

The Right to Belong: India's Denotified and Nomadic Tribes in Law

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I. Introduction

In 2020 the COVID 19 pandemic made its way throughout the world and spared no one from its devastating consequences. Many people were forced to adapt in ways they had never imagined. For some people around the world, the lack of resources made them even more vulnerable. The Denotified and Nomadic Tribes, which are estimated to be ten percent of India’s population, were reported to suffer from hunger, disease, and “received limited or no support from the administration, which has ‘always been at loggerheads with them formally.’”¹ Subsequently, the lack of identity documents has continued to cause problems in obtaining the COVID 19 vaccine.²

The term Denotified and Nomadic Tribes (DNTs) has been defined as “those communities which were notified under several versions of the Criminal Tribes Act, enforced during the British Rule between 1871 and 1947 throughout Indian territory and were de-notified by the repeal of these Acts after India’s independence.”³

There are many scholars who will argue that there are different root causes contributing to the problems that DNTs face in India. However, given the clear role the British Empire played in destroying the culture and identities of DNTs, the law is a tool that must be appropriately examined and reformed. This Concept Note focuses on the law in India and highlights briefly avenues for reform.

The case of the denotified tribes is the best example to illustrate such a situation where the state has shown a slow response to protecting the interests of the most marginalized and discriminated section of the society. – Dr. Deepshikha Agarwal, Rights Compass, August 11, 2021

II. There and Back Again

Terminology regarding “criminal tribes” in India was born from the British colonial times. During that period, the Criminal Tribes Act 1871 gave the police powers to “arrest them, control,

¹ Sadhika Tiwari, “COVID-19 leaves denotified nomadic tribes people hungry, indebted” IndiaSpend, May 8, 2020, <https://www.indiaspend.com/covid-19-leaves-denotified-nomadic-tribespeople-hungry-indebted/>.

² Sidhartha Dutta, “Rajasthan: Nomads miss out on COVID vaccination due to lack of Aadhaar & identify proof” Time of India, June 6, 2021, <https://timesofindia.indiatimes.com/city/jaipur/nomadic-tribes-deprived-of-vaccine-in-state/articleshow/83267880.cms>.

³ Professor Deepshikha Agarwal, “Denotified Tribes and Challenges of Age-Old Traditions, in conversation with Dr. Deepshikha Agarwal” Rights Compass, August 11, 2021, <https://www.betheclassroomseries.com/post/denotified-tribes-and-challenges-of-age-old-traditions-in-conversation-with-dr-deepshikha-agarwal>.

and monitor their movements.”⁴ The British applied the law to approximately 150 tribes. As journalist Dilip D’Souza noted:

“India seemed a hair-raisingly volatile place with its complex array of castes and communities, functioning as autonomous, self-governing entities, following different life styles and social norms. Those communities, which offered the stiffest resistance to pax - Britannica, were targeted in different ways for such special treatment. Among the worst victims were communities which did not have a sedentary life style which made it more difficult to demand subservience from them.”⁵

The British also had another reason to criminalize the nomadic tribes. The British wanted to secure their commercial interests in forest areas for commercial exploitation. The tribes who were considered “forest dwellers” were alleged by the British to have rebelled in some instances against the threat of foreign invasion in their territories.⁶ Criminalizing the forest dwellers and the nomadic tribes, therefore, removed any potential threats to the British in securing timber and other resources the Indian forests provided.⁷

The 1871 Act was later consolidated and became the Criminal Tribes Act of 1924. The 1924 Act has an often-overlooked clause which required villagers who may have “criminal tribes” to report such persons to local police authorities and further, that any such tribe could be placed in a “reformatory settlement.”⁸ The Act allowed for the separation of children from families.

After India obtained independence, although the Ayyangar Committee reviewed the tenants of the Act⁹ and repealed it in 1952, it was through these discussions that the Habitual Offenders Act was born to “keep effective control over the so-called hardened criminals.”¹⁰ Succinctly put, whereas the British Act punished entire tribes collectively, the Habitual Offenders Act would punish the individual.¹¹

III. Consequences

Every year on August 31 Vimukti Diwas is celebrated by DNTs because it marks the day that the Criminal Tribes Act was repealed. Despite this freedom, DNTs are still “considered a criminal

⁴ The Resist Initiative International, “Branded ‘Born’ Criminals: Racial Abuses Against Denotified and Nomadic Tribes in India” February 2007, <https://www2.ohchr.org/english/bodies/cerd/docs/ngos/resist.pdf>.

⁵ Dilip D’Souza, “Declared Criminal at Birth” Manushi, Issue 122, accessed August 12, 2021, http://www.manushi-india.org/pdfs_issues/PDF%20file%20123/4.%20Declared%20Criminal%20at%20Birth.pdf.

⁶ Susan Abraham, “Steal or I’ll Call You a Thief: ‘Criminal’ Tribes of India” Economic and Political Weekly, 34 (27), 1751-1753, 1999, <http://www.jstor.org/stable/4408149>.

⁷ See also Regina M. Paulose, “Avenging Champawat: Adivasis and Tigers in the Age of Extinction” The Resolution Journal, Vol 1, 2020, <https://www.jerseylawcommission.org/the-resolution-journal>.

⁸ Ajay Dandekar, “INVISIBLE PEOPLE, INAUDIBLE VOICES: The Denotified Tribes of India” India International Centre Quarterly, 41(2), 90-96, 93, 2014, <http://www.jstor.org/stable/24390752>.

⁹ Ibid.

¹⁰ Bibek Debroy, “An unfortunate legacy” The Indian Express, January 5, 2017, <https://indianexpress.com/article/opinion/columns/crime-criminal-act-racial-discrimination-non-bailable-offence-criminal-tribes-act-an-unfortunate-legacy-4459258/>.

¹¹ Ibid.

by the virtue of birth and this stigma continues until they die.”¹² There are two challenges which continue to persist, the first is the stigma the Habitual Offenders Act creates and the other is the poor prevailing attitudes of authorities, particularly law enforcement towards DNTs.

There have been attempts at repealing the Habitual Offenders Act but to date there has been no success. In 1998 India’s National Human Rights Commission set up an Advisory Group on DNTs.¹³ In a subsequent high-level meeting that took place in February 2000, there was a general consensus that the Habitual Offenders Act was “rarely used” and therefore the “Act can be repealed with the recommendation of the National Human Rights Commission.” Further, the delegates to the meeting agreed that law enforcement support and sensitization and training of the force was needed in working with the DNT community.¹⁴ In 2004, in a meeting between the National Human Rights Commission and representatives of DNT community, a demand was made once again to repeal the Habitual Offenders Act.¹⁵ This same sentiment was echoed in 2007, when the United Nations Committee on the Elimination of Racial Discrimination (CERD) asked India to repeal the Habitual Offenders Act.¹⁶

In 2018, conversations to repeal the Habitual Offenders Act resurfaced at the ministerial level again. The Ministry of Social Justice and Empowerment looked to “definitely act in this regard.”¹⁷ Further, at the request of the National Commission for Denotified Nomadic and Semi-Nomadic tribes, the Ministry of Social Justice and Empowerment was also asked to consider amending the Atrocities Act to include protections for DNT communities.¹⁸

In a more recent and interesting development, in 2003 a group of 6 men were charged with murder and rape. Their case was appealed to the Indian Supreme Court where in 2006 it determined that the defendants were guilty and sentenced them to death. On subsequent appeal the case came back to the Supreme Court in 2019 where the court vacated the guilty findings and the death penalty. The 2019 Court noted:

“all the accused persons are from nomadic tribes coming from the lower strata of society and are very poor labourers. Therefore, in fact and circumstances of the case, false

¹² Imaad ul Hasan, “Denotified 68 Years Ago, ‘Criminal’ Tribes Still Fight Stigma, Poverty” Outlook, August 30, 2020, <https://www.outlookindia.com/website/story/india-news-denotification-68-years-ago-on-this-day-ex-criminal-tribes-still-fight-stigma-poverty/359558>.

¹³ National Human Rights Commission, India “Habitual Offenders Act to be repealed: NHRC takes up the cause of the Denotified and Nomadic Tribes” 2000, <https://nhrc.nic.in/press-release/habitual-offenders-act-be-repealed-nhrc-takes-cause-denotified-and-nomadic-tribes>.

¹⁴ Ibid.

¹⁵ National Human Rights Commission, India “Denotified and Nomadic Tribes meet” 2004, <https://nhrc.nic.in/press-release/denotified-and-nomadic-tribes-meet>.

¹⁶ OHCHR, CERD, “Consideration of Reports Submitted by States Parties Under Article 9 of the Convention” Recommendation 11, March 9, 2007, http://idsn.org/uploads/media/CERD_concl_obs_India_12.pdf.

¹⁷ Nandita Singh, “What 13 crore Indians are celebrating their ‘independence day’ today” The Print, August 31, 2018, <https://theprint.in/india/governance/why-13-crore-indians-are-celebrating-their-independence-day-today/109449/>.

¹⁸ Shalini Nair, “Denotified nomadic tribes may come under SC/ST Act” The Indian Express, July 23, 2018, <https://indianexpress.com/article/india/denotified-nomadic-tribes-may-come-under-sc-st-act-dalit-5157803/>.

implication cannot be ruled out since it is common occurrence that in serious offences, sometimes innocent persons are roped in.”¹⁹

Perhaps the movement towards repealing the Habitual Offenders Act and amending the Atrocity Act to incorporate DNTs will be a headlining achievement of 2022. Although the 2019 Supreme Court Judgment did provide a window for the Court to address the continued ramifications of the Habitual Offenders Act, it remained silent on the issue. Nonetheless, the courts throughout India may have a hand in pushing the repeal to come to fruition faster.

IV. A Global Legal Perspective: International Law

This Concept Note briefly focuses on three main international instruments that should be considered in conjunction with Indian law when discussing DNTs. There are many places where the Indian Constitution incorporates and advances the norms found in these instruments. Regardless of whatever solutions the rule of law can present, enforcement of the law remains a problem that must be addressed.

a. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The UNDRIP is a Declaration which emphasizes the rights of Indigenous Peoples. The rights detailed in UNDRIP are derived from the “twin pillar” human rights treaties, the Covenant on International Civil and Political Rights and the International Covenant on Economic, Cultural, and Social Rights. India acceded to both Covenants in 1979. In different UNDRIP articles, there is an emphasis that Indigenous Peoples have the right to be free from genocide, violence, and discrimination. India voted in favor of UNDRIP in 2007.²⁰

b. United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

India became a party to the CEDAW in 1993. CEDAW is an instrument that aims to prevent discrimination against women and girls in various areas, including but not limited to, employment, health care, and in cultural practices. The Supreme Court of India has reiterated the importance of upholding India’s obligations under CEDAW. In a 1996 civil estate case, the Court stated, “the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution and the Human Rights Act became enforcement.”²¹ Further it is an “imperative of the State to eliminate obstacles, prohibit all gender-based discriminations as mandated by Article 14 and 15 of the Constitution of India.”²²

¹⁹ Dhananjay Mahapatra, “6 awarded death by SC in 2009, acquitted in 2019” Times of India, March 6, 2019, <https://timesofindia.indiatimes.com/india/6-awarded-death-by-sc-in-2009-acquitted-in-2019/articleshow/68278205.cms>.

²⁰ India does not recognize the term “indigenous” but does agree that there are tribes with various cultural beliefs and practices.

²¹ Masilamani Mudaliar and Others v. Idol of Sri Swaminathaswami Thirukoli and Others, 1996 Supreme Court of India, para 20

²² Ibid, para 21

Moreover, “the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights.”²³

In 2020 a group of researchers conducted a study around DNT communities and the COVID 19 pandemic. The researchers studied the 2019 Prison Statistics Report released by the National Crime Records Bureau *vis a vis* the DNT communities of Madhya Pradesh and found that DNT women were “overrepresented in excise cases. The narrative of born or inherent criminality is deeply intertwined in constructing the category of the “DNT woman” as a criminal.”²⁴

Women who belong to DNT communities should be afforded the appropriate avenues to realize their economic, cultural, and social rights. This is also consistent with India’s obligations under International Covenant on Economic, Cultural, and Social Rights. To further emphasize this, it would also be important for India to take national census of the DNT community to ensure that appropriate services are provided and delivered to the communities.²⁵

c. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The ICERD focuses on the elimination of racial discrimination. The vestiges of British colonial tools which segregate and separate the DNT community should be repealed and eliminated. India is a state party of the Convention and Article 5 enumerates that a person has the “right to security of person and protection by the States against violence or bodily harm”²⁶ This is a far cry from what is happening in the status quo. In the same study noted above, researchers documented the following:

“Every year, hundreds of people from the Pardhi community in Bhopal, Raisen and Sehore districts of Madhya Pradesh, suffer caste-based violence at the hands of both the police and dominant caste groups. This includes harassment, torture and mob-lynching.”²⁷

The torture, humiliation, and degrading treatment of the DNT community must be addressed by the Central government. This is in line with India’s obligations under ICERD. Currently, the ICERD is evaluating India and the India State Report for the 104th session which will take place August 9 – August 25, 2021.²⁸

²³ Ibid, para 22.

²⁴ Nikita Sonavane, Srujana Bej, Ameya Bokil, “People of denotified tribes continue to bear the burden of an unjust colonial past” The Indian Express, December 8, 2020, <https://indianexpress.com/article/opinion/people-of-denotified-tribes-continue-to-bear-the-burden-of-an-unjust-colonial-past-7095613/>.

²⁵ See The Hindu, “Census of denotified tribes will bring about a change” October 20, 2020, <https://www.thehindu.com/news/cities/Madurai/census-of-denotified-tribes-will-bring-about-a-change/article32894084.ece>.

²⁶ ICERFD, 5(b).

²⁷ Sonayane, note 23.

²⁸ See United Nations Human Rights Treaty Bodies, India, (accessed August 15, 2021), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2483&Lang=en

V. Recommendations

CGF makes the following recommendations based on the information that has been briefly highlighted in this Concept Note:

1. CGF urges India to undertake a true and accurate census of all DNT communities throughout India. This would allow for the appropriate allocation of resources, including ensuring access to justice in all areas.
2. CGF urges India to prioritize the repeal of the Habitual Offenders Act and any subsequent legislation that has been derived from British colonial policies aimed at the Denotified Tribes and Nomadic people.
 - a. CGF further urges India to amend the Atrocity Act to incorporate DNT communities.
3. CGF urges state governments throughout India to retrain law enforcement in order to justly and appropriately respond to allegations of crimes.

As a result of all the forms of social, educational and political exclusion, the human rights of the DNTs, such as the right to life with dignity, right to education, right to livelihood, cultural rights etc. are denied to them. – Dr. Deepshikha Agarwal, Rights Compass, August 11, 2021
