

Constructed Criminality and Contemporary Solutions for De-Notified Tribes

Celia Joanne Jenkins*

Abstract

Criminal tribes or ‘born criminals’ of India represent a morbid concept etched onto the minds of people at the time of British rule, varnished over with legislation notifying them criminal and preserved for over a century. Despite being formally de-notified by the Indian state post independence, they are still socially excluded, marginalised and face varying degrees of oppression. Mere removal of an adverse label has proved inadequate and thus various contemporary solutions founded on the touchstone of human rights are delved into herein.

1. Contextualising the Case of ‘Criminal Tribes’

In most urban cities, criminal tribes like the Bawarias, the Pardis and Sansis still strike at the dead of night, robbing homes and bludgeoning their inmates to death. So the police still round them up routinely and counter-bludgeon them to extract information on their crimes and not uncommonly kill some of them in custody.¹

The image painted above is of a violent and brutal set of thieves, and of the police system striking back. The latter is a harsh reality, the former an image in the minds of the Indian people, a mere myth that has sometimes forced reality. Referred to as ‘criminal tribes,’ ‘De-notified Tribes’ (DNTs) or ‘born criminals,’ they represent a morbid concept etched on the minds of people at the time of British rule, varnished over with legislation and preserved for over a century.

The arbitrary categorisation of criminal tribes was first made by the British in 1871, and this dubious status reigns even today, reducing them to one of the most neglected elements of Indian society. The creation of criminal tribes was done by the British, but just as inherited property comes with rights and liabilities attached to it, so also the Indian state, and its responsibilities towards protecting the well-being of criminal tribes. So far the Indian state has been negligent in the fulfillment of this responsibility. However, this is primarily due to the fact that DNTs are unorganised and scattered groups facing differing levels of oppression all over the country with no public forum to build support and force the hand of the state.

There is a dearth of writing and research being conducted relating to DNTs. So far few non-governmental or state institutions have attempted to work with DNTs to ascertain the issues that plague them and the kind of solutions they seek. This study is an attempt to trace how DNTs came into being, the theories of criminology that have been utilised in explaining their existence, the kind of oppression they faced by statute and the societal perception that continues to

* B.A., B.L. (Hons), Nalsar University of Law, India 2005; Currently working in the Supreme Court of India as a Law Clerk to Justice P.K. Balasubramanyan.

¹ Karan, ‘Police, Crime and Punishment’, in Shankardass (ed.), *Punishment and the Prison* (Sage, 2000) 221.

marginalise them. It then identifies plausible solutions and movements that might prove beneficial to DNTs in contemporary times.

2. Research Methodology

The literature available on criminal tribes largely traces their history and underscores the effect of the enactment during the time it was in force. These studies are primarily conducted by historians and, with the exception of very few, do not provide an adequate perspective of the contemporary status of the ex-criminal tribes. Thus, a large part of the solutions suggested has been almost entirely based on analysis by the author.

Apart from literature on criminal tribes, the author has also widely perused available literature on British strategies of punishment, criminological theories, the disability movement, indigenous people's movement and other relevant areas.

An ideal study with concrete solutions could have been undertaken only through direct interaction with DNTs. However, the author faced practical constraints on this front as they exist in scattered groups across the country, with varying issues and problems. Hence, the perspective of DNTs in one place might not characterise the issues of the larger group. Further, even on the organisational front not many institutions devote time solely to working with DNTs. Hence, this source was minimally used, and therefore fostering co-operation and organisation between all the groups remains one of the author's biggest concerns.

3. British Strategies of Criminalisation For Free Labour

Transportation of criminals was not a one-time incident with the British. It was a practice that they used to their advantage over centuries. Early in the seventeenth century, they began to transport serious offenders to distant colonies. Initially, convicts were sent to the West Indies, and later to the North American colonies, with Australia becoming the final dumping ground after the American War of Independence.²

After the American War of Independence, the number of convicts in Britain due for transportation began to build rapidly.³ Thus, the long-term solution was the establishment of new colonies in Australia.⁴ The British discontinued the system of transportation in mid-nineteenth century, but the use of convicts as free labour took far longer to die away.⁵

² Extracts from 'Crime and Punishment, History of', MSN Encarta, Online Encyclopedia 2004, available at: <http://uk.encarta.msn.com>.

³ 'Basics on British Criminal Justice', Society of Australian Genealogists, available at: <http://www.sag.org.au/ossources/crime.htm>.

⁴ Criminals were first transported from Britain/Ireland to Australia in 1787. For Ireland the practice continued for about 62 years until 1853. For more details, see 'Criminals Transported to Australia 1836 to 1863', available at: <http://www.rootsweb.com/~irlros/Criminal/transported.htm>.

⁵ The sentence of transportation was abolished in 1857 through an enactment, but the same enactment also allowed for convicts sentenced to penal servitude to be sent beyond the seas. Such transportation continued from England till about 1868.

The British cited protection of society to justify transportation, but a lot of ‘dangerous’⁶ criminals managed to buy their freedom with free labour. A little less than half had their capital sentences commuted on condition of transportation to the colonies for a period of years or for life.⁷ At this time felonies were capital offences, theoretically leading to a public hanging or burning, with the addition of quartering for the most heinous crimes. An escape route from such punishment was to convert it into transportation for seven years.⁸ Even after they completed their terms, many decided to stay on as free settlers, with their families coming out to join them.⁹

Especially in Australia, convict labour was actually used to develop the region and serves as one of the major reasons advanced for why parts of Australia could have become a penal colony. For instance, Western Australia was initially not a penal colony, but was a colony for free settlers since 1829. After 18 years of being a free colony, it sought to bolster its flagging economy through the use of convict labour¹⁰ in an attempt to develop the region. It is also interesting to note that this took place at a time when several Eastern states were shutting down their penal settlements and Britain once again needed an offshore dumping ground for convicts.¹¹

Thus, by and large, colonies were useful offshore dumping grounds for criminals and they in turn would pay off their sentences with labour needed to develop the region. The strategy was however, not ideal for colonies with an already surplus population, but which had potential for development all the same. India was such case. Therefore, modification of the strategy was called for.

4. The Modified Strategy Adopted in India and the Creation of Criminal Tribes

The British tendered hopes of developing the Indian region. However, compared to other colonies, India had a huge supply of labour and there was no need to ‘import’ dangerous criminals from outside. This called for a modification of the earlier British strategy of transportation. However, this period marked the end of transportation as a whole, with the numbers being transported rapidly diminishing.

Labour was urgently needed, but even in poor labour conditions in India it came at a price. Free labour called for the development of a new strategy, and at the time a strategy of

⁶ Those transported were mostly persons who had committed crimes against property, such as petty thieves and burglars, pickpockets and shoplifters, with a lesser number of sheep-stealers, receivers, forgers and the like. Under no circumstances can these be considered to be so dangerous to society that they had to be banished virtually forever. Initially, the British justified the system saying that it was only for those who had committed the most heinous of crimes, but in practice, the ones transported were mostly guilty of pettier offences. See ‘History of Capital Punishment in Australia’, available at: <http://www.angelfire.com/stars/dorina/historycp.html>.

⁷ At times of war, commutation of a sentence was often contingent on serving in the army or navy. But when this need was not present, they used them to serve another.

⁸ In one study of around 1,500 Old Bailey convicts from the 1760s, 14% were sentenced to be hanged (perhaps half of these were transported instead), 75% sentenced to transportation, 4% branded, 5% whipped and just 1% imprisoned. See ‘Basics on British Criminal Justice’, supra n. 3.

⁹ At least 30,000 men and 9,000 women were transported for a minimum period of seven years. See ‘Criminals Transported to Australia 1836 to 1863’, supra n. 4.

¹⁰ About 9,720 British convicts were sent from 1850-68, consisting largely of prisoners from England though one ship is believed to have come from Bermuda and a couple consisting of military prisoners from India. See ‘Western Australian Convicts 1850-1868’, available at: <http://members.iinet.net.au/~perthdps/convicts/con-wa.html>.

¹¹ A parallel is drawn to a similar situation 65 years earlier with the American War of Independence. Another possible reason was that Britain was also re-assessing its criminal system and beginning to keep more of the lesser offenders at home, and thus it was the more hardened criminals that were exported. However, this is more unlikely.

criminalisation seemed appealing. Ideas about crime, criminals and social danger were developed and utilised by the East India Company in pursuance of its interests in commerce and governance.¹²

In India at this time there existed several itinerant groups very much like gypsies. They were travelling magicians, traders, wandering cultivators, pastoralists, forest dwellers and other itinerants. While they were very much a part of the Indian trading system, their 'rootlessness'¹³ caused severe discomfort to the British. Not only did their wandering existence reinforce an economy that the East India Company was attempting to replace with settled agricultural production, but these wanderers might well have proved indistinguishable from roving bands of thugs or indeed moonlight as thugs as they moved around the country.¹⁴ Their desire to feel in control of this 'floating' population encouraged the production of official typologies like criminal cults and criminal tribes.

It was a concern for political stability as well as cost effectiveness that caused a distinction to be drawn between 'individual' and 'group' crimes. For 'ordinary crimes' of individuals, policing was nominally and rather unenthusiastically provided. However, the 'extraordinary crimes' of collectivities raised the anxieties of officials and prompted an altogether more energetic response. They used theories of criminology prevalent in England, as well as capitalising on a worldwide general notion of distrust in gypsies,¹⁵ to justify the passing of the Criminal Tribes Act 1871, (henceforth referred to as the CT Act) which for the first time termed a tribe as a whole criminal.¹⁶

They claimed that several itinerant groups only posed as wandering salesmen, when they were actually groups that periodically advanced their professional and economic status by committing crimes such as thieving and cheating. What was problematic about their criminal activity, however, was that they engaged in it only sporadically, making it difficult to draw their conduct squarely within the Thagi and Dakaiti¹⁷ Departments' operations.¹⁸ Hence, the British categorised them as 'criminal tribes' who were '[s]uch tribal groups of people in India who have

¹² Brown, 'Crime, Governance and the Company Raj—The Discovery of Thuggee', (2002) 42 *British Journal of Criminology* 77.

¹³ From the Middle Ages, a lot of concern has been raised regarding the rootless vagabond. These consisted of either beggars, deserters from the army, entertainers, tinkers, gypsies, etc. who were either forced, or whose way of life kept them on the roads. Once such individuals were excluded, denied ordinary civil rights, and labeled as dangerous, there could have been a strong incentive for them to commit criminal acts either as the best or the only way to ensure a living. The people who argued for police reform in the late eighteenth and early nineteenth century all expressed concern about vagabonds and those individuals who they felt preferred lives of idleness and luxury rather than trying for respectable labour for an honest wage. The obsession with the vagrant as a criminal had a remarkable longevity from the medieval period until well into the nineteenth century. In England there was a shift in perceptions from the perception of the offender, to the motivation for his/her crimes. However, this is largely absent in India, even today. See 'Crime and Punishment, History of', MSN Encarta, Online Encyclopedia 2004, available at: <http://uk.encarta.msn.com>.

¹⁴ Brown, *supra* n. 12.

¹⁵ Gypsies were originally thought to have come from Egypt, hence their name. It is now known that they originated in North West India, migrating westward from the ninth century onwards. They are today scattered throughout Europe and North America. The French call the Gypsies 'bohemians' because they believe that they came from Bohemia. The gypsies own name for themselves is 'Romany'. For more details see Room, *Brewer's Dictionary of Names* (London: Cassell Publishers, 1992) at 223.

¹⁶ Lalitha, *The Making of Criminal Tribes* (Hyderabad: OUP, 1982) at 24.

¹⁷ It was well accepted that both these groups were considered to be 'bandit' like groups who were largely marginals who lived at the fringes, out of the respect of society. See, 'Crime and Punishment, History of', *supra* n. 13.

¹⁸ Brown, *supra* n. 12.

traditionally committed criminal activities as their way of life. For non-criminal tribes, criminal activities are not the approved means of livelihood, even though members may occasionally commit crimes.¹⁹

Thus, the question changed from being one of identifying individual thugs to one about identifying and documenting the characteristics of criminal tribes. The task of officials became easier. No longer did they need to find individuals whose profession was crime, but they developed a categorisation to identify whole tribes or groups for whom crimes of various sorts provided a livelihood. And this categorisation between criminal and non-criminal tribes was largely based on caste.²⁰ Criminal tribes were broadly classified into two groups: those that wandered about like gypsies and those that settled in villages.²¹

Prior to the passing of the CT Act, all criminals had been dealt with uniformly under the Indian Penal Code. However, the British Government felt that such laws were useless in curtailing nomadic groups who were born into and lived by crime. Hence, under the CT Act, they intended to restrict groups as a whole in order to identify the professional criminals in them and thus prevent them from committing crimes and punish those who indulged in crime.²² There even existed a school of thought which believed that since criminal tribes were organised groups, they represented a form of organised crime.²³

The CT Act had certain basic underlying assumptions. First, all persons born into a group would become criminals from birth, as they would take up their father's profession. Second, once they took to crime, they would continue to be criminals, as they believed it to be a legitimate profession. Third, due to continuous criminal practices, they became hardened criminals.²⁴ Hence, when a sufficient number of members of a particular group were accused or suspected of committing crimes they were deemed to be 'criminal tribes' and were subsequently dealt with under the Act.

Among those notified under the CT Act, several were followers of beliefs and practices of caste Hindus in rural areas. This led them to be termed 'backward Hindus'.²⁵ However, although Hinduism was their dominant faith, others followed the paths of Islam and Christianity.²⁶ It is pertinent to note that irrespective of their caste or religion, it was

¹⁹ Simhadri, *The Ex-Criminal Tribes of India* (Delhi: National Publishing House, 1979) at 3. It is interesting to note that the notion of criminal tribes was created when the idea of 'born criminals' was prevalent in England. For example, in a description of London's criminal class in 1829, an unidentified writer stated, 'They are born thieves, and it is their inheritance: they form a caste of themselves, having their particular slang, mode of thinking, habits and arts of living.' This was a keen reflection of looping Indian born knowledge and concepts back to metropolitan Britain, depicting that India was not only a receiver of extant British wisdom, but was also a site for knowledge production in its own right. For more details see Brown, *supra* n. 12.

²⁰ However, in making this categorisation, they largely underestimated the fluid character of pre-colonial social arrangements in which caste was yet to become a rigidified concept. They viewed caste as a social space into which an individual is born and which is dictated by his/her profession as well as their social and religious observances and habits. If caste could be understood in this way, then it envisioned a society that might be known, ordered and analysed on the basis of such characteristics and the distinctions or divisions between them.

²¹ Of these the general notion was that the former were tougher to handle than the latter. For further details see Gillin, *Taming the Criminal* (New York: Macmillan, 1931) at 106.

²² There was also a prevalent feeling among prominent members of the government that persons who were 'born' criminals should be dealt with on the severest of terms.

²³ They have been compared to the Mafia in the USA, but it is conceded that they did not establish links with criminals of other countries.

²⁴ Simhadri, *supra* n. 19 at 29.

²⁵ Ghurye, *The Aborigines: So Called and their Future* (Bombay: Popular Book Depot, 1949).

²⁶ However, this could be a later development due to colonial rule.

characteristic of these groups to occupy the lowest rungs of the population, equivalent to or lower than the untouchable castes.²⁷

The CT Act provided for:

- Designation of a group as a 'criminal tribe';²⁸
- Registration of all members of tribes who were deemed criminal tribes;²⁹
- Once registered, it was mandatory for all members to report themselves to the police or designated authorities at fixed intervals;³⁰
- It was necessary for them to notify the police of their place of residence, intended change of residence or any absence or intended absence from residence;³¹
- The Government was authorised under the Act to restrict any member of a criminal tribe, or a tribe as a whole, to movements in a specified area, reside in that area and leave the area only with permission in the form of a pass even if it was only for a few hours or for a laudable/innocent purpose;³²
- If any of these rules were contravened, stringent punishments could be imposed. For a minor offence like inadvertently walking out of a settlement one could be whipped. The punishment increased proportionately with the gravity of the offence spanning from imprisonment for one year on a first conviction, to imprisonment for three years and a fine of upto Rs. 500/- for more than two convictions.³³

The Act was amended in 1873 on the recommendation of the Police Committee and provided for enhanced punishments.³⁴ The Government also felt that criminality among these groups was a function of association,³⁵ and hence provisions were made for the separation of children between the ages of 14 and 18 from their parents and placing them in reformatory settlements.³⁶ This was in consonance with theories of 'born criminals' or 'bad breeding' which were popular at the turn of the twentieth century. These claimed that a person's inherited make-up could make him/her inherently flawed³⁷ and this, coupled with parental influences, could lead to poor

²⁷ This status was precipitated to a large extent by their dietary habits and by the fact that they earned their livelihood by practising nefarious acts.

²⁸ This emerges from a combined reading of Sections 2 and 5, CT Act.

²⁹ Section 7, CT Act.

³⁰ Section 8, CT Act.

³¹ Section 9, CT Act.

³² Section 13, CT Act.

³³ Sections 19, 20, 21 and 22, CT Act.

³⁴ Sections 19 (A) and 19 (B), CT Act.

³⁵ They found justification in several psychological theories prevalent in that period, such as those advocated by Locke and Rousseau. Locke considered that a child came into the world as a 'tabula rasa' or a blank slate. The child's experiences in the world determined what was written on the 'slate' and shaped the person they became. This view saw the child as essentially 'passive' in the developmental process and the environment as the active agent. This view of Locke was expressed in the seventeenth century, but is by no means unsupported through the ages. As recently as the twentieth century, behaviour annalists Watson and Skinner also followed this school of thought.

Rousseau, on the other hand, termed a child as a 'noble savage' with natural virtues and an innate capacity to reason. Hence nature played a greater role than nurture, which only played a facilitating, but not determinative role. For further details, see Sanson and Wise, 'Nature and Nurture', The Australian Institute of Family Studies, available at: <http://www.aifs.gov.au/institute/pubs/fm2001/fm60/as.pdf>.

³⁶ Section 17(A), CT Act. It is ironic to note that this was the same trend that was followed in other colonies as well. Especially in Australia, it was common for children to be separated from their parents in the guise of giving them better prospects in life.

³⁷ For some this was derived from a reading of the Christian notion of original sin.

outcomes.³⁸ Therefore, this act of separation was widely supported and did not find much opposition in spite of the fact that the children were not well schooled or given the chance to develop capabilities.

Until 1908, the offenders were usually put in prison. However, this only increased their own poverty and placed their families in great deprivation. The Salvation Army had been experimenting with criminal tribes in prisons and managed to convince the British Government that criminal tribes could be reformed and made to deviate away from their lives of crime by placing them in settlements. Hence, the Criminal Tribes Settlement Act of 1908 was enacted.

The crux of this Settlement Act was that now even persons *suspected* of living by crime could be brought under its purview.³⁹ They could be registered and their movements supervised. All those who had been convicted of crime could be placed in settlements, where they were taught to do work and their children were forcibly schooled.

Subsequently, the Act was also amended in 1911, with a different categorisation of criminals and further amended in 1923 and 1924. The result of these legislative changes was that any member of any community that was a habitual offender could come under the purview of the Act.

5. Labeled and Marginalised: The Effects of The CT Act

It is generally through the process of law that social stigma is sought to be removed. However, the CT Act was an exception to this rule. It serves as an apt example of a piece of legislation that created an adverse label and attached it to persons who henceforth lived stigmatised, marginalised lives, effectively segregated from society as a whole. It is acknowledged that a criminal record attached to any person will serve as a means of marginalisation, but this Act ensured that even persons in a group who had never committed a crime⁴⁰ could have their movement significantly restricted, accompanied by a societal sanction of their criminal potential. From the commencement of the CT Act, they rose to the status of official guinea pigs-the first to be rounded up by the police for any crime committed in the vicinity. With the presumption of their criminal tendencies being taken virtually for granted, it became impossible for them to prove their innocence.

Prior to the commencement of the CT Act, these groups were primarily nomadic and their means of livelihood were non-sedentary. With the onset of industrialisation and other forms of development, many of them lost a large part of their traditional occupations. This was especially true for those who were travelling traders and salesmen who could not match the competition of goods being transported by road or rail. Many of them were reduced to abject poverty and turned to crime for survival. Those that followed other occupations such as fortune-telling and performance of magic were already distrusted. Hence, general notions of their criminality were already floating around society and were exacerbated only by the process of development and the CT Act which built notions of their inherent criminality.

³⁸ These again were theories that referred to nature as the inherent cause of criminal tendencies, and did not attribute much to nurture. However, it must be mentioned that now both nature and nurture are felt to contribute almost equally to a child's development.

³⁹ See also Section 19(B), CT Act.

⁴⁰ At later stages, even persons in a group who had never committed a crime could be placed in the settlements and thus suffered the same oppression.

The rationale behind placing them in reformatory settlements was for their ‘moral’ correction. However, very little of this was ever seen. Those settled were separated from their children and lived in glorified concentration camps⁴¹ which were effectively centres that generated free labour for government projects and did nothing to contribute to their reformation. The work in the settlements included repairing roads, mending tank bunds, clearing drains, planting and cutting crops and other activities as necessary. The justification was that this process would contribute to economic correction. Moral correction was an objective that was simply dispensed with. Apart from being free manual labour, the basic living conditions in the settlements were appalling. They received miniscule wages for work, lived under draconian rules and regulations and had terrible sanitary conditions, a complete lack of freedom and abject poverty. This was a perfect example of a paternal, patronising government at its best, arrogating to itself the power to notify a community criminal, presuming that it could reform such a notified community and that it knew what to do with the children of that community, abducting them from their parents.⁴²

The authorities in charge of the settlements also greatly abused their position. Permission to leave the settlement always came at a price.⁴³ The officials habitually resorted to fraud and bribery and sometimes even instigated these people to commit crimes.⁴⁴ If it was alleged that a person in a settlement committed a crime, they would be whipped or abject themselves to more arduous labour. Hence, their view of work was largely as a punishment and thus taking up honest work outside a settlement was still foreign to them. The Salvation Army, who ran a large number of the settlements, forced a number of conversions to Christianity. Following conversion several persons were left disappointed, as they did not reach the desired goals that Christianity had promised them. But persons who converted to Christianity were given many privileges to serve as an incentive, and this created discrepancies and ill-will between those in the settlements.⁴⁵

After their tenure at the ‘reformatory settlements’ many of the DNTs completely lost their means of livelihood. Used as free labour of the British was insufficient to provide them with the skills or capabilities to become economically independent after post release granting them a future of poverty. Furthermore, they developed further feelings of fear and hatred, leading to what is sometimes called a ‘culture of crime.’⁴⁶

6. Continuing Discrimination Post-Repeal

The CT Act was in force for about 80 years. Post-independence, several leaders and social reformers argued that such an act was a blot on Indian legislation and against civilised principles of criminal justice and treatment of offenders. Thus the Act was repealed in 1952 and more than 150 criminal tribes were de-notified and became de-notified tribes or DNTs. Thus, the legal stigma was formally removed, but the social stigma and its consequences reigns on.

⁴¹ D’Souza, *Branded by Law* (New Delhi: Penguin, 2001) at 46.

⁴² Ibid. at 44.

⁴³ This price could be in terms of free and forced labour, a bribe or exploitation of a woman.

⁴⁴ Lalitha, supra n. 16 at 35.

⁴⁵ This has a lot of similarity with the forced conversions of ‘Black’ slaves in America.

⁴⁶ Lalitha, supra n. 16 at 38.

‘Laws may be common to all, but their execution and administration are different.’⁴⁷ This statement holds much truth, especially for DNTs. Now de-notified, they stand equal to all others in the eyes of the law but this is far different in actual practice. They are still the primary suspects of the police and are constantly victimised.⁴⁸ Much of the view of them being criminal has been perpetrated by the police.⁴⁹ Often, they are automatically rounded up by the police drawing the assumption by the general public that they are indeed criminal and this perception lives on. In terms of atrocities, not much has changed on becoming de-notified. Women are still exploited as they become easy targets as their men-folk are often absconding or locked up by the police.⁵⁰

There exists an allegation that it is the police officer’s objective to ‘prevent and control crime, even if this means maiming or killing a criminal.’⁵¹ However, this maiming and killing is often very selective. A number of DNTs lose their lives at the hands of the police and it is time that society questioned the rationality that permits such brutal treatment of them ‘because it must have been their fault’, but allows other criminals to remain untouched.⁵² It is time that they ceased to be scapegoats for crimes they do not commit.⁵³

Apart from the blatant human rights violations, DNT’s live in abject poverty. They have lost out in the whole developmental process.⁵⁴ Post de-notification, they were still primarily nomadic. They are now forced to take up wage labour, petty trade or more lucrative thieving. With their image of dishonesty in society, it is very hard for them to compete with the rest of the unorganised sector for the few available jobs. This is especially true of those in urban areas.

Poverty will gradually dissipate if capability enhancement takes place. But the DNT value for education is very slim. Though enrolment in schools has increased, retention rates are still far from satisfactory. Seasonal migration, parental apathy, domestic insecurity, unattractive format of education and societal ridicule are the main hindrances in the spread of education.⁵⁵ Non-formal education also does not hold much hope as currently the system is not really developed in India.

One of the biggest barricades is perhaps seen in terms of their exclusion from the Constitutional schedule. In some states DNTs are now under scheduled tribes.⁵⁶ However, there are anomalies. Often the lists of the Police Department and the Social Welfare Department do not match.⁵⁷ Due to these factors, DNTs cannot avail central reservations and concessions.⁵⁸ Therefore, neither the violation of their human rights can be addressed effectively nor can their economic advancement take place.

⁴⁷ Dharmadhikari, ‘Criminal Justice System and Tribes in India’, (1998) *All India Reporter* SC 70.

⁴⁸ It has been said that all basic principles of the criminal justice system are violated as they are considered guilty until proven innocent.

⁴⁹ D’Souza, *supra* n. 41 at 93. It is claimed that they are still referred to as ‘criminal tribes’ in courses taught by the Police Training Institutes and books prescribed by them.

⁵⁰ Bokil, ‘De-Notified and Nomadic Tribes’, *Economic and Political Weekly*, 12 January 2002 at 152.

⁵¹ Karan, *supra* n. 1 at 220.

⁵² D’Souza, *supra* n. 41 at 93.

⁵³ The custodial deaths of Budhan Sabar and Pinya Hari are not isolated incidents.

⁵⁴ Where development is characterised by mechanisation, urbanisation, commercialisation, large scale infrastructure, growth in communication and transportation, enhanced social and spatial mobility and a shift from an agrarian to industrial economy.

⁵⁵ Bokil, *supra* n. 50 at 152.

⁵⁶ In Andhra Pradesh Yanadis, Sugalis and Yerukalas come under the Schedule now.

⁵⁷ For example, some may be DNT’s in the Telangana region, but Scheduled Tribes in the Andhra region.

⁵⁸ Although they can in some states.

Furthermore, there is complete lack of decent living space. The old settlements are in an appalling state. In one area, the DNTs had been billed for water for 25 years when all they had was a pipe sticking out of the ground amidst a muddy pool of water.⁵⁹

By far, the main problem they face is negative societal perception. They are unable to get jobs, move into a locality permanently, or in some cases even get admitted to schools as they are perceived to be inherently criminal or 'born criminal'. While it is easy to debunk these theories as a myth created by the British to get free and easy labour, a great portion of society exercises a strong belief that these persons are indeed inherently criminal. These theories have resurfaced periodically and therefore, it is helpful to explore their content.

7. The Typology Of 'Born Criminals'

The British never claimed to criminalise people for the sake of free labour. They used some of the popular criminological theories prevalent at the time to claim that there was a certain class of people who were by their very nature criminal. They also used this theory to justify why children should be taken away from their parents. At the turn of the twentieth century, a common, but not universal, view was that the child was inherently flawed. Theories of 'born criminals' or 'bad breeding' claimed that a person's inherited make-up could lead to poor outcomes. These theories proved very useful in India, where there were attempts to label groups as a whole as criminal.

From Biblical times various groups of people have believed that when the taint of original sin is not wiped away, people have a natural propensity towards committing socially unacceptable acts. However, these beliefs have generally been used whilst preaching to social outcasts to undergo baptism and wash the taint of original sin away.

It was the writings of Cesare Lombroso,⁶⁰ an Italian anthropologist,⁶¹ that their beliefs became concretised into an acceptable criminological theory. He sought to discover the causes of crime by examining the characteristics of Italian prisoners, and reached the conclusion that most crime is caused, or at least manifested, by discernible physical characteristics of the individual.⁶² He believed that in general, many criminals share a unique physical type with excessively long arms, receding chins, twisted noses, outstanding ears, abundant hair, a sparse beard, enormous frontal sinuses and jaws, a square and projecting chin, broad cheekbones and gestures. In fact, this type resembled the 'Mongolian' and sometimes the 'Negro,' and hence persons with these characteristics stand a greater chance of finding the need to commit a crime more desirable.⁶³ These features indicated that criminals were evolutionary throwbacks in our midst.⁶⁴ It was believed that people with such characteristics were innately driven to act as a normal ape or savage would, except for the fact that such behaviour is deemed criminal in a civilised human society. Thus, it became easy to identify born criminals because they bore anatomical signs of

⁵⁹ D'Souza, *supra* n. 41 at 124.

⁶⁰ For example, one of his first writings was the encyclopedic study *L'Uomo Delinquent (Criminal Man)*, which was published in 1876.

⁶¹ He is also in some ways considered the 'father' of modern day criminology.

⁶² Dershowitz, 'Indeterminate Confinement: Letting the Therapy Fit the Harm', (1974) 123 *University of Pennsylvania Law Review* 297.

⁶³ *Ibid.* See also Harris, 'Criminal Justice as Environmental Justice', (1977) 1 *Journal of Gender, Race and Justice* 1.

⁶⁴ *Ibid.*

their apishness.⁶⁵ Hence it was physical traits and not free will that determined a person's willingness to commit crimes.

There were other contemporary theorists of Lombroso who believed that our actions are actually controlled or impelled by forces beyond the immediate decision making process of the individual.⁶⁶ Hard determinism takes a number of forms, particularly biological, psychological, and sociological determinism. It was thus society's duty to humanely offer treatment to anyone compelled to such untoward behaviour.⁶⁷

Lombroso further advocated that since physical characteristics could be determinative of the likelihood to commit crime, preventive measures should be adopted in order to protect society from the crimes of these born criminals. He claimed that the method and amount of punishment should differ according to whether the concerned criminal is a born criminal, an occasional criminal or a criminal by passion. He further claimed that the born criminals and the 'criminaloids who have become habitual criminals' should be 'set at liberty again only after extraordinary proof of reformation.'⁶⁸ Some criminals ought never to be liberated. He was thus one of the first advocates of the controversial indeterminate sentence which stressed that while no man should be imprisoned unless it is clear that his freedom is dangerous to others, once imprisoned, he should not be freed until the danger has ceased.⁶⁹ Greatly criticised for this in latter times, the indeterminate sentence was avidly supported at one stage and was even suggested to be adopted in the United States in the early part of the twentieth century.

Lombroso analogised both the preventive imprisonment of the born criminal and the use of the determinative sentence to the confinement of the insane, finding principal justification in society's right to defend itself. In furtherance of his stance, he stated,

Now, just as men came to recognize a century ago, contrary to the beliefs of the Middle Ages, that insanity did not depend upon free will, we must now recognize that neither does crime itself depend upon it. Crime and insanity are both misfortunes; let us treat them, then without rancor, but defend ourselves from their blows.

At one stage, Lombroso even went on to claim that gypsies were born criminals as they bore the necessary characteristics and their lust to wander and live life through carrying out 'con' jobs was just a reflection of this. In 1911, he stated,

⁶⁵ To support his theory, Lombroso argued that both apes and savages, groups more primitive than civilised man, shared important characteristics with born criminals; and he made excursions into ethnology to 'identify criminality as normal behavior among inferior people.' See *ibid*.

⁶⁶ As opposed to free will theories which claim that persons commit crimes out of choice.

⁶⁷ 'Philosophical Issues and Criminological Theory', available at: <http://www.criminology.fsu.edu/crimtheory.html>. [S]ociety ought not to wait while he perfects himself in crime by a new sojourn in prison, but should keep him shut up until assured of his reformation, or, better, of his powerlessness to do harm. We should, for this end, establish special penal institutions, to which a jury composed of directors, physicians, and judges shall consign all the individuals who, having from infancy shown an inclination toward crime, have relapsed several times, especially if they present those physical and psychical characteristics which we have seen to be marks of the born criminal. See Dershowitz, *supra* n. 62.

⁶⁹ *Ibid*.

They have the improvidence of the savage and that of the criminal as well...They devour half putrefied carrion...They murder in cold blood in order to rob, and were formerly suspected of cannibalism.⁷⁰

It was almost as if he believed that they were not fit to be human beings. These notions of indecency, immorality and pollution were commonly associated with criminals as well.

This controversial theory was by no means unsupported. There are several fellow theories. For instance, Lamarck believed that traits learned by one generation could be passed on through heredity to the next and American criminologists such as Loring Brace and Henderson applied the theory to such behaviors as criminality, drunkenness and laziness. If parents were involved in these behaviours, then their children would most likely be as well.⁷¹ In fact, this precipitated many countries to attempt sterilisation of those persons believed to be carrying criminal traits. Some theorists even suggested that certain persons are drawn by a congenital impulsiveness to commit crimes.⁷²

It was these popular theories that the British used to justify the creation of criminal tribes in India. These notions also resulted in the treatment of criminal tribes in much the same way that the insane were treated- through preventive measures like the indeterminate sentence. The supposed higher rates of criminality among these groups were attributed completely to their natural propensity to committing crimes and no alternative explanations were even considered.

8. More Plausible Explanations

There were other theorists that attributed the tendency to commit crimes to factors other than those related to the individual. For example, some claim that criminality can arise from environmental factors,⁷³ or poor economic conditions. They implied that a change in environmental factors or a reduction in the level of poverty would result in a reduction of crime amongst crime prone groups. These theories are appealing for the simple reason that most of the 'criminal tribes' belonged to the lowest strata of society on both economic and social scales.

Another very plausible reason for crime being more prevalent in certain groups is the theory of cultural conflict, whereby it could be attributable to a conflict in values between tribal culture and larger societal values.⁷⁴ This theory has a certain amount of substance as it is a well known fact that criminal tribes (very much like the Roma people) were bound by their own ethical codes,⁷⁵ which did not always match with that of the dominant societal values.

Unfortunately, none of these theories were taken into consideration. It is ironic that unlike Lombroso, the British never attempted any anthropometric tests in India to sufficiently prove that criminal tribes were drawn to crime based on the racial homogeneity.⁷⁶ Therefore,

⁷⁰ D'Souza, supra n. 41 at 139.

⁷¹ 'The Positive School: Biological and Psychological Factors', available at: <http://www.criminology.fsu.edu/crimtheory.html>.

⁷² Lombroso, Ferri and Garoffollo belong to this school of thought. For further details see Simhadri, supra n. 19 at 10-1.

⁷³ Gopalrao, *Facts of Crime in India* (1962) at 24; and Simhadri, supra n. 19 at 12.

⁷⁴ Ibid.

⁷⁵ For example, they had their own code of conduct and secret dialect to communicate with each other at the time of their work.

⁷⁶ Simhadri, supra n. 19 at 10-1.

even though they might be commonly referred to as ‘hereditary criminals’, there is no convincing proof that criminality is passed between generations biologically. The British, however, used the caste system to claim that these were people born to crime and it was their designated livelihood under the system. This proved useful for designating groups of people as a whole as criminal and not just individuals who committed crimes. Hence, societal perception concretised from there.

9. Still Thought To Be Born So

These theories were not a mere phase. They have contributed to a societal perception. It is clearly apparent that periodically through the ages much support has been mustered for the theory of the ‘born criminal’, elevating it to the status of an oft-cited criminological theory. Even today there is a vibrant school of thought composed of members of the law enforcement as well as lay society that ardently believe that physical traits passed from generation to generation can be apt indicators of an individual’s propensity to commit crime. In India criminal tribes are still believed to be born to ways of crime. And this is not an isolated case in India though due to the criminal tribes legislation it is more aggravated here than anywhere else. Physical traits are still very much linked with crime.

As recently as 1974, an author claimed that the special taste of criminals for a painful operation so long and so full of danger as tattooing, the large number of wounds their bodies present, have led him to suspect in them a physical insensibility greater than amongst most men, an insensibility like that which is encountered in some insane persons and especially in violent lunatics.⁷⁷ This is an apt depiction of the fact that criminals and the insane are often equated in terms of the way society sees them, as well as in terms of what should be an appropriate punishment/rehabilitation/treatment of them.

In 1999, in the Czech town of Střekov, a 6 feet high, 65 yards long wall was erected to separate ‘neat’ houses from a dilapidated set of apartment blocks in which gypsies lived. This was considered necessary due to the noise, dirt and crime that gypsies brought. The city council justified its stance by saying that the wall is needed to separate those with good morals who do not break the rules from those who do not pay rent, do not exercise proper hygiene, and commit crimes.⁷⁸ It was almost as if people actually believed that sedentary gypsies could live no other way.

In the past, many countries attempted to force sterilisation of those persons believed to be carrying criminal traits and still petitions for the same are made on an occasional basis.⁷⁹

Since colonial times the legal system has seen skin colour itself as a sign of criminality. The idea that skin colour itself can create or denote criminal behaviour is deeply rooted in American history. Initially, blackness did not lead to a presumption of any particular status. Early in the colonial period this changed, however. Throughout the South colour led to the

⁷⁷ Dershowitz, *supra* n. 62.

⁷⁸ Perlez, ‘Czech Gypsies Face Bias from Beyond the Wall’, *The New York Times*, 2 July 1998.

⁷⁹ This has also been attempted with several groups of social outcasts, such as eunuchs, the mentally disabled, etc. For further details see Cepko, ‘Involuntary Sterilization of Mentally Disabled Women’, (1993) 8 *Berkeley Women’s Law Journal* 122.

development of a presumption that all 'blacks' had a certain status in law. This was the equivalent, in criminal law terms, to what might be called a presumption of guilt based on race.⁸⁰

In addition to the crime of 'blackness', early America developed separate criminal procedures, protections, and punishments for 'blacks', whether slave or free.⁸¹ The disproportionate punishments accorded to 'Black' slaves, the fact that they were either not allowed to testify or their testimony was disregarded, the special crimes only based on race, etc. in the British colonies of North America, were an indication of colour itself being a crime and race an indicator of criminality.⁸² This subordinate status in turn reaffirmed the notion that 'black' people were to be mistrusted and feared, and that they were naturally criminal. This remained true, whether they were slaves or free people. Even today, clandestinely, race is used to single out people on criminal suspicion. This is termed racial profiling. Racial profiling is not only a denial of the right to equal treatment, but also a current manifestation of the historical stigmatisation of all African Americans as predisposed toward criminality. This legally enforced stigma arose out of, and was essential to, slavery and the social structures necessary to maintain slavery. Courts have wrongly divorced the modern practice of racial profiling from its historical roots and instead focused solely on the subjective intent of individual police officers in discrete cases. By doing so, courts have misunderstood and undervalued the injuries inflicted by racial profiling; failed to acknowledge the systemic, historical bases of racial profiling; and failed to provide effective relief.⁸³

There are shocking revelations of the clandestine and open racial profiling that happens in the United States of America. In one such incident, a woman was assaulted in her home in New York State. She could not describe anything about her attacker other than the fact that he was 'black'. The local police rounded up virtually all the 'black' men in that town, interrogating them as to their whereabouts the previous night.⁸⁴

Traditionally, those who support the use of race as an element of criminal profiles have argued that the practice is merely a reflection of racially disparate crime rates. If African Americans, for example, commit more crime, it only makes sense to include race as an element of profiles used to predict criminal conduct.⁸⁵ Opponents of the practice respond with studies showing that rates of drug use (drug interdiction being the context in which racial profiling is most commonly employed) are not in fact racially disproportionate, or at least not so

⁸⁰ Well before the American Revolution courts and legislatures concluded that blackness presumptively meant someone was a slave. This meant that if a black was found away from the control of a white, the 'black' was presumed to be guilty of something: travelling without a pass, running away, or being in rebellion. For example, slave patrols might whip or arrest any 'black' walking around at night without a pass, because the very act of being away from a master's premises without permission was criminal. See Finkelman, 'The Crime of Colour', (1993) 67 *Tulane Law Review* 2063.

⁸¹ For example, in antebellum Virginia every free black had to register with county officials and carry a copy of his or her free papers at all times. Free blacks without their papers would be 'committed to jail by a justice, until such copy [of his papers] be produced, or till the court be satisfied that it has been casually lost or destroyed'. The black would then be released from jail, 'on paying jail fees'. Free blacks unable to pay the fees could be hired out as indentured servants. Free blacks twice arrested for being without papers would be whipped. The colonial laws provided special penalties for blacks, special crimes for blacks, or criminalised activities merely because a black was involved.

⁸² Finkelman, *supra* n. 80.

⁸³ Carter, 'A Thirteenth Amendment Framework for Combating Racial Disability', (2004) 39 *Harvard Civil Rights-Civil Liberties Review* 17.

⁸⁴ See D'Souza, *supra* n. 41 at 144-5.

⁸⁵ Carter, *supra* n. 83.

disproportionate as to justify the massive racial disparities regarding whom law enforcement officers single out for suspicion. Racial profiling is like a badge for slavery and criminality. Criminologists continue to argue about whether the overrepresentation of African American people in the criminal justice system is due primarily to disproportionate black criminality or to racist law enforcement.⁸⁶

All these parallels make it apparent that there is a very vibrant school of thought the world over that actually believes in inherent criminality. If gypsies move into a locality, it is assumed that the crime rate in that area will naturally go up. The prejudices of filth and criminality associated with DNTs are associated with a variety of communities the world over—be it the gypsies, blacks or DNTs. It almost makes one believe that certain prejudices are universal, and like the British in their time found the scapegoats on whom to pin crime and use as free labour, even today marginal communities like DNTs are further marginalised by the labelling they suffered a century ago.

In India, DNTs cannot be singled out openly due to the De-notification Act. But they are still referred to as ‘criminal’ in courses taught at the police training institutes and even mentioned to be so in the books prescribed by them.⁸⁷ It is common for them to be referred to as an ‘ethnic criminal group.’ The police, doctors, bureaucrats, farmers, judges and villagers assume this criminality. Even some DNTs believe it about others. Also they have lost out on much of their traditional forms of livelihood due to urbanisation and development and are deprived of the capabilities and opportunities to take up any other form of livelihood. Since most of them continue to live active lives, societal perception of them as wandering criminals lives on.

10. Seeking Utopia: The Path Ahead For DNTs

From all this it can be seen that societal perception and the manner in which the police system works has left DNTs in an extremely vulnerable state. Nothing has been done for them following the repeal of the CT Act. They not only need anti-discrimination provisions but also affirmative action. Since, no solution has been proposed till now, it is useful to consider the various options that might prove valuable to DNTs.

A. Suggestion 1: The Social Model Of Disability

The traditional or medical model of disability is largely the one reflected in statutes all over the world. This model of disability sees the disabled person as the issue as it lays the focus on the impairment, rather than the needs of the person. Thus, the emphasis is on dependence,⁸⁸ backed up by stereotypes of disability that call forth pity, fear and patronising attitudes.⁸⁹ Disabled

⁸⁶ Harris, *supra* n. 63.

⁸⁷ Dharmadhikari, *supra* n. 47 at 72.

⁸⁸ The power to change them lies primarily within the medical and associated professions and their talk of cures, normalisation and science. It is primarily these opinions that will determine where disabled persons will be schooled, what support they should be entitled to where they should live, whether they can work or not and even whether they be allowed to procreate. Their needs are determined by such groups of people and even the design of their built environment which creates barriers is made by others.

⁸⁹ Rieser, ‘The Social Model of Disability’, available at: <http://inclusion.uwe.ac.uk/inclusionweek/articles/socmod.htm>.

persons are meant to be grateful for what they receive.⁹⁰ Even basic rights such as equality come with a price tag.

Almost all legislative and policy efforts tend to follow this individual method and tend to concentrate on ‘compensating’ people with impairments for what is wrong with their bodies by targeting ‘special’ welfare benefits at them and providing segregated special services for them.⁹¹ The disabled can be led to believe that their impairments automatically prevent them from participating in social activities and it is this internalised oppression that makes them less likely to challenge their exclusion from mainstream society. Many disabled people internalise negative views about themselves that create feelings of low self esteem and low achievement, further reinforcing non-disabled peoples’ assessment of their worth. This creates a cycle of dependency and exclusion.⁹² It is clearly practices and attitudes that disable people rather than impairment.⁹³

This is very much the same case with DNTs. They are almost led to believe that there is some inherent flaw in them that makes them social outcasts. Thus, as in the case of persons with traditional forms of disability, it is practices and attitudes that disable them rather than a real or mythical impairment. This includes failing to make education, work, leisure and public services accessible; failing to remove barriers of assumption, stereotype and prejudice; and failing to outlaw unfair treatment.⁹⁴ Thus, their problems stem primarily from social exclusion and they face disadvantages because of the discrimination resulting from the way society is organised.

It was these inherent flaws in the medical model of disability that saw the inception of the social disability model. The origins of the ‘social model’ can be traced back to an essay by Hunt published in 1966 titled ‘A Critical Condition’, wherein he argued that people with impairments are viewed as ‘unfortunate,⁹⁵ useless,⁹⁶ different, oppressed and sick’ and thus seen as a direct challenge to commonly held Western values.⁹⁷ Although it initially referred to only the physically disabled, this definition was formally called the social model of disability in 1983⁹⁸ and then extended, by various writers including Finkelstein,⁹⁹ Oliver and Barnes in the UK and DeJong in the USA.

⁹⁰ In fact, they are often seen as an *extra expense* to councils and the government.

⁹¹ ‘The Social Model of Disability’, available at: <http://www.manchester.gov.uk/disability/policies/model.htm>.

⁹² Rieser, *supra* n. 89.

⁹³ It is not uncommon for powerful and persuasive views to be reinforced in the media, books, films, comics, art and language.

⁹⁴ ‘The Social Model of Disability’, available at: <http://www.drc-gb.org/citizenship/howtouse/socialmodel/index.asp>.

⁹⁵ Because they are unable to enjoy material and social benefits of modern society. See Light, ‘Social Model or Unsociable Muddle’, Disability Awareness in Action, The International Disability and Human Rights Network, available at: http://www.daa.org.uk/social_model.html.

⁹⁶ Because they are considered unable to contribute to the economic good of the community. See *ibid*.

⁹⁷ They are seen as a minority group because like ‘black’ people and homosexuals they are perceived as abnormal and different. See *ibid*.

This definition was expanded further ten years later by the Union for the Physically Impaired Against Segregation. ‘The disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream social activities.’ But this definition was criticised as it referred only to people with physical impairments.

⁹⁸ Described by Mike Oliver, a disabled academic.

⁹⁹ He was a disabled communist from apartheid South Africa. In the late 1970’s he came up with his version of the Social Model of Disability which states that ‘disability is caused by society’s inability to accommodate people who are physically or mentally different from the average, and that is the built and social environment that disables people.’ See ‘What is Disability?’, available at: <http://www.reddisability.org.uk/DisabilityDefinition.htm>.

This model of disability approached the issue from a completely innovative perspective viewing impairment and disability as very different things¹⁰⁰ and attributing the problems of the disabled to society. It staunchly advocates that their individual and collective disadvantage is due to a complex form of sexism, racism or heterosexism.

The social model of disability states that impairment is ‘An injury, illness, or congenital condition that causes or is likely to cause a long term effect on physical appearances and/or limitation of function within the individual that differs from the commonplace.’¹⁰¹ Thus the term ‘impairment’ is used to describe a characteristic or feature of one’s body that makes it different from other people’s bodies.¹⁰² This model defines disability to be ‘The loss or limitation of opportunities to take part in society on an equal level with others due to social and environmental barriers.’¹⁰³

The social model seeks to shift policy away from a medical charity care agenda into a rights-led equality agenda.¹⁰⁴ It places a person’s impairment in the context of social and environmental factors that create disabling barriers to their participation in society.¹⁰⁵

Proponents of this model therefore feel that the ‘cure’ to the problem of disability lies in restructuring our society to remove the kind of barriers that disabled people face in everyday life.¹⁰⁶ It makes it obvious that the barriers that prevent people who have impairments from joining society are ‘man-made’ and therefore they can be removed.¹⁰⁷

Some of the barriers they face are: environmental: inaccessible information, buildings, transports e.g. lack of information; systematic: inflexible organisational procedures and practices e.g. segregated provision; and attitudinal: prejudice and stereotypes for example disabled people being seen as expensive, useless or needy. Attitudes are important not only because they underpin and shape an individual’s behaviour, but also because they are picked up by others.

If the barriers to disabled persons are removed systematically disabled persons could play a full part in community life working and paying taxes etc., like everyone else. In the long run, it would also be cheaper and more economical to support disabled persons being independent than providing services that foster and maintain dependency throughout their lives.¹⁰⁸ It is widely accepted that disabled people generally have fewer opportunities and a lower quality of life than non-disabled people. Any actions taken to deal with or remove the disadvantage experienced by disabled people will depend on what is believed to be the cause of the disadvantages.¹⁰⁹ While

¹⁰⁰ In the individual model, impairment and disability are combined as impairment. This means that both the cause of functional limitation and the functional limitation within the individual itself are separated from external factors.

¹⁰¹ ‘The Social Model of Disability’, supra n. 91.

¹⁰² ‘The Social Model of Disability: A Different Way of Thinking’, Sheffield City Council, Development, Environment and Leisure, available at: <http://www.sheffield.org/councilreports.htm>. However, the effects of impairment have been misunderstood. For a long time, it has been said that people with physical or mental impairments cannot take part in things because of their impairments. This is the prevalent view even today.

¹⁰³ ‘The Social Model of Disability’, supra n. 91. See also ‘The Social Model of Disability: A Different Way of Thinking’, supra n. 102.

¹⁰⁴ ‘Implementing the Social Model of Disability’, Equalities Online, available at: http://www.birmingham.gov.uk/GenerateContent?CONTENT_Item_ID-1196&CONTENT_ITEM_TYPE=0&MENU_ID=1815.

¹⁰⁵ ‘Social Model of Disability’, available at: <http://www.nda.ie/cntmgmt.nsf/0/9416F0F1CF81DEAA80256C7B005A9E79?OpenDocument>.

¹⁰⁶ ‘Implementing the Social Model of Disability’, supra n. 104.

¹⁰⁷ ‘The Social Model of Disability: a different way of thinking’, supra n. 102.

¹⁰⁸ ‘Implementing the Social Model of Disability’, supra n. 104.

¹⁰⁹ ‘The Social Model of Disability’, supra n. 91.

some of these barriers are easily apparent and perhaps more easily curable, others like prejudice and stereotypes are not as they are barriers in the form of ideas in people's heads and thus very hard to banish.

Disabled persons not only have to deal with barriers which exist now, but they also have to deal with barriers that have stopped them from doing things in the past. For example, barriers that prevent people from going to mainstream school or college can result in them not having the same opportunities to get qualifications and learn social skills as non-disabled persons.

The social model does not say that if all barriers are removed we will all be equal. Rather, it shows that different people can do different things in different ways. It enables both the disabled and the able to understand these differences. It describes disabled people as being different but not inferior, and it helps them to work out how to take part in society on their terms.¹¹⁰ The social disability movement thus advocates not only for antidiscrimination measures, but also for structural changes for reasonable accommodation to be made.¹¹¹

By and large, the differences between the two models of disability can be summarised as follows:

The Medical Model says:	The Social Model says:
• You are the problem	• 'Disability' is not an individual problem
• Your disability needs curing	• You can not compete on equal terms because there are too many barriers.
• You can't make decisions about your life	• We need to recognize that 'society' through the government and its agencies has a duty to remove these barriers.
• You need professionals to look after you.	• Disabled people have the same right to full equality as all other citizens.
• You can never be equal to a non-disabled person.	

¹¹⁰ 'The Social Model of Disability: A Different Way of Thinking', supra n. 102.

¹¹¹ Although many associated with the Disability Movement are under the impression that there is only one model of social disability, actually several exist. Out of these there are 2 distinct and popular models. First, the 'Crypto-Marxist Model': (prevalent mostly in the UK) which states that the organisation of society produces discrimination experienced by people with disabilities. The social organisation must be changed in order to end discrimination based upon disability.

Second the 'Identity Model': (used mostly in the US) which states that fulfilling the 'normal' role models in society help's constitute a person's identity, at least as seen by others. The definition of disability is an unexpected differentness which makes some roles impossible or at least quite difficult to carry out. See Pfeiffer, 'A Comment on the Social Model(s)', (2002) 22 *Disability Studies Quarterly* 234 at 234-5.

Researchers using the UK social model will analyse social structures and their impact on people with disabilities. Researchers using the US social model will analyse social roles and attitudes toward failure to fulfill them. This is significant because although related, the two are quite different. Similarly, advocates using the UK model will work for changes in social structures and advocates using the US social model will seek to change attitudes and behaviours.

(i) DNTs as persons with disability

The social model of disability acknowledges that it is practices, attitudes, stereotypes and systemic construction that disable people, rather than actual impairment. Even though DNTs do not possess an ‘impairment’ in the traditional meaning of the term, they suffer from a practical impairment. One school of thought believes that it is their genetic make-up that leads them to criminality. Another school of thought believes that it is environmental factors that draw them to crime. Society at large acknowledges that they suffer from something similar to an impairment which is attributed to factors beyond their physical or mental control.

Preventive measures for the ‘born criminal’ over time have often been equated with those taken for persons deemed to be insane. They are invisible because they were excluded from everyday life. They are either regarded as a threat to society, responsible for many of the social problems of the day, or were seen as a vulnerable people, potential and actual victims of an uncaring society. In both cases they lead separate and segregated lives in special schools, day care centres and in institutional or residential care.¹¹² This has made them invisible. They are silenced because people choose not to listen to them.

Underpinning all this is the obsession of society with what constitutes ‘normality.’ DNTs are considered not to fit into these notions of normalcy. Due to social and environmental barriers they have been unable to take part in society on an equal footing. And this is due to a societal perception that is a little more than a prejudice. It is a stereotype that is present in the social structure, based on a history of labelling and criminological theories prevalent around the world, popular from time to time. They are excluded for what are deemed to be their inherent features, just as persons with traditional forms of disability. It is thus not just a perception, but perception coupled with systemic structures over time and space.

(ii) Universalising Difference: Protection under the Social Model of Disability

The Social Model of Disability has been recently adopted by the working group framing the Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities Draft Convention. This provides for

- Equality and non-discrimination in terms of all forms of discriminations including systemic ones and includes discrimination based on an actual or perceived disability;¹¹³
- Liberty and Security of the Person—without discrimination based on disability;¹¹⁴
- Freedom from torture, cruel or degrading treatment, punishment, etc.;¹¹⁵
- Freedom from violence and abuse;¹¹⁶

¹¹² Atkinson, ‘Bringing Lives into Focus- The Disabled Person’s Perspective’, in May (ed.), *Transition and Change in the Lives of People with Intellectual Disabilities*, 1st Edn (London: Jessica Kingsley Publishers, 2001) at 157.

¹¹³ Article 7, Draft Convention.

¹¹⁴ Article 10, Draft Convention.

¹¹⁵ Article 11, Draft Convention.

¹¹⁶ Article 12, Draft Convention.

- Being included in the community;¹¹⁷ and
- Education, right to work, social security and an adequate standard of living.¹¹⁸

All these rights are very much needed by persons with disabilities. However, in relation to DNTs they may require some modification, with regard to:

- *The right to shelter:*

One major problem that DNTs have faced since the process of de-notification took place is a serious lack of living space, especially in urban areas. It is common knowledge that migration to cities from rural areas in the hope of finding better job prospects as well as the population explosion is leading to shortage of living space in cities. Even in rural areas, DNTs are never welcomed into a locality due to notions regarding their indecency and potential criminal abilities. Thus, while large numbers of them have made a conscious choice to revert to nomadic lives after de-notification, a fairly substantial number are finding their 'wanderlust' impractical and undesirable. Several desperately seek living space but find it hard to come by, and even when it is found DNTs are often get hounded out of localities. It is not being suggested that they be forced into sedentary ways of life. The choice of being sedentary or nomadic should lie entirely with them. However, those who choose the sedentary path should be provided a guarantee for shelter. In this particular instance, it is such a vital concern that it must be specifically articulated.

- *Freedom from police atrocities:*

Certain general provisions exist in the Draft Convention guaranteeing freedom from torture, cruel and degrading treatment, etc. However, DNTs have faced special kinds of atrocities at the hands of the police. Not only are substantial numbers tortured and killed at the hands of the police, but they face minor forms of harassment on a virtual day-to-day basis. Thus, the Draft Convention would have to be modified to include protection from police atrocities at the most normally minimalist stages. As a serious disincentive to the police, these provisions must be backed up with severe punishments for their contravention. Even the fact that they are referred to as inherently criminal in police training institutes should be made a punishable offence. This is the only means to combat the social perception of them freely fortified by the police.

(iii) Useful or Futile Model?

The disabilities model is very useful, as it will provide DNTs with a certain amount of anonymity, which is most needed to combat an adverse label. Moreover, it will give them a great degree of solidarity with the persons of the disability movement. Despite the artificial nature of the label 'disabled', this shared experience of external barriers allows people irrespective of their different impairments, to feel a sense of shared identity. This can be easily honed in upon by DNTs who will now see their 'impairment' as a figment of social creation and not inherently attributable to their genetic make-up. Having a shared identity as 'disabled people' need not and should not interfere with their identities as people with specific impairments, nor should they cause some impairment or specific needs to be prompted at the expense of others. The disability

¹¹⁷ Draft Article 15, Draft Convention.

¹¹⁸ Draft Articles 23 and 24, Draft Convention.

movement can only remain strong and effective when there is respect for the enormous diversity within the movement. Secondly, this model aims to battle barriers from the past as well as contemporary ones. Therefore, this will prove invaluable to DNTs who have suffered economic and social exclusion for more than a century. Thirdly, this model of disability, in seeking to normalise difference, advocates an approach to protection and promotion of human rights that will see difference as a part of a normal life cycle and not from the angle that it is approached now. This is also a distinct advantage.

This social model of disability could be fruitfully utilised by DNTs to seek recognition at an international level. However, it must be borne in mind that most countries still follow the medical model of disability wherein being termed 'disabled' carries adverse connotations. It will be a great deal of time before this paradigm shift is brought about in the disability movement and amongst policy makers and lay people. Hence, if seeking inclusion in the disability movement will lead to one adverse label being replaced by another then the whole exercise might be futile. It must be noted that while this is a valid fear, the laws of disability are in a state of transition and perhaps the time is ripe to seek inclusion. It cannot be denied that the social model has become internationally recognised as the driving force behind the disability agenda and a cornerstone of the disabled people's movement.¹¹⁹

B. Suggestion 2: The Indigenous Peoples' Model

Since the early 1970s, 'indigenous peoples' has been transformed from a prosaic description without much significance in international law and politics into a concept with considerable power as a basis for group mobilisation, international standard setting, transnational networking and programmatic activity of intergovernmental and nongovernmental organisations.¹²⁰

After World War II, state colonialism was brought to an end and greater interdependence of states was encouraged and the movement for the protection of individual human rights was initiated.¹²¹ Indigenous peoples were not excluded from these instruments.¹²² Inclusion in such instruments provided the forum for indigenous peoples to gain an audience on the world stage to push for the development of international law to protect their rights.¹²³ This enabled them to lobby the United Nations for the development of a multilateral treaty defining the rights of indigenous peoples.¹²⁴

The problem with all of these instruments, however, is that there is no specific protection of the distinctive cultural and group identity of indigenous peoples, and nor is there for the spatial and political dimension of that identity, their way of life.¹²⁵ As a general matter, existing

¹¹⁹ 'Implementing the Social Model of Disability', supra n. 104.

¹²⁰ Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, (1998) 92 *American Journal of International Law* 414.

¹²¹ See for example, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), 14 December 1960, A/1514: 'Immediate steps shall be taken, in... Non-Self-Governing Territories... to transfer all powers to the peoples of those territories.'

¹²² They found inclusion, for example, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

¹²³ The movement was spawned in the 1970s as the result of an intensified scholarly study of the rights of indigenous peoples and the holding of international conferences such as the 1977 NGO Conference on Discrimination Against Indigenous Populations in the Americas.

¹²⁴ Siegfried, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', (1999) 12 *Harvard Human Rights Journal* 57 at 98-104.

¹²⁵ Kingsbury, supra n. 120.

international treaty law fails adequately to address the rights and status of indigenous peoples. Perhaps the most glaring deficiency in the existing international legal regime is the inadequacy in expressly recognising and declaring that indigenous peoples possess a right to self-determination.¹²⁶

Thus, in response to advocacy from indigenous groups, in 1982 the United Nations Economic and Social Council established a working group to develop a universal declaration on the rights of indigenous populations.¹²⁷ This group was composed of experts and indigenous peoples and eventually developed the Draft Declaration on the Rights of Indigenous Peoples Draft Declaration in 1993.¹²⁸ In addition, in 2000, the United Nations established a permanent committee on indigenous peoples.¹²⁹

While the assumption is more implicit than explicit, the Draft Declaration is based upon an assessment that Indigenous societies are fragile and in danger of becoming extinct in the absence of legal protection. Despite its inherent contradictions, the Draft Declaration reflects an admirable effort to accommodate both the group rights and individual human rights of indigenous peoples.

This model could be very easily used by DNTs. One primary reason is that their oppression grew to the proportions it has reached today only through the process of colonialism in India. This is in harmony with the indigenous peoples movement which acknowledges that colonialism was the source of all problems and thus its crippling effects can only be cured by addressing the problems at their roots and moving for a meaningful revitalisation of their societies based on a process of indigenisation and active pursuit of a distinct developmental path, culture and identity.¹³⁰ Since the roots of the problems of DNTs and the indigenous peoples movement are essentially the same, they will probably find an easy integration into the movement at the international level.

The fact that the indigenous movement speaks of the protection of group and individual rights, also makes it a very viable option for DNTs. Their labelling and subsequent marginalisation took place largely on a group basis and was aimed at curtailing their nomadic ways of life which, in effect, destroyed their occupations. This can be most effectively combated by seeking collective, and not individual, solutions. Since individual rights are also protected this movement becomes all the more useful.

Moreover, indigenous peoples are also viewed as socially dysfunctional and the movement is seeking to make efforts for programmes concentrating on health-care, housing and community infrastructure, employment training, education, law enforcement, and welfare. These are some of the most burning issues for DNTs as well. Thus, joining the international movement will bring about a certain degree of solidarity with indigenous peoples the world over and achieve international recognition. This will better their bargaining power with the Indian authorities as well and will provide an international forum for redress. Seeking protection from discrimination and affirmative action as indigenous peoples will also prove constructive as it will allow them to enjoy a certain degree of anonymity from their label of criminal.

¹²⁶ Porter, 'Legalizing, Decolonizing, and Modernizing New York State's Indian Law', (1999-2000) 63 *Albany Law Review* 125.

¹²⁷ Siegfried, *supra* n. 124.

¹²⁸ Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations, 23 August 1993, E/CN.4/Sub.2/1993/29 (1993).

¹²⁹ Resolutions and Decisions Adopted by the Economic and Social Council at its Substantive Session of 2000, 15 August 2000, E/2000/INF/2/Add. 2 (2000).

¹³⁰ Porter, *supra* n. 126.

However, it must be borne in mind that the rights of indigenous peoples have been traditionally sought on land issues and, more recently, in terms of intellectual property rights. Thus, this trend might not include DNTs who have been characterised by their sheer lack of a sedentary form of life. Furthermore, the indigenous peoples movement might consist of many groups of people across the world of varying sizes. But within a jurisdiction, in spite of being scattered, they are largely composed of groups from the same stock. This is not true of DNTs. They hail from all over India; from a variety of origins. Loosely called ‘tribes,’ they do not fulfil the sociological definition of a tribe, such as that provided by Sir Herbert Risely:

A collection of families or groups of families, bearing a common name which, as a rule, does not denote any specific occupation, generally claiming common descent from a mythical or historical ancestor. Occasionally it is derived from an animal, but in some parts of the country, it is held together only by obligation of kinship. Members usually speak the same language and occupy... a definite tract of the country.¹³¹

These individual groups had no common characteristic to tie them all together, except for nomadism.

Even today, the DNT movement has been stunted largely through a lack of common identity between the groups. They fail to realise that their common identity has been spawned through a draconian legislation known as the Criminal Tribes Act. Discrimination between the groups is rife. Some even believe that other DNT groups are ‘born criminals.’ To effectively join a movement at the international level, it will be vital from them to first achieve a certain degree of solidarity at the local level.

This movement is one of the most useful solutions ahead for DNTs. As enumerated above, it is not without disadvantages but nonetheless proves to be one of the most attractive options for DNTs today.

C. Suggestion 3: Inclusion In The Constitutional Schedule On A Uniform Basis

One of the most prominent suggestions raised so far is to include DNTs as scheduled tribes on a uniform basis. Most literature on the subject seems to view this as the most ideal as well as practical solution. At present (as mentioned earlier) they have been included, albeit in an extremely inconsistent manner. This is due the fact that each federal state is delegated the power to notify them, and hence some groups get notified while others do not, irrespective of the fact that they were all oppressed through the same act. Even between states there is no uniformity. At times a group is listed as a scheduled tribe in one state, but the same group is not listed in a neighbouring state. This consistently has been the problem with this method.

A further problem is that this affords them a very general protection on par with all other scheduled castes and tribes-providing mostly reservations and protection from caste based atrocities. While it is not denied that these are indeed pressing issues for DNTs, and has the distinct advantage of letting them be included within a wider group of persons who have faced discrimination over time and space, the disadvantage it proposes is that it cannot guarantee uniform inclusion. It will still depend largely on the will of the state. Furthermore, a lot of the

¹³¹ Risely, *The People of India* (Calcutta: Thacker, Sprink and Co., 1908) at 61.

issues specific to DNTs and the special needs they face may be subsumed by the needs of the wider community.

Thus, while possessing distinct advantages, these problems must be borne in mind. It must also be remembered that this solution is certainly the most practical as it is the most cost-effective and easy to put into place. Since this is the method already in use, it should only be ensured that protection is accorded on a uniform basis.

D. Suggestion 4: Separate Legislation Articulating Their Rights

Generally, the best means of legal protection for forgotten, marginalised and oppressed communities is through legislation. Several groups in India have formed movements for the protection of their land and employment which have successfully culminated in protective legislation.¹³² The actual success of this legislation in terms of enforcement is certainly an issue, which for want of space will not be discussed here. However, it is not disputed that the presence of legislation leads to the creation and recognition of certain very basic rights and can form the core for further lobbying and advancement.

Although this is generally the best means to adopt within a jurisdiction, this may not be the most useful means in the present instance. The problems of DNTs found its inception in the CT Act. It was legislation that labelled them as criminals, and hence protection through a specific piece of legislation, whether for anti-discrimination or affirmative action or both, will only reinforce that label. A change in label is not a solution. 'Criminal Tribes' was replaced with 'De-notified Tribes' without any change in societal perception. Thus, legislation which will make evident their 'title' will only be counter-productive. It is acknowledged that what is being sought is inclusion and not assimilation, but making their status apparent will only lead to further segregation and hence is not an advisable option. Therefore, this option will be useful only to the extent that this will provide specific articulation of rights, with the side-effects of this process being perhaps more dangerous than the cure itself.

11. In Solidarity With DNTs

In a worldwide sense, most impairments are created by oppressive systems such as hunger, lack of clean water, exploitation of labour, lack of safety, child abuse and wars. DNTs owe their 'impairment' to a myth of their inherent criminality to the British who capitalised on the official and societal attitudes of unease towards nomads to create a class of persons who everyone believed to be criminal and treated in much the same way as the insane. Socially excluded and marginalised for almost a century, they found no respite in independent India even with fundamental rights being recognised by the State for all citizens.

More than 50 years after independence and de-notification DNTs are still suffering the effects of brutal oppression. At present there is no comprehensive movement for the protection of their rights. Nascent efforts at creating a countrywide movement have been made, but they are successful only in specific areas where co-operation between several actors has been achieved. Thus, the time is perfect for a national movement, but the exact content of their demands and the path they will seek for inclusion are yet to be determined. Enumerated above are a set of

¹³² For example, the Beedi Workers movement led to them being one of the first groups in the unorganised sector to get certain basic labour protection.

plausible options. They are by no means exhaustive. While the first two are certainly attractive, they essentially refer to movements at the international level which are themselves in an embryonic state of development. Even when complete, they will primarily set-up principles at the international level. Actual implementation and policy making should still be lobbied for at the local level. International conventions legislate for the future, and thus will serve only as an anchor to lobby for programmes at the local level.

The second two suggested solutions pose the distinct advantage of immediate implementation at the local level, but also suffer from certain basic infirmities as enumerated in detail above. However, it must be borne in mind that as non-DNTs we can only prescribe problems, issues and solutions. Actual description of the same has to evolve from DNTs themselves.

Demanding the right to advocate for themselves is a dynamic and daunting process. No matter to what extent a movement might want to be joined by other under-represented groups, DNTs themselves must want to be a part of that wider community. Forcing them into an option that outsiders consider the best is only a form of disguised oppression. Furthermore, the wider community should also be willing to see DNTs as a marginalised group which has faced similar oppression. Opposition to inclusion can never lead to solutions being sought on equal terms.

However, irrespective of the path that DNTs decide to tread in the future, they should search for an interest group that has an underlying philosophy of 'rights' and not 'charity', for in charity lies no permanence. If the movement is to become a direction for change, this has to involve not only the rejection by DNTs of their status as recipients, but also a rejection by donors of charity as the means of supporting them.¹³³ They should also seek a movement that considers providing services to them only after taking into consideration the kind of societies and structures that create vulnerable groups within.¹³⁴ It will have to be acknowledged by DNTs that their special needs can only be confronted by accepting that merely appealing to a sense of fair play will never change things.¹³⁵

As with the disabled, DNTs should pursue enjoying the same rights as everybody—to live in the same streets, go to the same places and do the same things.¹³⁶ Ordinary independence is not about doing everything for themselves but simply about being in control of what happens.

Ultimately, whatever route they choose to take DNTs should make all efforts to move away from the oppression that has completely characterised their very being, where oppression is 'your belief that you are better than I am and mine that you may be right.'

¹³³ Middleton, *Disabled Children: Challenging Social Exclusion* (London: Blackwell Science, 1999).

¹³⁴ James, *Managing to Care: Public Service and the Market* (London: Longman, 1994) at 16.

¹³⁵ Middleton, *supra* n. 133 at 62.

¹³⁶ 'The Seven Needs and the Social Model of Disability', available at: <http://www.dcil.org.uk/Papers/Word/7needs.doc>.