

Situating Law: Adivasi Rights and the Political Economy of Environment and Development in India¹

Ajit Menon

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Résumé : *Situer le droit : les droits des adivasi et l'économie politique de l'environnement et du développement en Inde.*

Cet article explore la manière dont le droit, et plus particulièrement une législation sociale et protectrice, est élaboré en Inde. Il s'interroge sur son efficacité (ou inefficacité) dans la pratique à travers le prisme des droits qui ont été attribués aux *adivasi*, ou « tribaux » par le *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Bill* de 2006. La contribution retrace la généalogie des droits des *adivasi* dans la période post-coloniale. Il insiste sur la dimension diachronique du processus de reconnaissance de droits et examine la manière dont elle s'est insérée dans le contexte plus large des droits sociaux et environnementaux.

La thèse principale de l'argumentation est qu'un examen minutieux de l'intersection de la loi et des droits illustre que d'une façon générale ces droits ont été façonnés par les priorités du « développement » et de « l'environnement ». L'article met en lumière les mille et une façons dont les droits des *adivasi* ont été *de facto* limités ou mis en danger dans le droit constitutionnel, la loi ou la jurisprudence (*constitutional, statutory and case law*). Principalement on peut souligner que l'ineffectivité du droit, incluant les trois catégories susnommées, peut résulter de sa non-application pure et simple, de ses ambiguïtés ou d'assouplissements menant à le vider de son essence. Pour les comprendre, il faut aborder ces limites selon deux axes. D'une part, il est important d'analyser la hiérarchisation des droits selon des préoccupations sociales ou environnementales. D'autre part, il faut explorer les effets sur les droits du discours hégémonique du développement et des tensions qui existent entre le Centre et les états fédéraux dans l'élaboration et la mise en œuvre des lois. On ne peut nier l'existence d'espaces juridiques à travers lesquels les activistes doivent continuer à avancer l'agenda de la reconnaissance de droits. L'article souligne néanmoins les limites du droit dans le contexte politique actuel qui est orienté avant tout vers le développement.

De l'analyse émergent aussi des enseignements critiques sur la manière d'aborder le droit comme phénomène social et sur le risque qu'il encourt d'essentialiser « la communauté ». Une littérature relativement importante soutient que le droit est un domaine contesté. C'est le produit d'agendas sociaux en compétition. Cet article suggère cependant que dans le domaine du droit certaines préoccupations hégémoniques sont privilégiées par rapport à d'autres dans le projet englobant de développement. Ce sont les préoccupations, du développement et de l'environnement tels qu'ils sont envisagés par la modernité dominante (*mainstream modernity*) qui prennent le dessus sur les droits culturels des *adivasi*. Si la lutte pour la reconnaissance des droits coutumiers demeure un agenda important, elle doit non seulement reconnaître les revendications de ceux au-delà de la « communauté », mais elle doit aussi reconnaître que la lutte pour les droits doit s'inscrire dans une lutte plus large qui affronte l'idée même de développement.

INTRODUCTION

The recent controversial debates and eventual passing of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Bill, 2006 (hereafter the STB),² which was originally aimed at

¹ An earlier version of this paper was also presented (*in absentia*) at the Ninth Sustainable Development Conference 'Missing Links in Sustainable Development: South Asian Perspectives' held at the Sustainable Development Policy Institute, Islamabad, Pakistan on 13-15 December. I would like to thank C. R. Bijoy for his constant support and encouragement in drafting this paper.

² The original draft bill did not include other traditional forest-dwelling communities.

providing *adivasi*³ people rights to forest land already occupied by them and access to forest produce for livelihood purposes, not only highlights the struggles that surround the passing of protective social legislation but, equally importantly, the vagaries of law as a possible instrument through which meaningful social change (that recognizes *adivasi* ‘customary’ claims to land) can be initiated. Although the passing of the bill is no doubt a victory of sorts for activists and *adivasi* communities, last minute amendments to the recommendations made by the Joint Parliamentary Committee (JPC),⁴ which potentially exclude a number of beneficiaries and bestow significant powers on the bureaucracy, are indicative of the manner in which the rights discourse has been limited by the wider hegemony of mainstream development and environmental thinking.

This is nothing new. In fact, a careful examination of the manner in which law and rights intersect illustrates that rights have more often than not been mediated by other priorities (including environmental concerns) of the developmental state – priorities that have a temporal dimension to them. I try, in this paper, to highlight the multiple ways in which *adivasi* rights have been limited or undermined – with the context of the STB as a reference point. First, I try to detail how law is ostensibly envisaged by the state as a means by which to address *adivasi* rights and concerns of social justice. Second, I suggest that such rights discourses must be analysed, keeping in mind the fact that law has had multiple other purposes, both in the colonial state’s project of revenue generation and in the post-colonial state’s project of development. Third, I attempt to assess the claim that ‘legal spaces’ remain available despite the apparent limits to law. I try to do all of this in the context of situating law. It has become common among many legal scholars to understand law in terms of social processes – to see statutory law as the outcome of negotiation/contestation (see Pathak 1994a for a detailed discussion). While I partly endorse this view, my focus here is on the structural determinants of law that emerge from hegemonic discourses and practices of development. I distinguish between processes related to the ‘making of law’ and the ‘working of law’, illustrating how both in different ways are embedded in the wider political economy. The arguments put forward are largely based on a *re-reading* of existing laws and legal decisions as well as on analyses of environmental law that address social rights in particular, with a view to opening up a more broad-based dialogue between legal scholars and social scientists pertaining to the socio-economic and political dimensions of law.

Conceptualizing Law, the Environment and Rights

A considerable literature has emerged over the last ten years or so 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 law is autonomous (Pathak 1994a: 1975). Autonomous not in a positivist sense, in which legal systems are considered to be independent and to function with their own rules and norms (ibid. 1974), but autonomous in the sense that law can be considered a contested domain that can be shaped by different social forces. Views differ significantly, with some scholars having more faith in the law and its creative potential (V. Upadhyay 2001) and others seeing 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 (Bushan 2004; Pathak 1994, 1994a).

Both these positions speak some truth. In terms of the making of law, that the law can address rights concerns is borne out by the fact that there are legal provisions – both in the Constitution and in statutory law – that are aimed at protecting the rights of marginalized communities. However, at the same time, one knows that these rights are often not protected in practice, that there are significant silences and limitations to these laws and that more often than not they are mediated by other concerns that often conflict with the implementation of rights. Pathak (1994a: 3139) argues that it is the fractures and the divisions within the state itself that allow for the simultaneous protection of rights and their undermining. The state, he argues, is not a monolithic entity.

³ 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).

⁴ Objections to the bill come mostly from conservationists, who fear that giving *adivasi* households rights to forest land could result in the destruction of both forests and wildlife (Karanth and Bhargav 2005, Madhusudan 2005, Rangarajan 2005).

While Pathak's main focus is on how the environment (and therefore to some extent social rights) might at given points in time be privileged by the state because of the importance of the environment to the 'sustainability' of capitalist development, I am more interested in unpacking how rights are protected or denied as a result of the privileging (if one can call it that) of the environment. In other words, the privileging of the environment can have both beneficial and adverse effects on the rights of marginalized communities. It is necessary, therefore, to see when the environment is privileged (and when it is not), in what form it is privileged and what the implications of this are for rights.

Doing so requires a more nuanced look at law, even if one sees law as a social process. First, it requires distinguishing between the making of law and the working of law. 'Good' laws are not necessarily implemented, nor are all laws that are made good. To understand both the making and working of law, it is necessary to examine the wider policy (and development) context in which laws are situated. Second, it requires distinguishing between statutory law and case law and thinking about how both might differ in terms of their impact on marginalized communities. This is important when discussing the availability or not of legal spaces. Third, the temporal dimension should not be ignored. Law is very much tied to the manner in which development is articulated *at a given point in time*.

Addressing these concerns will add to the existing analyses of law, the environment and rights of the marginalized. It will provide more clarity as to whether or not there is a hierarchy of rights, what form this hierarchy takes and the extent to which law can be dynamic enough to remain an important instrument through which to address the rights of adivasi communities. Concerns around the autonomy of law and the agency of actors should, in other words, be examined side by side with the structural constraints of development that at least partly affect the autonomy and agency of particular actors.⁵

Law and Social Change

Law has been an important instrument through which the state has addressed social welfare concerns, or at least stated its intentions related to adivasis and *adivasi* rights. While Nehru's five principles provided a vision of respecting the 'uniqueness' of *adivasi* communities and their customary claims to land, law (and policy) has been a critical means to act on this vision. Article 342 of the Constitution, by providing the President the power to notify communities as scheduled tribes, implicitly recognizes the fact that scheduled tribe communities are the ones that have suffered some of the worst types of deprivation. Under Article 46 of the Directive Principles of State Policy, the state is obliged to promote 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 in Articles 320, 332 and 334 of the Constitution (Bijoy 1999: 1332, Mohanty 2001: 3857).

The most significant article in the Constitution respective of adivasi rights is Article 244, for it states that the provisions of the Fifth Schedule and Sixth Schedule shall apply to the administration and control of scheduled areas and scheduled tribes, both in the country as a whole (states other than the northeast) and the northeast. 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 to modify them in accordance with the needs of scheduled tribe communities. Of equal importance, the Fifth Schedule permits the Governor (on the advice of the Tribal Advisory Council) to prohibit the transfer of land by or among scheduled tribes, as well as to regulate the allotment of land to non-scheduled tribes and the working of moneylenders (Bijoy 2000).

A number of other legal and policy measures have been taken to protect *adivasi* communities. Foremost has been the enactment of various land legislations, either in the form of specific tribal land alienation acts, land revenue codes or land reform acts that prevent the alienation of land to non-adivasis. These acts have their roots in the colonial period, with the Bombay Province Land Revenue Code, 1879, being the first legislation to prohibit transfer of land from tribals to non-tribals. Some of the many

⁵ The political strength of particular actors determines the extent to which structural constraints limit their agency.

legislations prohibiting transfer of tribal land to non-tribals in the pre- and post-independence period include the Chhotanagpur Tenancy Act, 1908, the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949, the Bihar Scheduled Areas Regulations, 1969, the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959 (and amendment in 1970), and the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 (Bijoy 1999: 1331).

In 1954, moreover, a separate tribal development policy was drawn up, which established multi-purpose tribal development blocks in a few select blocks of the country. During the Fifth Five-Year Plan, the Ministry of Home Affairs, Government of India, initiated the Integrated Area Development Programme (IADP) in scheduled tribe areas (not necessarily Fifth Schedule areas). This resulted in the formation of a Tribal Sub-Plan (TSP) approach, an initiative aimed at taking a comprehensive and holistic view of scheduled tribe problems. The vision set forth was that scheduled areas and other areas with a scheduled tribe majority should be governed so as to privilege the specific needs of scheduled tribe communities (Menon 2000: 86).

It was, however, only in 1996, with the passing of the Panchayat (Extension to Scheduled Areas) Act (PESA), that *adivasi* communities were given substantive powers with regard to natural resource management that would potentially enable them to realize some of the legal rights envisaged in Nehru's five principles. Although a separate tribal development policy and the establishment of tribal development blocks were ostensibly meant to address the specific needs of scheduled tribe communities, in actuality these structures more often than not were simply bureaucratic impositions of the developmental state. The PESA, on the other hand, constitutionally gives significant governance powers directly to *adivasi* institutions. According to the PESA, *gram sabhas*⁶ are empowered to preserve their cultural identity, their community resources, their 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. Finally, these local bodies have been given ownership rights over minor forest produce, as well as the power to give recommendations with regard to the granting of mining concessions.

The STB, therefore, is the latest in a line of legal/policy initiatives to address *adivasi* rights. The basic premises of the STB are that scheduled tribes (and other traditional forest dwellers) have inhabited the forests for centuries, that their rights have not been recognized and hence that there is a need to rectify this historical injustice. The draft bill vests thirteen forest rights with traditional forest dwellers, including rights to hold, live and cultivate forest land, rights to minor forest produce, rights to biodiversity, rights to protect, regenerate or conserve community forest resources and any other traditional rights (Section 3). Implicit in the bill is also the assumption that giving such rights would improve the overall management of forest areas (GoI 2006a). In the penultimate section, I return to the STB and attempt to locate it in the analysis put forward in the following sections.

Law, Territoriality and Development

The potential of law to address *adivasi* rights has always been linked to or affected by law as a means of territorialization. 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, during the colonial period, elaborate processes of enumeration (census) were invariably followed by the establishment of different revenue regimes aimed at collecting tax. Simultaneously, territory was demarcated into state and private lands, both in the context of revenue and forest land. Although the nature and shape of revenue and forest settlement varied significantly across the geographical landscape, were influenced by local factors and were often contested through agrarian (*adivasi*) struggles (Bijoy 2000), settlement (forest and revenue) introduced new forms of property relations that impacted on the socio-economic and cultural space of *adivasis* (Pathak 2002). Rights were increasingly marginalized or were reinvented as concessions or privileges.

⁶ A *gram sabha* is a village assembly.

The post-colonial state both fine-tuned the process of revenue and forest settlement and introduced new legislations that increased its territorial reach and control over land. The Indian Forest Act, 1927, remained largely in place (with amendments of course). In addition to forest legislation, the Wildlife Protection Act, 1972, set aside more land for the state to manage, this time in the name of protecting fauna. Much of this expansion again occurred in areas that had large *adivasi* populations. The Land Acquisition Act, 1894, has been the state's ultimate weapon for asserting its eminent domain. To add fuel to the fire, *adivasi* rights to land have been hampered by an absence of title over land, benami transactions and contestations over land they claim as theirs. This was due, at least partly, to the non-implementation of existing legislation or because existing protective legislation was repealed (Bijoy 1999).

This apparent conflict between protecting the rights of the *adivasis* and colonizing much of the land on which they depend can be understood better if tribal development is located in the context of development and modernity. While Nehru might have been cognizant of the need to not impose development on *adivasi* communities, he himself spoke about the need to bring the fruits of development to tribal communities. The developmental bureaucracy, like its colonial predecessor, has in practice not even recognized this 'cultural' uniqueness. Tribal development, from the very beginning, has been immersed in the language of modernizing and civilizing. The roots of this, as Sengupta (1988) has observed, were in the colonial period and again linked to processes of territorialization and revenue collection. Tribal areas were either considered the 'heart of darkness', 'diseased' or 'not accessible' and were therefore treated differently administratively. This portrayal of tribals continued in the post-independence period, when tribals were constructed as backward by nature and in need of development. A closer look at tribal development policy highlights the fact that it has been aimed primarily at bringing the fruits of development to tribal areas. From the outset, therefore, tribal development has been beset by a contradiction – the desire to respect the cultural diversity of *adivasi* communities as opposed to the need to mainstream and assimilate them – the latter taking precedence.

Moreover, tribal development was never meant to detract from the wider compulsions of post-colonial development. Nehru envisaged an industrial and modernised India. Large dams were the temples of modernity and were central to this path of development (Singh 1997). Many of these dams are located in *adivasi*-dominated areas. So, too, the case of mines and mineral exploitation. The Land Acquisition Act, 1894, is an instrument that has been used frequently to make land available for developmental projects. While international human rights law focuses both on appropriate procedural protection *and* due process, the Land Acquisition Act, 1894, simply guarantees that the procedures of law are followed, and not necessarily the due process of law. What this means is that the greater common good, however defined, can always be a reason for displacement.⁷

There is also a case to be made that the more recent discourses/ practices of liberalization and 'environmentalism' have either put *adivasi* rights on the backburner or/and contributed to the further marginalization of *adivasi* lands. A number of worrisome developments have occurred to suggest this. There is the case of land reform regulations being watered down to spur on corporate investment that dates back at least to the early 1990s. Nair (1996) has highlighted this in the context of Karnataka. In Tamil Nadu, a number of efforts have been made to give common lands to corporate bodies to invest in the environment through plantations (Pandian 1996). More recently, on May 17, 2005, the government of Gujarat passed a G.O. aimed at bringing wastelands under the control of corporate houses and big farmers – which is likely to have a major impact on nomadic pastoralists and *adivasi* households (Bharwada and Mahajan 2006). Recent high-profile events in Plachimada (Bijoy 2006) and Kalinga Nagar (Padhi and Adve 2006) are examples of how the wheels of development keep turning, despite protective legislation. In the case of Plachimada, the decision to ban Coca Cola was taken by the government and not by the judiciary, i.e., it was not a case of pro-active judicial intervention.

What the above discussion highlights in a nutshell is the tenuous ground on which *adivasi* rights have always been situated. A clear dualism exists and operates. On the one hand, the Constitution and other legislations (with limitations of course) aim to address the rights of scheduled tribes. On the other hand, other statutory law and prerogatives of development often challenge and negate these rights. Further, this

⁷ The Land Acquisition Act, 1894, by giving the state the power to usurp land for developmental purposes, does not recognize the rights of those communities that own this land. In that sense, the procedures embedded in the Land Acquisition Act, 1894, do not ensure appropriate procedural protection.

dualism has resulted not only in a marginalization of the rights discourse, but also in a significant recasting of it when it is part of policy. For example, rights, in programmes such as joint forest management, are more often than not envisaged as a means to involve communities in the management of resources (Menon 2006: 191). While managerial responsibilities could be an added benefit, rights should be fundamental as opposed to instrumental. Instrumental rights ignore the cultural dimension of rights. Are urban residents promised water only if they utilize it sustainably?

The poor performance of upholding *adivasi* rights is therefore to be seen in terms of basic living standards. *Adivasi* communities have suffered more than any others in the name of the 'greater common good'. According to the recent Draft National Policy on Tribals, 55.15 per cent of the total of displaced persons have been *adivasis*, approximately 10 million people (GoI 2006). Poverty data suggest that a much higher percentage of scheduled tribe households is below the poverty line than in other communities (barring Dalits). For example, in states such as Orissa, Madhya Pradesh and Maharashtra, where *adivasis* constitute a significant percentage of the population, the headcount ratios for scheduled tribe households are 61.2 per cent, 26.1 per cent and 33.3 per cent respectively, and for the whole population 37.5 per cent, 15.3 and 25.1 per cent respectively (Meenakshi *et al.* 2000: 2750). The high poverty rates among *adivasis* are at least partly due to insecurity of land tenure and the usurpation of land by private interests and the state. In the case of state-induced displacement, resettlement and rehabilitation have at best been poorly undertaken. Legitimate questions can therefore be asked as to what impact protective legislation and policy have had on the welfare of scheduled tribes.

'Legal Spaces'?

Thus far, I have tried to illustrate that the discourse and practice of *adivasi* rights in the post-independence period has been limited by continued processes of territorialization and the state's 'bigger' priorities of development and modernization. This notwithstanding, V. Upadhyay (2001: 2131) has argued that there is a creative potential in the use of law (both statutory and constitutional) because of the 'open-ended and general' nature of law. V. Upadhyay makes this point by highlighting how Article 21 of the Constitution (the right to life) has been used liberally by lawyers, how judges have upheld claims based on this line of argument, and by suggesting that specific policies and acts such as the National Forest Policy, 1988, and the Indian Forest Act, 1927, provide enough room for liberal interpretation, which can result in the protection of forest dwellers' rights. Moreover, he argues that the judiciary by and large has tried to reconcile different and often contradictory interests.

In this section, I re-look at V. Upadhyay's contentions more systematically. There is no denying at one level, as I too have suggested, that there have been legal provisions that articulate the interests of *adivasis*. There is also no denying that such rights have been upheld by the courts on a number of occasions. Hence, in addition to the constitutional and statutory provisions alluded to above, one can refer to a number of landmark judgements pertaining to *adivasi* rights to forest resources, restoration of lands and the prevention of land alienation. For example, in the case of *Fatesang Gimba Vasava v. 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 v. State of Karnataka* (AIR 1984 SC 1151) and *Lingappa Pochanna v. 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). The most high-profile case is no doubt *Samatha v. State of Andhra Pradesh* (AIR 1997 SC 3297). In a prior case (*P. Rami Reddy v. 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* was necessary, given the poor economic status of *adivasis*. The Supreme Court in the *Samatha* case went further by saying that 'persons' included the constitutional government, i.e., land alienation to the state was to be prohibited (V. Upadhyay 2001: 2131).

To suggest, however, that the presence of protective legislation and landmark judgements are adequate legal space to uphold *adivasi* rights would give only a partial picture. A number of more nuanced points need

to be made. First of all, with regard to statutory law, it is necessary to distinguish between good legal provisions and bad ones, and the manner in which different legal measures often overlap and contradict each other. For example, do forest laws that deny adivasis access to forests not contradict Article 46 of the Constitution, which speaks about the need to promote the educational and economic interests of weaker sections? Constitutional provisions often appear to have little practical value in terms of the everyday functioning of law. Similarly, while the National Forest Policy, 1988, for the first time upheld the interests of forest-dependent communities, the Indian Forest Act, 1927, prevents this policy from being upheld in spirit by often denying forest dwellers rights to forests. Even initiatives such as the JFM, which some argue are a step in the right direction, have no legal backing in the Indian Forest Act, 1927. Second, even 'good' laws are often not operationalized. Take for example the PESA. Although the PESA was passed in 1996, in most states it has not been operationalized into rules and, when it has, it has often been watered down.⁸ In the particular case of the PESA, it points to a legal quandary of sorts, given the state's (not the centre's) jurisdiction in terms of framing laws related to *panchayati raj*. As *adivasi* areas are rich in minerals, the states have been reluctant to empower *gram sabhas* too much, as they would likely prohibit unchecked exploitation of forest land. Third, these good laws often have ambiguities that not only constrain their effectiveness, but which could undermine their potential if implemented. Again the PESA is a case in point. In the PESA, it is stated that the *gram sabha* should be consulted prior to the acquisition of land. But what does consulted imply? Does it imply that the approval of the *gram sabha* is needed? (S. Upadhyay 2004) Fourth, even case law decisions are often not upheld in other contexts, or are challenged by the state itself. Not only has the Samata judgement been restricted to Andhra Pradesh (Regulation 1/70), but the state has attempted to amend the Fifth Schedule to promote mining through the Andhra Pradesh Mining Development Corporation.⁹ Finally, decisions emerging from judicial intervention, i.e., case law, have their own limits. These decisions can only be applied post-facto (if at all). Moreover, it is often not possible for *adivasis* to take the legal route to protect their rights due to the costs (both financial and other) involved.

The hierarchy of rights within case law also requires more attention. While *adivasi* rights have at times been protected, at other times they have not been upheld, or have been qualified or even ridden roughshod over. To understand why this has been the case requires a more thorough look at a wider gamut of environmental cases in an attempt to categorize them. A tentative attempt to do so has resulted in the following conclusions. First, the courts have tended to uphold *adivasi* rights more when there are no major developmental or environmental prerogatives that conflict with rights. The above-mentioned case of *Fatesang Gimba Vasava v. State of Gujarat* is a case in point. Although the Samata judgement might contradict this claim in principle, the challenge to that ruling by state agencies noted above highlights once again the importance of other developmental priorities. Second, when there are developmental or environmental priorities, the courts have tended to limit the rights of *adivasis*, to speak of alternative packages of rights or compensation. For example, in *Animal Rights and Legal Defence Fund v. Union of India* (AIR 1997 SC 1071), the Supreme Court had to intervene to resolve a dispute between Madhya Pradesh and Maharashtra. Madhya Pradesh had allowed *adivasis* fishing permits in the Totladoh reservoir of the Pench National Park. Maharashtra objected, saying that this could lead to the felling of trees, disturbance to water and migratory birds, etc. While the court emphasized the need to address the rights of *adivasis* (in terms of rights to fishing) and to ensure their rights to livelihood after resettlement (when resettlement took place), it also emphasized the need for stricter vigilance in terms of execution of fishing rights and placed restrictions on the extent of fishing permitted (Leelakrishnan 2005: 24). In the case of *Banwasi Seva Ashram v. State of Uttar Pradesh* (AIR 1987 SC 374), the National Thermal Power Corporation (NTPC) required forest land for an electricity-generating scheme. When this was challenged by the NGO Banwasi Seva Ashram, the courts articulated the need for the NTPC to render resettlement and subsistence allowances to displaced *adivasis*, but they justified the need for the NTPC's electricity-generating schemes in the name of development (ibid.: 190-91).

⁸ This has happened in a number of ways: (1) there have been some critical omissions with regard to the fundamental principles (or spirit) of the PESA; (2) powers have been taken away from the *gram sabha* and given to 'other appropriate levels of *panchayats*', (3) rules have not been framed to operationalise acts and (4), where rules have come into play, they too remain legally ambiguous (S. Upadhyay 2004: 3).

⁹ According to critics of the Samata judgement, the judgement allows the APMDC to hold forest land. I would like to thank Samata and P. Sivaramakrishna for their help with regard to understanding the Samata judgement.

Third, a distinction should be drawn between environmental protection cases and developmental cases, the former referring to environmental conservation (of, for example, ecologically important landscapes) or environmental pollution (industrial or vehicular pollution), and the latter to large infrastructure projects. V. Upadhyay (2000: 3790) himself has highlighted that the courts have tended to take a more pro-active position in environmental conservation cases than in developmental cases (thereby weakening his own case that the law is open-ended). For example, in the frequently cited Doon Valley case (*Rural Litigation and Entitlement Kendra and others v. State of UP and others* (AIR 1988 SC 2187)), the Supreme Court was pro-active in appointing a number of committees to study the impact of mining on the ecology, and actually phased out mining in the region (Leelakrishnan 2005: 13). In the M.C. Mehta cases pertaining to pollution, the courts imposed a number of restrictions on industry despite the negative employment consequences of these restrictions (ibid.: 196-97). Although both types of cases could therefore have a negative impact socially, the difference is that in developmental cases the negative environmental impacts are often ignored. Also in environmental pollution cases, some people's rights are actually protected - for example urban residents who benefit from better air quality. An argument could be made, therefore, that the environment assumes more importance vis-à-vis other concerns when the environment is part of the middle-class imagination, i.e. clean and unpolluted cities, unspoilt national parks, etc. On the other hand, large infrastructure projects such as dams are rarely stopped in the name of the environment (or social rights) alone - witness both the Narmada and Tehri cases.

A number of other points are in order here. It appears that the courts have tended to problematize concerns around development and environment very much within currently hegemonic discourses of development and modernity. Development continues to be envisaged in terms of Nehruvian notions of modernity, although perhaps using different strategies to get there, i.e., a greater role for the market. Hence, the courts have tended to be reluctant to swim against the tide of big development projects. This is not because the courts are not aware of the environmental and social consequences of these projects, but rather because they are resigned to the fact that they are necessary for development. When it comes to socio-economic concerns, the courts focus more on resettlement and rehabilitation aimed at minimizing the negative social consequences of development. Second, when objections are made to particular developmental projects on environmental grounds, the courts have at times circumvented these objections by arguing that a particular project had already been cleared on environmental grounds. It is worth referring to the *Dahanu Taluka Environment Protection Group v. Bombay Suburban Electric Supply Ltd. Case* (1991 A SCALE 472). Here, the Supreme Court ignored the report of the Environmental Appraisal Committee, which highlighted the ecologically fragile area in which the power project was located, arguing that the Centre had made use of a state expert committee report that had okayed the project (V. Upadhyay 2000: 3790).¹⁰ Third, the courts have increasingly chosen to resort to the separation of powers doctrine (in different ways) to justify their status quoist position. John (2001: 3032) has argued that this is even more the case when socio-economic rights are at stake. Fourth, the reason the courts have been more pro-active in environmental pollution cases is most likely because they see the possibility of technical fixes that do not prevent the process of development itself from moving forward, e.g., common effluent treatment plants for tanneries. These occurrences do not bode well for the potential of law as an instrument for upholding the rights of the marginalized. Infrastructure projects are more likely to affect marginalized communities such as *adivasis*.

The marginalization of *adivasi* rights is today very much part of a wider marginalization of rights in general. Bhushan (2004) has argued that the biases of the court are more generally linked to the wider neo-liberal agenda, which privileges the advent of private capital and the creation of an investor-friendly climate. Bhushan cites the case of the *Balco Employees Union v. Union of India* (2002 Vol. 2 SCC 343), in which the employees questioned the government's decision to disinvest. The Court chose not to interfere. The same scenario emerged in the case of *CITU v. State of Maharashtra*. Here, CITU challenged the state government's decision to disinvest based on a number of procedural and financial concerns it had (see Bhushan 2004: 1771-72 for more details on both these cases), but again the Court chose to invoke the separation of powers doctrine. It would be too simple, of course, to argue that courts act in a conspiratorial manner - as there are often dissenting voices in particular judgements. Nonetheless, what many of the above-mentioned cases indicate is a possible trend that calls for caution. Moreover, another noticeable trend

¹⁰ Judgements 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 and perhaps even to public opinion. However, what the above analysis suggests are noticeable trends in terms of judgements.

involves the courts becoming more strict with regard to the application of *locus standi*. In the Balco case, for example, the court ruled that public interest litigation was not a panacea for all wrongs and, more importantly, that it should be an instrument only for those who are directly affected by potential adverse consequences of development interventions (ibid.: 1771).

Finally, a distinction needs to be made between legal spaces in terms of case law and statutory law. It is the everyday forms of law (statutory) that affect communities more directly and on a daily basis, e.g., forest law imposing restrictions on the gathering of fuel wood and other forest produce. Thus, however much the judiciary adopts an interventionist approach, it is unlikely to prevent either the day-to-day enforcement of ‘unjust’ laws or the violations of law that protect *adivasi* rights. In that sense, the open-endedness of law in general is no substitute for good sectoral laws. The forest sector is a case in point, where even well-intended initiatives in support of community-based forest management have found no mention in law.

Clearly, blaming the law and its inadequacies for all problems is not the right approach. Political and social movements will continue to fight for better laws and try to ensure that the state upholds them. Nonetheless, the limits to law, be it in the form of people-unfriendly laws, or ambiguity within the law, or marginalization of rights in the name of environment and/or development need to be noted in order to highlight the apparent structural impediments to the enforcement of rights in a capitalist-driven economy. In the next section, I will consider the limits of the recently passed STB and what the wider implications of this are for the limits to law in terms of *adivasi* rights.

The STB, 2006

As suggested above, activists and *adivasi*s cannot afford to have a completely pessimistic view about law, despite the current political economy. And, their struggle to have the STB passed is an indication that they have continued to engage with the legal avenue. Nonetheless, the same question arises – What is the potential of this law? What do the debates and developments around the STB tell us?

Earlier, I made a distinction between the making of law and the working of law, suggesting that even existing laws might not actually be implemented. Implicit in that discussion was the contention that it might be easier to make laws than to make them work because laws are made in the legislature, where the rights of *adivasi*s are likely to at least be represented (if not upheld). For their part, decisions pertaining to the implementation of law occur in the executive, where no electoral compulsions exist directly. However, the developments around the STB suggest that making laws that are cognizant of rights has itself become increasingly difficult, with environmental/conservationist prerogatives assuming a more significant and different role than before. By tracing the broad developments around the STB, I hope to highlight the precarious state of the rights discourse vis-à-vis questions of the environment, as well as the somewhat problematic nature in which the discourse has been located.

To recall briefly, the main premises of the STB are that scheduled tribes and other forest-dependent communities have inhabited the forests for centuries, that their rights have not been recognized and that there is hence a need to rectify this historical injustice. Much of the debate thus far around the STB has concerned the possible environmental consequences of the bill.¹¹ These debates hotted up with the JPC’s recommendations not to have a ceiling on the amount of land allocated, to include traditional non-*adivasi* forest-dependent communities in the list of those entitled to land and to give *gram sabhas* the ultimate decision-making power with regard to the allocation of rights.

The pros and cons of the STB have been debated at length. The intent here is not to re-open these debates but to highlight how rights continue to be restricted on the basis of the hierarchy of rights set forth above. To do this, it is first necessary to point out that the final bill is a diluted version of the JPC version, which possibly restricts the impact of this bill, even if it were implemented properly. A few examples of this are illustrated below. First, Sections 2(c) and 2(o) require forest dwellers to reside in forest land (as opposed to in or in close proximity, as in the JPC draft), something that is relatively rare and likely to limit the

¹¹ The major concern is that the granting of land rights to *adivasi*s will lead to a Malthusian type of pressure on forests and consequently wildlife as well. Mohanty (2005: 33) argues that the bill does not put any territorial limit on claims to forest resources and that this will lead to the unbridled destruction of forests. Although Madhusudhan (2005: 4894) admits to the need to address the genuine concerns of *adivasi*s, he argues in particular that rights to land in protected areas would be detrimental to wildlife, because wildlife needs large tracts of uninhabited land.

number of claimants. Second, the *gram sabha*'s role according to Section 6 has largely been reduced to that of making recommendations about who should be given rights, placing the real decision-making power potentially with the bureaucracy. Third, according to Section 15, this law will be in addition to, as opposed to in derogation of, other laws, again providing a possible way of delimiting the allocation of rights.¹²

Returning to the broad hierarchy of rights, a few points need to be made. First, the indication is that the conservationist agenda has been taken seriously (though conservationists might disagree) and that rights are restricted because of these concerns. This has happened despite unrelentless lobbying in favour of the STB. Like pollution in Delhi and the preservation of the Doon Valley, among other things, wildlife conservation seems to be very much a part of the middle-class imagination that drives the nation's environmental consciousness. Second, as a result, other reasons for forest degradation seem to receive less attention. As the *Seminarist* (2005: 58) argues, there are 'far more powerful actors with vested commercial interests who threaten forests but do not evoke the suspicion they deserve'. These other powerful actors often represent the cause of development and therefore seem more able to either bypass existing laws, or to subvert them. The dilution of land reform legislation and the promotion of private corporate investment in the commons, for example, seem to rarely be challenged in the same way as witnessed with the STB. Third, rights seem to have no place unless they are part of a wider managerial discourse. The last-minute amendments to the STB all appear to be aimed at ensuring that the allocation of rights does not lead to unsustainable use of forest resources.

Should managerial concerns be part of such a bill? The neo-liberal discourse on rights is increasingly being tied to managerial responsibilities. What is potentially worrying about this is that the implications do not seem to have been adequately addressed. In the case of the JFM, for example, forest protection committees have often been disbanded by forest officials without adequate consultation with villagers. Might the same thing happen with this bill? While the STB no longer mentions in the main text that forest dwellers are responsible for managing the forest, mention of this is found in the preface. Moreover, the latest version of the bill reiterates the centrality of 'sustainability'. By signing up to that, might not rights be limited or withdrawn if forest-dwelling communities are deemed not to be managing the forests sustainably? Given the fact that pressures on land are increasing, is this not a likely scenario? While many might argue that linking rights to managerial responsibilities is a good thing, more important is to address the wider reasons for forest degradation, addressing its causes as opposed to its symptoms.

This is all the more pertinent given the wider practice of development. In earlier sections, I have tried to relate the manner in which rights to resources have been very much embedded in wider concerns around environment and development. Even during the hectic period in which the JPC put forth its recommendations, *adivasis* in different parts of the country continued to be uprooted in the name of development – the most notable example of course being Kalinganagar, where *adivasis* were killed while protesting against land being allocated to Tatas (Padhi and Adve 2006). In other words, while the STB was in the process of being finalized, fundamental violations of other constitutional legal safeguards continued, ironically often through the use of law. In such a context, it becomes even more problematic to subscribe to an agenda that ties rights to managerial responsibilities.

It is important to recognize that there are a number of other concerns that address the limits of law. First, even if law continues to be a source of struggle, legal safeguards need to be complemented by active engagement/opposition to a development paradigm that negates these safeguards. Notwithstanding the potential of legislation such as the PESA, it is important to remember that *adivasi* communities, even if self-governing, will continue to be located in wider territories and policy domains that affect their self-governance. It is imperative, therefore, that there is continued struggle to prevent policies introduced in the name of the greater common good from undermining the potential of *adivasi* communities to govern themselves. This will require broader alliances that engage with the parameters of economic policy.¹³ Second, it is important to recognize the plurality of *adivasi* communities in the country. The danger of a *law* is that heterogeneity can be undermined. The STB already excludes a number of forest-dwelling

¹² I would like to thank C. R. Bijoy for clarifying many of my doubts with regard to the final amendments made to the STB.

¹³ Such an agenda is important, given the critique that the bill subjects *adivasi* communities to living in the 'pre-modern' world. Singh (2005: 39) says the bill 'is not about survival and it is not about preserving a 'way of life'. Most *adivasis* do not have a way of life. They live in appalling conditions and it is wrong that they should have to. While such an argument is of course false – as the bill does not compel anyone to remain tied to the land – a more detailed articulation of a culturally-embedded socio-economic agenda would go some way in allaying such fears.

communities. But even among those likely to be included, it is important to recognize that cultural practices with regard to land use will differ significantly across regions. In implementing the STB, it is important that statutory law does not impose itself on particular customary practices of land use. Third, the bill should not lead to an over-essentialised discourse that is incognizant of non-*adivasi* communities situated in *adivasi* territories. Although the bill, as redrafted by the JPC, suggests the need to also guarantee the rights of traditional non-*adivasi* forest dwellers, one should be aware of what Malkki (1992) calls the ‘sedentarist metaphysic’.¹⁴ Rootedness should not be an excuse to alienate communities or households that are not deemed traditional as defined by the STB. These questions and dilemmas require more attention and debate.

Conclusion - Rethinking Law

The above concerns no doubt are normative concerns that, given the current political economy of development, will not necessarily materialize. However, it remains important to articulate them (at least tentatively) because, as an agenda of social change, law is clearly complex in nature. In this final section, I summarize the arguments put forward and try to situate law in the context of rights struggles.

First of all, while law is often seen as a way to articulate normative concerns, there are a number of such concerns and at times they conflict with each other. Although law has been an important instrument with which to address the rights of *adivasis* and their customary claims, such rights have often come into conflict with wider developmental prerogatives, whereby law also assumes an important role in the project of development. The result has been that protective legislation for *adivasis* has often played second fiddle to the greater common good. In more recent times, the environment (as well as development) has assumed the role of *bête noire* for *adivasis* fighting for their land rights. While protective measures were clearly part of the constitutional agenda, and the passing of the PESA and the STB are indications that bills in the spirit of the Constitution can be introduced and even passed, these bills/acts are often watered down, ambiguities remain prominent and implementation is poor at best.

Second, a more disaggregated and nuanced reading of law is required. Some scholars have highlighted the fact that statutory law is a reflection of complex social reality and is contested and reconfigured in different micro-contexts (Pathak 1994a, 2002). Although such arguments are important and valid, I have suggested in the above discussion that law nonetheless emerges in a hierarchy of sorts. It would be too simple, in other words, to argue that somehow all actors equally shape law or that all ideas receive similar attention. As Bhatia *et al.* (2005) have argued, protective legislation is often shelved in the wider context of the political economy of development. Moreover, although law manifests itself differently in different micro-contexts, this does not detract from the fact that statutory law itself often has quite devastating impacts, in the immediate sense, in all regions where a particular law applies.

Given such a critique, how does one position oneself in terms of the usefulness of law? At one level, in a society where law essentially lays down a prohibitive regime, it becomes critical to engage with that law if such a regime acts as a barrier to constitutional provisions related to rights. Second, as Pathak rightly points out (1994: 3138), activists are ‘bound by the politics of the immediate’ and necessarily must act in ways so that law itself becomes an advantage. The advocacy in favour of the STB is no doubt an attempt to make use of the opportunities that law might provide.

However, the positioning of law within the wider politico-economic domain can also not be ignored. While there is evidence that the courts have at times interpreted the law in ways that privilege the rights of the marginalized, there are also cases in which such rights seem to hardly matter. And as we have suggested, the violation of constitutional provisions in the name of development is certainly more prominent than the gains made because of available legal spaces. The politics of the immediate, therefore, needs to be supplemented by a wider engagement with both discourse and policy that is aimed at deliberating about development itself. While this might be obvious and even trite, it is unlikely that law can effectively challenge the juggernaut of development without in a sense re-imagining what one means by development and how discourses on identity (in this case *adivasi* identity) are to be conceptualized.

¹⁴ The sedentarist metaphysic highlights the manner in which identity discourses are rooted in the idea of place.

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