

TRIBAL WOMEN'S AND THEIR RELATION WITH LEGAL PERSPECTIVE.

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ABSTRACT

Status of tribal women can only be analysed in absolute form when the legal dimension and protection provided to them is analysed, therefore this paper include the all the legal variables providing important part in the life of tribal woman. This paper includes the major international laws and treaty dealing with specifically tribal women's. Key among them is the ratification of the convention on elimination of all forms of discrimination against women (CEDAW) in 1993 by India, the Mexico plan of action (1975) and the Nairobi forward looking strategies (1985). Our constitution and its constitutional mandate provide and guarantee certain rights to tribal women's and this paper involve the analysis of the same. It will also analyse the different provision of our constitution which guarantees rights to tribal women in depth and along with the same it will touch the Provision of Article 14 and Article 21 with regards to tribal women. Moving further it involve certain Articles such as -Articles 14, 15, 15(3), 16, 39(a), 39(b), 39(c) and 42 of the Constitution also constitute there specific importance in this regard. In the course of the same this paper involves the in-depth analysis of problem facing by tribal women's in India such as carriage of customary laws which acts as a obstruction to their development. In the last phase of the same some legal developments are also suggested such as providing easy access to justice through special tribunal simplifying procedural laws etc.

INTRODUCTION

CONSTITUTIONAL OBLIGATION

Equality

Our constitution starts its philosophy with the term equality, In India every person is subject to be equal before eye of laws irrespective of their cast, religion, gender, occupation etc .Equality

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have been interpreted by our guardian of constitutions many time in a vast manner but in all and same it condemn discrimination and arbitness under it. We have come across many tribal communities where equal rights for the woman are still the Einstein philosophy. women's have been in there past are deprived of their equal status in the mask of tradition custom moral but our constitution right from the front protect and grant the equal status to every tribal women in their community. Previously land ownership was not granted to the tribal women and they have not rights in tenancy of the agricultural land but our Hon'ble supreme court in its series of reforms add **Madhu Kishwar and others v. State of Bihar**³ where it was opined that tribal women's have equal right as compare to other dignitary members of society and there entitlement of property cannot be challenge on ground of customary law. More and often we came across the arguments against the equality of tribal women's on the basis of customary laws, The same have been already decided in the supreme court in the matters of **Sheikriyammada Nalla Koya v. Administrator, Union Territory of Laccadives**⁴, K.K. Methew. J., as he then was, held that customs which are immoral are opposed to public policy, can neither be recognized nor be enforced.

Moreover in **In V. Tulasamma v. Sessa Reddy** this Court, cognizant to equality in intestate succession by Hindu woman, held that after the advent of independence old human values assumed new complex; women need emancipation; new social order need to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the times.⁵ These serious of judgment clearly embark the equal status of tribal women in the eyes of constitutional law. Talking about custom we should analyze the case of **Abdul Husain Khan v. Bibi Sona Dero**⁶, when it was pleaded that by customs of the family, the sister of an intestate Mohammedan was excluded from inheritance in favors of a male paternal collaterals, by operation of Section 26 of the Bombay Regulation IV of 1827 (a usage was in question in the suit), the Board held that the custom was not established to exclude the sister of the deceased from inheritance

Article 15 (4) and Article 16(4)

³1996 INSC 561.

⁴AIR 1967 Kerala 259

⁵AIR 1977 SC 1944 at 1961

⁶[(1917-1918) 45 Indian Appeals 10].

If we go through with the plain reading of Article 15(4) and Article 16(4) we will come across with the prima facie impression that this is the exception for rule of equality, earlier even the supreme court has interpreted it in the same manner⁷ considering these sub clause as the exception to equality but later on the situation has changed. The course has started from the landmark judgment of **Kerala v. N.M. Thomas**⁸ there it was opined that clause (4) of Article 16 was not an exception to clause (1) or (2) of that article. This view in Thomas was reiterated, much more emphatically by Chinnappa Reddy, J. in his concurring opinion in **A.B.S.K. Sangh v. Union of India** later on the same has been recognized in case of **Indira sawney v Union of India (Mandal Case)** There the Supreme court has pull the discussion to an end by retreating it as a part of equality as right to equality introduce equal opportunity and in the logical world the same interpretation is applied to Article 15(4) with the same result. In the case of tribal women's they have the equal right of opportunity as others in their respective community by the virtue of our constitution and hence safeguarding the equal opportunity to tribal women is already being protected by our Constitution makers. For the same we should refer to the words ushered by **Mrs. Hansa Mehta**⁹ :

“It will warm the heart of many a woman to know that free India will mean not only equality of status but equality of opportunity. It is true that a few women in the past and even today enjoy high status and have received the highest honour that any man can receive, like our friend, Mrs. Sarojini Nadu. But these women are few and far between. One swallow does not make a summer. These women do not give us a real picture of the position of Indian women in this country.”

This statement clearly demarcated the concerns of our fore father toward the women who are backward in their gender itself such as tribal women's. In the original arena our country has recognized the right to equality not in the “formal” form but in “substantial” one. In other words we can say we never talks about treating unequal as equal therefore giving room to the extra

⁷M.R. Balaji v. State of Mysore, AIR 1963 SC 649.

⁸ (1976) 2 SCC 310

⁹ A Singh, The role of law in empowering women in India, Shodganga ,2015.

protection by the ways of law, reservation for the upliftment of weaker sections of our society such as tribal women's.¹⁰

Tribal Women's Representation: From Context to Text Below is presented field data relating to the Panchayat Raj Elections (2013) and the tribal women's representatives who were elected to the respective post.

Table 1: Tribal Women Representatives in Panchayat Raj Election, 2013

Overall Women

No. of Zilla Parishad Members 22

No. of Anchal Samiti Members 175

No. of Gram Panchayat Members 6630

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Article 19

Article 19¹¹ clause 4 is the most reliable but more or less not discussed article of the Indian constitution it provide that every citizen of the country has the right to settle everywhere within the territory of our country and the same must be taken as the landmark if we trace down the societal values and functioning of tribes in India who are less known to get the permanent address in there society and they are allotted with the right to move. Tribal women's are also consulate to be the mover and not a believer of permanent address as they have to practice agriculture for that they are in constant search of the pasture land ,therefore it can be confer that while adding this clause as the fundamental right makers of our constitution has safeguard the practice of the tribal mainly women's.

¹⁰ Ashok Kumar Tripathi v. Union of India 2000 (2) MPHT 193.

¹¹ Constitution of India 1950.

Article 21

Right to equality const of right to social protection and security by ensuring the social and economic justice to all .In the case of **K. Ramaswamy J., Calcutta Electricity Supply Corporation (India) Ltd. v. Subhash Chandra Bose**¹² judges opined that the right to life and liberty is a cosmetic right therefore the basic economic and social justice is the basic aspiration of every individual of country and hence inseparable from the right to life and liberty. Following the case It can be said the constitution has provided he basic right to all the individual including women specially tribal who are economic and socially backward to get the social prosperity even above the customary laws or tradition. In the case of **State of Maharashtra v. Madhukar Narayan Mardikar**¹³, the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when she likes. This case is very important when concern with tribal population the real sense of privacy is the symbolic representation of civilization in the present scenario tribal women with such right may hide their identity in outer world if they want to as we are aware of the discrimination made by the other people with regard to tribal.

Article 46

Article 46 ensure the special rights to the schedule tribe or backward class which open the block of preferential status to the tribal women and this article serve as the platform for the opportunity creator to the most backward section of society- tribal women's . Earlier the scenario was different Supreme court has rejected the plea of reservation on the basis of Article 46,In the case of **State of Madras v. Champakam Dorairajan**,⁷ *judge bench was opined that giving reservation on the basis of article 46 cannot be justified and hence declare it to be void in legal scenario. To counter the same Article 15 (4) is added in the constitution hoping to give the affirm ground, most of the time dissent are become subject to ignorance but in the case of **C.A. Rajendran v. Union of India** dissent of Suba rao j. definitely paid off where he added that reservations would indeed be a matter of right, because 16(1) makes it clear that "there shall be equality of opportunity."* This, unambiguously, is the language of right.

¹²AIR (1996) 1234 :(1996) SCC (1) 742

¹³AIR 1991 SC 207, 211

Article 46 provide the obligatory duty of the state to protect and safeguard the weaker section of the state it is important to note that here the term weaker is used despite of using the term “backward class” this lead to the separate scenario to special sections such as tribal women’s.

Article 335

This article provide the claims to the member of tribal community in the job post available in union or state and the consequent reservation of women’s along with the same create the environment welcoming for the tribal women in the sector of government jobs which is utmost necessary.

Political Safeguard To Tribal Women’s

Article 330 and Article 332 This article provides the reservation of the seats to tribal people in the house of the people. In the case of **Kamal Kant Prasad Sinha v. Union of India**¹⁴, it was the matter of the issue that reservation posing since last 60 years after the independence of the country without any review which was presided by the constitutional makers is ultra vires and the provision related to same is void such as Article 330, There the court opined that special reservations to these weaker sections would strengthen the essential features of real democracy with equal opportunity and equal status, which is in consonance with the preamble of the Constitution. Under article 330 seats are to be reserved accordingly to the schedule cast and schedule tribe is largely based on population index or proportion. By the 42nd amendment the of the constitution , the number of seats for the schedule castes and schedule tribe in lok Sabah and the state legislative assemblies were frozen at the level of 1971 census population figures and this number will not be varied until the first census held after the year 2000.¹⁵

Tribal Women’s Representation: From Context to Text Below is presented field data relating to the Panchayat Raj Elections (2013) and the tribal women’s representatives who were elected to the respective post. Thus reservation for tribal women in election representation through the 73rd amendment also helps out to bring the equal status of women in our country.

¹⁴2008(2)JCR603(Jhr).

¹⁵ In 1980 there were 78 Harijan and 39 Adivasi members in lok Sabah and the 546 harijans and 291 Adivasi in the state assemblies.

Table 1: Tribal Women Representatives in Panchayat Raj Election, 2013

Member	Overall	Women
No of Zila Parishad Members	2	2
No of Anchal Samiti members	17	5
No of gram Panchayats members	66	30

Article 243 T

This article provide the equal status to the tribal people especially women's reservation of seats for the schedule tribe and women in every municipality and further enables the legislature of a state to make provision for reservation of seats in favour of backward class of the society.¹⁶

The supreme court has held that a woman when married to a member of a tribe ,after the due observance of all the formalities involved would be regard as the member of the tribe, In the case of **N.E Horo v. Jahanara Jaipal Singh**¹⁷ the wife is elected as the representative but the issue arises as she was not the member of tribe she cannot be representative from the reserved seat there the Supreme Court has demarcated that That as she was duly married to a person of Munda tribe therefore she is eligible for the same.

However, more recently the Supreme Court in **Anjan Kumar v. Union of India**¹⁸ has held that a women belonging to the forward class marrying a tribal cannot automatically attain the status of tribal unless she has been accepted by the community one of them observed all the rituals and traditions.

¹⁶ MP Jain Indian Constitution Law 7th edition, Lexis nexis page no 1453.

¹⁷ AIR 1976 SC 939.

¹⁸ (2006) 3 SCC 257.

INTERNATIONAL OBLIGATIONS

CEDAW is the same format treaty as the elimination of the discrimination on racial basis both with regards of the two dimension include the scope of its substantive obligations and its international monitoring mechanisms¹⁹. Out of the 30 mentionable article which cover the every aspect of the social justice 1st part generally regard to anti discrimination norms and the sex trafficking. This part includes the article from (1 to 6) and it includes the most illicit definition of the discrimination against the woman²⁰ which can be worded as:

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

While doing so it includes the tribal women's who are suffered of political economic and social oppression and this give it a new dimension of discrimination on the basis of the gender at general without taking tribe as specific

Moving further it accommodate the political rights of the women under the article 7 and 9 and this regard as the second part of the same From the article electoral representation is guarantee which is also guarantee under the Indian constitution under the article 243(T) in the form of the reservation in the panchayti raj elections. Article 8 take the rights to the new dimension to the next stage where it guarantee the representation at the international leveling in the author view the time has come to give the tribal women preference in the international stage to ensure the protection and safeguard the status and right of most backward of backward community. In the words of the provision mentioned in the context of the treaty²¹:

"States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations."

¹⁹ Henkin, Louis (2009). Human Rights,. Foundation Press. p. 221.

²⁰ Art 1 CEDAW,1979.

²¹ Art. 8 CEDAW,1979.

The third part that includes the articles from 10 to 14 talks about the education in large and when we analyze the education status of the tribal woman in India some of the not so cherished facts can be portrait.

Table 2 LITERACY RATES OF SCHEDULED TRIBES (STS) BY SEX AND URBAN/RURAL 1961 TO 2001

YEAR	URBAN		RURAL	
	MALE		FEMALE	
1961	13.7	30.43	2.0	13.45
1971	16.92	37.09	4.36	19.64
1981	22.94	47.60	6.82	27.32
1991	38.45	66.3	16.0	45
	Referred to : LITERACY RATES OF SCHEDULED TRIBES (STS) BY SEX AND URBAN/RURAL 1961 TO 2001			

Article 15 and 16 talks about the rights in marriages and right to equality in family and this is the major legal setback in India where tribal women's still waiting for the property right from the ancestors although laws are there but there is still need of the implementation of the same. Hindu Succession act equally applicable but the grassroots compliance is still the matter of dust and air.

UNDP millennium goals are set for forecasting the social and economic inclusion by elimination gender despiratory among the cultural dimension. CEDAW also poses the clauses related to the tribal women which include Article 2 which talks about the discrimination against women. This state as:

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.”

Not only has this had the exception some of the other laws also talked about the same which include UDHR²² ICCPR²³ and ICESCR.

The Convention on the Rights of the Child (art. 2) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 7) also prohibit discrimination based on sex. The Convention on the Rights of Persons with Disabilities (art. 6)

²² Article 2 of Universal Declaration of Human Right.

²³ Article 2 of Universal Declaration of Human Right.

recognizes the same and has established the discrimination of any form against women is atrocities and same can be linked to the women's also as they are the most backward part of the group.

The African (Banjul) Charter on Human and Peoples' Rights came forward in global community in 1981 by the Organization of African Unity. Although every article of the same is the story in their version and try to protect the rights of tribal women but one of the most important is article 2 prohibits discrimination on any grounds, including sex, in the enjoyment of the rights guaranteed by the Charter. Article 18 forms the obligation which can be referred as the source of directive principle of state "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". The Charter's Protocol on the Rights of Women in Africa (Maputo Protocol) was adopted in 2003.

Conclusion

At the End of the discourse it must be understood that our laws right from the starting is in the support of the tribal women's and try to protect it in every possible manner no matter what it add or interpretative that can be analyzed while reading preamble, Article 14,19,21,24,6 and others in detail. This not itself ends various judicial pronouncements also talks about the same. May be the situation is derogatory but the same can be improved just by implementing the constitution in its real sense. Moreover the state is also bound by the various international conventions also and the same is in the favour of the tribal community.