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present by 50 to 60 seats. This will give the BSP a chance to form a majority government for a full five years term in the state [cited in Kumar 2007: 265].

In all, the BSP's leadership followed a different strategy, in this era of coalition politics, by directly forging an alliance with castes and communities instead of having an alliance with political parties. Along with its core constituency of dalits, OBCs and Muslims, the BSP mobilised the so-called upper castes and they also voted for BSP (Table 2).

Superior Organisational Machinery

Apart form consolidating its core constituency of dalits, OBCs and Muslims and adding savarnas, the BSP's success in the assembly elections of 2007 should be seen in terms of its superior organisational preparedness. For instance, the party had announced its prospective candidates almost one and a half years in advance. Further, while the national parties formed coalitions, the BSP contested elections alone. Moreover, in a shrewd political move BSP did not contest the civic polls held in November 2006 to avoid the embarrassment of defeat, as it knew its weakness in urban areas. That also helped the party avoid inner party bickering and prevented factions emerging in the local leadership.

Besides building a social movement and political manoeuvring, Mayawati has developed a charisma of an able administrator and hard taskmaster, cutting across caste and religious boundaries. She is considered to be the only political boss able to teach bureaucrats a lesson that they are the servants and not the masters. People remember her treatment of the self-styled aristocrat of Kunda to prove the point that no one is above the law. As far as commitment to her ideology is concerned, by pursuing the Ambedkar Village Scheme, effective implementation of the Atrocities Act, overseeing a communal riot-free regime in 1995, 1997 and 2003, she has justified her commitment to dalits, minorities and other marginalised sections of the state [Kumar 2003b]. By wooing the savarnas she projected herself as the leader of an umbrella party, which can carry all the castes/communities together.

Conclusions

The BSP's victory in the UP elections 2007 is the result of a "social engineering" process started some three decades ago by Kanshi Ram, which divided India's population into two imaginary group, 85 per cent bahujans and 15 per cent Manuwadis. Different castes in the social hierarchy were brought together via construction of a common history of exclusion. Lower caste Muslims were also made conscious of exclusion wihin their own religion and handed an agenda of development with independent leadership. While other parties offered food, shelter and employment BSP offered them "self-respect". After the demise of Kanshi Ram – the founder of 'Bahujan' ideology – Mayawati window dressed the so-called upper castes with the slogan 'Sarvajan', which is not a part of the social engineering as discussed earlier. But it is sure that dalits and OBCs and minorities have become more confident that their party can come to power on its own and are joining the BSP in different states. EPW

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Engaging with the Law on Adivasi Rights

Judicial interpretations of constitutional directives towards assuring adivasi rights have been of many kinds, especially in instances when such rights have overlapped with the discourse of sustainable development or the need to ensure the greater common good. The struggle to ensure adivasi rights is one that must then seek a constant engagement with the law.

AJIT MENON

The recent enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter the STA)[1] reflects the perseverance of political activists to fight for "good" laws that seemingly uphold and protect adivasi[2] rights. However, how effective has the law been in addressing such rights in the past? Have legal spaces really existed through which rights have been upheld and protected? Why does the law remain so central to many struggles around rights to resources, though its role in such struggles has been chequered?

These questions are important in a context where neoliberal development increasingly appears to ride roughshod over rights – ironically using the law to do so – as has been witnessed in recent developments in Kalinganagar, Singur and Nandigram amongst others. This article has two main purposes: (i) to highlight the contradictions of law (statutory and case) due to competing priorities of rights, development and the environment; and (ii) to understand why these contradictory claims both necessitate engagement with the law but also limit its protective potential. This is done with a view to providing a genealogy of sorts to the STA and highlighting the importance of a more broad-based struggle that supplements the legal avenue.

Two Faces of Law

A considerable amount of literature has emerged over the last ten years in the Indian context exploring the potential of law to address social concerns (in particular rights) pertaining to the environment. At the heart of this debate has been the issue of whether or not the law is autonomous [Pathak 1994a; 1975]: autonomous not in a positivist sense where legal systems are considered to be independent and functioning with their own rules and norms (ibid: 1974), but in the sense that the law could be considered a contested domain

that can be shaped by different social forces. While few, barring legal positivists, would dispute that the law is autonomous in the manner suggested above, significant differences exist in terms of passing judgments on how effective the law might be for political activists who choose to use it. Some scholars have more faith in the law and its creative potential [Upadhyay 2001] while others see this potential, if any, very much linked to (or defined by) the manner in which the environment becomes part of capitalism's project of accumulation [Bhushan 2004; Pathak 1994, 1994a].

Adivasi rights (in a legal sense) offer a site through which to explore how these contradictory social forces shape the making and working of the law. In the immediate post-independence period, the law served as an important instrument of the state in recognising adivasi rights. While Nehru's five principles provided a vision of respecting the "uniqueness" of adivasi communities and their customary claims to land, law has been a critical means to act upon this vision. Article 342 of the Constitution, by providing the president the power to notify communities as scheduled tribes, implicitly recognises the fact that scheduled tribe communities are the ones who have suffered some of the worst types of deprivation. Under Article 46 of the Directive Principles of State Policy, the state is obliged to ensure the educational and economic interests of the weaker sections, especially those of the scheduled castes and scheduled tribes. In addition, Article 14 speaks about the right to equality and Article 15 prohibits discrimination due to religion, caste, sex, etc. Article 13 prevents the state from making laws that deny people their fundamental rights. Scheduled tribes are also guaranteed various forms of reservation by Articles 320, 332 and 334 of the Constitution [Bijoy 1999: 1332; Mohanty 2001: 3857].

The most significant article in the Constitution vis-à-vis adivasi rights is Article 244. The logic of Article 244, in the spirit of Nehru's five principles, is that for the traditions and culture of scheduled tribe communities to be respected scheduled areas should function autonomously. The fifth schedule allows the president to declare areas as scheduled and the governor the power by public notification to not apply acts of Parliament or modify them in accordance with the needs of scheduled tribe communities. Crucially the fifth schedule permits the governor (on the recommendation of the tribal advisory council) to prohibit the transfer of land by or amongst scheduled tribes as well as regulate the allotment of land to non-scheduled tribes and the working of money-lenders [Bijoy 2000].

In addition to these constitutional provisions, a number of other acts have been passed in order to uphold adivasi rights ranging from land tenancy acts and revenue codes [Bijoy 1999: 1331] to most recently the 1996 Panchayat (Extension to Scheduled Areas) Act (PESA), that gives adivasi communities substantive powers with regard to natural resource management and self-governance. According to PESA, gram sabhas are empowered to preserve their cultural identity, community resources, modes of dispute resolution, and equally importantly the right to approve government plans, programmes and projects within their jurisdiction [Mukul 1997: 929]. Moreover, the gram sabhas or the panchayats at the appropriate level have to be consulted before the acquisition of land for development in scheduled areas. The STA, which aims at providing adivasis rights to forest land already occupied by them and access to forest produce for livelihood purposes, is the latest in a line of legal initiatives to address adivasi rights.

But while laws to uphold adivasi rights have been enacted, the state's concern for development (pushed by other social forces) has been responsible for denying adivasis these very rights. As Vandergeest and Peluso (1995:386) have highlighted "all modern states divide their territories into complex and overlapping political and economic zones, rearrange people and resources within these units, and create regulations delineating how and by whom these zones can be used". In India, this process of territorialisation has led to usurpation of land from adivasis. The Forest Act 1927, a colonial legislation that remains in place, has led to large tracts of forests being reserved regardless of prior claims to these lands. The Wildlife Protection Act 1972 has further increased state control of land in the name of protecting fauna. The Land Acquisition Act 1894 has been the state's ultimate weapon to assert its pre-eminent domain. An estimated 10 million adivasis have been displaced due to developmental projects that have made use of the Land Acquisition Act in the name of the greater common good. Moreover, protective legislation such as PESA has remained largely unimplemented or has been watered down by individual states as land and decentralisation are state subjects. States, in their attempts to invite investment, have been reluctant to uphold legislation such as PESA that could discourage such investment. To add fuel to the fire, adivasi rights to land have been hampered by an absence of title deeds over land, benami transactions and contestations over land, adivasis claim as theirs [Bijoy 1999]. The overall picture, therefore, is of protective legislation not being adequately upheld.

Judicial Activism and Rights

Have the courts been more cognisant of these rights than the executive? One might expect so given the history of judicial activism in India. The purpose here is not to take a comprehensive look at relevant case laws (which would be an enormous task), but to delineate noticeable trends in how the case law has worked in relation to adivasi rights. A cursory glance at some prominent court judgments suggests that adivasi forest and land rights have been taken seriously by the courts on occasions. For example, in the case of Fatesang Gimba Vasava vs the State of Gujarat (AIR 1987 Guj 9), the Gujarat High Court ruled that the forest department's action to prevent the transport of bamboo for sale to adivasis at concessional rates was unwarranted. The court ruled that once bamboo had been converted to bamboo chips it did not constitute a produce from nature and hence was not a violation of the Indian Forest Act 1927 [Leelakrishnan 2005: 20-21]. In both Sri Manchegowda vs State of Karnataka (AIR 1984 SC 1151) and Lingappa Pochanna vs State of Maharashtra (AIR 1985 SC 389), the Supreme Court ruled in favour of the protection of adivasi lands: in the former case nullifying private purchases of adivasi land and in the latter allowing the state to enact legislation aimed at restoration of lands to adivasis (ibid: 22). And then there is the famous

Samata judgment (AIR 1997 SC 3297). In a prior case (P Rami Reddy vs State of Andhra Pradesh) (AIR 1998 SC 1626), the Supreme Court had ruled that prohibitions against transfer of adivasi land to persons who were not adivasis were necessary given the poor economic status of adivasis. The Supreme Court in the Samata case went further by saying that persons included the constitutional government [Upadhyay 2001: 2132].

Yet pro-adivasi judgments must be understood keeping in mind the wider hierarchy of rights that the courts seem to uphold. First, for the most part, adivasi rights are upheld when they are deemed to be not in conflict with the "greater common good" or "sustainable development" such as in the above examples (barring Samata). Second, when adivasi rights (in the form of land or forest rights or more broadly livelihood rights) are juxtaposed with development concerns, these rights are often limited or redefined. For example, in the context of large-scale development projects, the courts have tended to privilege development both at the expense of social rights and the environment. The Narmada and Tehri cases come immediately to mind but there are a host of other similar cases related to power projects, mining and industrialisation. More often than not in such cases adivasi rights to place (and culture) are denied and re-imagined in terms of rights to resettlement and rehabilitation. Third, there are a number of "environmental" cases where the protection of "pristine nature" results in limits placed on rights of use to natural resources such as forests and fisheries. The Doon Valley and Silent Valley cases are notable examples [Upadhyay 2000: 3790]. In such cases, the environment takes precedence over development too. This can be explained by the fact that the environment, imagined in terms of pristine wildlife sanctuaries, unpolluted urban middle class localities, for example, are very much part of the middle class imagination that influences the judiciary either directly or indirectly.

While few would deny the importance of the greater common good or sustainable development, it is the manner in which these concerns become important (or do not become important) that is worrisome. Sustainable development is rarely invoked when large-scale infrastructure projects wreak havoc in the environment, but become important when adivasis collect non-timber forest produce. Similarly, while there is no denying that preservation of "natural" habitats and wildlife is a must, why is it again that this happens in the context of adivasi claims to land and not when industry or game poachers stake their claims? Sustainable development requires first of all a much more critical and comprehensive analysis of what it is that makes development unsustainable.

The courts understandably have been reluctant to venture into a deeper analysis of sustainable development as it falls outside its purview of expertise. However, when questions have been raised in particular cases about negative environmental impact, the courts have been as reluctant to act. For example, in the case of the Dahanu Taluka Environment Protection Group vs Bombay Suburban Electric Supply Ltd Case (1991 A SCALE 472), the Environmental Appraisal Committee brought to the Supreme Court's notice that the power project was located in an ecologically fragile area, but the Supreme Court ignored the report arguing that the centre had made use of a state expert committee report that had okayed the project [V Upadhyay 2000: 3790].[3] At least, the Supreme Court should have called for a review of the project. Time and again questions have been raised about the manner in which environmental impact assessments have been done but the courts have largely refrained from taking action unless an external funding agency has raised questions as in the case of the Morse Committee report for the Narmada. In fact, as John (2001) and Bhushan (2004) have argued, the courts have increasingly invoked the separation of powers doctrine when passing judgment on large-scale development projects arguing that it is the executive's job to act on policy matters. In the Balco Employees Union vs Union of India case (2002 Vol 2 SCC 343), the court went even further by ruling that public interest litigation should be an instrument only for those who are directly affected by potential adverse consequences of development interventions [Bhushan 2004: 1771], suggesting a more strict application of the idea of locus standi.

The case law also has a number of other limiting features. First, case judgments are based on the reading of existing statutory law. As long as statutory law denies adivasis their rights, so too will case law. In the case of the Samata judgment, the state is now trying to amend both the Mines and Minerals (Regulation and Development Act, 1957) and the fifth schedule in order to water down the applicability of the Samata judgment. If it succeeds in doing so, the Samata judgment will lose whatever meaning it currently has. Second, given the fact that judges are becoming more reluctant to interfere in policy matters suggests that going to the courts is less worthwhile than it was before. Finally, going to the courts is a time consuming and often long-drawn out affair; while it might be possible for NGOs like Samata to pursue that course of action, what about in circumstances where such NGOs do not exist or are unwilling to pursue the legal avenue?

Law and Beyond?

Why does the law remain an important arena of struggle given this largely bleak analysis of its potential? The immediate reason is that adivasis (and activists who support them) have no other choice but to challenge draconian legislation or fight for better protective legislation given the everyday struggles adivasis have to go through to meet their basic livelihood needs. A repressive forest act that denies adivasi households access to forest produce makes it more difficult if not impossible for them to eke out a living. Similarly, the presence of STA and PESA, if implemented, legitimises adivasi claims to land or their own systems of governance. Non-engagement in these legal battles would simply make it easier for the state to do as it sees fit regardless of prior claims to land.

These struggles over the law, however, are more than just livelihood struggles. They are struggles over cultural territories as well. The state's claim of eminent domain through the Land Acquisition Act denies the existence of customary claims to homeland by adivasi communities. Hence, the struggle for "good" laws is also very much about the right to remain in places which are considered home. Resettlement and rehabilitation, even if implemented properly, deny adivasis these rights to place.

Underlying the struggle for better laws is also a belief that politics has an important role to play in shaping social change. As pointed out above, if one views the law as autonomous, i e, shaped by different social forces, then the corollary to this is that political struggles for rights can have an impact on the shape the law takes. The STA and PESA are examples of laws that have been enacted because of the struggle of adivasi political movements. The final character that specific laws take, however, is determined

by the relative strengths of different social forces at given points of time. The changing configuration of these social forces over time could also mean that good laws are not enforced or watered down.

Legal remedies are also fraught with difficulties. Laws do not only give people rights, but they also deny others rights. The debates around the STA are a case in point. The original draft bill focused only on the rights of adivasis and correctly was criticised and amended accordingly. The challenge, however, of identifying who traditional forest dwellers are remains and getting it wrong could deny genuine claimants rights they have had historically. Li (2002) has illustrated the dangers of this in the context of Indonesia where discourses of indigeneity have denied other marginalised groups claims to resources. The other difficulty is that customary law is very site specific. Making sure that statutory law does not end up trampling on customary practices is important. For example, one of many criticisms made of joint forest management is that it ignored prior claims to forests; hence while trying to give communities rights to forests it in fact ended up denying prior claims.

Equally important is the need to go beyond the law. Notwithstanding the possibilities of making good laws, the outcomes of such laws depend to a large extent on how development itself is being envisaged. In other words, the ability of adivasi communities to govern themselves or to cultivate forest land sustainably is affected by wider policy decisions such as those on special economic zones, the use of wastelands and mining. The last ten years or so have been witness to policy initiatives that have increasingly sought new territories for investment, both by the state and the private sector. It is imperative, therefore, that there is continued struggle to form broader alliances against such policies, and especially so given the judicial reluctance to intervene in matters of policy.

The challenge for political movements, therefore, is to find both legal and policy spaces through which alternatives can be articulated. This will not be an easy task given the current politico-economic disposition. However, a number of reasons exist for some amount of optimism. First, the character of the state as suggested above is such that there are competing claims within the state that make space available for a rights agenda to be articulated. The Ministry of Tribal Affairs (with prompting from activists no doubt) in fact played an important role in pushing forward the STA. Second, if the past is anything to go by, progressive legislation is possible and victories can be won by adivasis and their supporters. Moreover, at present the momentum in challenging the neoliberal policy exist as can be witnessed by the fact that political mobilisation has resulted in the state promising to re-look at policies on SEZs and land acquisition. Third, decentralisation, good governance and rights are very much part of the neoliberal agenda. While the neoliberal variant of these normative concerns is largely linked to more efficient and transparent management and governance, it nonetheless puts these concerns on the table and allows for some room for debate and struggle. Fourth, a number of micro-level initiatives have highlighted alternative forms of sustainable and equitable development. Although these initiatives require much more critical scrutiny and not merely blind adulation, they provide some evidence that alternative visions are possible and that the state has taken cognisance of them.

Hence, the law must and will remain part of the struggle for adivasi rights. Not engaging with the law when it has such a direct impact on the struggle for the survival of adivasi communities will be tantamount to surrendering both economically and culturally to the whims of the neoliberal state. The basic principles of the Constitution provide a framework in which this struggle can be fought. The challenge will be to make use of legal and policy spaces to uphold these constitutional rights without watering down the rights discourse in ways that are currently fashionable in neoliberalism. Rights are important in and of themselves and not for managerial purposes alone. EPW

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Notes

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1 The original draft bill did not include other traditional forest dwelling communities.
2 The term adivasi or literally original inhabitants is used instead of tribals as most scheduled tribe communities now refer to themselves as adivasis. However, use is also made of scheduled tribes and tribals to refer to the official administrative category of the state (scheduled tribes) and the day to day language of the state (tribals).
3 Judgments no doubt will be influenced by a number of factors ranging from individual assessments by particular judges to the relative strength of particular actors involved in the case to perhaps even public opinion. However, what the above analysis suggests are noticeable trends in terms of judgments.

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