

**The Blur of a Distinction:  
*Adivasis* Experience with Land Rights, Self-Rule and Autonomy**

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**Introduction**

The indigenous peoples of India, the *Adivasis*, represent the largest indigenous population within the borders of a state. According to the United Nations there are over 300 million indigenous peoples in the world<sup>1</sup> and 70 million of them live in India. The indigenous population of India represents more than 8 percent of the total Indian population.<sup>2</sup> The indigenous peoples of India live in different parts of the country, from the northern mountains down to the central and southern plains of India and represent an astonishing complex and rich account of the world cultural diversity. The *Adivasi* population is spread across the whole country; however, there are some important numerical differences within the different Indian states. Some states, like the central and northeastern states, have a large indigenous population – in some instances, even a majority. For example, in Mizoram, indigenous peoples comprise 95 percent of the population. However, in others, such as Uttar Pradesh, they represent just 0.2 percent of the total state population. Composed of thirty states and more than one billion people speaking several different languages, India represents a vast and ambitious project of bringing together peoples of different ethnic and religious backgrounds in a ‘united and multicultural’ democracy. In this ‘big puzzle of ethnic and communal division’,<sup>3</sup> the political and legal situations faced by different indigenous populations of the country are fairly similar. The position of the government of India has always been contradictory with regard to its large indigenous population. On the one hand there is a real policy of protection and promotion of indigenous rights, as the Constitution of India explicitly recognises the rights of the

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<sup>1</sup>*UN Chronicle* (UN Publications, June 1993), p. 40.

<sup>2</sup>1991 Census; figures for 2001 are available at [www.censusindia.net/2001housing/housing\\_tables\\_main.html](http://www.censusindia.net/2001housing/housing_tables_main.html), last consulted 9 July 2003.

<sup>3</sup>A. Lijphart, ‘The Puzzle of Indian Democracy: A Consociational Interpretation’ (1996) 90 *American Political Science Review* 258.

tribes and puts in place a system of positive discrimination in their favour. On the other hand, however, government policy is often at the fulcrum of indigenous oppression and appropriation of indigenous lands and generally the 'legal and constitutional frame is defeated by a co-opted leadership, weak political will, poor execution coupled with ignorance, poverty and lack of organisation as an interest group'.<sup>4</sup>

As in many other countries, the bedrock of the indigenous struggle is the land ownership issue. All over the country, the *Adivasis* are pushing the political and legal agenda for the recognition of their right to self-determination, the recognition of customary land tenure systems, and the restoration of traditional lands. From the northeastern states to the southern states of India, indigenous peoples' land ownership is at the forefront of the struggle. The situation of the *Adivasis* relating to the right to own their lands varies considerably within the country with the struggle touching every aspect of the spectrum of the land rights issue. In the northeast, the struggle focuses on the range of options presented by access to 'self-determination', whereas in some other parts of the country the struggle is for access to natural resources, right of livelihood through legal ownership, or simply the right to live on their lands. But, in any case, both federal and state governments tend to react with the same level of intensity, leading to extensive human rights violations. This tendency is especially true in some parts of the northeastern regions (Assam, Manipur, Nagaland) where arbitrary arrest, torture, and rape are widespread, and where a state of emergency prevails allowing for arrests of suspicious persons for up to one year without charges or legal proceedings.<sup>5</sup> Thus, even though the situations faced by the *Adivasis* vary considerably within the country, they face similar pressures as elsewhere *vis-à-vis* ownership of their own territories. In past years, *Adivasis* have been more and more organised and united in their struggle for the recognition of their land rights. This activity makes India a good illustration of the indigenous struggle worldwide: in particular, for a study of the political organisation of indigenous movements in their fight for the recognition of land rights. The activities employed in this battle range

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<sup>4</sup>Commonwealth Human Rights Initiative, *Human Rights and Poverty Eradication – A Talisman for the Commonwealth*, (CHRI's Millennium Report, New Delhi, 2001).

<sup>5</sup>See: Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 2000-2001), pp. 407-411.

from armed struggle and large-scale movements of civil disobedience, to political lobbying and individual hunger strikes.

The purpose of the present chapter is twofold. Firstly, it seeks to emphasise that even though the Indian legislation provides the *Adivasis* population with specific entitlements over their territories, those rights are not properly enforced or are often violated. Secondly, this chapter proposes to explore the issue of the recognition of indigenous land rights and its fundamental linkage with the recognition of indigenous customary land tenure systems, and autonomy *vis-à-vis* internal legislation. In this regard, the case of the *Adivasis* of India reveals that the distinction often made in international law between autonomy and collective land rights is empirically blurred by the practical experience that the *Adivasis* have lived in the very recent past. Ultimately, the present chapter seeks to argue that the failure of the central government to ensure indigenous peoples' ownership of their lands has ratcheted up the struggle of the *Adivasis* to a phase where claims for autonomy and self-determination are becoming the main focus of indigenous survival across the country.

### **Racism and Definition: Are the *Adivasis* Indigenous?**

At the World Conference Against Racism, a member of the Indian National Human Rights Commission highlighted that '...there can be no doubt that in India – as everywhere else in the world – history and society have been scarred by discrimination and inequality.'<sup>6</sup>

The indigenous peoples of India have been submitted to a system of segregation from very early in the history of the country tracing back to about 3500 BC when the Aryans arrived in India and introduced the *Varna* system. *Varna* means 'colour' and the *Adivasis* were called *Atisudra*, meaning 'lower than the Sudras', the untouchables. The Aryans introduced a system that still prevails today – the caste system – that has a great impact on indigenous peoples, as they are considered so low that they are

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<sup>6</sup>Statement at the Plenary of WCAR, National Human Rights Commission, Dr. Justice K. Ramaswamy, <[www.un.org/WCAR/statements/india\\_hrE.htm](http://www.un.org/WCAR/statements/india_hrE.htm)>, last consulted 9 July 2003.

included only at the very bottom of the social system.<sup>7</sup> There has been huge social pressure from the Hindu religious system on all indigenous social structures. The fact that the *Adivasis* are considered even lower in the social hierarchy than the so-called ‘untouchables’ explains the general racism suffered by them. This racism is firmly rooted within Indian society and often reflected within the Indian legislation.<sup>8</sup> Such legislative racism started a long time ago, as when the British colonized India, one of the first laws undertaken by the British administration regarding the tribals was the *Criminal Tribes Act 1871*. This Act ‘notified’ some of the tribes as criminals from birth, affirming that entire tribal communities were born criminals due to their nomadic lifestyle.<sup>9</sup> With independence, the new government amended this Act and have since ‘denotified’ the nomadic tribes. However after several substantive amendments, the Act was renamed *Habitual Offenders Act* and still concerns more than 2 percent of the Indian population that is classified as ‘denotified and nomadic tribes’.<sup>10</sup>

The *Adivasis* claim that they are the original settlers of the country, a claim which is not fully accepted by the government. The word *Adivasi* comes from the Sanskrit and is a conjunction of two words: *Adi* meaning ‘original’ and *Vasi* meaning ‘inhabitant’.<sup>11</sup> The use of this term is preferred to the term ‘tribes’ or ‘tribal’, because those terms echo the colonial past of the country, and the use of the term *Adivasi* is also the symbol of the new political organisation of the indigenous movement in India.<sup>12</sup> Officially, the Constitution uses the term ‘Schedule Tribes’; such nuances remain important, since, according to the government of India, there are no *Adivasis* – only ‘Schedule Tribes’ – in the country. The usual argument made by the government is that India was previously Hindustan: the country of the Hindus who are the

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<sup>7</sup>S. Chakma, ‘Setting the Records Straight’ in S. Chakma and M. Jensen (eds.) *Racism Against Indigenous Peoples* (IWGIA Document No. 15, Copenhagen, 2001), p. 11.

<sup>8</sup>S. Chakma, ‘Behind the Bamboo Curtain: Racism in Asia’ in S. Chakma and M. Jensen (eds.) *Racism Against Indigenous Peoples* (IWGIA Document No. 15, Copenhagen, 2001), p. 176.

<sup>9</sup>See: M. Radhakrishna, *Dishonoured by History: ‘Criminal Tribes’ and British Colonial Policy*, (Orient Longman Limited, New Delhi, 2001).

<sup>10</sup>On this issue, see: S. Chakma, ‘Behind the Bamboo Curtain: Racism in Asia’ in S. Chakma and M. Jensen (eds.), *supra* note 8, p. 176.

<sup>11</sup>On this issue see: C. Bates, ‘Lost Innocents and the Loss of Innocence: Interpreting *Adivasi* Movements in South Asia’ in R.H. Barnes, A. Gray, and B. Kingsbury (eds.) *Indigenous Peoples of Asia* (Association for Asian Studies, Inc., No. 48), p. 103.

<sup>12</sup>However, in this chapter, the term ‘Tribal’ or ‘Tribes’ is used when referring to official figures, documents, or legislation.

indigenous population of the country.<sup>13</sup> It is therefore a very sensitive issue and, accordingly, in India the Constitution gives power to the President to designate 'Schedule Tribes'. This power is achieved by Presidential decree seeking to define which indigenous community should be recognised for this purpose, and when such recognition is made, the official term 'Scheduled Tribes' attaches itself to the population, bringing it under the special protection of the Constitution. The Constitution itself thus defines 'Scheduled Tribes' in Article 366 (25): 'Scheduled Tribes' means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this constitution.'

Article 342(1) empowers the President of India to specify the tribal communities of India. By this procedure, an important number of *Adivasis* communities have not been recognised as 'Scheduled Tribes' and are still claiming recognition in order to gain access to the legal protection to which they are entitled. In 1952, the Commissioner for Scheduled Castes and Scheduled Tribes issued a list of criteria for identifying a tribe and included it in the Schedule:

- a. Autochthony;
- b. Groupism or a very strong community fellowship, if not descent from common ancestor or loyalty to a common headman or chief;
- c. A principal, if not an exclusive habitant;
- d. A distinctive way of life, primitive or backward by modern standards and apart and aside from the main current of culture;
- e. Economic, political and social backwardness.<sup>14</sup>

These criteria compare reasonably well to the different international definitions of indigenous peoples used by the UN, the ILO, and the World Bank. For each of these three institutions, though their views vary, the notions of descent, territory, distinctive way of life, non-dominance, and economic, social and political disadvantages are central features to the definition of indigenesness.<sup>15</sup> India, however, rejects the recognition of *Adivasis* as indigenous peoples at an international level. Instead, the

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<sup>13</sup>This issue is one of the central issues of the tension between Hindus and Muslims. For an illustration in the state of Maharashtra, see: C. Talwalkar, 'Shivaji's Army and Other "Natives" in Bombay' (1996) 16 *Comparative Studies of South Asia, Africa and the Middle East* 114.

<sup>14</sup>Report of the Commissioner for Scheduled Castes and Scheduled Tribes (Manager of Publications, Government of India, New Delhi, 1952).

<sup>15</sup>See: J. M. Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations', U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, paras. 379-80; ILO Convention 169, 27 June 1989, 28 ILM 1382, Article 1 (1); World Bank Operational Directive 4.20 (reprinted in IWGIA, Newsletter, Nov/Dec 1991).

government argues that the notion of indigenous peoples does not apply to the tribal groups of the country because the whole population of the country is indigenous. This argument posits that after centuries of migration it would be impossible to differentiate between the first inhabitants and the several generations resulting from the Indian 'melting pot'. Thus, on several occasions, Indian representatives to the UN Working Group on Indigenous Populations have highlighted that 'Scheduled Tribes' of India are not indigenous peoples.<sup>16</sup> At the UN level, however, *Adivasi* representatives are usually recognised as indigenous representatives by the ECOSOC<sup>17</sup> and participate in the debates of the Working Group.<sup>18</sup> In its periodic report to the Committee on the Elimination of Racial Discrimination (CERD), the Indian government stated that Article 1 of the Convention was not applicable in India.<sup>19</sup> However, based on the notion of descent mentioned in article 1 of the Convention, the CERD affirmed that '... the situation of the scheduled castes and scheduled tribes falls within the scope of the Convention.'<sup>20</sup> In a similar vein, the World Bank, in its developmental programmes, classified Scheduled Tribes as indigenous peoples. It is also worth noting that India was one of the first countries to ratify the ILO Convention 107, which concerns indigenous populations.<sup>21</sup> As argued by Das, it should be affirmed that the 'Scheduled Tribes' of India, the *Adivasis*, are certainly indigenous peoples:

By refusing to acknowledge that there are indigenous peoples in India, all that the government seeks to achieve is to ensure that there are no problems for it to discuss in the UN Sub-Committee. The fear of the government to accept the existence of Indigenous Peoples is that the acceptance would eventually mean ratification of the *Declaration of the Rights of Indigenous Peoples* in future making it much more obligatory for the government of India to fulfil the demands of autonomy as per the Constitution, on the one hand, while on the other more such demands are obviously going to emerge from other areas as the process of internal colonisation of *Adivasis* gain momentum in the wake of the opening up of the nation for the imperialists.<sup>22</sup>

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<sup>16</sup>For examples, see: U.N. Doc. E/CN.4/Sub.2/1992/33, p. 13; U.N. Doc. E/CN.4/Sub.2/1993/29, p. 22.

<sup>17</sup>For example, the Indian Council of Indigenous and Tribal Peoples is affiliated with the World Council of Indigenous Peoples that has the consultative status with the ECOSOC.

<sup>18</sup>However, see: M.A. Martínez, 'Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations', Final Report, U.N. Doc. E/CN.4/Sub.2/1999/20, paras. 90-91.

<sup>19</sup>See: U.N. Doc. CERD/C/304/Add.13 and CERD/C/299/Add.3.

<sup>20</sup>U.N. Doc. CERD/C/304/Add.13, para. 14.

<sup>21</sup>See: R.D. Munda, 'India's Protection and Promotion of Tribal Rights: Obligations under ILO Convention on Indigenous and Tribal Peoples 1957 (No.107)' (Paper Submitted at Indigenous Rights in the Commonwealth Project, South & South East Asia Regional Expert Meeting, New-Delhi, 2002) <[www.cpsu.org.uk/projects/DELHI\\_P2.htm](http://www.cpsu.org.uk/projects/DELHI_P2.htm)>, March 2002.

<sup>22</sup>J.K. Das, *Human Rights and Indigenous Peoples* (A.P.H. Publishing Corporation, New Delhi, 2001), p. 35.

Based on the position of the Indian government and its policy regarding the Scheduled Tribes, it can be affirmed that the rejection of the recognition of the *Adivasis* as indigenous peoples is a simple case of political hypocrisy that is hiding racism. Evidence of such hypocrisy is highlighted through the policy of positive discrimination, and the set of rights that the Indian legislation put in place with regard to its tribal population. With varying degrees of success, such legislation addresses all the specific entitlements of indigenous peoples in international law, i.e., specific legislation regarding occupation of their ancestral lands, legislation in favour of the protection of the indigenous cultures and languages, and some autonomy rights. Under the heading of ‘Scheduled Tribes’, the Indian Constitution specifically organises some ratio regulations to encourage positive discrimination and affirmative action in favour of the tribals. According to their proportion of the total population, 8 percent of the jobs in the public service are reserved for *Adivasis*. The Constitution also includes some clauses for the protection and promotion of indigenous languages and cultures. However, an evaluation of the situation today quickly reveals that such special provisions have failed to bring positive gains for the *Adivasis*; for instance, *Adivasis* still represent only 2 percent of personnel in public services. Constitutional provisions relating to education have also failed, as tribal children have had to study in a language foreign to them. As a result, most Scheduled Tribes lag behind the majority population of India with regard to development indicators (85 percent of the *Adivasis* live below the poverty line and even though 90 percent of them depend on agriculture for their livelihood, it is estimated that about 10 million of the indigenous peoples live in urban slums).<sup>23</sup> Thus, even though there are some potentially positive provisions in the Constitution, these provisions seem only notional since the political will to implement them has been lacking since the beginning. As in many other countries with a large indigenous population, one of the central angles of the Constitution concerns the land rights issue.

### **One Step Forward, Two Steps Back: Indian Policy Regarding *Adivasis* Land Rights**

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<sup>23</sup>On this issue, see: Minority Rights Group, ‘Development, Equity & Justice: *Adivasi* Communities in India in the Era of Liberalization and Globalization’ (MRG Workshop Report Title, 6-9 April, 1998).

## *Constitutional Entitlements: An Overview*

In India, like in Australia or North America and many other places, the concept of land ownership started with the arrival of European colonisers. When the British arrived, they started a huge enterprise of forestry across the country and introduced the idea of property of forestlands resulting in the loss of land ownership for a large number of *Adivasis*. Prior to the arrival of the British, there was no record of land ownership in India and some of the first pieces of land legislation adopted under British rule remained in use until the 1980s. Independent India has often re-used the schemes put in place by the British administration in its tribal policy. In 1874, the British introduced the notion of ‘Scheduled Areas’ to provide tribals with special protection; by the same token, the Indian Constitution also provides special provisions for ‘Scheduled Areas’. However, one of the objectives of Indian policy since independence has been the protection of its tribal population against land alienation by non-tribals. There are two annexes to the Constitution that deal with indigenous peoples’ land rights, the Fifth and Sixth Schedule of the Constitution. The Fifth Schedule gives special protection to the ‘Scheduled Tribes’ that are included within the territory of the ‘Scheduled Areas’, meaning the eight states that the Constitution officially proclaimed as ‘scheduled’.<sup>24</sup> Thus, several states, especially in the south of the country, are not included in the Scheduled Areas even though large *Adivasi* communities inhabit those states. The prime objective of this part of the Constitution is to create special provisions for the development of tribal lands and to prevent their alienation. Within the Scheduled Areas, in order to protect the Scheduled Tribes, the Governor of each of the eight federal states, who represents the executive, has the power to restrict the application of any legislation of the state parliaments that might apply to Scheduled Areas. The Governor is also in charge of making regulations to:

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such areas;
- (b) regulate the allotment of land to members of the Scheduled Tribes in such areas;
- (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.<sup>25</sup>

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<sup>24</sup>These states are: Andhra Pradesh, Bihar, Gujarat, Haryana, Madhya Pradesh, Maharashtra, Orissa, and Rajasthan.

<sup>25</sup>Constitution of India, Art. 244 (1), Part B, 5.

Nevertheless, before making such regulation, the Governor is required to consult the Tribes Advisory Council. The Tribes Advisory Councils are bodies established in each state having Scheduled Areas, and consist of twenty members, fifteen of whom are representatives of the Scheduled Tribes in the state legislative assembly. However, even though the Governor has to consult the Tribes Advisory Councils it must do so only as an advisory body on 'matters pertaining to the welfare and the advancement of the Scheduled Tribes'. Before making any regulation, the Governor has to submit it to the President for assent. Thus, even though land is a subject that comes under the power of each state, the central government has an advisory and coordinating role in every land program in the country.

The other scheme of the Constitution, the Sixth Schedule, a much more complex part, provides for some autonomy to specific tribes of the Northeast. This part of the Constitution is applicable only in the states of Assam, Meghalaya, Tripura, and Mizoram, and reflects the legacy of the history of resistance of the Northeastern tribes towards colonisers.<sup>26</sup> When independence was proclaimed, the geopolitical situation in the Northeast implied that the Constitution recognised special autonomy rights for those regions.<sup>27</sup> In this sense, the Fifth Schedule is the generally applicable rule, with the Sixth Schedule seen as the special law. The Sixth Schedule creates some elected bodies, notably *Autonomous District Councils* that are given some administrative and legislative powers, even though the Governor always ultimately controls such powers.<sup>28</sup> Relating to *Adivasi* land rights, the Sixth Schedule gives power to these prescribed autonomous bodies to legislate on the allotment, occupation, use, or setting apart of land, the management of the forest, the inheritance of property, and on the regulation of money-lending.<sup>29</sup>

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<sup>26</sup>See: Chakravorty, Birendra C., *British Relations with the Hill Tribes of Assam since 1858* (Calcutta, India: Firma K. L. Mukhopadhyay, 1981).

<sup>27</sup>On the drafting of the Constitution, see: R. Joshi, M. Pinto, L. D'Silva, *The Indian Constitution and its Working* (Orient Longman, Bombay, 1986) and B. Shiva Rao, *The Framing of the India's Constitution: Select Documents* (N.M. Tripathi, Bombay, 1967).

<sup>28</sup>See: Supreme Court of India, *Edwingson v. The State of Assam*, AIR (1966) SC 1220; and *State of Assam v. K.B. Kurkalang*, AIR (1972) SC 223.

<sup>29</sup>On the limitation of the power of the District Council, see: Supreme Court of India, *District Council of U.K. & J.H. v. Sitimon*, AIR (1972) SC 787.

Thus, there are two major schemes in the Constitution; the Fifth Schedule tends to be protective and ‘paternalistic’ as the government is in charge of any development in tribal lands, whereas the Sixth Schedule is more in favour of self-management.<sup>30</sup> While these two parts of the Constitution are the pillars of legislation regarding tribal land rights, several other statutes also deal with *Adivasis* land rights. As stated earlier, the federal government has an advisory and coordinating role in national land policy but the states are the prime actors in implementing land reforms.<sup>31</sup> Thus, in concordance with the Constitution, both the central government and state governments have enacted laws based on two main principles: the prohibition of tribal land alienation (e.g. transfer of individual tribal land to non-tribal individuals) and the restoration of alienated lands. However, while this has been official state policy, the reality is that the federal and the state governments are often responsible for the grabbing of *Adivasi* lands through many means such as manipulation of laws, the national forest policy, the large scale development programmes, the non-implementation of the land restoration policy, and/or simply by not protecting tribal lands against transnational corporations. Three major angles of the policy that has been undertaken by the government of India with regard to tribal lands seem crucial to appreciate the failure of the Indian policy:

1. The proposition to amend the protection of land alienation of tribal lands to non-tribals;
2. The failure and non-implementation of the restoration policy of the stolen lands;
3. The usurpation of tribal lands under land acquisition laws coupled with the lack of a proper rehabilitation policy for persons forcibly displaced.

### *The Real Face of the Central Government: Attempting to Subvert the Constitutional Provisions*

During the 1990s, the Andhra Pradesh government leased some forestlands of indigenous peoples to a company to exploit calcite. The High Court dismissed the

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<sup>30</sup>The self-management orientation of the Sixth Schedule will be analysed in the latter section relating to self-rules and autonomy.

<sup>31</sup>For an overview of states’ policy see: S.N. Mishra (ed.), *Ownership and Control of Resources Among Indian Tribes* (Inter-India Publications, Tribal Studies of India Series T 184, Vol.3, 1998).

case filed by the NGO *Samatha* on behalf of the *Adivasi*. The Supreme Court upheld the case and annulled the lease in what became the landmark judgment known as the *Samatha* case.<sup>32</sup> In many respects, the *Samatha* case can be regarded as the ‘Indian Mabo’, as its consequences regarding indigenous peoples’ land rights in India is very similar to the impact of the Mabo decision in Australia. One of the central issues in the case concerned the meaning of the legal prohibition of ‘transfer of immovable property to any person other than a tribal’ as enacted in the Andhra Pradesh *Scheduled Area Transfer Regulation*. The question for the judges was to define whether the word ‘person’ would include the state government. The Supreme Court stated that the word ‘person’ would include natural persons as well as judicial persons and constitutional governments. In this regard, this judgment had far-reaching consequences across the country as the Supreme Court clarified the content of the Fifth Schedule of the Constitution by stating that government lands, tribal lands, and forestlands that are included in the Scheduled Areas cannot be leased out to non-tribals or to private companies for mining or industrial operations. Consequently, all mining leases granted by the state governments in Fifth Scheduled Areas were now suddenly illegal and the government was asked to stop all illegal mining and other industrial activities within the Scheduled Areas. This ruling of the Supreme Court had a strong impact all over the country, as 90 percent of India’s coal mines and 80 percent of the forests and other natural resources are on *Adivasi* lands.<sup>33</sup> Subsequently, the Andhra Pradesh government, as well as the central government, filed appeals to the Supreme Court, both of which were dismissed.<sup>34</sup> In 2000, the Ministry of Mines, in a document classified ‘secret’, proposed to the Committee of Secretaries of the government of India that it modify the Constitution to subvert the Supreme Court judgment and allow private investors to own tribal lands. In this note, the Attorney General suggested that the amendment of the Fifth Schedule of the Constitution would be the solution ‘to counter the adverse effect of the *Samatha* judgement’.<sup>35</sup> The proposed amendment’s purpose is to remove the prohibitions and restrictions on the transfer of

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<sup>32</sup>Supreme Court of India, *Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191.

<sup>33</sup>On the other implications of the judgment, see: PUCL Bulletin 2001, ‘Attempts to Subvert “Samatha” Judgment’ (January 2001).

<sup>34</sup>For an overview of the legal proceedings, see: South Asia Human Rights Documentation Centre, *Racial Discrimination: The Record of India* (SAHRDC, New Delhi, 2001), pp. 26-30.

<sup>35</sup>Government of India, Ministry of Mines, ‘Note for the Committee of Secretaries regarding amendment of the Fifth Schedule to the Constitution of India in the light of the *Samatha* Judgment’ (No.16/48/97-M.VI, 10 July 2000).

land by *Adivasis* to non-*Adivasis* for undertaking operations such as mining and any other non-agricultural operations.

### *Land Alienation and Lack of Rehabilitation Policy*

Since independence, more than 50 million people have been displaced by large-scale development projects, including industries, mines, irrigation projects, national parks, and wildlife sanctuaries, based on the right of land acquisition for 'public purpose'. Forty percent of the total displaced population belongs to groups classified in the Scheduled Tribes. Notably, only a quarter of the total displaced population has been rehabilitated so far.<sup>36</sup> Like everywhere else, this displacement mostly occurs in the name of economic interests and 'development'. India has witnessed many famous cases of tribal land alienation for the construction of dams, mining interests, and forestry. The Narmada Valley Project, for example, is a plan for the building of 30 major, 136 medium, and 3,000 minor dams. The scale of the total population affected by the overall project is colossal with especially disastrous consequences for the *Adivasi* in terms of displacement and loss of land. More than 90 percent of the people affected by the Sardar Sarovar Project, one of the project's dams, are members of the *Bhil* and *Tadavi* tribes.<sup>37</sup> One of the major objections of the concerned *Adivasis* has been the total lack of rehabilitation policy for those forcibly displaced. This case is not isolated, as despite the large amount of displaced persons, India does not have a proper national rehabilitation policy.<sup>38</sup> To respond to this lack of a national rehabilitation policy, the central government put in circulation a scheme for a *National Policy for Rehabilitation of Persons Displaced as a Consequence of Acquisition of Land* in 1994. A year later, concerned NGOs published a critique to this governmental proposition in the form of a draft bill. This bill was entitled *Land*

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<sup>36</sup>A. Ekka, 'Adivasi Rights: Empowerment and Deprivation' in Vigil India Movement *Human Rights 2001* (Vigil India Movement 2001), p. 76.

<sup>37</sup>S. Kavaljit, 'The Narmada Issue: An Overview' *Cultural Survival* Issue 13.2; see also: The Constitution (Scheduled Castes and Scheduled Tribes) Orders (Amendment) Bill (2002).

<sup>38</sup>Three states, namely, Madhya Pradesh, Karnataka, and Maharashtra, have their own national laws. The National Thermal Power Corporation and Coal India promulgated their policies in the 1990s; on this issue, see: W. Fernandes and V. Paranjpye (eds.), *Rehabilitation Policy and Law in India: A Right to Livelihood* (Indian Social Institute, New Delhi, 1997).

*Acquisition Rehabilitation and Resettlement Act* since one of the pillars of the proposal was to link land acquisition and rehabilitation, two areas currently separated in Indian legislation.<sup>39</sup> Finally, a governmental commission was established to draft the future bill. The proposed Bill, designated the *Land Acquisition Bill*, is an initiative that amends the *Land Acquisition Act of 1894*, which, for more than a century, has allowed compulsory acquisition of lands for ‘public purpose’. The proposed amendment is aimed at facilitating the process of acquisition; for example, the government would be allowed to acquire lands for the benefit of private companies ‘not only for work which would be in the nature of public purpose but also for engaging in productive activities that is likely to prove useful to the public’.<sup>40</sup> The proposed amendment does not address the definition of ‘public purpose’ even though there was a grave need for such definition. As highlighted by Ramanathan, one of the striking features of the notion of ‘public purpose’ is the fact that courts ‘have generally sustained the view that a state’s perception of what constitutes ‘public purpose’ cannot be judicially reviewed’ and thus this notion has acquired immunity from challenge in the courts.<sup>41</sup> The amendment of the *Land Acquisition Act* was expected to redress such loopholes in the land acquisition system but instead the proposed amendment excludes rehabilitation measures.<sup>42</sup> In response, the *National Human Rights Commission* (NHRC) has stated ‘...that provisions relating to the resettlement and rehabilitation of persons displaced by land acquisition for developmental projects should form a part of the Land Acquisition Act itself (or an appropriate separate legislation) so that they are justiciable.’<sup>43</sup>

The NHRC also highlighted the government’s obligation under ILO Convention 107 (ILO 107). India is a party to ILO 107, in which article 12(2) especially addresses the issues of rehabilitation and resettlement. Article 12(2) reads: ‘When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied

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<sup>39</sup>Ibid.

<sup>40</sup>A. Ekka, *supra* note 36, p. 80.

<sup>41</sup>U. Ramanathan, ‘Issues of Equity in Rural Madhya Pradesh’ in K.J. Praveen (ed.) *Land Reforms in India* (Vol. 7, New Delhi, Sage, 2002) p. 204.

<sup>42</sup>On this issue, see : Government of India, ‘National Policy Packages and Guidelines for Resettlement and Rehabilitation 1998’ (Ministry of Rural Areas and Employment, New Delhi, 1998).

<sup>43</sup>National Human Rights Commission, ‘Resettlement and Rehabilitation of Persons Displaced by Land Acquisition should form a part of Land Acquisition Act’ (Newsletter, New Delhi, March 2001).

by them, suitable to provide for their present needs and future development.’<sup>44</sup> Even though this article of ILO 107 was not specifically mentioned by the NHRC, the NHRC took the view that it was desirable to incorporate the rehabilitation and resettlement package in the *Land Acquisition Act* itself, otherwise India would be in violation of its international obligations as enacted by ILO 107.

### *The Setback of the Land Restoration Policy*

As in other countries of the world, the government has recognised past abuses and started to organise a land restoration process across the country. So far, however, the implementation of such a policy has been unsuccessful.

An example of the lack of implementation is visible in Kerala. In 1975, the Kerala government adopted the *Kerala Scheduled Tribes Act (1975 Act)* which was supposed to restore some of the one million acres of land that are believed to have been stolen by settlers from *Adivasis* over the last century. However, 27 years after the *1975 Act* was passed and despite orders from the High Court, this law has not been implemented. In 1999, the government of Kerala adopted a new law that sought to overturn the *1975 Act*. Even though the High Court of Kerala stated that such a law could not legally overrule the *1975 Act*, the government challenged this decision in the Supreme Court in a pending decision that will have serious consequences for the whole country.<sup>45</sup>

Aside from this legal battle, in the months of July-August 2001 several *Adivasis* died of starvation in Kerala, provoking large and well-organized protests by the *Adivasis*.<sup>46</sup> Subsequent demonstrations were launched by the *Adivasis-Dalit Action Council* agitating for a political discussion within the state and resulting in dialogue between government and *Adivasi* representatives, the cornerstone of which was the land

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<sup>44</sup>Convention (No.107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (ILO 1957, 328 UNTS 247, entered into force June 2, 1959).

<sup>45</sup>See: C.R. Bijoy, ‘Indigenous Peoples’ Rights in Kerala, India’ (Paper Submitted at Indigenous Rights in the Commonwealth Project, *supra* note 21), available at [www.cpsu.org.uk/downloads/C\\_R\\_Bijoy.pdf](http://www.cpsu.org.uk/downloads/C_R_Bijoy.pdf), last consulted 9 July 2003. More detailed information about the Indigenous Rights in the Commonwealth Project is available at [www.cpsu.org.uk](http://www.cpsu.org.uk)

<sup>46</sup>See: K.S. Singh, *The Dark Clouds and the Silver Lining: Adivasi Struggle in Kerala* (Kerala Study Group, Delhi Forum, November 2001).

restoration process. In October 2001, an agreement was finally signed that entered into force in January 2002. The agreement guarantees the allotment of one to five acres of land to landless tribal families. This agreement is the result of the new governmental policy based on the idea of providing ‘alternative land’ instead of the ‘alienated land’ to affected groups, transforming its land restoration policy to a rehabilitation policy. Only a few months after the entry into force of this agreement, however, it seems that the promised lands are lands and forest lands dedicated to timber, naturally protected areas, or lands not suitable for cultivation. Thus, the agreement signed by the government appears to be nothing more than empty rhetoric as, legally, the landless tribals would not be able to own the promised lands. In a recent decision, the High Court of Kerala has already intervened in favour of the forest department, as under the *1980 Forest Conservation Act* assigning such tracts of land to tribal populations is illegal, reasoning that those forest lands fall under the jurisdiction of the forest department: and can only be assigned with prior permission of the central government.

The government has been accused of ‘double standards’ on the *Adivasi* rehabilitation issue. This criticism was based on the involvement of the state government in claiming those lands which had been assigned to the *Adivasis* as forest lands in Mathikettanmala. In this regard, the state government has been blamed for ‘conspiracy’ with the central forest department to deny land to the *Adivasis*.<sup>47</sup> This example shows the hypocrisy and the unwillingness of the state government to implement its own policy of land restoration, and reflects a general trend with other states who have a fairly similar approach to the issue.<sup>48</sup> The case of the *Adivasis* of Kerala points out another fundamental issue in the land rights struggle which is the potential conflict between wildlife protection, forest preservation, and *Adivasis* rights of land ownership.

### *Impact of Wildlife Conservation on Adivasis Land Rights*

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<sup>47</sup>*The New Indian Express* (Kochi), 20 April 2002.

<sup>48</sup>For another example: R. Ramagundam, *Defeated Innocence, Adivasi Assertion, Land Rights and the Ekta Parishad Movement* (Grassroots India Publishers, New Delhi, 2001).

In India, the protection of the environment is often used as a way of expelling indigenous peoples from their land in the name of 'wildlife protection', notably through the establishment of 'protected areas' within tribal areas.<sup>49</sup> The establishment of protected areas, such as national parks or sanctuaries, often disrespects tribal relations with land, forest, and water, and often is aimed at expelling tribal communities. During colonization, the British introduced the idea that forests should be governmentally owned and classified them as 'protected areas'. The *Adivasis*, as inhabitants of those forest lands, entered into conflict with the British government and finally with the Indian government that maintained the same laws.

The legislation that is in contradiction with *Adivasis* land rights is based on two statutory acts: the *1927 Forest Act* and the *1972 Wild Life Protection Act*. The International Work Group for Indigenous Affairs has highlighted the case of the *Van Gujjar* indigenous peoples of Uttar Pradesh that illustrates such confrontations by supporting the resistance organized by this semi-nomadic community against 'faulty conservation policy'.<sup>50</sup> In this case, the Uttar Pradesh government had planned to convert indigenous homelands into a national park. Under the *Wild Life Act of 1972*, no residence is allowed in national parks, thus forcing expulsion of the indigenous populations. This case is an example of larger policy that has been developed across the country. Recently, the central government has planned to set-up paramilitary forces to 'protect' forest areas. Such paramilitary forces regularly threaten indigenous inhabitants - with several cases of human rights abuses already registered.<sup>51</sup> Another important issue in India has been the recent adoption of the *Biological Diversity Bill*. This legislation is the national implementation of the international *Convention on Biological Diversity*<sup>52</sup> to which India is a party, and which is in favour of the protection of indigenous knowledge by regulating the access to natural resources to ensure the protection of local knowledge and thus indigenous intellectual property. However, the *Biological Diversity Bill* is another illustration of how the government

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<sup>49</sup>On this issue, see: Survival International, *Tribal Peoples and Conservation, Parks and Peoples* (Survival International, London 1999) and more generally: M. Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation* (UNRISD Discussion Paper, Geneva, 1994).

<sup>50</sup>See: Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 1996-97), pp. 219-22 (1996-97), pp. 279-80; (1998-99), pp. 265-68.

<sup>51</sup>See: N. Kaur, 'Targeting Tribal People' *Frontline* (Vol. 19, Issue 21, 12 October 2002) and L. Bavadam, 'Fear in the Forests' *Frontline* (Vol. 18, Issue 13, 23 June 2001).

<sup>52</sup>Convention on Biological Diversity, UNEP, Na. 92-7807, 5 June 1992.

is using the guise of environmental concerns to violate indigenous rights, as it will allow transnational corporations to research and use indigenous biodiversity resources and knowledge, rejecting indigenous peoples' rights over their own resources.<sup>53</sup>

In this debate it is essential to understand that both objectives, preservation of the environment and protection of indigenous rights, should be complementary and not opposed. At the international level, indigenous peoples are often considered as 'environmentally friendly'. The *Rio Declaration on Environment and Development* placed emphasis on the importance of respecting indigenous cultures and several environmental NGOs have pointed out that the preservation of the environment is interlinked with the protection of indigenous knowledge.<sup>54</sup> The declaration adopted at the *United Nations World Summit on Sustainable Development* states: '[W]e reaffirm the vital role of indigenous peoples in sustainable development.'<sup>55</sup> Despite such declarations, governments often use the protection of the environment as a pretext to violate indigenous land rights. As pointed out above in India, indigenous communities have often had to pay the price for so-called 'environmental protection'. The *Adivasis* situation shows how governments might use environmental arguments against indigenous rights.

It is also important to stress that the international debate has evolved in recent times and international developmental agencies have adopted new guidelines emphasising the essential protection of indigenous rights as the basis for developmental or environmental projects. In this sense, quite often both the central as well as state governments are turning a blind eye to the reports submitted by *ad hoc* international bodies inviting these governments to respect the minimum standards generated by international law.<sup>56</sup> Locally, the Indian indigenous movement has shown its ability to propose alternative policies based on both protection of the environment and respect for their fundamental rights. The creation of the *Jharkhand Save the Forest Movement*

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<sup>53</sup>On this issue, see: Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 2000-2001), p. 304.

<sup>54</sup>Hitchcock, 'International Human Rights, the Environment, and Indigenous Peoples' (1994) 5(1) *Colorado Journal of International Environmental Law and Policy* 1-22.

<sup>55</sup>Johannesburg Declaration on Sustainable Development (Johannesburg, South Africa, 26 August – 4 September 2002), UN.Doc. A/CONF.199/L.6, paragraph 22bis.

<sup>56</sup>For example, see: World Bank Inspection Panel Report on the Rajiv Gandhi National Park Ecodevelopment Project, more information available at <[www-wds.worldbank.org](http://www-wds.worldbank.org)>, last consulted 9 July 2003.

is another illustration of this central complementarity between environmental and indigenous concerns.

### ***Adivasis Experience with Self-Rule, Autonomy, and Self-Determination***

#### *The Panchayati Raj System: Self-Rule?*

After independence, the government engaged itself in a broad 'Community Development Programme', one of the pillars of which was the development of a decentralized system of rural governance under the organizational structure of the *Panchayati Raj* (local government). The Panchayats have two main responsibilities: to plan economic development and to organise social justice. The experience started at the state level but was finally nationally and constitutionally organised through the *73rd Constitutional Amendment Act of 1992*.<sup>57</sup> However, this Act was not applicable in states having Scheduled Areas, and the Panchayat system was not extended to tribal areas. Following the vast movement of protest organised by the *National Front for Tribal Self-Rule*, the Parliament appointed a committee of experts, the *Bhuria Committee*, to work on the issue. Based on recommendations of this special committee, the government finally adopted specific legislation on this issue. In 1996, the *Provisions of the Panchayats (Extension to the Scheduled Areas) Act (PESA)* was passed to extend the application of the Panchayat system to Scheduled Areas. Under the *PESA*, the *Gram Sabha* (village council) was given the power to manage natural resources, conserve and protect customs and traditions, manage community resources, manage minor water bodies, resolve disputes through customary methods, control money lending to Scheduled Tribes, and control and manage non-timber forest produce (minor forest produce). Thus, the *PESA* brought a new approach to indigenous peoples rights; whereas the Fifth Schedule of the Constitution is based on a paternalistic approach giving power to the President and his appointed state Governors to rule the rights of the tribals, the Panchayat system is a self-management approach based on the decision of the village community represented in the *Gram*

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<sup>57</sup>Constitution (Seventy-third Amendment) Act 1992 (20/4/93).

*Sabha*. Relating to land control, the *Gram Sabha* has a central role to prevent alienation of land and restore unlawfully alienated land of Scheduled Tribes. On the issue of land alienation, the *PESA* states that ‘...the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas...’<sup>58</sup>

Even though this new legislation was acclaimed as an ‘historical’ evolution for the right of the *Adivasis*, it was criticised for the fact that the *Gram Sabha* will only have to be consulted by the government before any decision to acquire land. In its recommendations to the government, the *Bhuria Committee* had emphasised the fact that ‘land should be acquired with the consent of the Gram Sabha’,<sup>59</sup> thus, it was hoped that the government would have needed the consent of the village council, rather than only having the duty to consult it. The second criticism concerns the implementation of the *PESA*. The *PESA* states that every concerned state government should organize the implementation of the *Panchayat* system in its respective state. States having a recognized, scheduled tribal population were required to make appropriate amendments to state laws to give power of self-governance and traditional community rights to their tribal population. However, a majority of states have not carried out the necessary amendments; several states did not amend their Acts according to the *PESA*, even after the stipulated time.

The *PESA* also stipulates that, in the implementation process, state governments have the power to increase the power given to local councils. However, during the implementation process, in some cases, state governments have infringed on the power of the local council. For example, the Jharkhand state government passed a *Panchayat Raj Act* in 2001 to implement the central legislation but in violation of ‘every constitutional principle and in defiance of the central act of 1996’.<sup>60</sup> Even when states have implemented the Constitutional provision, local administration often

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<sup>58</sup>Provision of the Panchayats (Extension to the Scheduled Areas) Act, 1996, Section 4 (i) (Emphasis added).

<sup>59</sup>Report of MPs and Experts to Make Recommendations on the Salient Features of the Law Extending Provisional Constitution (73rd) Amendment Act, 1992 to Scheduled Areas, para. 21(v).

<sup>60</sup>B. Mundu, ‘Challenges of Traditional Customary Rights of the Adivasis: The Jharkhand Experience’ (Paper Submitted at Indigenous Rights in the Commonwealth Project, *supra* note 21), available at <[www.cpsu.org.uk/downloads/Bineet\\_M.pdf](http://www.cpsu.org.uk/downloads/Bineet_M.pdf)>, last consulted 9 July 2003.

tries to subvert the process of self-governance that it is officially pretending to facilitate. A striking example of such subversion took place in the state of Chhatisgarh, where the district administration of Bastar tried to allot tribal land under the *Land Acquisition Act to the National Mineral Development Cooperation (NDMC)* to establish a steel plant in the Scheduled Area of Nagarnar.<sup>61</sup>

In this case, the concerned *Gram Sabhas* strongly resisted the proposal of land acquisition for the steel plant in the absence of clear plans for the future of the villagers. The local administration rejected this position, however, and fabricated records concluding with an ‘agreement by majority’ of the *Gram Sabha*. The concerned villagers petitioned the *National Commission for Scheduled Castes and Scheduled Tribes*,<sup>62</sup> which came to the conclusion that the acquisition process violated the Constitutional mandate for the Scheduled Areas. The National Commission pointed out that neither the letter nor the spirit of the law regarding consultation with the *Gram Sabhas* had been followed. However, the advice of the National Commission to restart the process by honouring the spirit of the constitution and legal provisions was ignored by the government, and, even though it is a constitutional body, the Commission has ‘no teeth’ to ensure the compliance with its decisions. This contention remains unresolved and some 365 tribal people have been arrested for opposing the district administration on this issue while several others have been the victims of police violence.

Thus, the process so far has been disappointing; however, introduction of the PESA is still recent and more time is needed to evaluate its full impact in terms of indigenous self-governance. Even though officially the *PESA* provided one year for concerned states to enact the constitutional legislation, in most cases the relevant state legislations are quite recent. Thus, there is a need to examine the impact of the *PESA* with regard to its implementation by states and its proper impact on village governance. It is also relevant to bear in mind that Article 254 of the *Constitution of India* provides that if a state law is not consistent with central law, the state law to the extent of repugnancy is void. Therefore, there are still a lot of ways for the *Adivasis* to

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<sup>61</sup>K. Ray, ‘Bastar Tribal’s Endless Wait For Justice’, *Deccan Herald*, 13 July 2002.

<sup>62</sup>On the mandate and power of the Commission, see: P.D. Mathew, ‘The National Commission for Scheduled Castes and Scheduled Tribes’ (Indian Social Institute, Legal Education Series No. 59, Delhi 2002).

push for proper enforcement of the *Panchayati Raj* system. It is important to underline that the *PESA* has opened up a very important door, as the spirit of this Act is based on co-habitation between customary laws and national laws.<sup>63</sup> Thus, it might take some time before a proper evaluation of the real impact of the *PESA* can be undertaken.

### *Adivasis Experience with Autonomy*

Several *Adivasi* communities have petitioned for autonomy within Indian democracy since independence and sometimes long before. The recent establishment of new states in eastern and central India, in fact, came as an answer to autonomy demands from the *Adivasis*.<sup>64</sup> Regarding such rights, the different *Adivasi* communities in the Northeast of India have always sought autonomy *vis-à-vis* the central government. As pointed out earlier, some communities have been granted a certain degree of autonomy rights under the *Sixth Schedule of the Constitution* and tribal affiliation has been recognised as a basis for statehood in some parts of the Northeast. But a closer scrutiny of those two cases of apparent success towards autonomy rights asserts that no significant changes were brought to the concerned tribal communities despite the reference to autonomy rights.

### *Disenchantment in Jharkhand and Chhattisgarh*

One of the eminent hopes for the development of indigenous peoples' rights to autonomy was the creation of new states in 2000. The formation of Jharkhand and Chhattisgarh – newly created states in the eastern regions of India – followed the long struggle of the *Adivasis* of these regions for the creation of their own state.

The Jharkhand movement started about 200 years ago, and the region is famous for its anti-colonial rebellions.<sup>65</sup> One of the central claims of the movement was the legal

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<sup>63</sup>See: S.V. Sharan, 'Implementing the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, Perspectives and Issues', Keynote Paper-11, 'National Conference On Panchayats (Extension to the Scheduled Areas) Act, 1996: Its Implications and Challenges for Tribal Development and the Local Government System' (Institute of Social Science, New Delhi, March 1999).

<sup>64</sup>See: S. Muralidharan, 'The Birth of Three States' *Frontline* (1 September 2000).

<sup>65</sup>On the history of the movement, see: R. Bhengra, 'The Jharkhand Region' in R. Bhengra, C.R. Bijoy and S. Luithui, *The Adivasis of India* (Minority Rights Group, London, 1998), pp.15-20.

recognition of the ancestral system of self-governance of the tribals of the region. To different extents across history, the *Adivasis* of Jharkhand have always lived under customary self-governing structures. Those traditional customary systems of governance have been put under pressure by different colonisers; however, until independence, these systems mainly stayed in place. *Jharkhand*, meaning 'forest land', is a dream come true for the tribals of the region as it is the result of a long struggle for land rights. The state has created *Jharkhand* from the existing state of Bihar, which is one of the poorest states of India. However, by itself, Jharkhand is a region rich in terms of natural resources and industries.

The *Adivasi* struggle was motivated by the creation of a state in which the *Adivasis* would be a majority, placing them in a better bargaining position *vis-à-vis* the central government and allowing them to benefit economically from the wealth of their land.<sup>66</sup> The 18 districts of the new state cover only half of what the Jharkhand Movement leaders asked for. By excluding some indigenous areas from this new state, the government managed to form it in such a way that the indigenous peoples continue to be a minority within what was supposed to be their own state. The *Adivasi* population is recorded to be as low as 27 percent of the total population of Jharkhand.

Similarly, the *Adivasi* population of Chhattisgarh fails to constitute the majority of the total population of the state. By the exclusion of large tribal areas of the bordering states of Orissa and West-Bengal, the government succeeded in maintaining the *Adivasis* as a minority within their newly created, supposedly autonomous states. As a result, after only two years of existence, the new state of Jharkhand has already witnessed a series of bloody instances of repression against its *Adivasis* population. There were some important demonstrations in this state during the summer 2001, and several clashes with the police. In 2002, several *Adivasis* were killed by police forces during a peaceful anti-dam protest. Thus, overall, the establishment of the two new states did not bring the hope that it was supposed to carry, and the *Adivasis* remain a minority subject to discrimination of the non-tribal majority. In terms of land legislation, the *Adivasis* did not gain any improvement of their rights, nor can any serious evolution of autonomous rights be detected. Thus, after only two years of

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<sup>66</sup>A. Ekka, *supra* note 36.

existence, these two states, which seemed to be a victory for the *Adivasis* of the concerned regions, appear to be more a story of disenchantment.

### *The Struggle for Autonomy in the Northeast*

The Northeast of India is composed of seven states: Arunachal Pradesh; Assam; Manipur; Mizoram; Tripura; Nagaland; and Meghalaya. In those seven states the indigenous peoples represent a large percentage of the total population and the region also contains a high and diverse concentration of different indigenous communities. By its geographical position, the Northeastern region regroups several different indigenous communities (Mongoloid, Tibeto, Birman racial ancestry) that have lived there with little outside contact. The region has historically been separated from mainland India; during British colonization the Northeastern regions had always been kept under a separate legislation. For example, in 1873, the *Inner Line Regulation*<sup>67</sup> regulated entrance to the hill district and later the region was considered as an 'excluded and partially excluded area'.

Apart from the Nagas, who have always fought for self-determination, most of the other communities sought autonomy within India at the time of independence. Thus, in 1947, the indigenous communities asked for preservation of specific laws that protected their cultures. These demands were acknowledged under the provisional constitution of the *Sixth Scheduled of the Constitution* that provides for a certain degree of autonomy. This part of the Constitution operates in parts of the Northeast (applicable to the tribal areas in Assam, Meghalaya, Tripura and Mizoram) and embodies the notion of self-management of resources and a substantial measure of autonomy, including the power to legislate through the *Autonomous District Council* (ADC). As pointed out by one author, this scheme of the constitution highlights two major aspects of governmental policy towards the Northeast: '(t)he successful political incorporation of dissenting minority groups by giving them significant level of political autonomy and a major say in determining public policy (...)'<sup>68</sup>

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<sup>67</sup>Still applicable in Nagaland, Mizoram and Arunachal Pradesh.

<sup>68</sup>B. Sanjib, 'Indigenous Peoples, Cultural Survival and Minority Policy in Northeast India', (Cultural Survival, Issue 13.2).

Similar to the facade of autonomous rights, the ADCs set up by the Constitution are largely controlled by the centre. The ADCs also depend financially on the central government, though state governments have the power to dismiss them. Finally, any legislation undertaken by the autonomous council requires the consent of the state Governor. These restrictions on autonomy have pushed the indigenous communities to ask for real autonomy. Apart from the *North-Eastern Areas Reorganization Act of 1971* that reconstituted the region into a number of distinct states but was ‘only a change of name’,<sup>69</sup> the reaction of the government has always been to treat this demand as a problem of ‘law and order’. In this sense, the region has witnessed numerous special laws derogating from general legislation and human rights protection.

As early as 1958, the parliament enacted the *Armed Forces (Assam-Manipur) Special Powers Act*, an act extended to the totality of the region by the *1972 Armed Forces (Special Powers) Act (AFSPA)*. Generally, these laws empower army members to shoot at any person that is ‘suspected’ of disrupting law and order, protecting military personnel from any eventual responsibility for their acts. From time to time, Special Ordinances are promulgated to allow the imprisonment of individuals for a period of six months to one year without trial. This violence is worsened by the government’s inability to respond to the pressure created by the massive arrival of migrants and refugees in the region. Some of the crucial issues in the Northeast center around the problems generated by the policy of forcible relocation. Migrations from outside India or within the national boundaries have drastically affected the position of the indigenous peoples of the region, which have found themselves in a minority position *vis-à-vis* new in-groups. There is no prevention and protection of indigenous rights from these large-scale settlements of migrant populations within tribal lands, often resulting in violent conflict. Despite specific legislation regarding tribal land rights, large areas of cultivable lands are transferred to migrants based on the alienation of tribal rights, and usually result in the economic exploitation of the *Adivasis*. This scenario aggravates the already difficult social and economic conditions of the *Adivasis*, and also highlights the unwillingness of the government to implement effective laws and to address the definitive lack of autonomy of the *Adivasi*

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<sup>69</sup>R. Bhengra, C.R. Bijoy, and S. Luithui, *supra* note 65, p. 32.

communities of the region. Thus, the situation in the Northeast is not encouraging, and after several years of struggle to achieve some degree of autonomy the *Adivasis* continue to face state repression and land-grabbing by the migrants, making the Northeast a place where violence is more common than peace.

*From Nagaland to Nagalim: Nagas' Experience with Self-Determination*

The Nagas, who live at the junction of China, India and Myanmar (previously Burma), have remained unconquered and independent from time immemorial. Even though during the British colonization of India some part of the Naga territory was administered under British rule, the Nagas retained their independence. When the British withdrew from the region, the Nagas saw their land; Nagalim (land of the Nagas) divided between India and Burma. The Nagas declared independence one day before India. Notwithstanding the promise made at the time of independence by Gandhi, despite the *Hydari Agreement* of 1947<sup>70</sup> signed between Naga representatives and the government that agreed that the Nagas would administer their affairs themselves for ten years and then decide on their own future, and regardless of the Naga plebiscite of 1951 by which 99.9 percent of the Nagas expressed their desire for independence, the Nagas did not get access to their independent national state and the promises made by the Indian government have never been honoured.<sup>71</sup> To respond to the demands of the Nagas and the establishment of the *Naga National Council*, the government resorted to violence and then to negotiation. The government of India sent the army and paramilitary forces into the region to suppress the Naga movement. This action started the first Indo-Naga conflict during which thousands of people were killed and hundreds of villages were burnt down.<sup>72</sup> The next attempted solution was through political negotiations, which gave birth to the state of Nagaland in 1963. The Constitution recognises the specificity of Nagaland, and states that no act of parliament in respect of ‘...ownership and transfer of land and its resources, shall apply to the state of Nagaland unless the legislative assembly of Nagaland by a resolution so decides’.<sup>73</sup>

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<sup>70</sup>For a full text of the Sir Akbar Hydari Agreement, see: R. Vashum, *Naga's Right to Self-Determination: Anthropological-Historical Perspective* (Mittal Publications, New Delhi, 2000).

<sup>71</sup>*Ibid.*

<sup>72</sup>S. Luithui, ‘The North-East Region’, in R. Bhengra, C.R. Bijoy, and S. Luithui, *supra* note 65, p. 31.

<sup>73</sup>Constitution of India, Arts. 371-A and 371-G (4).

However, even though a first peace process was agreed (1964-72), the establishment of Nagaland did not put an end to the conflict and the Nagas remain divided between different states of India. The disagreement persisted as the Nagas insisted on sovereignty, whereas the government offered an agreement within the Union of India. This resulted in the transfer of Nagaland state from the *Ministry of External Affairs* to the *Ministry of Home Affairs* and the classification of the *Naga National Council* as an unlawful organization. In 1975, the *Shillong Accord* was signed by a faction of the Nagas who later confessed that they signed under duress.<sup>74</sup> After several years of violence, another ceasefire was signed in 1997 and was extended until August 2003.<sup>75</sup> Even though the government has acknowledged and highlighted the ‘uniqueness’ of the Naga case, parallel to the cease-fire, the Indian government and Naga’s representatives still disagree on several contentious and central issues. Some of the issues concern the peace process itself, as based on past betrayal it might be difficult for the Nagas to trust the Indian government on its sincerity and commitment to the dialogue.<sup>76</sup> During the ceasefire, military forces committed several atrocities against the Nagas and draconian laws, such as the *AFSPA* and the *Nagaland Security Regulations*, are still in place.<sup>77</sup> The so-called *Operation Good Samaritan* has also highlighted the ambiguity of the government. In 1995, the launching of *Operation Good Samaritan* gave power to the Army Development Group, i.e. the army, to carry out ‘development projects’ across the region. This operation is often designated as a ‘peace offensive’. As pointed out by the International Work Group for Indigenous Affairs:

Through ‘Operation Good Samaritan’, the army is actually able to freely interfere in people’s lives, to disorient them and then co-opt and assimilate them. The Indian authorities fully understand the Nagas sense of dignity, self-respect and responsibility is rooted in their traditional self-sufficient community-based way of life. The ‘peace offensive’, it appears, is an attempt to cripple this.<sup>78</sup>

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<sup>74</sup>R. Vashum, ‘Challenges and Prospects of Peace Process in Nagalim (Nagaland)’ (Paper Submitted at Indigenous Rights in the Commonwealth Project, *supra* note 21), available at <[www.cpsu.org.uk/downloads/Dr\\_R\\_Vas.pdf](http://www.cpsu.org.uk/downloads/Dr_R_Vas.pdf)>, last consulted 9 July 2003.

<sup>75</sup>Unrepresented Nations Organisation, ‘Naga Peace Talks’ (UNPO News, The Hague, May-July 2002)

<sup>76</sup>R. Vashum, *supra* note 74.

<sup>77</sup>Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 2000-2001), p. 407.

<sup>78</sup>*Ibid.*

On substantive issues, the dialogue is just beginning; thus, several central questions will have to be resolved including the central issue of the right to self-determination of the Nagas. Another significant issue is also likely to be the challenge for the Nagas to enter into political discussions to determine their leadership in a decisive manner. As highlighted by Vashum, as the talks on substantive issues are being initiated there will be a great demand for able statesmanship and leadership from the leaders of the government and the Nagas.<sup>79</sup> Thus, as stated a few years ago by the Chairman of the *Nationalist Socialist Council of Nagaland* to the *UN Sub-Commission*, the question in Nagaland remains: ‘...will the international community allow India and Burma to continue to exterminate the Naga nation and its right to self-determination?’<sup>80</sup>

It is important that the international community involve itself in the peace process, especially since these peace talks have begun after nearly fifty (50) years of war. It remains crucial to monitor the actors and the use of delaying tactics in the tentative evolution toward peace.

## **Conclusion**

The overall result of land policy towards *Adivasis* in India remains poor. The general policy protecting land alienation is not working, policies governing the return of territory have so far failed, and there is no adequate policy of rehabilitation. Generally speaking, land legislation has remained patriarchal. Indian legislation has so far failed to provide enough recognition of indigenous peoples’ traditional forms of land tenure systems. Even though some communities contained individual households, usually village councils owned, controlled, and managed the lands and natural resources within those communities.

The *Adivasis* have been fighting for this recognition through different means but in most cases, the response of the government has been inadequate, pushing the *Adivasis* to seek greater autonomy. The government’s reactions have been very poor; when the *Adivasis* sought recognition of their land rights it was denied, when they sought

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<sup>79</sup>R. Vashum, *supra* note 74.

<sup>80</sup>Oral Statement, Mr. Isak Chishi Swu, United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, 1 August 1995 (oral statement delivered by the Society for Threatened Peoples).

autonomy they received minimal land rights protection, and when they sought self-determination they received limited autonomy rights. There has been some evolution as the central government has tried to give more space for the recognition of a tribal land tenure system through the recognition of the *Gram Sabha*. However, as highlighted earlier, this system is in its infancy and state governments are already showing their unwillingness to enforce the system. The issue of inequality in land policy remains vital all across the country. In this sense, the *Sixth Schedule of the Constitution* should be seen not as a special body of law only applicable in the Northeast, but as the minimum threshold of rights guaranteed by the Constitution to the *Adivasis*.

Addressing the future of this issue, Ratnaker Bhengra, who was engaged in the *Adivasis* struggle for autonomy in Jharkhand, stated: ‘We feel that for uniformity in the treatment of the Scheduled Tribes/*Adivasis* in the country, the powers – executive, legislative and judicial that is there in the Schedule should apply also in the Fifth Schedule.’<sup>81</sup>

Compared to other countries, India has the potential to clearly recognise collective and autonomous tribal rights over their lands. In the debates relating to land rights, the issues of collective ownership, traditional land tenure system, and autonomy are interlinked. It is now time for the central government and state governments to change their ethos and stop treating indigenous demands as an issue of law and order. The *Adivasi* representatives have demonstrated their political ability and should be regarded as such and not as terrorists. In this sense, there remains an urgent need for the government to withdraw the *AFSPA*, which has led to human rights abuses. However, to conclude on a more positive note, India has to be regarded as a promising model for judicial activism among indigenous peoples. As highlighted throughout this chapter, the Supreme Court of India has often been successfully petitioned in cases related to indigenous peoples rights. An important legal victory was gained recently, in fact, when the Supreme Court ordered the closure of the Andaman Trunk Road and the removal of settlers from tribal reserves. This road was

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<sup>81</sup>R. Bhengra, ‘Autonomy in Jharkhand: Past and Present’ (unpublished paper, on file with the author).

threatening the survival of the Jarawas, a nomadic tribe of the Andaman Islands.<sup>82</sup> This case is just another illustration of the important role that judicial activism can play in the fight for indigenous peoples' rights, and indigenous organisations in India have demonstrated their ability to enter such judicial activism.

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<sup>82</sup>See: Survival International, News Release, 'India's Supreme Court Closes Isolated Jarawa Tribe's Road of Death' (27 May 2002).