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Tribal and Marginalized Communities

Constitutional Provisions, Laws and Tribes
Virginus Xaxa

Actualising Adivasi Self-Rule
Rahul Banerjee

The Food Bill, Wild Foods and Adivasi People
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**Community Resource Person:
Harbinger of Change in Rural Land Governance**
Sanjoy Patnaik

Special Article
Climate Change and State Preparedness
Subhash Sharma





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Let noble thoughts come to us from all sides
Rig Veda

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Actualising Adivasi Self-Rule—The Only Panacea

Rahul Banerjee



Adivasi self rule will be possible only if there is conscious community mobilisation at the grassroots level in support of this. Macro level policies since independence have led to the decay of the traditional communitarian practices of the Adivasis and so a revival will have to be attempted at a decentralised level by the Adivasis themselves

A SEARINGLY HOT summer afternoon in the month of April 2001 saw Motiabhai, the Bhilala Adivasi Patel of Katukia village in Bagli Tehsil of Dewas district in Madhya Pradesh sitting among the ruins of his house and plaintively asking the then Chairman of the National Scheduled Castes and Scheduled Tribes Commission, whether as a citizen of India he did not have the right to live with dignity under his own roof.

Why is it that Adivasis like Motia Patel have again and again been forced to ask this question in independent India without receiving any satisfactory answer? Why is it that, despite constitutional safeguards and other ameliorative legislations, Adivasis continue to face the iron hand of state repression whenever they demand their rights in any significant manner? Why has the Panchayat Provisions Extension to Scheduled Areas Act 1996 (PESA), which had initially been hailed as the long awaited panacea for all the ills of Adivasi mal-development, also been unable to deliver the goods to the Adivasis? Why indeed does Adivasi self-rule still remain an elusive Holy Grail even after over six decades of independence? To find the answers to all these burning questions, it will be necessary to trace the history of various legal provisions leading up to

the enactment of PESA and its later non-implementation.

The presence of articulate Adivasi leaders like Khan Abdul Ghaffar Khan and Jaipal Singh resulted in the debates in the Constituent Assembly reverberating with eulogies for the inherently democratic and non-exploitative nature of Adivasi communities and the expression of concern about enabling them to negotiate the process of integration into the modern economy to their advantage (GOI, 1954). Consequently, extensive provisions were made in the Constitution and many laws were enacted for the protection and betterment of the Adivasis. Nevertheless, the imperatives of modern industrial development enunciated in the centralised planning process initiated from the early 1950s and the powerlessness of the Adivasis in the face of the State authorities, resulted in a policy of even greater intrusion into Adivasi areas than in colonial times, being adopted after independence, to exploit the vast natural resources that these held.

The independent Indian government, in fact, continued the policy of the British of extraction of resources to fuel modern industrial development. The British enacted the Indian Penal Code (IPC) in 1860 and the Code of Criminal Procedure (CrPC) in 1861. These laws, with some minor amendments

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only, are still in force today and have been codified in such a manner so as to provide the administration with a handy means of suppressing organised public dissent.

The biggest lacuna of all was that Gandhi's conception of "Gram Swaraj" or the promotion of grassroots democracy through the establishment of autonomous village republics was given a go by. Panchayati Raj was included in the Directive Principles of State Policy which were non-justiciable that is, unlike the fundamental rights these could not be enforced through

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the courts. Basic rights like that to free education, health and nutrition services and the means to a dignified livelihood too, were included in this section. Thus, provisions that could have created an aware, healthy and articulate Adivasi population and provided them with an institutional structure for implementing their development according to their own genius, were ignored totally by the Governments, both at the centre and the states after independence, paving the way for the persistence of a form of internal colonialism and feudalism. Matters were compounded by the fact that fundamental rights too, were not easily assured, given the tremendous expenses involved in approaching the High Courts and the Supreme Court for redress. While the erstwhile princes, landlords and the industrialists often went to court to obstruct the path of justice for the poor, the latter could hardly afford to do so and had to bear

with the illegal actions of the rulers through the organs of the state.

The Adivasi Dilemma

The Adivasis, as mentioned earlier, had special provisions included for their benefit in the Constitution. Those in the states of Assam, Meghalaya, Tripura and Mizoram were to be covered by the provisions of the Sixth Schedule while those in the states of Andhra Pradesh, Odisha, Jharkhand, Himachal Pradesh, Madhya Pradesh, Chhattisgarh, Maharashtra, Gujarat and Rajasthan were to be covered by the provisions of the Fifth Schedule. The basic philosophy behind these provisions was that the tribals had a unique communitarian culture based on a subsistence non-accumulative lifestyle that was totally at odds with the consumerist culture spawned by modern industrial development. Thus, it was necessary to conserve this culture by secluding it from the aggressive thrust of modern development. The British administrator, anthropologist and social activist Verrier Elwin was the foremost proponent of this view and it was he who influenced Nehru in this matter and was the brain behind his "Panchsheel" for tribal areas which spoke of their development keeping in mind their uniqueness. However, given the tremendous imbalance of powers away from the grassroots level, these noble ideas remained a pipe dream in reality.

The provisions under the Sixth Schedule purport to provide for a self contained code for the governance of the tribes living in those areas through the institution of autonomous district councils. Despite the fact that autonomous district councils gave some powers to the tribes in respect of determining many aspects of their life, these were limited by the greater powers of the states of which they were a part. In the case of Assam and Tripura, non-tribals who were in no mood to cede any substantial concessions to the tribals dominated the state legislatures and curbed the powers of the district councils. In the case of the states of Meghalaya and Mizoram, the tribal

leaders at the state level usurped all the powers emasculating the district councils. Problems have been created by not giving sanction to the laws and rules passed by the councils and also by restricting the funds available to them to carry out developmental activities. Centralised development and immiserisation of the tribals has been the rule and the district councils have fallen well short of the aspirations of the people in the North Eastern states (Roy-Burman, 1997).

The situation in the Fifth Schedule areas has been even worse. The relevant portions of Section 5 of the Fifth Schedule reads thus –

5 (2). The Governor may make regulations for the peace and good government of any area in a State which is for the time being, a Scheduled Area. In particular and without prejudice to the generality of the foregoing power, such regulations may –

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- a) Prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
- b) Regulate the allotment of land to members of the Scheduled Tribes in such area;
- c) Regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

5 (3). In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may

repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which for the time being, is applicable to the area in question.”

Thus, theoretically it is possible for the Governor of a State, on the advice of the Tribes Advisory Council consisting of the Adivasi MLAs of the state, to prevent the application of or repeal the Indian Forest Act and the Land Acquisition Act. The most important aspect of these provisions is that the Governor may implement them so as to ensure "peace and good government" in Adivasi areas, as the framers of the Constitution felt that this could be possible only if the Adivasis were allowed to develop according to their own laws and customs. However, this has never happened because it is not a binding provision and only a suggestion like the Directive Principles of State Policy, which finally has to depend on the executive for its implementation.

Consequently, there has been neither peace nor good government in Adivasi areas. The history of the past 60 years after independence is replete with innumerable struggles of the central Indian Adivasis against the injustice meted out to them by the Indian state through the ruthless implementation of the Indian Forest Act and the Land Acquisition Act and the cynical non-implementation of the Fifth Schedule. There have been widespread protests by Adivasi mass organizations.

The *Samatha v. State of Andhra Pradesh*, 1997 8 SCC 191 case, fought the Government of Andhra Pradesh's decision of giving of a lease to a private company to extract minerals in scheduled Adivasi areas, all the way to the Supreme Court which, in a landmark judgment, rendered in the light of the debates in the Constituent Assembly, upheld that the intention of the founders of the Constitution when drafting the Fifth Schedule was that the Adivasis should be protected from dispossession of their land and so, even though the actual word in the Constitution is that the Governor "may" act for their benefit, it should

be read as "shall" and has thus, effectively prevented the transfer of Adivasi land to non-Adivasis. This view has now been further strengthened by the recent decision of the Supreme Court in the *Niyamgiri* case in Odisha that the Adivasi Gram Sabhas will have the final say in deciding whether their lands are to be used for purposes other than for what they have been traditionally using them. This has now provided power to the movement for Adivasi self rule as will be detailed later.

The Promised Land

Obviously, the lack of grassroots governance institutions was becoming more and more of a problem as the level of political awareness and literacy was increasing and the centralised trickle down type of development was coming apart at the seams. There was a need to provide a third tier of democratic institutions to take some of the pressure

The report basically upheld the paramountcy of the Adivasi Gram Sabha in all matters related to their governance and development and defined the Gram Sabha as the small Adivasi hamlet and not the administrative panchayat which may contain one or more villages and is too large a unit for the Gram Sabha to function through direct democracy. With the enactment of PESA, the paramount nature of the Gram Sabha in Adivasi areas has been established even though it has not been vested with the wide ranging powers that it should have.

of accountability off the shoulders of the State and Central Governments. Consequently, the pressure building up within the mainstream parties and from various mass organisations and NGOs finally led to the passing of the 73rd Constitutional Amendment in 1992 making Panchayati Raj mandatory. Article 243M (4) (2) of Part IX of the Constitution envisages that "Parliament may, by law, extend the Provisions of this part to the Scheduled Areas..... subject to such exceptions and modifications as may

be specified in such a law". Thus, this was the first time that a central law had not been automatically extended to the Scheduled Areas. It was also stated that such a law enacted by Parliament would not amount to an amendment of the Constitution and could, thus be passed by a simple majority. Provision for this special law was made keeping in mind the failure of the Governors to implement the enabling provisions of the Fifth Schedule.

There was, however, no enthusiasm shown by the central government to pass this special act and extend the provisions of the 73rd amendment to the scheduled areas. Finally the Government of India constituted a Committee of Members of Parliament and Experts in 1994 to suggest the framework of the special law to be enacted for this purpose and the changes necessary in other statutes to accord with the spirit of the new law. This committee, which has since come to be known as the Bhuria Committee submitted its report on January 17th, 1995. The report basically upheld the paramountcy of the Adivasi Gram Sabha in all matters related to their governance and development and defined the Gram Sabha as the small Adivasi hamlet and not the administrative panchayat which may contain one or more villages and is too large a unit for the Gram Sabha to function through direct democracy. With the enactment of PESA, the paramount nature of the Gram Sabha in Adivasi areas has been established even though it has not been vested with the wide ranging powers that it should have.

Illusion and Reality

The Madhya Pradesh Panchayat Raj Act was amended in 1997 in accordance with PESA and rules framed for its implementation in 1998. The Gram Sabha or village council had been made the paramount decision making body and so a special local government system to accord with Adivasi lifestyle and culture had become a legal possibility. Mobilisation proceeded all over the Bhil Adivasi dominated western Madhya Pradesh region to exert pressure towards implementation of these provisions.

Since 1999, there had been deficient rainfall in this region. Whereas some tehsils of Barwani and Jhabua districts had been officially declared drought hit, others had not been so fortunate as the harvest there had not been less than the statutory level of 37 per cent of the normal harvest required for declaring a district or tehsil as being drought hit. Even after being declared drought hit, paltry amounts of between Rs 3 and 4 crores each had been sanctioned for these two districts for relief works over and above the minimal amounts that are normally available through various Central Government schemes. The rest of the region had not even got these crumbs. The Adivasi mass organisations launched a massive campaign for putting pressure on the Government to carry out sufficient relief works. Plans for soil and water conservation works were prepared by the people and sanctioned by the Gram Sabhas and forwarded to the administration for action.

The net result was that the Sahukars were having a field day. The Adivasis were forced to go to these sahu-kars in the absence of any other support system and bear the burden of usurious interest rates that had shot up to levels of 10 per cent per month and more. Reviewing the situation, the Adivasi mass organisations found that the only way in which things could be improved was for the Government to take action under the various laws at its disposal against the sahu-kars. However, this did not result in much relief as the Adivasi mass organisations were not strong enough to get the provisions of the PESA implemented. Generally, this has been the problem in most places and PESA has largely remained on paper.

The Way Ahead

The PESA, despite its lack of implementation, does provide a greater space for legal and mass action to press for increased Adivasi autonomy especially after the Samatha and Niyamgiri judgments of the Supreme Court which have empowered the

Adivasi Gram Sabha considerably. With the help of the judiciary and the media, it may be possible to give weight to the contention that modern development cannot be carried out at the cost of the Adivasis. Thus, there is a chance to ensure that the basic principles of liberal democratic governance are not flouted with impunity by the State in Adivasi areas as they were being earlier. The PESA is a first step in the direction of preserving and promoting Adivasi culture and thus, ensuring a saner world involving more sustainable resource use and equitable inter-personal relations than the one we are living in (Rahul, 1997). Proof of this can be found in the fact that the leaders of the Chiapas indigenous people's movement in Mexico have used PESA as one of the reference points for the formulation of their own draft constitution.

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The passage of the Mahatma Gandhi National Rural Employment Guarantee Act and the Right to Information Act in 2006 has considerably enhanced the effectiveness of PESA. There are now many instances throughout the country of small mass organisations in Fifth Schedule Areas taking advantage of the provisions of these later laws and using them to fulfil the promise of self rule that is there in PESA. Similarly, many Adivasi mass organizations have conducted long drawn campaigns which have resulted in the enactment of the Scheduled Tribes and Other Forest Dwellers (Recognition of Rights) Act, 2006, popularly known as the Forest Rights Act, which tries to give teeth to the provisions of the Fifth Schedule and nullify the historical

injustice done to the Adivasis through the implementation of the Indian Forest Act by making the Gram Sabha paramount.

The foregoing discussion makes it abundantly clear that ultimately Adivasi self rule will be possible only if there is conscious community mobilisation at the grassroots level in support of this. Macro level policies since independence have led to the decay of the traditional communitarian practices of the Adivasis and so a revival will have to be attempted at a decentralised level by the Adivasis themselves. Especially as, such communitarian culture, apart from ensuring peace and good governance, will also save the natural resources and have a mitigating effect on climate change (Cruz, 2009). So, the way ahead lies in persisting with the synergistic implementation and further refinement of the Adivasi oriented laws that promote self rule as envisaged in the Fifth Schedule of the Constitution as the only panacea for the lack of peace and good government.

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