There is no escape from this outcome because the realities of life being what they are with the population increase amongst the tribals remaining unfrozen, increase in their population will automatically diminish the size of their pool if the same is frozen. No unreasonableness therefore is involved in making the prohibition against transfer to 'non- tribals' applicable to both the 'tribal' as also to the non- tribal' owners in the scheduled area. As a matter of fact it would have been unreasonable to do otherwise. In the absence of protection, the*

[98] P.Rami Reddy & Ors. Etc v. State of Andhra Pradesh & Anr. on 14th July, 1988 available at, http://indiankanoon.org/doc/101893/?type=print (Accessed on December 4, 2015)

[99] Ibid

[100] Ibid

[101] Ibid

[102] Ibid

[103] Ibid

[104] Ibid

[105] Ibid

[106] Ibid

[107] Ibid

economically stronger 'non-tribals' would in course of time devour all the available lands and wipe out the very identity of the tribals who cannot survive in the absence of the only source of livelihood they presently have. It is precisely for this reason that the Architects of the Constitution have with far sight and foresight provided in paragraph 5(2) of Fifth Schedule that the Governor may make regulations inter alia "prohibiting or restricting the transfer of land in the scheduled areas notwithstanding any provision embodied in the Constitution elsewhere". And as has emerged from the foregoing discussion, it is unreasonable to restrict the prohibition against transfer to 'tribals'. It has to be made comprehensive enough to embrace the 'non-tribals' as well. With the improvement in the economic conditions of the 'tribals', there would not be much difficulty in finding 'tribal' purchasers. Besides, Section 3(1)(c) *thoughtfully provides even for the contingency of not being able to find a 'tribal' willing or prepared to purchase the property. This provision obliges the State Government to acquire the property on payment of compensation as provided therein. One can envisage that some hardship would be occasioned to the owners to lands located in the scheduled areas. But such hardship would operate equally on the 'tribals' as well as the 'non-tribals'. Such hardship notwithstanding keeping in mind the larger perspective of the interest of the community in its entirety in the light of the foregoing discussion, the restrictions cannot be condemned as unreasonable. More so if the factor that the original acquisition by `non-tribals' from 'tribals' was polluted by the sins of exploitation committed by the non-tribals' is not ignored."*[108]

This amazing judicial outlook, coupled with the dismissal of the said petition was a boon upon the tribal masses of India.

A revolutionary judgement that changed the outlook of the entire country was the famous case involving the rape of a tribal girl. Famously known as the Mathura Rape case[109], this case led to the amendment the criminal law in force in India. Mathura Rape Case (1972) led to the large scale protest amongst common Indians and virtually forced the alteration of rape laws in India. Mathura, a young tribal woman, was raped by two constables within the premises of the Desai Ganj Police Station in Chandrapur district of Maharashtra.[110] The Sessions court judge found the accused not guilty. The reasoning behind this was (believe it or not) that Mathura was habituated to sexual

[108] Ibid at p 433

[109] Tuka Ram And Anr vs State Of Maharashtra on 15 September, 1978

[110] 10 Most Interesting Indian Court Cases Everyone Needs To Know About, available at, http://www.scoopwhoop.com/inothernews/indian-court-cases/ Accessed on Jan 10, 2016

intercourse.[111] This, according to the judge, clearly implied that the sexual act in the police station was consensual. [112]The amendments to the law that were forced by the protests got one thing right - submission does not mean consent.[113]

Another significant case relating to tribals is Nandini Sundar & Ors. v. State of Chhattisgarh[114]. In this case there has been large scale violation of human rights in the state of Chhattisgarh, more specifically in three villages in the district of Dantewada. There has been large scale Maoist insurgency with anti insurgency movements and the area virtually became a battlefield. The situation was such that, about 350000 Tribals were forced to displace from their land. There has been cases and incidents of armed and strategic attacks which caused large scale mass killings. This affected adversely to say the least to the tribal population by state and state aided counter insurgencies. Instances of large scale law lessness coupled with attacks on innocent tribal women and children leading to large numbers of rapes by militia and security forces.

This situation was subsequently alleviated by the State policy of appointing local tribals in the temporary posts of Police with Rs.3000 as honorarium and armed them with firearms. This act was subsequently declared by the Supreme Court as violation of Article 14, 21 and other provisions of law. This case further declared the notion of calling the human right activists as Maoist as bad in law. In this case the Supreme Court gave appropriate directions including the transfer of investigation to CBI and provided relief to the tribals.

Amongst these encouraging judgements attention must be given to some decisions of the courts which were less sensitive to the rights of the tribal people. One of such case came up in the year 1997, the same year when the famous Samatha judgement was pronounced.

In this case the Supreme Court extended the Forest Conservation Act, 1980 to include all lands yet to be finally notified under the Indian Forest Act, 1927 and the court totally banned the removal of dead, diseased, dying or wind fallen trees, dwarf wood and grass etc, from the National Parks and Wild Life Sanctuaries. It also banned collecting and selling of all non timber forest produce by all, including tribal peoples and adivasis. As an effect of this judgement, three to four million people

[111] Ibid

[112] Ibid

[113] Ibid

[114] Writ Petition (CIVIL) NO. 250 of 2007

living inside protected areas were deprived to access to non timber produces of the forest which is critical source of survival for them.[115]

In yet another disappointing case famously known as Dahanu Taluka Environment Protection Group v. Bombay Suburban Electric Supply Ltd, the Supreme Court okayed a project of constructing a power plant in an ecologically fragile area, including adivasis in them. Even when the Environment Appraisal Committee gave a report to the Hon'ble Supreme Court, it was ignored.[116] At least, the Supreme Court should have called for a review of the project. Time and again questions have been raised about the manner in which environmental impact assessments have been done but the courts have largely refrained from taking action unless an external funding agency has raised questions as in the case of the Morse Committee report for the Narmada.[117]

On the question of the right to inherit ancestral property by tribal women, the High Court of Himachal Pradesh in a very famous case concerning rights of tribals settled this dispute in clear terms. The position of women as to their rights over ancestral property has been the subject matter of dispute and debate as there had been many instances where they have been deprived from their right of inheritance. On 18th January, 2012, in the case of Rameshbhai Dabhai Naika v. State of Gujarat & Others [Civil Appeal No.654 of 2012] the question was settled by the Hon'ble court. The question that arose before the Court was what would be the status of a person, one of whose parents belongs to the scheduled castes/scheduled tribes and the other comes from the upper castes, or more precisely does not come from scheduled castes/ scheduled tribes and what would be the entitlement of a person from such parents to the benefits of affirmative action sanctioned by the Constitution.[118] The Bench held that "in an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case."[119] "In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the

[115] Rathin Bandyopadhyay, Dhiraj Subedi, "Developmental Invasion in Endangering 'Right to Life' of Forest Dwellers in India-Can the Contemporary Forest Conservation Law Prevent it?" 37 & 38, *The Banaras Law Journal,* 20. (Jan 2008-Dec 2009)

[116] Upadhyay 2000: 3790

[117] IJOART, "Tribes & Environmental Conservation" 3 *International Journal of Advancements in Research & Technology*, 71 (2014)

[118] Arun Sharma, 'Tribal women gets rights in ancestor's property, breaks age old practice', available at http://indianexpress.com/article/india/india-others/tribal-women-gets-rights-in-ancestors-property-breaks-age-old-practice/ accessed on Jan 10, 2016

[119] Ibid

father.[120] This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste.[121] But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe."[122]

In another interesting case relating to tribals, the Supreme Court gave the benefit of customary beliefs to spare a rather dangerous act which took the life of one tribal lady and injures two others.[123] In this case the facts go on like this, one Ram Bahadur Thapa was the servant of J.B. Chatterjee of a firm called Chatterjee Bros. Located in Calcutta. They had come to Rasogovindpur, a village in Balasore district in Orissa to purchase aeroscrap from an abandoned aerodrome outside the village.[124] Because it was abandoned, the locals believed it was haunted.[125] This piqued the curiosity of Chatterjee who wanted to "see the ghosts".[126] At night, as they were making their way to the aerodrome they saw a flickering light within the premises which, due to the strong wind, seemed to move.[127] They thought it was will-o'-the-wisp .[128] Thapa jumped into action as he unleashed his *khukri* to attack the "ghosts" which turns out to be local adivasi women with a hurricane lantern who had gathered under a *mohua*tree to collect some flowers.[129] Thapa's indiscriminate hacking caused the death of one Gelhi Majhiani and injured two other women.[130] The Sessions court judge however, acquitted Thapa declaring that his actions were the result of a stern belief in ghosts and that in the moment; Thapa believed that they were lawfully justified.[131]

5.5. The Way Ahead

The need to protect the indignity of the indigenous and tribal peoples have been felt and acknowledged by the world community and have been advocated by many belonging to this community and beyond. The problems of assimilation, self governance and preventing the

[120] Ibid

[121] Ibid

[122] Ibid

[123] State of Orissa v. Ram Bahadur Thapa (1959)

[124] Supra note 110

[125] Ibid

[126] Ibid

[127] Ibid

[128] Ibid

[129] Ibid

[130] Ibid

[131] Ibid

continuing menace over this vulnerable class has been plenty. The English doctrines, the religious dictates and the economic exploitation has been the hindrances to the protection of the tribals in most of the countries including the commonwealth. The judiciary has rightly identified them and had been providing relief to these peoples from such violation of human rights. State must ensure that these rights are not infringed by any of the state machinery and also such rights be not abused by any other people. Thus a comprehensive machinery is needed to be set up in furtherance of updated international standards to protect the rights of the peoples and to ensure justice in its comprehensive sense to all belonging to these communities and prevent the growing sense of intolerance and retaliation of these poor and deprived lot in the name of development, construction of dams etc. The way ahead is a way filled with struggle for these peoples but the struggle must continue in every possible way with the fruitful contribution of the judiciary.

However, in some cases the tribals have taken the extreme steps to prevent continued exploitation and violation of their human rights.

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 Kerela lead 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 subsequently diploid which unleashed a brutal attack on the innocent adivasis and opened fire resulting in the death of two adivasis.[132]

Another incident happened in Madhya Pradesh in the district of Dewas, where the police opened fire on tribals in the village of Mehndi Kheda and has shot and killed four persons. The police had leashed a reign of terror and thousand of adivasis had fled their villages and were hiding in the forest while the police and administration ransacked their village. This state supported repression on groups' unarmed and unprepared shows the true nature of the state towards the tribes in India.[133]

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

[133] Srilata Swaminathan, 'A Tale of Continued Oppression: Government Atrocities on Tribals in Dewas', Economic and Political Weekly, May 5, 2001 pp 1510-1512 at p 1511

In yet another incident there was retaliation by the tribes, in Orissa, in 1998, thousand of tribal prisoners demolished the jail, killed two under trial prisoners and then burnt both of them in front of the police station. In fact one of them was alive and had tried to run away from the fire but was quickly chased, killed and again thrown into the fire.[134]Thus is this struggle between the tribals and the non-tribals, which may be compared to a race between a disabled one legged person and an able bodied two legged person. Parallel, the two branches of the State, the Legislature and the Judiciary are in constant tussle relating to the various issues of tribals in the arena of both property right as well as the amending powers of the Constitution and more recently, on human rights violation.

A Sum Up

The above discussion includes a handful amongst the plethora of Indian and foreign cases (including a host of cases involving tribal courts in India), ideally reflects the changing condition of the tribal and indigenous people towards a more prominent position in the society. The chapter highlights the insensitive approach of the non tribals and the state governments towards the adivasi and tribal communities. Instances of developmental projects, leading to large scale displacement of forest dwellers and adivasis of the hills has been witnessed by the country. There have been instances of land grabbing by non tribal as well as governmental machinery in connivance with the capitalist class. Instances of large scale corruption in noticed in both Indian and American scenarios. The most positive aspect that has been notices in the last few decades is the contribution of the court towards the protection of the tribals and indigenous peoples all across the globe. The sensitive feeling towards the tribal deprivation has to a great extent provided them the much needed encouragement. In the absence of educated tribals to move to the court for redressal has permitted other social organisations and social workers to file cases on behalf of these vulnerable sections through PIL has been a welcome step in the protection of the rights of these peoples.

Another aspect that must be noted is that mere legislation will not suffice to protect the tribals against the market forces which are based on tribal exploitation and deprivation and more explicitly on the colonial structure and philosophy. Only laws implemented in conjunction with social activists, and raising tribal consciousness, can checkmate this process.[135] Such activism should come from the judiciary both including the judges and the prominent advocates who devote their life and profession for humanity and to abjure violence.

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[134] Lalit Das. 'Tribal Policing- A Nightmare, The Indian Police Journal, July-September 2001 at p 39

[135]The Problem, Marginal Tribals, Seminar 412 December 1992 at p 14.available at, http://www.du.ac.in/du/uploads/Faculty%20Profiles/2015/Anthropology/July2015_Anthro_Vinay.pdf (Accessed on December 4, 2015)