TRIBAL RIGHTS STAND IN COUNTERPOISE TO WILDLIFE CONSERVATION STRATEGIES – THE NEED FOR 'RIGHTS BASED' APPROACH IN INDIA

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ABSTRACT

Wildlife conservation and the rights of tribals are often seen as mutually exclusive, as opposed to each other. When we say 'wildlife conservation', we do not tend to include the indigenous people within its ambit. Neither are they placed on the same pedestal as the fellow human beings when it comes to the protection of basic human rights. In this manuscript, the Authors would discuss the Indian perspective in balancing the rights of tribals and wildlife conservation. First, the authors would briefly showcase the history of wildlife conservation in Indian forests, the implementation of such laws and their impact on tribals. Then, the authors would enunciate the Constitutional and statutory protections available to the tribals, and the role of the judiciary in upholding tribals rights. Further, the authors would make a comparative study by referring to the laws regarding wildlife conservation in various countries. Finally, the Authors would reflect upon the drawbacks in the approach towards wildlife conservation in India in the light of 'transformative Constitutionalism' and would suggest that wildlife conservation need not be achieved at the cost of basic rights of tribals.

Keywords**:** Tribal rights, Wildlife conservation, Rehabilitation of Tribals, Transformative Constitutionalism and Tribal rights, Rights based Approach

INTRODUCTION

India, a gift of nature, is the home to a variety of diverse flora and fauna. Being a rich biodiversity hotspot, the need arose to protect and conserve the wide variety of species of plants and animals and the habitat they live in. All these efforts came at the expense of the tribal communities who regarded the forests as their homeland, as the policies and ideologies were conservation-oriented. Over time, groups of people began protesting against the concept of displacing the indigenous tribals from their ancestral lands. It also led to the passing of statutes and guidelines for guaranteeing the rights of traditional forest dwellers. However, these statutes were undermined as some of their provisions were in conflict with the conservationist approach.

It is true that the wildlife habitats are to be conserved and safeguarded. At the same time, in the name of conserving them, it is unreasonable to evict the forest dwellers since they also belong there and it cannot be justified by providing them with some piece of land, out of which they were expected to be benefitted. Hence, a mechanism that fosters the inclusivity of tribals in conservation plans has to be devised so that their rights are not violated at the cost of wildlife conservation, among other factors.

CONSERVATION BEFORE BRITISH COLONIZATION

The Santhal Rebellion of 1855 was regarded as the most significant and the first tribal movement in the path of Indian Independence. However, Shachi Arya comes up with the information regarding the existence of tribal movements even beyond that, which dates back to 1778 and even before.[i] He bases his work on Mahaswetha Devi's texts and has concentrated on the forgotten history of tribal participation in Indian independence. According to him, the tribal movements had started during the Marathas reign. He also argues that the intention behind entry of British in India was even sensed by tribals but not Mughals. He regards them as more sensible people and their activism protected them from being controlled by any external forces before Independence.[ii]

Over the past few centuries, the advancement of man brought about a massive depletion of the forests. Owing to the rise in population and the fact that men are dependent on the forests for

almost everything, there has been a gradual exhaustion of the forest area and its resources. Prior to the British colonization, numerous pieces of evidence that can be found in the ancient texts like *Vedas*, *Puranas* and *Arthasastra* points out the significance given to forests and wildlife. *Yajur Veda* highlights that the relationship between human beings and wildlife should be of mutual respect and kindness and not of dominion over them.

During the Maurya period, the Emperors used to appoint officers to keep an eye on the forests. Notably, Emperor Ashoka took various measures to protect and conserve forests. When the Mughals invaded India, masses of people fled from the villages and migrated to the forests which led to the formation of settlements. As the invaders were avid hunters, forests meant nothing more than a place where they could hunt and cut trees for timber. Nonetheless, the Mughals contributed to conservation as they fancied having beautiful and well-maintained gardens and parks.

The lives of the tribes and dwellers were intertwined with the forests and they held the forests in high regard; several ceremonies performed by them rooted from the forests. They had a mutually beneficial relationship with the forests wherein they utilized the forest resources for fuel, food, shelter and hunted animals for their subsistence but also placed a restriction so that their activities never meddled with the forest ecology. They were permitted to utilize the forest wealth without any restrictions. Thus the practices followed in ancient India taught the people to respect nature and safeguard the wildlife. Any kind of exploitation was considered unjust and opposed to the ethics of the culture.

EXPLOITATION OF FORESTS DURING COLONIAL ERA

In Europe, the demand for teak trees was on the rise after the exhaustion of oak and teak forests as they were utilized to supply timber for farming, shipbuilding and iron smelting. Gradually, the forest resources of India were also expropriated by the British authorities as they generated a fortune. They made sure that the forest resources cannot be used without the knowledge and prior permission of the authorities with the intention of being the exclusive users of the forest resources. In the early 1800s, a commissioner was appointed to inspect the availability of teak in the Travancore and Malabar forests and to conserve it. But the conservator looted the forest's wealth instead of conserving the same which later on resulted in the abolition of the title.

In 1807, the East India Company obtained complete royalty rights over teak wood so that no ordinary person can use timber for domestic purposes. These activities escalated with the introduction of railways in the year 1853. The realization of the authorities that the depletion of Indian forests could lead them to a huge loss resulted in the formation of a forest department in the year 1864. For the first time, the Indian Forest Act was passed in 1865 which established a State monopoly over the forests. As forests were considered a main source of revenue, the Act allowed the authorities to declare any land with trees as government forest and use it as they please.

It was followed by the Indian Forest Act of 1878, which was a stringent piece of legislation passed to curtail the customary rights of the traditional forest dwellers and to secure the British government, its claim on the forests. The main features of this Act were that the forests were classified as reserved forests, protected forests and village forests – and the forest settlement procedures were established. The rights of the locals to use forest resources was taken away while certain privileges were given to them that could be withdrawn at their will. The ambiguity of language and several amendments made to this Act demanded a single piece of legislation.

The Indian Forests Act of 1927**,** a consolidation of all the pre-existing laws were passed and it was, again, solely confined to protect British interests. At that time, forestry was completely production-oriented and focused only on the extraction of forest resources, predominantly timber. The main objective of enacting this statute was for the British to exercise absolute ownership over the forests in order to meet the demand for timber. This Act looked upon forests as a tradable commodity and laid down rules to exercise control over transit of forest produce, to collect duty levied on timber etc. It laid down the procedure required to be followed to declare an area as reserved, protected or village forests.

The Act mandated the appointment of a forest settlement officer to investigate and determine the rights alleged to exist in favour of any person over a land determined as reserved forest. Since the foremost intention of this Act was to generate revenue by exporting timber and denying the rights of indigenous communities, the process of settlement was ineffective. Large patches of land which were mostly traditional homelands of tribes were declared as forests and the dwellers therein were considered encroachers as their rights were never recognized. The

1927 Act reveals the exploitative intentions of the Britishers rather than the ecological interests to conserve the forests, and as a result, it caused a serious depletion of forests in India.

POST-COLONIAL ADVANCEMENT

Hunting of wild animals for their organs and skin was the source of livelihood for forest dwellers over a long time. In early days, hunting was a necessity as people were nomadic and had to eat meat for sustenance. But as time passed, the act of poaching animals for commercial purposes to a large extent led to a plunge in the population of wild and exotic animals. As a result, there was a disruption of ecological balance and exploitation of the wildlife which resulted in several species becoming endangered and vulnerable.

In addition, Article 48-A of the Constitution says that "*the State shall endeavour to protect the environment and to safeguard the forests and wildlife of the country.*"[iii] Article 51A (g) imposes a fundamental duty on every citizen of India "*to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.*"[iv] In order to fulfil the Constitutional mandate, the Wildlife Protection Act was enacted in the year 1972. The aim of the Act was to protect the plants, animals and bird species and various other ancillary matters. It laid down provisions to ban the hunting of wild animals and made it illegal. However, hunting was deemed to be legal if it is done with a license given by an authorized officer or for the purpose of self-defence to protect life or property. The Act enabled the respective governments to declare a particular area as sanctuaries, national parks, tiger reserves and conservation reserves.

Over the years, another issue arose regarding the conservation of forests. As the forests were designated by the state governments for numerous purposes such as agriculture, industrial projects and other developmental projects, deforestation was increasing at an alarming rate. The forests play a major role in maintaining the ecological balance necessary for the survival of all living beings. Hence, there arose an immediate need to conserve whatever is left of the country's forest lands.

The Forest Conservation Act was passed in 1980 as a crisis-driven response. The object of this Act was to regenerate the forests by planting more trees, prevention of deforestation, prevention

of loss of biodiversity and prevention of soil erosion. The Act was promulgated to curb the indiscriminate diversion of forests and to regulate diversion for non-forest purposes such as irrigation projects, railways, mining, roads etc. The power to grant permission for non-forestry purposes is vested with the central government. Further, it prohibits reserve forests from being de-notified by the State government without prior approval of the Central government. Hence, if a State intends to declare an area as a reserve forest, it has to comply with the rules relating to the settlement of claims of the dwellers by a Forest Settlement officer.

IMPACT ON TRIBALS

The ban imposed on hunting has been the most crucial factor in the resurgence of wildlife in India. In the decades that followed, there has been a rapid increase in the establishment of wildlife sanctuaries, national parks and protected areas. This massive effort has borne its fruit by preserving and ensuring protection to the animals. However, it came at the cost of the tribal people and indigenous communities living within the areas declared as wildlife preserves. By following the orthodox principles of conservation, millions of people were evicted from their homeland and hundreds of villages got destroyed. As tourism generates revenue for the government, there has been a bloom in that sector as well. The irony is that where tribals were chased off from their own land and termed as 'encroachers', the tourists were welcomed into the sanctuary and reserves. Thus, the communities who have lived in and worshipped the forests were being subject to eviction and harassment.

Under the Wildlife Protection Act, several protected areas (PA) were created. Often, these PAs were carved out of the existing reserved forests that were established under the Indian Forests Act of 1927. During that time, the British cared less for the communities living within the forests. Such utter disregard for the people claiming their traditional right in their homelands continues even now. Over the next decades, there has been a huge increase in the establishment of protected areas and as a result, the tribals are being evicted from their lands indicating that they are the intruders in the conservation of forests.

As a matter of fact, the right to the lands they have been living in for ages is a traditional one. The indigenous communities have been maintaining and conserving their forests and their

resources even before the concept of 'conservation' was conceived, by using their traditional techniques and boundless knowledge of the complex forest systems. The tribes and wildlife have always maintained a symbiotic relationship benefiting both parties. The forests have always played a vital role in the tribes' spiritual and cultural identity as several customs, values and beliefs followed by them rests upon the forest and its resources. As their survival is wholly dependent on the forests, they enjoy the resources in such a way that it causes minimum damage. A strong opinion among people was that '*the tribes protected the forests; the forests protected the tribes*'.

As statutes were passed, hunting- the main source of their livelihood was banned; their homeland was declared as sanctuaries and they were termed as 'encroachers'. The people who have been guarding the forests and wildlife for all these years were considered as enemies of forests by the conservationists and policymakers. The lawmakers enacted the laws in a way that neglects the welfare of the forest dwellers, in spite of the fact that the ultimate goal of both tribes and the government is the protection of the wildlife and forests. Hence there should be a clear vision while drafting laws relating to the environment and wildlife as the lives of tribal communities are entwined with nature.

CONSTITUTIONAL PROTECTION OF TRIBAL RIGHTS

As Dr. B. R. Ambedkar says, "*Social democracy means a way of life which recognises liberty, equality and fraternity as the principles of life*"[v] Besides their traditional and customary rights over the forests, the tribes are also given protection under the Indian Constitution. The framers of the Constitution wanted India to be a social democracy and they intended to take away all the inequalities, thereby protecting the basic human dignity of all the individuals irrespective of their status or class and by providing equal opportunities to all groups of people, thereby ensuring the trinity of rights, i.e., liberty, equality and fraternity.

The Preamble of the Constitution contemplates India as a 'Socialist Democratic Republic'. It also makes a commitment to secure social, economic and political justice. The establishment of the egalitarian social order through rule of law is the basic structure of the Constitution.[vi] The objective of the Constitution is to build an egalitarian social order where there will be

social and economic justice for all, everyone including the low visibility areas of humanity in the country will be able to exercise Fundamental Rights and the dignity of the individual and the worth of the human person which are cherished values, will not remain merely the exclusive privileges of a few but become a living reality for the many.[vii]

In *Samatha v. State of Andhra Pradesh*, it has been observed;

> "It is an established rule of interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic broad and wide interpretation of the Constitution make social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to "we, the people of India," who would include the Scheduled Tribes. All State actions should be to reach the above goal with this march under rule of law."[viii]

Part III of the Constitution of India which guarantees Fundamental rights are also applicable to the tribes. Article 14 provides that the State shall not deny any person, the right to equality before the law and equal protection of the law within the territory of India the same shall be available to all persons, irrespective of them being citizens or non-citizens.[ix] It is pertinent here to note that the equality approach adopted by Courts is the 'substantive' approach and not the 'formal' approach.[x] Article 15 prohibits discrimination by the State of any citizen on grounds solely of religion, race, caste, sex, place of birth, or any of them.[xi] Article 15(4) goes a step further and states that nothing in Article 15 prevents a State from making any provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[xii] Hence, the historical discrimination of the tribes must not only be forsaken by the State, but the State should take material steps to repudiate the consequences that are being faced by them and place them in a respectable position.

Right to life enshrined in Article 21 means something more than mere survival of animal existence.[xiii] The right to live with human dignity with minimum sustenance and shelter and all those rights and aspects of life which would go to make a Man's life complete and worth living would form part of the right to life.[xiv] Therefore the right to livelihood,[xv] the right to shelter,[xvi] the right to a clean environment,[xvii] the right to health,[xviii] the right to economic equality,[xix] and various other socio-economic rights have been brought under the purview of the right to life

under Article 21 of the Constitution. Similarly, the tribals also have the fundamental right to social and economic empowerment.[xx] As a part of the right to development to enjoy full freedom, democracy offered to them through the States regulated power of good Government that the lands in scheduled areas are preserved for social-economic empowerment of the tribals.[xxi] Agriculture, being an integral aspect of the country's economy, is also a source of livelihood for the people in rural areas.

It has been held in *Rao v. Union of India* that;

> "India is a predominantly agricultural society; there is a strong linkage between the land and the person's status in the social system. The strip of land on which they till and live assures them equal justice and dignity of their person by providing to them a near decent means of livelihood."[xxii]

The land is the tribals' most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, dignity, economic and social equality, permanent place of abode and work and living.[xxiii] The Courts in India have time and again upheld that the fundamental rights are applicable equally to the tribals as the rest of the population. It shows that they should not be given less protection just because they are not as developed and equipped as the rest. Access to justice should also be given to them as it is provided to anyone.

Article 29(1) of the Indian Constitution provides that, "any section of the citizens having a distinct language, script or culture of its own, has the right to conserve the same."[xxiv] It is pertinent to note that the language, script or culture should be 'distinct' so as to attract protection under Article 29(1). When it comes to tribals, we can see that they have a distinguished culture which is not similar to the rest of the population and that keeps them distinct in their own sphere.

As Dr. Ambedkar noted, "Tribal roots were still in their civilization and their own culture…their laws of inheritance; their laws of marriage and so on were quite different from Hindus."[xxv] Moreover, during the Assembly Debates, Mr. J. J. M. Nichols Ray, who was a representative of the tribals, marked a significant note which has been forgotten. He noted;

> "The people of hills had their own culture which was sharply differentiated from that of plains…Among the tribesmen is there no difference between class and class. Even the Rajas (kings) and Chiefs work in the fields together with the labourers. They eat together. Is that practised in the plains? The whole of India has not reached that level of equality. Do you want to abolish that system? Do you want to crush them and their culture must be swallowed by the culture which says one man is lower and another higher?"[xxvi]

As we can observe, the culture of the tribals has always been distinct even before the inception of the Constitution. Hence, the culture of the tribals and their traditional knowledge and legal systems that are associated with their culture, have to be given protection under Article 29(1) of the Constitution. Moreover, the right conferred upon the section of the citizens residing in the territory of India or any part thereof to conserve their language, script or culture is made by the Constitution absolute.[xxvii]

Apart from Part III of the Constitution, the Directive Principles of State Policy (DPSP) also protects the rights of the tribes. Article 38 provides that the State has the duty to "secure a social order in which justice, social, economic and political, shall inform all the institutions of the national life and in particular to minimise inequalities in income and eliminate inequalities in status among individuals and amongst groups of people."[xxviii]

Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good.[xxix] Article 46 also provides that, "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."[xxx]

Tribal Administration and Autonomy:

Article 244 along with the Fifth and Sixth Schedules of the Constitution provide for the direction and administration in order to protect the tribals from exploitation. These provisions, when read together, create a manifest immunity for the homelands of tribals that have been recognized as scheduled areas. The intent behind these provisions is that, through the historical

lane, the tribal or the indigenous communities had suffered a lot at the hands of landlords, colonizers and the other people from the 'mainland'. Thus, to ensure the non-repetition of these historical wrongs and to restore their dignity, the Constitution has guaranteed special protections.

The traditional legal system developed by the tribals were sufficient to deal with the problems and their complexities of tribal lives. The Constituent Assembly Debates also show that the framers wanted the tribals to be governed by a framework that was part of their own culture. The reports of the Sub-Committees also enable us to understand that there was an understanding to enact legislations, if any, without interfering into the autonomy of the tribals' administration. The Cabinet Mission's statement urged that a Committee comprising due representation of affected parties had to be formed in order to advise on the matter relating to applicability of provisions with respect to their administration under the Constitution.[xxxi]

The Constituent Assembly had set up advisory committees on fundamental rights, minorities and tribal areas. The reports of these committees provide the basic understanding behind how the framework of the Constitution has been structured, and it is the same when it comes to tribals as well. As there are two yardsticks, the development of the nation in one hand and the rights of tribals on the other hand, the framers chose the rights based approach.

The Sub-Committee on Assam in its report underlined the presence of the democratic character among the tribal population and concluded that;

> "In all the hill areas visited by us, there was an emphatic unanimity of opinion among the hill people that there should be control of immigration and allocation of the land to outsiders, and that such control should be vested in the hands of the hill people themselves. Accepting this then as the fundamental feature of the administration of the hills, we recommend that the Hill Districts should have the power of legislation over occupation or use of land."[xxxii]

Hence, the administration of the tribals and their land was to be given at their hands. We can see some of the instances in the Constitution itself. Article 371A and 371G protects the customary laws, administration of civil and criminal justice according to their customary law

in the tribal areas of Nagaland and Mizoram respectively. However, it is limited to the tribes in North-east India.

STATUTORY PROTECTION AND THEIR DRAWBACKS

Article 243-M of the Constitution of India, 1950 provides that "where Scheduled Areas are concerned, provisions of this Chapter will not apply unless a special law is enacted by Parliament making such exceptions and modifications as necessary". The provision intends to recognize and respect the rights of *Adivasis* such as the right to self-governance in those Scheduled areas. The Parliament enacted the Panchayat (Extension to Scheduled Areas) Act, 1996 [PESA] in the above-mentioned context. The Act laid down the exceptions and modifications, both in Constitution and in the State Panchayati raj legislations. PESA extended the scope of Panchayati raj institutions over the Scheduled Areas also.

Panchayat (Extension to Scheduled Areas) Act

By bringing in the Gram Sabha, the prevailing approaches to forest governance were decentralized by PESA and the traditional rights were recognized over other resources. Section 4(d) provides that, "every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution". The three-tier panchayats are the executive arms of the Gram Sabha, and therefore should not statutorily be allowed to overlook the authority of the Gram Sabha.[xxxiii]

The Act also required the States to enact legislation within 1 year from the passage of PESA. Local self-government and village administration are State subjects according to Entry 5 of List II of the Seventh Schedule to the Indian Constitution. Thus, the State Legislatures are solely empowered to legislate upon matters relating to Panchayati raj institutions. In order to get PESA implemented, required changes need to be made at State level Panchayati raj legislations and they should conform to the object and intent of PESA. Section 4(a) states that "a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources".

Section 4(l) of PESA provides that there should be a prior consultation before "acquisition of land in the Scheduled Area for development projects and re-settling or rehabilitating persons affected by such projects in the Scheduled Areas". Wherever the term 'consultation' has been used in a law, there is a requirement that such consultation must be meaningful so that the views expressed are taken into consideration in the decision-making process.[xxxiv] However, according to the Section, the consultation should be with '*the Gram Sabha or the Panchayats at the appropriate level*'. By virtue of these vague and ambiguous wordings, the State governments used them in a way to safeguard their powers so that they could unilaterally decide on matters regarding the acquisition of land. Thus, the State legislations take away the powers from Gram Sabha.

Moreover, even where the provisions were affirmed, the applicability of these provisions was subject to the framing of rules or orders as may be prescribed. In most cases, such enabling rules or orders are not yet framed. Due to the ambiguity and lack of clarity in the operative provisions of the Act and some grave omissions in the fundamental principles, the law, which is otherwise significant and radical, has largely been put into misuse. Nevertheless, PESA stood as a basis for the laws concerning tribal rights that have been enacted after that.

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act

The common ignorance on part of the tribals of the modern framework of laws and regulations ruled them out from making genuine claims. The tribal communities also felt a sense of alienation because of their fear of being evicted from their home land. Then, in 2006, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, (hereinafter known as the Forest Rights Act – FRA) was enacted in order to remedy the historic injustice carried out towards the tribals and to recognize their forest rights.

The Act recognises and vests rights and occupation in forest land in forest-dwelling Scheduled Tribes and other traditional forest-dwellers who have resided in such forests for generations but whose rights were not recorded.[xxxv] The Act provides for the right to hold and live in forest land under individual or common occupation for habitation or for self-cultivation for a livelihood by a member or members of forest-dwelling Scheduled Tribes and other traditional forest-dwellers.[xxxvi] The Act also recognises the right of ownership access to collect, use and

dispose of minor forest produce which was traditionally collected within or outside village boundaries.[xxxvii]

The Forest Rights Act made Gram Sabha the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest-dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction under the Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim in such manner as may be prescribed for the exercise of such rights.[xxxviii]

However, the Act is facing implementation issues since many operative aspects of the Act are not in consonance with the Indian Forest Act, 1927 and Wildlife Protection Act, 1972. The forest department was given discretionary power by the Indian Forest Act in respect to the administration of forest lands. On the other hand, the object of the Wildlife Protection Act is to safeguard ecology and environment and to identify National parks and Sanctuaries. Both these legislations neither considered nor recognized tribal rights. Furthermore, the Forest Rights Act creates controversy between the Ministry of Environment and Forests and the Ministry of Tribal Affairs. It has also been said that the claims of the tribals over their land were mostly rejected by the Gram Sabhas. For these reasons, the Constitutional validity of the Act is in question before the Supreme Court. The Supreme Court also noted that over 11.8 lakh claims by the forest dwellers were rejected for baseless reasons.[xxxix]

ROLE OF JUDICIARY IN UPHOLDING TRIBAL RIGHTS

The role of the Indian Judiciary in striking the balance between rights of indigenous people and wildlife conservation is significant. It is true that the Courts have not been uniform with respect to the sides that they took in balancing the same. In some cases, the Courts have displaced the tribals to another land and have directed rehabilitation. On the other hand, the Courts have also recognized the traditional rights of the tribals and directed the State not to disturb their possession on such lands. The judiciary has faced complex situations in balancing these rights.

In the famous *Niyamgiri*[xl] case, the Court held that;

> "The forest-dwelling Scheduled Tribes have the right to be consulted before their traditional lands are diverted for the commercial and non-forest purposes. They also have the fundamental right under Article 25 of the Constitution of India, 1950 to protect and preserve their religious and cultural rights."

In *Narmada Bachao Andolan v. Union of India*[xli], the Supreme Court observed that;

> "Article 21 clearly suggests that when the removal of the tribal population is necessary as an exceptional measure, they shall be provided with the land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss or injury. The rehabilitation package contained in the award of the Tribunal as improved further by the State of Gujarat and the other States prima facie shows that the land required to be allotted to the tribals is likely to be equal, if not better than what they had owned."[xlii]

In *Banwasi Seva Ashram v. State of Uttar Pradesh*[xliii], the Supreme Court directed the NTPC for proper rehabilitation of the tribals in their Mirzapur project. The Court also ordered that NTPC must ensure the rights of the evicted persons were determined in their respective holding and were properly rehabilitated and adequately compensated.

In general, the State has to follow the procedures as provided in the provisions of the Wildlife Protection Act, 1972 in order to acquire land for National parks and Sanctuaries, before a final notification is issued with regard to the acquisition of the land. However, in the case of *Pradeep Krishen v. Union of India*[xliv], since the final notification was not issued, the Court directed the State to issue final notification before barring the entry of villagers in the National Park and to institute an enquiry for those who claim a right over any land proposed to be included in the said Sanctuary or National Park.

In *Fatesang Gimba Vasava v. State of Gujarat*[xlv], the Gujarat High Court emphasized that the rights of tribals depend on the forest, which was the only source of their livelihood. The supply of bamboo to the tribal population was to enable them to make out a living by making articles for sale in the open market. The court held that their removal did not warrant action by forest officials.

In *Animal and Environment Legal Defence Fund v. Union of India*[xlvi] and *Chandmari Tea Co. v. State of Assam*[xlvii], it has been made clear that the State government must always consider the rights of tribals before an action is taken to acquire an area and declare it as a National Park area.

In *State of Kerala v. Peoples Union for Civil Liberties*, the Court observed that;

> "The question of restoration of land should be considered having regard to their exploitation and rendering them homeless from the touchstone of Article 46…However, it may be of some interest to consider that the insistence of autonomy and the view of a section of people that tribals should be allowed to remain within their own habitat and not be allowed to mix with the outside world would depend upon the type of Scheduled Tribe category in question."[xlviii]

The court was of this view since some of the tribes were still living in jungles and were dependant on the same for their food, shelter and livelihood. On the other hand, some part of the tribal population had moved out and became entwined with the mainstream population.

If we observe the propositions laid down by judiciary when it comes to preserving the rights of tribals, it can be seen that the judiciary has tried to protect the interests of the tribals not by restraining them from being evicted, but largely by making sure that the evicted population gets the proper rehabilitation. Even though the court has stressed upon the consent and the consultation with the tribals before them being evicted from their home land, their rights had to pave way for the national growth. This has been the stance of Indian judiciary towards the tribal rights over the years.

LOOKING BEYOND REHABILITATION - THE STRIKING REALITY

As Tanika Sarkar notes, "For the earliest members of the Indian family now facing the prospect of extinction, subjugation, dispossession and usurpation of traditional rights live in their collective memory."[xlix] The tribals are no longer left to live in isolation. With the advent of industries, roads, global markets, dams, reservoirs, national parks and reserve forests, the rest of the population has relentlessly moved closer to them, which is resulting in their assimilation.[l]

The real question here is, are the constitutionally guaranteed rights of tribals actually being protected? Even if they are provided for rehabilitation and compensation for their property after being evicted from their home land, will that suffice? We tend to forget about the greater picture as we concentrate on whether they have been rehabilitated and compensated. We also do not realise the consequences of them being rehabilitated to a relatively new environment.

The sorry state of affairs is that the tribals are evicted and they are pushed to this extent not only for the cause 'national development', but even for wildlife conservation. Even when there are Constitutional and Statutory protections, we can see that the rights of tribals and forest-dwellers are being curtailed. This is due to the fact that in India, we tend to look at conservation only from an ecological point of view. However, if one looks solely at the ecological approach, not considering the socio-political and cultural understanding of forests and tribals who live there, then it leads to ultimate chaos. Not only had the animals lived in forests, but also the tribals and forest dwellers. Evicting them from their land in the name of conservation is erroneous and necessary steps are to be taken to avoid their eviction. 'Over 60% of sanctuaries and 62% of national parks had not even completed the required process of rights settlement, though many had been declared more than two decades earlier,[li] says the data submitted to the Apex Court in 2005. The Tiger Task Force of the Government of India also declared that 'in the name of conservation, what has been carried out is a completely illegal and unconstitutional land acquisition programme'.[lii]

It is true that the animal species are getting extinct not primarily because of hunting by tribal communities. It involves a lot of external factors. In 1947, over 49% of India's land were forest land. According to India's State of Forest Reports (ISFR), "about 4.238 million hectares of land was diverted for developmental projects between 1951 -1980. In 1980, the central government enacted the Forest Conservation Act 1980 which made forest diversion difficult. Since then, 1.5 million hectares of the forest area has been diverted for such projects." Now, the percentage of forest land in India is just 21.67 percent.[liii] It is evident that there has been a significant decrease in the percentage of forest lands in India post-independence. This is due to the fact that the non-tribals and the State appropriate the forest land for other private or commercial purposes, thereby affecting the livelihood of animals and tribals.

Due to industrialization and urbanization, the industries use forest lands to dump their wastes and they pollute both groundwaters as well as water bodies in the forests. The State uses the doctrine of 'Eminent Domain' as a tool to occupy forest lands and make them as State property. The tribals also fear this doctrine since the States use the doctrine to their whims and fancies so as to evict the tribal population for a "larger good", including the construction of railways, dams, etc. Ironically, the tribes are being deprived of their livelihood, evicted from their homeland for the "larger good" of others.

It is pertinent here to note that the Supreme Court, on June 7, 2021, had directed for the removal of all encroachments on forest land within 6 weeks in a plea seeking a stay on the demolition of 10,000 houses that had been planned by the Municipal Corporation of Faridabad.[liv] An appeal has been made to the Indian Government by the experts of UN Human Rights seeking to stop the mass eviction ordered by the Supreme Court to take place at Khori Gaon, in Faridabad, Haryana. The experts preferred this appeal because the eviction, if takes place, would render 100,000 people homeless, including 20,000 children that too when the Country is facing the COVID-19 crisis. The experts wrote, "we find it extremely worrying that India's highest court, which has in the past led the protection of housing rights, is now leading evictions placing people at risk of internal displacement and homelessness, as is the case in Khori Gaon."

There has been a huge disparity between the economy and livelihood of tribals before and after industrialization, globalization and urbanization. Before the advent of all these factors, the economy of the tribal population was autonomous in character. Then came the barter system, where the world economy had to come in contact with their economy and the latter had to become a part of world economy. Moreover, monetization due to migration and other social issues did not help their cause and they had to get along with the economy of the rest of the world, which was way ahead. The fact that has to be understood is that even when some of the tribal population have come out and live with non-tribals, they are placed in the lowest strata as they only perform daily wage works and they lack the sufficient skill to compete with the rest of the world. It could be difficult for them to accustom with the culture of the outer world and to cope with the modern society developments.[lv]

The mainstream population, if their land is getting occupied by the government under the guise of Eminent domain doctrine, they are being compensated either by way of money or equivalent

land. They generally do not find so much difficulty in adapting to the new environment, which is quite familiar to them. However, on the other hand, if the tribals are getting evicted from forests or hills and they are rehabilitated in the plains, the whole demography, culture and everything around them changes completely. Even if they are compensated for their property, they are kept in the lower strata as they cannot be placed on the same footing with the rest.

Alienation cannot be adequately described in terms of the loss of a material livelihood alone; it is most profoundly a wider loss of cultural autonomy, knowledge, and power .[lvi] One can argue that the government is giving reservations for the Scheduled Tribes for them to be placed equally among others and to reduce any kind of inequalities in the society. This can be true with regard to the set of tribes who actually want to come out of forests and mingle with the rest of the world. However, there are tribes who do not want to co-exist with the rest of the population. As far as these set of tribes are concerned, the rehabilitation process is nothing but evicting them from their society and culture where they treat everyone equally and are placed in a dignified position, and rehabilitating them in the environment that is completely alien to them. When this happens, they are placed in the lower strata of the mainstream society. Therefore, when rehabilitation happens, they are crushed down the line and ironically, they are given reservations by the same government to cope with the rest in the process of being equal to them.

It is the duty of the State to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.[lvii] In the first place, the State should strive not to create inequalities among different groups of people. It should rather minimize the already existing inequalities. With respect to the tribals, the State in itself is creating inequalities by placing tribes in a totally different environment. The Constitutionally emphasised duty to provide social equality and to minimize inequalities should be seen beyond the words, in substance. Hence, it should be the duty of the State to not create inequalities, along with minimizing the same.

CONSERVATION APPROACH IN OTHER COUNTRIES

With respect to the territorial rights of the indigenous people, the American approach is that the tribes shall have sovereignty over the lands they own. They also have fishing and hunting rights and the freedom to practice their religion. States should ensure their participation, consultation and prior consent in any matters that relate to their land. They are also obliged to make a regular and meaningful consultation with the indigenous people regarding the conservation and restoration of forests. The IACHR (Inter-American Commission on Human Rights) reports play a major role in influencing the rights of indigenous people in America. One such report states that "the relationship of indigenous people with the Earth is not merely a question of possession and production but rather a material and spiritual element to be fully enjoyed, including to preserve their cultural heritage and to transmit it to future generations".[lviii]

In Australia, by virtue of European settlement, the indigenous people were deprived of their land. When it was proved to be a disaster for wildlife and forest conservation, the indigenous people are being sent back to manage those lands and to conserve them. A variety of conservation activities were conducted by the indigenous ranger groups and this approach, according to them, keeps the culture and traditional knowledge intact and as a result, the conservation activities are successful. Moreover, the Territory Parks and Wildlife Conservation Act, 1976 provides that the Aboriginals who have traditionally used an area of land or water can continue to use the area of land or water for hunting, for food gathering (otherwise than for the purposes of sale) and for ceremonial and religious purposes.[lix]

Canada is a step ahead and it is functioning towards conservation led by indigenous people. At both provincial and federal levels, aboriginal interests have been specifically included in legislation involving environmental assessment and their participation has also been enhanced. In the environmental decision-making processes, efforts are being made to incorporate the traditional knowledge of these people.

Switzerland and the United Kingdom have adopted the IUCN (International Union for Conservation of Nature) Principles in order to conserve wildlife and to protect the rights of indigenous people. It consists of 5 Principles and these principles encompass 22 guidelines. The ultimate aim of these principles is to resolve conflicts between the indigenous people and

the scheme of protected areas, without any violation of the inherent rights of the indigenous people. These Principles also mandate that the conservation institutions should draw agreements with the indigenous community where the protected area is affecting the traditional rights, or the land of such people so as to ensure the protection of their rights. These mechanisms should be equitable and transparent.

TRANSFORMATIVE CONSTITUTIONALISM AND 'RIGHTS BASED' APPROACH

Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose.[lx] Thus, transformative constitutionalism signifies the ability of the Constitution to adapt and transform with the changing needs of the times. It has to be noted that the concept of transformative constitution has always been imbibed in our Indian Constitution and the framers have always wanted the Constitution to be a dynamic, living and a transformative document.

This does not mean that the text of the Constitution has to be amended time to time in order to achieve the same. The core structure and the basis of the *Constitution will never change, but the Constitution will continue to adapt to the requirements of society.* The courts, as the interpreters of the Constitution, have to give meaning to the same text in accordance with the changing needs of the society so as to have a contemporary meaning for the Constitutional text. *It gives utmost importance to Constitutional morality rather than what constitutes morality according to the popular perceptions of the society.*

The Apex Court in *Navtej Singh Johar v. Union of India*[lxi] has observed that;

> "The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature."[lxii]

In this case, the court specifically referred to fundamental rights, more specifically liberty and equality as the dynamic and timeless rights and they have to be given a dynamic interpretation realizing the nature of those rights. The court also went on to recognize the ideals stated in the Preamble of the Constitution and observed that;

> "The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution."[lxiii]

The concept was applied to the dispute regarding religious rights in the case of *Indian Young Lawyers Association v. Union of India,*[lxiv] wherein the court observed that the religious practices that go against dignity, equality and liberty of the individual shall not be immune from the judicial scrutiny as the practices that detract from the transformative vision of the Constitution should not be granted supremacy over the same. The court went on to state that;

> "The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the Constitution are operationalized and are aimed towards the self-realization of the individual."[lxv]

Hence, it can be seen that the heart of transformative constitutionalism lies in giving prevalence or primacy to individual liberty and dignity over any of the ideals mentioned in the Constitution, as it recognizes individual as the basic unit of the Constitution and all the other existing ideals have to be looked into from the standpoint of individual liberty and dignity. The same applies when it comes to tribal rights as well. Since the author tries to strike balance between wildlife conservation and tribal rights, there is a need for a mechanism to put individual liberty and dignity up front, along with conservation strategies.

The transformative model, which has always been imbibed in the Indian Constitution, supports the 'rights based' approach. It suggests that the rights of tribals have to be considered as a part of the conservation plan. There are numerous factors for which tribals are being evicted. When it comes to constructing roads, bridges, dams, etc., the inclusive approach is seldom possible. But when it comes to conservation, the tribals have to be included in the conservation plan and necessary steps have to be taken so that they live in the environment where they want to live.

The rights-based approach provides for the inclusivity of tribals in policy making and actual consultation with them before taking any decision that involves their rights.

CONCLUSION

Looking beyond the rehabilitation processes, the tribals are being subjected to the environment where they are never equal to their counterparts. Rather than taking measures to minimise this inequality, it would be remarkable if the State strives not to create this inequality as such. With the transformative model of the Indian Constitution and the Constitutional morality being given utmost importance, where the individual is seen as the basic unit, his liberty, dignity and the right to be treated equally should be upheld, not only on paper but also in substance and effect. The 'effect' of rehabilitation puts the whole tribal 'culture' in danger by placing them in an environment with a different culture altogether.

The current approach of India towards the conservation policy will lead to nowhere but to the extinction of the tribal communities and forest-dwellers. Often referred to as 'the forest keepers', the tribes play a significant role in the conservation of forest and wildlife. They have managed the forests through centuries and they are well aware of the conservation strategies than the conservationists. As we have noted above, many countries develop a good relationship with their tribes and they involve them in decision-making processes when it comes to forest conservation, and it yielded them better results too. India should concentrate on the 'rights-based approach' so as to primarily secure the basic human rights of the people who live in forests. This approach will enhance and empower the rights of tribals and will keep them on a better footing.

ENDNOTES

[i] SHACHI ARYA, TRIBAL ACTIVISM: VOICES OF PROTEST: WITH SPECIAL REFERENCE TO WORKS OF MAHASVETA DEVI (Rawat Publications 1998).
[ii] *Id.*
[iii] INDIAN CONST. art. 48-A.
[iv] INDIAN CONST. art. 51A (g).
[v] 4 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 944 (IIIT 1968).
[vi] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[vii] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[viii] Samatha v. State of Andhra Pradesh, (1997) 8 SCC 191.
[ix] INDIAN CONST. art. 14.
[x] Telecom District Manager v. Keshab Deb, (2008) 8 SCC 402.
[xi] INDIAN CONST. art. 15.
[xii] INDIAN CONST. art. 15(4).
[xiii] Paramanand Katara v. Union of India, (1995) 3 SCC 248.
[xiv] B L Wadhera v. Union of India, (1996) 2 SCC 594.
[xv] Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180.
[xvi] Shantistar Builders v. Narayan Khimlal Toame, (1990) 1 SCC 520.
[xvii] N D Jayal v. Union of India, (2004) 9 SCC 362.
[xviii] Francis Coralie v. Union of India, AIR 1981 SC 746.
[xix] Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 SCC 104.
[xx] Samatha, *supra* note 8, at 4.
[xxi] *Id.*
[xxii] Rao v. Union of India, (1981) 2 SCR 1.
[xxiii] *Id.*
[xxiv] INDIAN CONST. art. 29(1).
[xxv] 9 CONSTITUENT ASSEMBLY DEBATES, 1025 (1950).
[xxvi] *Id.;* He also added that, "In the plains the women is just beginning to be free now, and is not free yet. But in some of the hill districts the women is the head of the family; she holds the purse in her hand, and she goes to the fields along with the man . . . . In the plains of Assam there are some people who feel ashamed to dig earth. But the Hillman is not so. Will you want that kind of culture to be imposed upon the Hillman and ruin the feeling of equality and the dignity of labour which is exiting among them?"
[xxvii] Jagdev Singh v. Pratap Singh, (1965) 6 S.C.R. 750.
[xxviii] INDIAN CONST. art. 38.
[xxix] INDIAN CONST. art. 39(b).
[xxx] INDIAN CONST. art. 42.
[xxxi] 2 SIR MAURICE GWYER & A. APPADORAI, SPEECHES AND DOCUMENTS ON THE INDIAN CONSTITUTION 1921-47 583 (Oxford University Press 1957).
[xxxii] B. SHIVA RAO, *supra* note 5, at 694, 695.
[xxxiii] K.B. SRIVASTAVA, PANCHAYATS IN SCHEDULED AREAS: AN ANALYSIS OF THE PANCHAYATS (EXTENSION TO THE SCHEDULED AREAS) ACT, 1996 (1st edn. 1999).
[xxxiv] Indian Administrative Service (SCS) Association U.P. v. Union of India, 1993 Supp. (1) SCC 730.
[xxxv] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007 (India).
[xxxvi] *Id.* at § 3(1)(a).
[xxxvii] *Id.* at § 3(1)(c).
[xxxviii] *Id.* at § 6(1).
[xxxix] Wildlife First v. Ministry of Environment and Forest, 2019 SCC Online SC 238.
[xl] Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest, (2013) 6 SCC 476.
[xli] Narmada Bachao Andolan v. Union of India, AIR 2007 SC 3751.
[xlii] *Id.*
[xliii] Banwasi Seva Ashram v. State of Uttar Pradesh, (1992) 2 SCC 202.
[xliv] Pradeep Krishen v. Union of India, AIR 1996 SC 2040.
[xlv] Fatesang Gimba Vasava v. State of Gujarat, AIR 1987 Guj. 9.

[xlvi] Animal and Environment Legal Defence Fund v. Union of India, (1997) 3 SCC 549.
[xlvii] Chandmari Tea Co. v. State of Assam, AIR 2000 Gau. 13.
[xlviii] State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 49.
[xlix] Tanika Sarkar, Jitu Santal's Movement, in Malda, 1924-1932: A Study in Tribal Protest, in 4 SUBALTERN STUDIES: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY 136 (Ranajit Guha edn, 1985).
[l] SUNIL JANAH, THE TRIBALS OF INDIA 7 (Oxford University Press 1993).
[li] SHOMONA KHANNA, EXCLUDE AND PROTECT: A REPORT ON THE WWF CASE ON WILDLIFE CONSERVATION IN THE SUPREME COURT OF INDIA (SRUTI 2008).
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[liii] MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, INDIA'S STATE OF FOREST REPORT (2019).
[liv] Sarina Sarkar v. State of Haryana*,* W.P. (Civil) No. 592/2021.
[lv] S. N. CHAUDHARY, TRIBAL ECONOMY AT CROSSROADS (Rawat Publications 2010).
[lvi] David Marsden, Resettlement and Rehabilitation in India: Some Lessons from Recent Experience, in DEVELOPMENT PROJECTS & IMPOVERISHMENT RISKS 36 (Hari Mohan Marthur & David Marsden eds. 2000).
[lvii] INDIAN CONST. art. 38(2).
[lviii] Annual Report of the Inter-American Commission on Human Rights [IACHR], Rapporteurship on the Rights of Indigenous People*,* OEA/Ser.L/V/II, (December 30, 2009).
[lix] The Territory Parks and Wildlife Conservation Act, 1976, § 122 (Australia).
[lx] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[lxi] *Id.*
[lxii] *Id.* at 85.
[lxiii] *Id.* at 96.
[lxiv] Indian Young Lawyers Association v. Union of India, (2019) 11 SCC 1.
[lxv] *Id*.