

OUTSIDER MOVEMENT – A COLLECTIVE VOICE

Abhisar Vidyarthi

Maharashtra National Law University, Mumbai (India)

An 'Outsider' is someone who is not accepted by the mainstream society. Racial and gender discrimination in the United States of America led to the development of 'Outsider Jurisprudence'. Outsider Jurisprudence viewed laws as a reflection of the power differentials in the society and as a medium to further marginalize the outsiders in the society. In India, the tribal communities have been subject to historic discrimination and subjugation due to their backwardness. This subjugation and marginalization of the tribal communities in India has led to them being outcasts or 'outsiders' in the society. In 2011, nearly 1,960 tribals were imprisoned for demanding ration cards in Maharashtra. They had been asking for a ration card and the implementation of the Forest Rights Act to help them claim the land they had been tilling. However, the officials refused to give assurance to the tribals and arrested them when they peacefully protected against the arbitrary actions of the government officials. Tribal populations in India have been subject to various such discriminatory actions on day to day basis. Similar to the United States of America, various laws have been made by the State for the upliftment and mainstreaming to the tribal people. On that point it is important to understand that the tribes are highly attached to their culture and their land. Therefore, the government must acknowledge the beliefs of the tribes before carrying out any programme. As highlighted by Dr LP Vidyarthi in his book on Maler Tribe, the lives of the tribes are profoundly influenced by nature and that there is an intimate relationship and interaction between social organizations on the one hand and religious complex and ecological conditions on the other hand. Therefore, the paper shall examine whether the legislations and policies made by the government for tribal development are from the perspective of the law makers as illuminated by the 'outsider jurisprudence' or from the tribal perspective. The paper shall focus on the mainstreaming programmes and policies propounded by the government and the administration of tribal areas. The objective of the researcher is to critically examine the situation of outsiders in the Indian society i.e. the tribal communities and evaluate their progress. The paper shall promote the protection of the interest of the subjugated groups in the Indian society. It has been written in an article pattern and follows the Bluebook style of citation.

"It was we, the people, not we, the white male citizens, nor yet we, the male citizens, but we, the whole people, who formed this Union. And we formed it, not to give the blessings of liberty, but to secure them; not to the half of ourselves and the half of our posterity, but to the whole people—women as well as men."

- Susan B. Anthony

MARGINALISATION AND DISCRIMINATION

¹ LIZABETH CADY STANTON, 2 HISTORY OF WOMEN'S SUFFRAGE: 1861-1876, at 632 (Amo Press ed., 1969) (1881).

Discrimination is one of the most discussed and debated issues historically. The reason for the relevance of discrimination in scholarly writings is that no society in the world has been immune to discrimination. Historically the discriminatory practices included genocide, slavery, legislated discrimination, discriminatory immigration laws, and disenfranchisement.² The marginalised groups that are discriminated against in the society are economically and socially backward. It is often argued by various scholars that the aforementioned power relationships among people play a major role in shaping the logic and structure attributed to the law in the society. This argument can be traced back to the existence of racial and gender discriminatory laws in the United States of America in the 19th century. The presence of 'separate but equal law' limited the access of the marginalised class to various public places and subjugated them by blatantly discriminating against them. Structural racism was a common practice against the African and Latino Americans which meant that they were criminalised more than other races in the United States and the jury was more likely to convict them.³ Women were further discriminated on the basis of gender and were disallowed to stand on an equal footing with their male counterparts. They were often subject to domestic violence and their needs, interests and concerns were ignored by the law makers.⁴ Even though the African Americans claimed an American identity they were not accepted as citizens and were often discriminated. The basis of this discrimination was the belief that the racial difference produces an inherent superiority of a particular race. The 'Apartheid law' in South Africa led to the systematic discrimination against the 'Blacks' in which they were subject various human right violations on the basis of racial differences.⁵ Various scholars have written about the forms of discrimination and the power relationship between the diverse groups in the society. Critical legal theory and movement is a network of leftist legal scholars that emerged in the 1970s in the United States of America.⁶ Critical legal scholars argued that the laws are a reflection of the views of the dominant parties in the society. Moreover the law exists to support the interests of the party or class that forms it and is merely a collection of beliefs and prejudices that legitimise the injustices of society.⁷ Moreover the historical discrimination against the weaker sections of

² *The Effects Of Discrimination On Society*, 23 March, 2015 ,

<https://www.ukessays.com/essays/philosophy/what-are->, Last accessed on 11 February 2017

³ *Racism and gender discrimination*, <https://www.worldpulse.com/fr/node/7830>, Last accessed on 11 February 2017

⁴ Ravneet Kaur and Suneela Garg, *Addressing Domestic Violence Against Women: An Unfinished Agenda*, INDIAN JOURNAL OF COMMUNITY MEDICINE, 2008

⁵ *The History of Separate Development in South Africa*, *South African History Online*, <http://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s>, Last accessed on 11 February 2017

⁶ Gary Minda, *Neil Gotanda and the Critical Legal Studies Movement*, 4 ASIAN AMERICAN LAW JOURNAL, 7-14, 2009

⁷ *Critical Legal Theory*, *Cornell University Law School*,

https://www.law.cornell.edu/wex/critical_legal_theory, Last accessed on 11 February 2017

the country in the United States of America led to various scholars writing about legal theory using ideas associated with left politics.⁸ Critical legal theory as propounded by the American scholars in the 1970s saw themselves as extending and elaborating the more radical aspects of the American legal realist programmes.⁹ The movement stood against the law which promoted the interest of the powerful and illegitimate injustice.¹⁰ The crust of the argument of the critical legal movement was that the rights rhetorics works against the common good and against the interests of the groups that is marginalised.¹¹

VIEW FROM THE BOTTOM

The major approach of the critical legal movement was the outsider jurisprudence which covered aspects of feminist legal theory and critical race theory. Mari Matsuda, one of CRT's founding theorists termed Outsider Jurisprudence 'the view from the bottom'.¹² Moreover Outsider Jurisprudence can be defined as an umbrella term to characterise the political claims of a wide range of disadvantaged groups, including African-Americans, women, gays and lesbians and the disabled.¹³ These two theories, as highlighted above reflected the same issue i.e. to what extent does the law reflects the perspective and values of the white males in the society. The outsider movement was seen as an attempt of the downtrodden sections of the society to fight for their rights and justice and question the existing legislations.¹⁴ The movement had ignited due to the societal background in which inequality, discrimination and oppression were a common phenomenon. The feminist legal theory applied to a variety of topics that ranged from domestic violence to inequality at the work place. On the other hand, the critical race theory developed in the 1980s and examined the role of race and racism in the legal process. Furthermore with the entrance of other people of colour, the subordination of various other persons of colour have also been highlights as evidenced by the development of 'Lat Crit' (focusing on the legal position of Chicanos and other Latino Americans) as well as scholarship focussing on Asian Americans, native Americans and the relationships between these groups.¹⁵ LatCrit theory as a subset of the Outsider Jurisprudence is an intervention designed to highlight

⁸ BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT, 235-255 (South Asian ed., Sweet and Maxwell 2012) (2014)

⁹ *ibid*

¹⁰ Alan David Freedman, "Legitimising Racial Discrimination Through Anti discrimination Law: A critical review of Supreme Court Doctrine", 62 MINNESOTA LAW REVIEW 1049 (1978)

¹¹ BIX, *supra* note 3 at 236

¹² Mairi Nicolla Morisson, *Towards a transnational Outsider Jurisprudence*, *Academia Education*, <http://www.academia.edu/2565673>, Last accessed on 11 February 2017

¹³ *Ibid*

¹⁴ Scott Brewer, "Introduction: Choosing Sides in the Radical Critiques Debates", 103 HARVARD LAW REVIEW 1844 at 1850-1851 (1990)

¹⁵ MORISSON, *Supra* note 12

Latina/o concerns and voices in legal discourse and social policy.¹⁶ With regard to the identity of the downtrodden people, the argument on the part of the scholars is that group identity and experience are very central to a human being and the perception of the society affects their mindset.¹⁷ Moreover the scholars have supported the affirmative actions for these marginalised groups. The basis of the outsider thought process is that these minority groups experience a different life from the majority groups and are racially and ethnically different.¹⁸ After years of upliftment and mainstreaming of these groups in the society, there has been improvement in their social and economic well-being. However the Outsider Jurisprudence still holds relevance as even after years of the movement, the vulnerable groups continue to face discrimination and the laws made for their upliftment have failed to secure them an equal standing in the society. The question that still remains is that whether difference between the various social groups can be diminished by dialogue and explanation. Having studied the origin of 'Outsider Jurisprudence' in the United States, the paper shall now discuss how the outsider movement has evolved in India. Moreover the next chapter shall analyse whether the existing legislations are sufficient to undo the historic discrimination against the outsider groups and to bring them to a level playing field. Furthermore the subsequent discussion shall be on securing the social and economic welfare of the tribal communities and other marginalised sectors in India.

'OUTSIDERS' IN INDIA

Even though Outsider Jurisprudence has originated in the United States of America, the essence of the movement has been experienced in most parts of the world. Discrimination is omnipresent and only changes its form as we move from one country to another. Similar to the racial discrimination in United States of America is the caste discrimination in India. The discrimination and oppression takes place on the basis of the position that a person occupies in the caste structure. Caste is defined as a rigid social system in which a social hierarchy is maintained generation after generation and allows little mobility out of the position to which a person is born.¹⁹ Since the colonial rule in India, the lower caste has been subject to various restriction. Historically, they have been subjugated and their fundamental rights have been violated by the higher caste members.²⁰ One such community

¹⁶ Francisco Valdes, *LatCrit: A Conceptual Overview*, <http://latcrit.org/content/about/conceptual-overview/>, Last accessed on 11 February 2017

¹⁷ Milner Ball, "The Legal Academy and Minority Scholars", 103 HARVARD LAW REVIEW 1855 at 1859 (1990)

¹⁸ Randell Kennedy, "Racial Critiques of Legal Academia", 102 HARVARD LAW REVIEW 1745 at 1778-1787 (1989)

¹⁹ *Caste System*, http://schools.yrdsb.ca/markville.ss/history/religion/caste_stats.pdf, Last accessed on 11 February 2017

²⁰ *Meneka Gandhi v. Union of India*, AIR 1978 SC 597

in India that has been subject to harsh discrimination throughout the history of India are the Tribal population. Tribes in most part of the country have their own customs and traditions and do not follow the mainstream laws that are made by the government. Tribal societies are out groups in the society who have gone through the harsh elitist policies of the State like land alienation. In India, they are known as adivasi, vanwasi, aborigines, tribes, etc. India has the largest variety of tribal communities which are socially and economically deprived.²¹ The main reason for this backwardness as pointed out by Ambedkar is their long isolation from the general society.²²

Even though the Constitution of India guarantees to all the citizens equal protection before the law²³, the tribes experience the law differently to the mainstream society.²⁴ Land acquisition is one of the major problems that the tribes in India have faced. The tribal communities depended on forest products for their livelihood. Therefore they have had to pay the highest price for national development as commercial development have alienated the tribal communities from their resource rich regions.²⁵ This issue has led to various tribal movements across Poverty and indebtedness in tribes is another central problem with tribes in India. Most of them live under the debts of money lenders and zamindars because of which they have to mortgage their land and pay heavy interest to the money lenders. Health and educational backwardness continues to hinder their growth.²⁶ Apart from this, they are exploited by greedy and authoritative government officials like police officers, civil servants, and others.²⁷ These officers force the tribes to compromise on their culture and traditions. Moreover tribal population has been a subject to increasing number of crimes like murder and rape.²⁸

²¹ J.J Roy Burman, “ *Adivasi: A Contentious Term to denote Tribes as Indigenous Peoples of India*”, MAINSTREAM WEEKLY, 2009, Last accessed on 11 February 2017

²² Dr. K.S. Ingole, *A Critical study of social exclusion & its implications*, <http://mulnivasiorganiser.bamcef.org/?p=530>, Last accessed on 11 February 2017

²³ Art. 14, Constitution of India, 1950

²⁴ BIX, *Supra* note 8

²⁵ *Tribals and Social Change: Evolving a perspective*, http://shodhganga.inflibnet.ac.in/bitstream/10603/18032/6/06_chapter%202.pdf, Last accessed on 11 February 2017

²⁶ C.R. Bijoy, *A History of Discrimination, Conflict, and Resistance*, <http://www.pucl.org/Topics/Dalit-tribal/2003/adivasi.htm>, Last accessed on 11 February 2017

²⁷ JOSEPH *Infra* note 45

²⁸ *Crimes committed against Scheduled Tribe Men and Women*, <http://tribal.nic.in/WriteReadData/userfiles/file/ScheduledTribesData/Section9.pdf>, Last accessed on 11 February 2017

India being a very diverse country, it is important for the State to acknowledge the presence of these tribal communities in the society and work for their welfare. Keeping in view the socio-economic backwardness of the tribe, the framers of the Indian Constitution provided special status for their development in independent India.²⁹ The constitution provides for the protection of tribal interest³⁰ and reserves seats for tribal representatives in the legislature.³¹ The Fifth Schedule of the Constitution provides for the setting up a Tribes Advisory Council in each of the States having Scheduled Areas.³² The other policies undertaken by the government for tribal development include providing them jobs and primary education. Moreover scholarships are provided to students to study abroad and stand at an equal footing with the other members in the society.³³ Various other efforts have been made to safe guards the right of tribal communities and help them to join the mainstream society by ensuring their social and economic development.³⁴ However the tribal people have their own customs and often do not like intruders trying to interfere with their lives. Jarawa tribes in the Andaman Islands is one such tribe who has raised voices against their right to privacy being violated regularly by grossly entering their habitat.

MAINSTREAMING AND AUTONOMY

'Mainstreaming of tribes' refers to the government's action of pushing a tribe to join the country's dominant society.³⁵ The effect of 'mainstreaming of tribes' is devastating. It strips them of their self-sufficiency and sense of identity, and leaves them struggling at the very margins of society.³⁶ Tribes themselves are the best placed to determine what, if any, changes they wish to make to their lives. Therefore, providing them with something they do not need will not help in improving their conditions. As it was opined by Nehru that

²⁹ D.N. THAKUR, TRIBAL LAW AND ADMINISTRATION, (Deep and Deep Publications 2009), 22-24

³⁰ Art. 46, Constitution of India, 1950

³¹ Art. 330, Constitution of India, 1950: See also Art. 332 and Art. 335

³² Fifth Schedule, Constitution of India, 1950

³³ *Policies and Programmes for Tribal Development in India*,

http://shodhganga.inflibnet.ac.in/bitstream/10603/222/12/12_chapter3.pdf, Last accessed on 11 February 2017

³⁴ Barbara Harriss-White, *Social Discrimination in India: A case for Economic Citizenship*, <http://www.ihdindia.org/ihd-oxfamworkingpaper-pdf/vi.%20harris-white1.pdf>, Last accessed on 11 February 2017

³⁵ *The Jarawa, Survival International*, <http://www.survivalinternational.org/tribes/jarawa>, Last accessed on 11 February 2017

³⁶ Georgie Weedon, *Campaign launched to stop 'Human Safaris' threatening the Jarawa*, Ministry Of CounterCulture, <https://moc.media/en/469>, Last accessed on 11 February 2017

the tribal should develop along the lines of their own genius.³⁷ There should be no imposition or compulsion from outside and non-tribal should not approach them with superiority complex.³⁸ *Therefore the question that arises is that whether the efforts to mainstream the tribes and the legislations that have been made by the government is from the perspective of the tribal community or from the perspective of the people in power.*³⁹ Tribal economy is primarily an agriculture and forestry based economy⁴⁰ and therefore they value their land a lot. The land is considered as sacred by the tribal communities. Moreover the tribal groups have traditions and beliefs that are very different from the mainstream society.⁴¹ The tribal customs are very different from the common understanding and therefore they like to remain aloof from the general society.⁴² Therefore we should respect their distinct culture and not impose the dominant culture and practices on them. They have their own views on religious and cultural grounds which should be put on equal grounds with the dominant culture.⁴³ There is often a conflict between the traditions of tribals with modern institutions creates apprehensions among the tribals about preserving their identity.⁴⁴ Therefore the government while carrying out the mainstreaming policies must ensure that it does not lead to extinction of tribal dialects and languages. This is a major concern as it indicates towards the erosion of tribal identity in certain areas. Various tribal groups in India have often raised their voice against the impact of the forceful mainstreaming activities lead by the government on the tribal rights.⁴⁵ Intrusions into the privacy of the tribal communities in the name of 'mainstreaming' is a common practice in India. Jarawa tribes are a nomadic tribe in Andaman and Nicobar Islands.⁴⁶ Drastic measures have been taken to bring the Jarawa up to the basic mainstream characteristics.

³⁷ Dr Malsawmliana, *Integrating Tribal Population Into Mainstream India*, <http://www.trcollege.net/articles/75-integrating-tribal-people-into-indian-mainstream>, Last accessed on 11 February 2017

³⁸Ibid

³⁹ Examining the Outsider Jurisprudence from the tribal point of view and analysing how the laws made in India for the upliftment of the tribals is in accordance to their needs.

⁴⁰ *Review of Literature on Tribal Economy*, http://shodhganga.inflibnet.ac.in/bitstream/10603/93186/10/10_chapter%202.pdf, Last accessed on 11 February 2017

⁴¹ Nancy Ekka, *Impact of Modernisation on Tribal religious customs and traditions*, <http://ethesis.nitrkl.ac.in/5085/1/411HS1002.pdf>, Last accessed on 11 February 2017

⁴² Ibid

⁴³ MALSAWMLIANA, *Supra* note 37

⁴⁴ Benoy Joseph, *Ethnicity and Ethnic Conflict: A Search for Identity or an Identity Crisis? With Special Reference to Northeast India*, 4 INTERNATIONAL JOURNAL OF INNOVATIVE RESEARCH AND DEVELOPMENT, 354-64, 2015

⁴⁵ Mamta Agarwal, *Tribal Movements in India*, <http://www.historydiscussion.net/essay/tribal-movements-in-india/1797>, Last accessed on 11 February 2017

⁴⁶ *Safety & Conservation, Go to Andaman*, <https://www.go2andaman.com/know/safety-conservation/tribals-and-tribal-visits/>, Last accessed on 11 February 2017

Human Safaris in Andaman lead to intrusions into their land and their privacy.⁴⁷ Therefore it is important for the government to take into consideration, the totality of circumstances before carrying out mainstreaming policies and programmes. Another legislation that holds prime importance in the governance of tribal areas is Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA).⁴⁸ PESA mandated the states in peninsular India to devolve certain political, administrative and fiscal powers to local governments elected by the tribal communities in their jurisdiction.⁴⁹ However the legislation has led to further subjugation of the tribals due to the blatant violation of their interest. PESA legislations often ignored the tribal customs and traditions. Moreover it only marginally altered the power balance between the State and the tribes. PESA has failed to address the major problem of land alienation. Since the tribes right to property is merely a legal right, and not a fundamental right, the State can acquire their property with just compensation if it can establish that such appropriations are by authority of law.⁵⁰ That authority of law is found in section 4(i)⁵¹ of PESA which explicitly authorises the acquisition of land in Scheduled Areas. It has been ruled by the Hon'ble Supreme Court that the government is the best judge to determine if a public purpose is served by an acquisition.⁵² Similarly various other laws for tribal development do not function efficiently due to adverse balance of power between the government officials and the tribals. There is certainly no doubt that State has been working for the upliftment of the tribal communities. However the actions of the government have to some extent failed to understand the mind set of the tribal communities. The tribal situation in India is very complex due to the special nature of the crisis faced by them. Therefore even though the government has carried out numerous policies and enacted various laws for tribal development after the Independence of India, the desired result has not been achieved. The basic reason for the failure of the government schemes has been that the activities related to tribal development have been carried out in an impersonal bureaucratic manner. The Government has failed to acknowledge that two different segments have been established in the tribal community and no attention has

⁴⁷ *Supra* note 35

⁴⁸ Suparna Jain, *Decentralized Governance in Schedule V Areas and Empowerment of Women: Resolving Conflicts through Law, Wiscomp*, <http://wiscomp.org/Publications/15%20-%20Perspectives%2018%20-%20Decentralised%20Governance%20in%20Schedule%20V%20Areas%20and%20Empowerment%20of%20Women.pdf>, Last accessed on 11 February 2017

⁴⁹ Apoorv Kurup, *Tribal Law in India : How Decentralised Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better*, <https://tspace.library.utoronto.ca/bitstream/1807/17375/1/ILJ-7.1-Kurup.pdf>, Last accessed on 11 February 2017

⁵⁰ Art. 300A, Constitution of India, 1950

⁵¹ Section 4(i), Panchayat (Extension to Scheduled Areas) Act, 1996

⁵² *Daulat Singh Surana v. First Land Acquisition Collector*, AIR 2006 SC 482

being paid to the weakest of the weak section. Most of the above mentioned government schemes did not reach its desired targets which was the weakest of the weak tribal sections.

Also the development programmes have been unsuccessful mainly due to the fact that it has been made centrally without taking the local and social factors of the different tribal groups. Most of the government initiatives have failed to consider the perspective of the tribes and have acted on their own assumptions. Like the scheme of shifting tribals from hills to plains was a great failure as the government failed to appreciate that the tribes were attached to their environment since generations and their ancestors lived there.

CONCLUSION

Outsider Jurisprudence developed in the United States as a subset of the Critical Legal theory and questioned the fairness and justness of the laws made by legislature. It was argued that the laws were a reflection of the power imbalance between the different racial and gender groups. Applying the same theory in India, the tribal communities are considered as 'outsiders' in the society. The laws made for the upliftment and mainstreaming of the tribes in India are certainly not a tool for exploitation and further subjugation. However the policies and laws have failed to understand the needs and mindset of the tribes and work on their problems from their perspective. As seen in the case of Jarawa tribes, it is important to balance between mainstreaming and respecting the tribal culture and privacy. Moreover 'Tribal Autonomy' must be respected and they shall be allowed to govern themselves according to their traditions and customs. The major issue with respect to the policies and programmes carried out by the government is that of social dynamics. It is related to the opportunity and the access to the disadvantaged to take advantage of forums of the enforcement process and social mobilisation. The social reality of the society is highlighted by polarisation of castes and classes in the administrative system and the legal processes. Therefore even when the government has implemented various upliftment schemes and the processes were available to the disadvantaged, the weak, the oppressed, women and children, access was denied owing to its cost and remoteness. Also thought the State created some shelters through various form of Legal Aid to Scheduled Castes, women and to the oppressed, they were reduced to tokenism owing to the quality and availability.

The State has been successful in intervening with vigour against the injustice manifest in the system in the form of bonded labour, child labour, crime against the women and Scheduled Castes and tribals. However it is pertinent to note that the legal and institutional processes of redressal where provided are available only formally and have made a little or no impact. The disadvantaged sections of the society have difficult access even to the shelters and sanctuaries created for them under the law. Therefore this is the main hindrance for the system which incorporates in its formal text the creation and the

sustenance of a civil society. The objective of the government shall be to incorporate the local tribal people in the administration of the tribal areas right from the planning stage to final implementation of the programme. A team of their own people shall be constituted for the work of administration and development. Moreover all the tribals communities should not be put under same umbrella for development purpose. Each group has to be taken as separate entity and tailor made scheme has to be made for their development. Different tribal problems should be addressed separately and the government must look for individual plans for various tribes. The administration must be willing to keep the tribal interest as the priority while carrying out any programmes that affect the tribes and their land.