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Tribal and Marginalized Communities

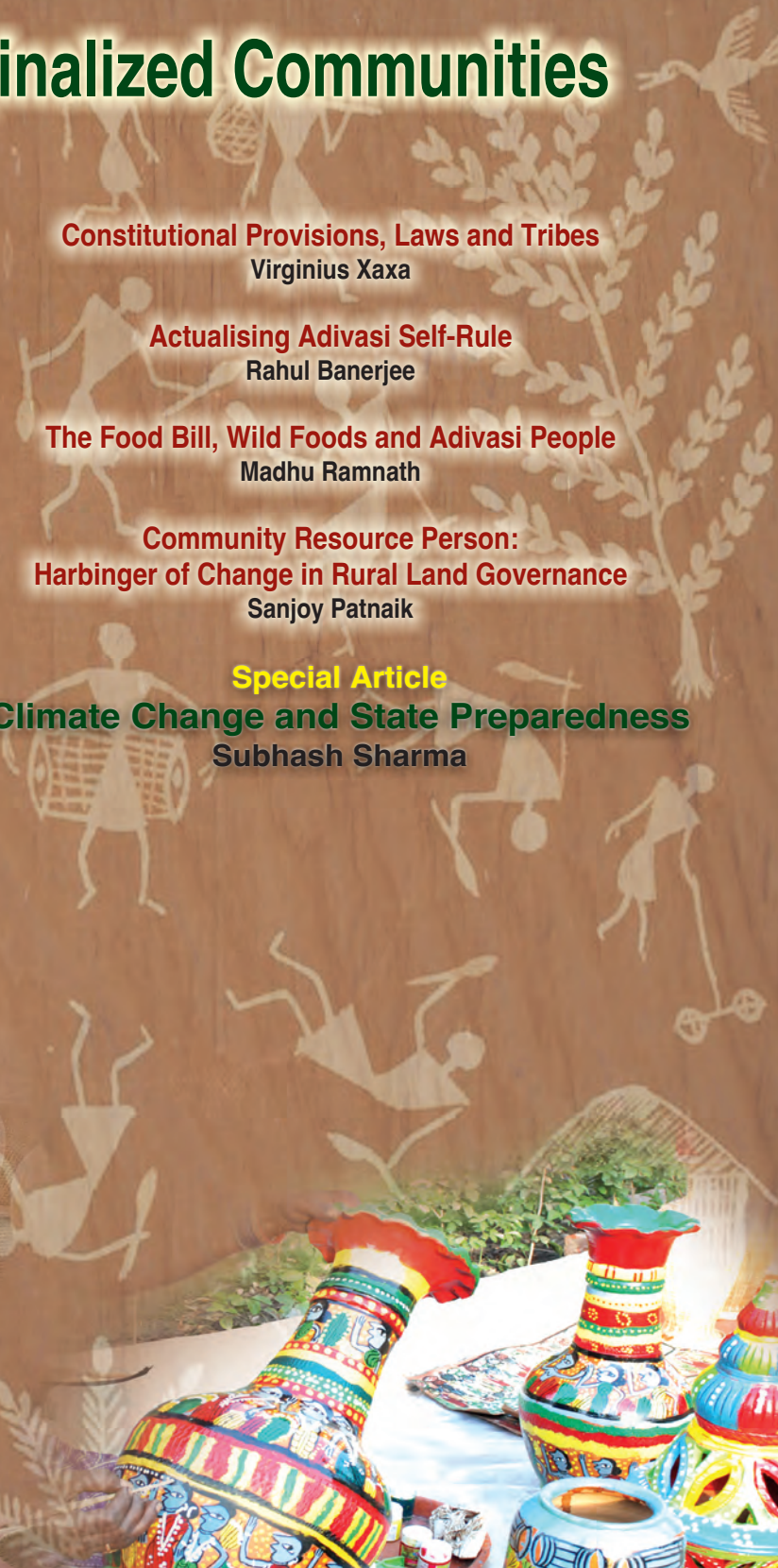
Constitutional Provisions, Laws and Tribes
Virginus Xaxa

Actualising Adivasi Self-Rule
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The Food Bill, Wild Foods and Adivasi People
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**Community Resource Person:
Harbinger of Change in Rural Land Governance**
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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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The Limits to Law, Democracy and Governance

Ajit Menon
C R Bijoy



Both PESA and FRA give powers to communities that allow them to determine their future destiny. What these laws also do is to make the state bureaucracy and for that matter elected, mostly non-tribal, representatives accountable to community institutions. The centre of power will, therefore, shift and allow tribals control over their own governance and natural resources that they are dependent upon for their livelihood. PESA and FRA can create a legitimate political space and democratic mechanism where equity, justice and participatory democracy are the core

TRIBAL DEVELOPMENT policy from its inception has always been beset by a contradiction, namely to recognize the uniqueness of tribal communities (including their governance systems) but yet deliver the benefits of mainstream development. In practice, the former has, for the most part been undermined, seemingly to attain the latter. However, even the latter goal mostly has not been achieved because of the wider priorities of ‘growth’ and ‘development’ for the nation. Over the last two decades since the adoption of the New Economic Policy in 1991 and the drive to speed up the growth process, a widening gap between the goals of national development and tribal development has emerged. The accelerated attempt to exploit natural resources in the name of economic growth has led to maladministration and misgovernance (‘governance deficit’) and neglect in terms of infrastructure, development and welfare (‘development deficit’) in tribal areas. These failures of state policy have led to the spread of Left Wing Extremism (LWE), pervasive now in 83 districts of the country.

This is not to say that progressive Constitutional provisions and laws that empower tribal communities have not been periodically passed, but rather that, these have been for the most part undermined. From Article 244 of the Constitution, which led to the establishment of Fifth Schedule Areas,

to legislation such as the Panchayati Raj (Extension to Scheduled Areas) Act, 1996 (hereafter PESA), and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter FRA), legal measures have been passed to empower tribal communities to govern themselves. But invariably these legal measures have to a large extent remained on paper because of a lack of political will to implement them, given the economic priorities of growth.

The purpose of this paper is limited to detailing tribal development policy in India and the tensions that exist between mainstreaming development and protecting the rights of tribal communities. While the historical narrative illustrates the possibilities within a parliamentary democracy to pass ‘progressive’ legislations, it also suggests how hegemonic discourses of development undermine these legislations in practice.

Constitutional Protection to Tribals: Good Intention, Limited Scope

Tribal areas were to a large extent ‘self-governing’ prior to British colonization, though many of these areas were notionally part of non-tribal states. While the British tried to colonize tribal areas, they were often unsuccessful because of tribal resistance and revolts. One consequence of this was an official recognition by the British of existing customary institutional arrangements through special laws

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which effectively acknowledged and permitted the relative independent existence of tribal regions. Examples of this were Regulation XIII of 1833 that declared the central Indian region of Chotanagpur, a non-regulated area and later the Scheduled Districts Act of 1874 that declared certain backward districts as scheduled so as to make existing laws not applicable in these tracts. The Government of India Acts of 1919 and 1935 further allowed for the declaration of backward districts and the exemption of excluded or partially excluded areas from the provisions of national and state laws. This allowed for tribal self-governance in such areas.

Partially excluded and excluded areas were translated into Article 244 of post-Independence India's Constitution – the article that sanctioned the creation of Fifth and Sixth Schedule areas. Article 244 (1) provides that the provisions of the Fifth Schedule shall apply to the administration and control of Scheduled Areas and Scheduled Tribes (STs) in any state other than the states of Assam, Meghalaya, Tripura and Mizoram. A 'Scheduled Area' was any area defined as such by the President. In brief, the Fifth Schedule allowed the President to rescind any order or orders made, that were applicable to any given state and in consultation with the Governor of the states concerned, make fresh orders for Scheduled Areas. Para 5 (2) provides that the Governor may make regulations for the peace and good government of Scheduled Areas under Clause (a) to prohibit or restrict the transfer of land by or among members of the STs, under Clause (b) to regulate the allotment of land to members of the STs in such areas and under Clause (c) to regulate the business of money lending to STs.

Article 244(2) provides for the Sixth Schedule to the Constitution and applies to the administration of certain tribal areas in the states of Assam, Meghalaya, Tripura and Mizoram. These areas are governed by District Councils, Autonomous Councils and Regional Councils constituted for Autonomous Districts and Autonomous Regions. These councils have wide ranging legislative,

judicial and executive powers with power to make rules with the approval of the Governor. Powers cover matters such as primary schools, markets, dispensaries, ferries, cattle ponds, roads, fisheries, road transport and water-ways. Additional powers to make laws with respect to other matters such as secondary education, agriculture, social security and social insurance, public health and sanitation and minor irrigation were granted to the Autonomous Councils of the North Cachar Hills and Karbi Anglong in Assam. Councils (excepting in

Unfortunately, Constitutional protections have had their limits. Well over fifty per cent of STs live outside the Scheduled Areas and hence are denied rights provided in Article 244. There are tribal habitations in states with Scheduled Areas that are left out of the provisions of the Fifth Schedule.

Bodoland and Tripura) have the power under the Civil Procedure Code and Criminal Procedure Code for trial of certain suits and offences, powers to collect revenue and taxes, and powers to regulate and manage natural resources. However, these councils do not have the power to manage reserved forests or acquire land.

Unfortunately, Constitutional protections have had their limits. Well over fifty per cent of STs live outside the Scheduled Areas and hence are denied rights provided in Article 244. There are tribal habitations in states with Scheduled Areas that are left out of the provisions of the Fifth Schedule. Tribal habitations in the states of Kerala, Tamil Nadu, Karnataka, West Bengal, Uttar Pradesh and Jammu and Kashmir have not been brought under the Fifth or Sixth Schedule. Various Government-appointed Committees have recommended including the remaining Tribal Sub-Plan and Modified Area Development Approach (MADA) areas and similar pockets as Scheduled Areas but the government is yet to comply with these recommendations. At present, the Tribal Sub-Plan areas are coterminous

with Scheduled Areas in the states of Bihar, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Odisha and Rajasthan. The Dilip Singh Bhuria Committee constituted by the central government to recommend extension of the 73rd Amendment to Scheduled Areas has also recommended inclusion of the left out areas under the Fifth Schedule. As recently as 2012, the National Advisory Council of the Government of India has recommended the same. However, no follow up action has been taken.

State governors have also not carried out their duties diligently in terms of the powers conferred upon them in Scheduled Areas. The Governor is the constitutional head of state in the states and is appointed by the Central government. However, under Article 163 of the Constitution, the Governor is bound to exercise his/her powers with the 'aid and advice' of the Council of Ministers, i.e. the Cabinet of the elected state government. In other words, in practice the Governor appears to be bound by Cabinet decisions and the policy of the elected government, although there has been significant debate as to whether this should have been the case. In fact, an official committee found that the mandatory annual reports by Governors to the President regarding the administration of Scheduled Areas under Para 3 of the Fifth Schedule were irregular. Moreover, these reports contain largely stale narrative of departmental programmes without reference to crucial issues of administration, the main intended thrust of the Fifth Schedule. The Ministry of Tribal Affairs, in a letter to the Governors of states having Scheduled Areas, dated 4 April, 2013, also asserted that given the threat of mining to inhabitants in Fifth Schedule areas, Governors should have invoked their powers in pro-active ways to secure the rights of STs. This letter was followed by a meeting of eight Governors organised by the Ministry in December 2013 at Jaipur in which the same was reiterated.

Pro-active Vision – Retrograde Implementation

Notwithstanding the limited geographical scope of the Fifth

Schedule, a number of other legal initiatives have been taken vis-à-vis tribal self governance. PESA, the result, no doubt of tribal movements and protest, promotes people-centric governance. PESA extended the provisions of Part Nine of the Constitution, which addressed issues of decentralization, to tribal areas. The most noteworthy features of PESA are that it empowers gram sabhas at the hamlet (or groups of hamlet) level as opposed to at the level of the unwieldy Gram Panchayat. This was done so as to safeguard and preserve the traditions of tribal people, to prevent land alienation within Scheduled Areas, to control (and give consent to) local development plans and to be consulted in matters of land acquisition and rehabilitation. Additionally, it was incumbent on the state governments having Scheduled Areas to adopt the pattern of Sixth Schedule areas in structure and content, i.e. District Councils with wide ranging legislative, judicial and executive powers.

But, here too, there have been significant limits in terms of achievements. A Planning Commission Working Group Report in 2006 minced no words in saying that most states had not taken adequate action to make PESA work. Old rules regarding money lending, forest use and ownership, mining and excise remained in place, nullifying PESA. Moreover, powers statutorily devolved to gram sabhas were not matched with concomitant transfer of funds and functionaries resulting in the non-exercise of such powers. Despite repeated calls by the central government and Planning Commission to rectify the flaws, the state governments have been unresponsive. In fact, many states still have not framed rules for implementation of PESA. Rules have only been notified in three of the nine states that have Scheduled Areas, namely Himachal Pradesh, Rajasthan and Andhra Pradesh and that too recently. Empowering the gram sabha, it would seem, is anathema to resource grabbing for neoliberal development.

In 2006, the FRA was enacted. The main aim of the FRA was 'to

recognise and vest the forest rights and occupation in forest land in forest dwelling STs and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting.' Fourteen rights were identified excluding hunting. Individual and community rights were to be conferred. Furthermore the law, in addition to vesting rights on claimants, also spoke about responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance, hence strengthening the conservation regime of forests while ensuring the

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livelihood and food security needs of forest dwellers. An elaborate procedure was prescribed through which rights could be claimed and verified. What the Act also implied was the need to get gram sabha consent for diversion of forest land for projects such as mines and dams, though in practice, this has not happened.

Weak implementation, failure to follow due process prescribed by the Act, refusal to recognise community forest resources and other community rights and stiff resistance by the forest bureaucracy have been the order of the day. Although 22,35,166 hectares have been settled and 13,98,831 titles given (as on 30 September 2013) under the Act, this is only about 15-20 per cent of the government controlled and

managed forest land that comes under this law. Moreover, the rejection rate of claims is over 50 per cent.

Tribal Development vs. Tribal Self Governance

Despite the enactment of progressive legislations that empower tribal communities to govern themselves through their own institutions, the main thrust of tribal development policy continues to be that of the Integrated Tribal Development Programme (ITDP) through Tribal Sub Plans. Tribal Sub Plans have been in operation in 22 states and two Union Territories, i.e. in all states except the tribal majority states of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland and in the Union Territories of Lakshadweep and Dadra and Nagar Haveli. The main aim of the ITDP is to bring the fruits of development to tribal areas.

ITDP and TSPs have come under a cloud for not having had any significant impact on tribals due to inefficient delivery of schemes, often marred by corruption and diversion of funds. Most states, moreover, do not allocate proportionate funds as required. Despite central guidelines from the Ministry of Tribal Affairs and other agencies, most states have also failed to set specific targets for TSP expenditure, and no states have field monitoring mechanisms to verify how well the funds are being spent.

Considering that ITDP and TSPs are the primary development and welfare strategy of the Government of India for STs, there has been a clamour to provide them statutory character. Andhra Pradesh has enacted a law, namely the Andhra Pradesh Scheduled Castes Sub-Plan and Tribal Sub-Plan (Planning, Allocation and Utilization of Financial Resources) Act, 2013, that does exactly that. A similar law has recently been enacted by Karnataka. However, these Acts are at variance with the provisions of PESA as, under PESA the Gram Sabha is endowed with powers to oversee local plans and resources [Sec.4(m)(vii)]. The ITDP is a bureaucracy driven programme, not one of self governance. It cannot be a substitute for either PESA or the FRA.

It is important to note that of particular concern are the 75 Particularly Vulnerable Tribal Groups (PVTGs), previously called as Primitive Tribal Groups (PTGs), most of whom have a precarious existence as a result of ecological vulnerability of their habitats and the precariousness of their livelihoods. A specific strategy for their survival with dignity is yet to be charted out concretely though, there are some recent initiatives to work towards this.

The National Advisory Council, like the earlier Mungekar Committee report, noted how tribal governance has been undermined. On 31 December, 2012, the National Advisory Council made a detailed set of recommendations vis-à-vis governance in Scheduled Areas. The recommendations included the need to amend PESA so as to empower gram sabhas and give them the powers to constitute committees, the need to align central and state laws in conformity with PESA, the importance of mandating prior informed consent for land acquisition and the importance of including excluded tribal areas within the Fifth Schedule.

The Governance That Could Be

The community governance regime that underlies the FRA and PESA departs from prescriptive solutions that privilege a bureaucracy-centred governance model. Both PESA and FRA give powers to communities that allow them to determine their future destiny. What these laws also do is to make the state bureaucracy and for that matter elected, mostly non-tribal, representatives accountable to community institutions. The centre of power will, therefore, shift and allow tribals control their own governance and natural resources that they are dependent upon for their livelihood. PESA and FRA can create a legitimate political space and democratic mechanism where equity, justice and participatory democracy are the core.

Skeptics might argue that these laws commit tribal communities to a life of backwardness and that it will likely most result in degradation, not protection of natural resources. On the contrary, it is the tribal areas which

are still richest in natural resources and where people are waging a battle to protect resources from destruction. Tribal self-governance, in fact, is seen as a space to develop conservation and development solutions that counter projects that destroy natural resources in the name of national development. Unlike the centralized, bureaucracy-driven visions of conservation and development that have for the most part failed, PESA and FRA offer an open system of decision-making, transparency and accountability as no other known system with space to raise and address all concerns. Quite significantly, in March 2010,

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the Ministry of Panchayati Raj recommended adoption of such a system for all areas and peoples. The question is whether such a vision is possible given the priorities of neoliberal growth and the increasing claims to land and resources in tribal areas?

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