
LEGAL RIGHTS OF TRIBAL IN INDIA AND PROTECTION OF BIO-CULTURAL RESOURCE

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ABSTRACT

Since Independence, several efforts were taken to effectively accommodate tribal people to the cultural main stream of the country. Their social, educational and economic backwardness always received governmental attention. Constitution itself afforded them peculiar status and special protection. But at the same time, there always existed a very serious confusion as to what exactly is most effective methodology to ensure dignity and livelihood of tribal people. Jurists have often pointed out the relevance of property rights in the fulfillment of human personality. The object of 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006' was to grant right over land and other forest resources to traditionally forest dwelling communities. This legislation was a novel attempt of granting property rights to tribal over their habitat. This right has been denied for them for several decades. Even though the different forest legislations had continued to grant hunting and forest entry rights to tribal, there never existed a legislative enactment to grant them as property rights to tribal people.

INTRODUCTION

The 2006 enactment grant two very interesting rights to the tribals :

1. Right to hold and live in the forest land under the individual or common occupation for habitation or self-cultivation for livelihood¹.
2. Right to ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected².

Property as understood in the contemporary context is an exclusive right of ownership. Connotations like 'hold', necessarily implies property right over a thing. If so, the '2006 tribal rights

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- 1 Section 3(a), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.
 - 2 Section 3(c), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

law' grant property right to the tribal people over their habitat. The law also recognizes individual as well as common occupation. This actually is a legislative realization of actual societal relationship existing inside a tribal community. Tribal are also granted the right to collect and sustain a living by selling minor forest produce. The Act is indeed revolutionary as it reiterates and recognizes the ability of tribal community to make decisions for themselves through Gramasabhas³. But its most peculiar and notable feature indeed is the granting of property rights.

Tribal people relies on forest for their survival. At the same time they do play significant role in the preservation of forest eco system. In *Fatesang Gimba Vasava v State of Gujarat*⁴ and *Suresh Lohiya v State of Maharashtra*⁵ Courts have recognized the dependence of tribals on forest land. In *Animal and Environment Legal defense fund case*⁶ Petitioners were claiming that they had a traditional right to fish for their livelihood in Pench river. The court observed that while every attempt must be made to preserve ecology of the forest area and protect the Tiger reserve, the right of tribals formerly living in the area to keep body and soul together must also receive proper consideration. The court directed that the tribal people be given suitable fishing areas outside the heart of national park area. In *Pradeep Kishen v Union of India*⁷ Supreme court suggested that "if one of the reasons for the shrinkage of forest is the entry of villagers and tribals living in and around the sanctuaries and the national parks, there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and fauna and wildlife in that area".

But very soon in *Animal and Environment Legal defense fund v Union of India*⁸, the Supreme Court observed that "while every attempt must be made to preserve the fragile ecology of the forest area and protect the tiger reserve, the right of tribal formerly living in the area to keep body and soul together must receive proper consideration. Undoubtedly, every effort should be made to ensure that the tribals, when resettled are in a position to earn their livelihood". This decision indeed recognizes the symbiotic relationship between tribals and the forest. Tribals were seen as the protectors of forest. In the past tribal people were known to be friends of the forest department and

3 Section 2(g), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

4 AIR 1987 Guj 9. This case explains the impact of reservation of forest on the tribal habitat. The tribals were supplied bamboo at reduced rates to enable them to make a living. But State forest officials blocked the transport of articles made out of bamboo on the ground of possible exploitation of forest. Gujarat High Court laid emphasis on the rights of tribals to depend on the forest, which was their only source of livelihood.

5 (1996) 10 SCC 397

6 AIR 1997 SC 1071

7 AIR 1996 SC 2040

8 AIR 1997 SC 1071

served to inform the movement of strangers in the forest and the commission of forest offenses⁹. But when the needs of development started displacing them from their habitat, tribals were seen as a group posing threat to environment. In *Narmada Bachao Andolan v Union of India and Others*¹⁰, apex court considered the issues relating to relocation of tribals displaced due to the construction of dam.

In the past, various state governments had given lands for tribal people. But the economically advanced and politically powerful groups always established their hold over this land and alienated it from the tribals. This had detrimental impact on the tribal welfare policies of the government. In most cases the title of the land will be obtained from the tribal for negligible consideration or for no consideration by deceiving him. Thus various state governments initiated legislative measures to restore lands already alienated to non-tribals and to prohibit further alienation. This was challenged before the supreme court in a series of cases. In *Sri Manchegowda v State of Karnataka*¹¹ lands were already granted to the scheduled castes and scheduled tribes. People not belonging to these groups purchased these lands. State Government enacted a law to make these transactions null and void. The law also empowered the commissioner to take possession of the land for restoration. Buyers challenged the law before Supreme Court. Court held that the law was enacted for uplifting the scheduled castes and scheduled tribes and for implementing the directive principle enshrined in art 46 of the constitution. Thus the court upheld the legislation and validated the actions taken for restoration of land to tribal people. The Supreme Court again considered the validity of legislation providing for restoration of land to, and annulment of transfers from, the tribal people in the case of *Lingappa Pochanna v State of Maharashtra*¹². The court held that the legislation is based on the principle of distributive justice and is an instrument of alleviating oppression, redressing and bargaining imbalance, canceling unfair advantages and generally overseeing and ensuring probity and fair dealing. The restoration of possession does not involve any deprivation of property in the sense that there is unsettling of title without consideration and law provides conditions subject to which a transfer may be nullified and possession restored. Thus the legislation was held to be constitutionally valid. The apex judiciary have through these cases shown immense interest in coming to the aid of tribal people. It can also be interpreted as a recognition for the tribal welfare measures being adopted by various state governments. But at the same time these cases reveals the incapacity of tribal people to hold on to their rights particularly with regard to property rights. It is doubtful whether traditionally they have followed any system of

9 Madhav Menon T, *Law and Tribal Societies in Kerala*, 1985, Cochin University Law Review, 157, pp 170,171.

10 AIR 2000 SC 3751

11 AIR 1984 SC 1151

12 AIR 1985 SC 389

establishing property rights over land through continuous possession, as Tribal settlements often changes their location for variety of reasons.

In *P Rami Reddy v State of Andhra Pradesh*¹³, the Supreme court held that there is a presumption that the land held by a non-tribal in a scheduled area had been transferred to him by a tribal person. A tribal is totally ignorant and so unable to prove his title to the land, whereas non-tribal could be reasonably expected to prove his title. Court found that the prohibitions against transfer of lands to non-tribals in the scheduled area are reasonable and valid under the constitution. Another interesting case is *Samatha v State of Andhra Pradesh*¹⁴, where the apex court considered whether the government can transfer land in a scheduled area to a non-tribal person. This question arises as the impugned Andhra Pradesh regulation says that the transfer by a 'person' of any immovable property would be 'absolutely null and void' unless such transfer is made to a person belonging to schedule tribe or a member of cooperative society composed solely of scheduled tribes. The issue is whether the 'person' in the regulation includes state government. Court held that the expression 'person' means not only a natural person, but also an artificial person including the constitutional government. Justice Ramaswamy observed. "the tribals have fundamental right to social and economic empowerment. As a part of 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". According to the Court a liberal and wider interpretation would maximize allotment of government land in scheduled area to the tribals and make socio-economic justice assured in the constitution a reality.

These judicial decisions illustrate how incapable is the tribal population to enjoy the property rights granted to them under a state law. The entire history of state sponsored tribal welfare measures of allotting forest land, reveals story of tribal exploitation and the land grabbing by the mighty and powerful. It marks the failure of a policy which presupposes that granting of land and property rights will enable tribals to settle down and sustain livelihood. It is the result of modern notions of progress being infected into the formulation of tribal welfare schemes. This questions the veracity of governmental policies and their failed direction. This also shows the failure of tribal population to cop up with the concepts of property ownership and its relevance in modern economic terms. Here comes the relevance of formulating the most appropriate policy for safeguarding the bio cultural resources of tribal people.

13 AIR 1988 SC 1626

14 AIR 1997 SC 3297

TRADITIONAL KNOWLEDGE AND PREVENTION

Traditional knowledge of tribals encompasses their vast bio-cultural resources and the knowledge associated with it. This knowledge has been generated by numerous generations and the tribals have been holding it as part of their lives. But in the context of globalisation, everything is being valued based on its market potential. Traditional knowledge has already caught the attention of entrepreneurs who intend to commercialize it. This creates a policy issue for the state to decide on how to deal with the interests of tribals and the possible commercial benefits from traditional knowledge¹⁵. Recognizing Traditional Knowledge as property and evolving a methodology to afford effective protection have been a much debated topic. The essence of these debates, have been the growing sentiment to recognize the basic human right of indigenous populations, in governing their own resources¹⁶. This recognition is very significant for their survival and preservation of culture. At the same time the precise contours of this right are yet to be determined. This create multifarious issues in developing a 'legal phenomenon' capable of effectively covering the subject matter. Property rights have always been pointed out as an effective 'enclosure' for this purpose. But the relevance of 'property rights' for indigenous populations, whether it be common or private, need to be examined. This examination becomes critical, as how the indigenous had held and preserved their bio-cultural resources must be found out and this may be much different from, what we can imagine in the modern day context¹⁷. Conceptualizing 'Traditional Knowledge' as property, without understanding its real nature won't help in enabling the indigenous people to govern their resources.

More than anything, the discussions on Traditional knowledge is being significantly influenced by its economic potential and the possibility of commercial exploitation. The current placing of 'traditional knowledge' inside the Intellectual Property law framework had contextualized all the discussions about it, into commercialization and benefit sharing angle. This propagates a 'philosophy' that State perceives 'Traditional Knowledge' as something to be commodified and to be profited from. And the Indian examples from the landed property rights granted to tribals, show their failure to effectively enjoy it. The real reason is tribal people are never acquainted with the exclusivity element, which is the bed rock of property. Tribal properties were always commonly held

15 Laura Westra, *Environmental Justice and the Rights of Indigenous people*, Earthscan, USA (2008), p.21

16 David Lea, *Property Rights, Indigenous People and the Developing World*, Martinus Nijhoff Publishers, Boston(2008), p.13

17 Bruke A, *Ownership, Authority and Self Determination*, The Pennsylvania University Press, Pennsylvania (2008), p.40

and enjoyed together. The modern day notions of exclusivity and private property are new for them and difficult to understand. When the government legislate a benefit sharing provision in return for the usurping of tribal property, it is indeed a negotiations of tribals right over their own resources. Instead of tribal rights protection, the clear objective behind such law is the effective commercialization of these resources. The State continues to have effective control over these resources even after its recognition as traditional knowledge of the tribal community. The traditional knowledge is often misunderstood as a property right in juristic writings. But in reality the property right over traditional knowledge is a myth.

Indigenous right jurisprudence needs to be re looked from a human rights perspective to recognize tribal people's right for self-governance¹⁸. But the idea of self-governance itself conflicts with the state's interest in exercising control over these resources¹⁹. Things have become much complicated as the subject matter of dispute is having immense economic significance. It is undisputed that States have been exercising control over these resources for quite sometime. This raises the very important question as to whether the state control had done any good to tribal welfare. If the answer is negative, situation warrants are look at the system. State control was always objected at regulating the economic utilization of these resources and revenue generation. This was merely an extension of Victorian age ideals of seeing forest land as a source of revenue without recognizing its value for mankind's survival. The indigenous knowledge must be understood as something no detachable from the tribal life. It is part of their culture, which must be safeguarded forever. There exist a basic human right to safeguard once culture, against illegal exploitation. This should be constructed in the context of traditional knowledge as an essentiality for the fulfillment of tribal life. But at the same time contemporary legislative framework approaches traditional knowledge as a commodifiable property which must be subjected to economic utilization. Only limited rights is given to the tribal people who have been safeguarding the knowledge for several generations. The benefit sharing concept even though recognizes the tribal role in generation and safeguarding of traditional knowledge, disregards tribal's right over it. At the same time there exist a ground for development of juristic thinking that the tribal right in question do have a human right dimension.

18 Patrick Thornberry, *Indigenous People and Human rights*, Manchester University Press, Manchester (2002), p.405

19 David Ritter, *Contesting Native Title*, Allen & Unwin, Australia (2009), p.73

CONCLUSION AND SUGGESTIONS

The rights over bio-cultural resources is a must for the effective preservation of tribal culture. It is closely associated with the needs of sustenance of tribal population. Tribal people did play a substantial role in the generation of this vast knowledge. Tribal right for self-governance need to be recognized for the effective preservation of these bio-cultural resources. When the indigenous jurisprudence is re looked from a human right perspective, tribal people attains a human right for the preservation of their culture and biological resources. Recognition of this right is indeed a necessity for the survival of tribal culture.

The resources preserved by the tribal population needs to be recognized as their joint possession rather than a commodity with the possibility of economic exploitation. The survival concerns of the tribals need to be given special attention. Recognition of the tribal's right over their bio-cultural resources will indeed be a forward step in the recognition of tribal right for self-governance. Institution of self-governance, will enable the tribal population to sustain a life of human dignity. It will let them decide their own pathway of development. Recognition of this human right is very critical for their survival.