

Restructuring and Democratising Governance, Expanding Political Autonomy | (...)

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Restructuring and Democratising Governance, Expanding Political Autonomy | C.R. Bijoy

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Abstract

The historical narrative of governance of peoples and lands in the Indian sub-continent seems to have two distinct trajectories that are yet to meet; the first progressively constricts democracy while the second deepens and expands democracy. In the context of the swing towards electoral autocracy, market hegemony, political chaos, social conflicts and rising aspirations, a critical examination of the latter, in law and practice, could unravel the governance structure that is structurally harmonious in ways that further democratizes governance and expands political autonomy. If adopted appropriately across the country, it could pave the way forward to a more cohesive endogenous growth and peaceful co-existence giving full expression to the socio-ecological diversities that is the sub-continent. This could usher in a complex web of non-centralising democratic structures that could become a countervailing politico-economic offset to the various global and domestic hegemonic tendencies.

Democracy in crisis

Territorially-bound communities with a shared national identity, celebrating their diversity in all its splendour, aspiring for a belonging without a hierarchy of identities and sharing the advantages of commonality is the breath of life that the Constitution gives to India. The abrogation of Article 370 and 35A with implied threat particularly to Article 371A of Nagaland and 371G of Mizoram; the Government of National Capital Territory of Delhi (Amendment) Act, 2021 effectively placing the elected government under the appointed central government nominee, the Lieutenant Governor [1]; centralised finance control through Goods and Services Tax introduced through the Constitution (One Hundred and First Amendment) Act, 2016; the political executive excesses that peripheralizes the Parliament; the overthrow of the elected governments through the deft use of defection and the office of the Governors; and the administrative centralization demoting States into line agencies of central ministries and Departments of the States pushing particular

delivery models supposedly for superior efficiency and the continued subordination of the institutions of democracies at the local, State and national level to the colonial administrative machinery propped up by colonial laws (Bijoy 2022) are definitive features of the present governance.

At the same time, this world's fourth-largest economy is rapidly deregulating the market [2], to enhance "ease of doing business" while giving way to the market much of the public goods and services that governments were in charge of. The rapidly widening economic disparities globally and the corresponding increase in resentment since the inception of neo-liberalism compounded now with the lockdowns to combat the COVID-19 pandemic, have further exasperated the power asymmetry between global corporations and nation states and their multilateral institutions, in favour of the former.

India meanwhile 'lost its status as an electoral democracy' turning into an "electoral autocracy" where 'ruling governments first attack the media and civil society, and polarize societies by disrespecting opponents and spreading false information, only to then undermine formal institutions' (V-Dem Institute 2021:7). Admittedly, liberal democracies have declined globally giving way to the rise of electoral and closed autocracies.

These, along with the shrinking democratic space and the widespread use and misuse of draconian laws (Sheriff 2021), challenge asymmetric federalism and consociational democratic practices that put in place constitutionally asymmetries, centrally administered territories, carved out new states from existing ones or elevated centrally administrative territories to statehood, and formed sub-state autonomous councils, local governing structures of decentralized governance and statutory Gram Sabhas (people's assemblies) at the habitation or hamlet level. These defined tradition, history, ecology and culture in a more inclusive manner. These socio-cultural, ecological and political diversities are being rendered ineffective or severely in conflict, unable to withstand these transitions due to structural incongruencies, inconsistencies and contradictions, amongst others. This portends a period of political turmoil and economic chaos that could, rather than identify and address issues from the perspective of democracy and governance, digress into divisive politics of hatred, demonization and vilification of the imagined "other".

Hence, it is now all the more important to locate and consolidate those governance laws and structures that seem to run fundamentally counter to the hierarchical, centralizing and hegemonising processes. This could effectively construct diverse politico-legal spaces for relatively non-centralised non-hierarchical governance providing a higher degree of political autonomy to take roots that demands cooperation with each other at a fundamental level for existence and progress. This could very well redefine democracy itself beyond the electoral into a vibrant participatory and engaged democracy. This merits traversing the governance history as it has evolved in the country, to identify those legal frames and regimes that potentially promote this counter, and to consolidate and refine them suitably.

Governance History

The governance history of the peoples of the Indian sub-continent traverses broadly two distinct trajectories that are yet to meet and dialogue. One stream is that of the so-called mainstream and the other is of those who fall outside, currently known variously as Adivasis, tribals and indigenous peoples, mostly falling within the legal and administrative category of Scheduled Tribes (STs).

During the reign of the princely states, while the mainstream formed the mainstay of these kingdoms and fiefdoms, the tribal regions remained outside or in the periphery or, a nominal part of the realm if within it. The rule of the monarchs rarely extended to these regions beyond collecting tributes; they were by far left to govern themselves through their customary and traditional governance systems and institutions (Saha 1996).

Consequently, the tribes were not subsumed into the caste order that formed the edifice of the mainstream through which production was organised, social stratification constructed, surplus hived off and political hegemony deployed. Nor were they subjugated like Scheduled Castes, even though excluded from the caste order. In effect, the tribals, in most parts, missed the feudal era – the feudal mode of production, of either enslaving others or getting enslaved, or internalising the feudal ethos; instead they remained in their unique political state of being relatively free peoples governing themselves through diverse forms of non-centralised democracy even though, in a few instances, imitating monarchy in form than in content, without the feudatory relationship within. Colonial incursions into tribal homelands, later treated virtually as an internal colony, for the expropriation of the immense natural wealth for extraction and conservation, turned these areas into conflict zones then and now without any let up.

The mainstream submitted to the might of the colonisers, ingrained as they were, politically and culturally, for generations within an oppressive social structure. Contrarily, the tribal regions, mostly located away in the periphery of the mainstream, dispersed and scattered, predominantly amidst rich natural vegetation, secure and free, fiercely resisted the colonial intrusions since the mid-18th century without any let up (Bijoy et al 2010:16-7). They either fought back or withdrew into the vast hinterland. The colonialists, reckoning with this persistence, formally legitimised their autonomy to govern themselves and their lands by keeping away from governing their territory or limiting their governance role, except when they had very specific commercial interests such as tea, coffee, timber, teak, spices etc.

These arrangements reflected through a variety of legislations resulting in the tribals continuing their existence in a state of relative autonomy and self-governance, neither internalising fully the feudal caste norms and values then and now, nor the colonial values, unlike the mainstream. They continued their trajectory to expand and deepen the domain of autonomy and self-determination into the post-independent era:

The Wilkinson's Rule of 1837 in Chaibasa in the Kolhan, presently the Sadar subdivision of Chaibasa, West Singhbhum and Saraikela areas of Jharkhand, legalised the traditional Manki Munda system "considering the Ho people's undaunted nature" (Ekka 2011:46);

The Inner Line Permit under the Bengal Eastern Frontier Regulation of 1873 [3] that is still law in Arunachal Pradesh, Mizoram, Hill areas of Manipur (extended to the rest of Manipur in 2019) and Nagaland, regulates entry of outsiders, and bars outsiders or residents of other parts of India from acquiring "any interest in land";

The Scheduled District Act of 1874 [4] required extension with or without modification of the laws for them to apply to Scheduled Districts, and thereby provided for the exemption of certain laws;

The Santhal Pargana Tenancy Act of 1876 [5] protected the lands of the Santals and the Chotanagpur Tenancy Act of 1908 [6] the lands of Mundas and Uraons of the old Ranchi district;

The Government of India Act of 1935 [7] introduced provincial autonomy and elected governments, empowered the Governor-General in Council (Sections 91-92) to declare any area as excluded or partially excluded continuing the earlier arrangement whereby the Governor is required to extend the application of the laws in toto or with modifications to the excluded and partially excluded areas which are areas largely inhabited by tribes. This was followed by the Government of India (Excluded and Partially Excluded Areas) Order 1936 [8];

Nagaland constituted under Article 371A [9] and Mizoram under Article 371G [10] provide exclusive power to the State Assembly on matters concerning religious or social practices and customary law and procedure of the concerned communities, administration of civil and criminal justice in areas covered by customary law, and ownership and transfer of land and its resources, prohibiting the application of any central law regarding ownership and transfer of land and its resources unless the State assembly resolves to apply them [11].

The partially excluded areas came to be generally designated as the Fifth Schedule and the excluded as the Sixth Schedule areas in the Constitution of India 1949 under Article 244[12], the former to be notified by the President [13] and the latter to be incorporated into the Sixth Schedule through constitutional amendments. The Governor can prevent, or apply with modification (laws apply unless prevented or modified), any law in the Fifth Schedule [14] areas and make regulations for peace and good government. Autonomous District Councils are constituted in the Sixth Schedule [15] areas with legislative, judicial and executive powers over specific subjects. Ten Autonomous District Councils have been constituted, three in Assam, three in Meghalaya, one in Tripura and three in Mizoram [16]. The Sixth Schedule provides a degree of control by the District or Regional Councils to make laws over land, though not covering areas notified as reserve forests, to allot, occupy or use, or to set apart land for the purposes of agriculture or grazing or for

residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town. However, the government can acquire land for public purposes. But for the most part, land including forests is traditionally community-controlled which has been steadfastly defended.

Militant political demands for autonomy in the north-east and elsewhere led some States to enact laws to create Autonomous Councils patterned on the Sixth Schedule devolving subject matters within the purview of the State to the Councils through State enactments. 14 Autonomous Councils were created, six in Assam, another six in Manipur and two by the erstwhile Jammu & Kashmir State [17].

Mizoram has elected village councils constituted in most parts of the State replacing earlier traditions of hereditary chieftainship. Nagaland through the Nagaland Tribal, Area, Range and Village Council Act of 1966 [18] provides for the creation of a tribal council for each tribe, an Area Council for Kohima and Dimapur, a Range Council where there is a recognized range in the Mokokchung and Kohima Districts and Village Councils for one or more villages in Kohima and Mokokchung. The 16 tribes in Nagaland occupy a distinct territory along with their traditional system of self-rule which is diverse. The villages constitute the Village Councils according to customary practices and the Village Development Boards consisting of all permanent residents for development planning and execution under the provisions of the Nagaland Village and Area Councils Act 1978 [19]. Nagaland Communitization of Public Services and Institutions Act 2002 [20] formally handed over ownership and management of education, health care, water supply, electricity, tourism and bio-diversity conservation to the communities including control over the personnel in phases.

The Provisions of the Panchayat Extension to Scheduled Areas, 1996 (PESA) [21] defined the powers of the Gram Sabha of villages delineated as hamlets or group of hamlets applicable to the scheduled areas that are in ten states. This is the first law in the country that enables the community through direct democracy to exercise substantial governance authority over which the structures at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha™.

The authority of the Gram Sabhas of all habitations accessing forest lands in all States (except Mizoram and Nagaland) and all Union Territories was further elaborated and extended under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA) [22], from determination of the rights of forest dwellers to defining its geographical jurisdiction to protect, conserve, access, use and manage [Sec.3 (1) (i)], and the geographical area beyond [Sec.5 (b) & (c)] to protect. With this, Gram Sabha consent became mandatory for forest diversion for any purpose, demarcation of forest areas to be kept inviolate and voluntary relocation and associated rehabilitation.

There are no land records in Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, Hill areas of Manipur and some tribal tracts of Assam as survey and settlement have been resisted by the people. In Arunachal Pradesh for instance, barring a few pockets of land

under wildlife sanctuaries, reserved forests, most of the land in the entire State is community land. The land in the Hill areas of Manipur is vested with the villagers. Rather than clear legal protection, it is de facto customary law that applies in the legal vacuum on non-applicability of laws such as land laws. The "Inner Line Permits" regulates entry of outsiders in Mizoram, Nagaland, Manipur and Arunachal Pradesh and bars land ownership by outsiders or residents of other parts of India. All of them are relatively better off amongst states when it comes to forest density and human development.

Most States, including the north-east, have special laws that prohibit tribal land alienation and restore illegally alienated lands (Government of India 2009a: 129-31) except for Tamilnadu and Karnataka. Amendments have been made to further weaken the law as in 1991 in Kerala where restoration of certain categories of tribal land was replaced with provision of alternate land. There have been repeated attempts to dilute the Regulation 1/70 of Andhra Pradesh which was successfully resisted through massive protests. Strengthening such laws have been rare; one such is in Maharashtra where the Governor of the State issued notification in 2016 [23] using the Governor's powers under the Fifth Schedule amending the Maharashtra Revenue Code, 1966 preventing the Collector from sanctioning transfer of land from tribal to non-tribal without the previous sanction of the Gram Sabha. The Jharkhand government in 2016 and 2017 tried to amend the Chota Nagpur Tenancy Act 1908 and the Santhal Pargana Tenancy Act of 1876 which prohibits the transfer of tribal lands to non-tribal and restrictions on their use. These restrictions were to be partially removed to open up tribal lands for commercial use which could open up the floodgates for land alienation. This has so far been resisted through mass protests (Jitendra 2016) that were attempted to be violently suppressed. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 makes wrongful occupation or dispossession of land a crime and now includes forest rights recognised under FRA.

Unlike forest lands, there is as yet no overarching law similar to FRA applicable to non-forest revenue lands for Gram Sabhas to determine rights and to protect, conserve and manage land and its resources within its geographical jurisdiction.

The UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples [24] on 13 September 2017. The Declaration recognized the right to self-determination of indigenous peoples. Article 3 of the Declaration states that: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Similarly Article 4 recognises that: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".

In stark contrast, the mainstream, steeped in the feudal and colonial ethos, continued their trajectory of governance laws strengthening the colonial system of administration as they transited into a capitalist economic system now blossomed into market hegemony under neoliberalism.

The 73rd Amendment in 1992 [25] transferred 29 subjects to the Panchayats through the State Panchayat Raj laws. It required the effective transfer of functions based on the principle of subsidiarity, unambiguous control of the Panchayat over the functionaries discharging the functions and financial authorization of the Panchayat commensurate to the functional responsibilities it should discharge. However, contrary to this, the hegemony of the bureaucracy was retained and the local governance structure got subordinated, at best to an appendage [26].

The 74th Amendment in 1992 [27] transferred 18 subjects to the municipalities which, in effect, continued to be retained by the administration (bureaucracy) with the Municipal Council as their extension. Significantly the amendment in Article 243 Q exempted the industrial townships from the municipal laws and municipal elections altogether, handing local governance and municipal services to the unelected industrial establishments of the corporate houses, private monopolies, running local unelected governments.

Further, the Special Economic Zone Act 2005 [28] conferred autonomy on the corporations to run an unelected government (Bijoy 2008: 22-4) subsuming the administration (bureaucracy) under them [29]. State Governments are to declare the SEZs as industrial townships under Article 243 Q of the Constitution with appropriate governing body (Sood 2015: 1-7).

The political path undertaken by the tribals through struggles demonstrably deepens democracy, democratic governance and autonomy while the mainstream straddles a path of truncating democracy in varying degrees. Lessons in democracy are deeply embedded in the governance trajectory that tribal struggles have etched in the domain of law and practice. However, there are large gaps that need to be ironed out (see below), mostly a result of the inability and unwillingness of the governments and the ruling class in the mainstream to comprehend, concede and comply. Moreover, both the mainstream and tribals alike tend to see these as "tribal issues" rather than issues of "democracy and democratization of governance" which these really are.

The diverse tribal experiences ranging from the traditional institutions of democracy to the formal ones, be it at the level of the village, Panchayat, district or the State, the structures that these have created, the extent of harmony and conflicts, and the gaps in the structures are yet to be concretely and comprehensively assessed and addressed so that these can be reconstructed harmoniously, expanded and applied.

The Political Geography and Ecology of Governance

There are 705 STs with a population of 10.43 crores constituting 8.6% of the total population living in 26 of the 28 States and 6 out of 8 Union Territories (2011). Of the 640 districts in the country, STs are a majority of over 50% in 110 districts, 20 to 50% in 87 districts and 10 to 20% in another 74 districts. Of the 5,985 blocks (tehsils/talukas) in the country, STs are a majority of over 50% in 1,063 blocks, 20 to 50% in 700 blocks and 10

to 20% in another 626 blocks. Of the 5,97,483 villages in the country, STs are a majority of over 50% in 1,10,118 villages, 20 to 50% in 45,902 villages and 10 to 20% in another 29,800 villages (Government of India 2013:7).

Of the 640 administrative districts, 123 are listed as Scheduled Areas [30]. Of them, 104 districts have Fifth Schedule areas of which 36 are fully notified and 68 are partially notified. The remaining 19 are in the north-east under the Sixth Schedule of which 15 are fully and 4 partially notified. Approximately 13% of the total geographical area of the country is scheduled area. 11.3% falls in the Fifth Schedule and 1.7% in the Sixth Schedule. About 6.3% of India's population (both tribes and non-tribes) resides in the Scheduled Areas, of which 5.7% live in the Fifth Schedule and 0.6% in the Sixth Schedule areas. Only about 39.4% of the total STs reside in the scheduled areas; 35.2% in the Fifth Schedule and the remaining 4.2% in the Sixth Schedule areas. About 53% of the total population in the Fifth Schedule and about 60% in the Sixth Schedule are Scheduled Tribes (Wahi 2018:25-30). If Nagaland's 0.5% area and 1.64% ST population and 0.02% total population were added, then the total area covered under special provisions for STs would be 13.5% where a total population of 6.32% reside but covering only 41.04% ST population. The three Sixth Schedule areas in Assam with slightly different powers cover six of the 21 district; the whole of Meghalaya except for the municipality and cantonment of Shillong is under the Sixth Schedule; the three Sixth Schedule Areas covers three districts of Mizoram, and in Tripura, about 68% of the State is under the Sixth schedule spread over five hill ranges in four districts.

What remains to be included to these figures are the populations, the STs and others, covered by the 14 Autonomous Councils constituted under State laws in Assam and Manipur and the Union Territory of Ladakh, the rest of Mizoram other than the three Sixth Schedule districts, and in addition to all these, the extent of area that would fall within the jurisdiction of the Gram Sabhas across the country under FRA [31] other than the Fifth and Sixth Schedule Areas, and the states of Nagaland and Meghalaya. This would determine the area and the population, both STs and non-STs that could be termed as having varying degrees of autonomy, at least in law.

The Unfinished Agenda

1. Notification of Scheduled Area

Para 6 (2) of the Fifth Schedule confers absolute discretionary powers on the President to declare or alter any area as Scheduled Area. Neither the Constitution nor any law provides any criteria for identification of such an area. However, following the 1961 Dhebar Commission Report, the criteria for declaring any area as a Scheduled Area under the Fifth Schedule are said to be (a) Preponderance of tribal population, (b) Compactness and reasonable size of the area, (c) A viable administrative entity such as a district, block or taluk, and (d) Economic backwardness of the area as compared to the neighbouring areas [32].

Arbitrary politico-administrative decisions and ambiguities on the unit of the area to be considered, whether a revenue village, panchayat or taluka or district, and whether the STs are to be a numeric majority (over 50% of the total population) abound. Scheduled Area, by policy decisions, is to be coterminous with Tribal Sub-Plan and MADA areas. These are yet to be complied with fully in many States. However, PESA in 1996 defined the unit of governance in the Fifth Schedule area to be the "village" as defined in Sec.4 (b): "a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs".

Since the intent of the Constitution is clearly the protection and welfare of STs, the principle of maximization of the coverage of STs under these provisions would require the listing of all hamlets/habitations in the country where STs are the preponderant social group rather than a numerical majority, and to check whether they are covered under the Fifth or Sixth Schedule areas appropriately, and if not, to take appropriate actions (Bijoy 2023). The Kerala Government interestingly proposed the notification of Scheduled Area in 2015 comprising of 2,133 habitations, 5 Gram Panchayats and 2 wards which are enclaves in 5 different districts. This proposal is still awaiting Union Government approval and Presidential notification [33].

2. Update territorial jurisdiction of the Gram Sabhas

FRA extends the territorial jurisdiction of the Gram Sabhas to include those forest lands, if any, that the village has under Community Forest Resource (CFR) "to protect, regenerate or conserve or manage" [Sec.3(1)(i)], and "to regulate access and stop any activity which adversely affects [Sec.5(d)], and protect 'adjoining catchments area, water sources and other ecological sensitive areas' [Sec.5(b)] and their 'habitat' [Sec. 5(c)] falling outside the CFR areas, if any. Where communities are already de facto and de jure in control as in the north-east, whether FRA is applicable or not, these are to be affirmed. Additionally, the customary common land within the traditional or customary boundaries of the village on non-forest revenue lands are yet to be determined and demarcated on the lines of FRA, and included fully within the geographical jurisdiction of the village. These territorial jurisdictions are not exclusive, but inclusively a web of overlapping jurisdictions amongst Gram Sabhas, communities, clans and tribes as well as overlapping land use and rights which are self-determined.

3. Reconstitution into compact administrative units

The hamlets that are notified as Scheduled Area are to be reconstituted into compact districts such that the districts so constituted shall be fully Scheduled Area, whether Fifth or Sixth Schedule. While the principle of geographical contiguity is considered desirable, it is already established through precedents that contiguity need not be an essential criteria [34].

3. Restructuring and redefining the governance structure

PESA 1996 requires "that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha" [Sec.4 (n)] and that "the State Legislature shall endeavour to follow the pattern of the Sixth Schedule to the Constitution at district levels in the Scheduled areas" [Sec.4 (o)]. None of the 10 Fifth Schedule area States have adhered to these two critical provisions. This, in effect, disables the Gram Sabha to function as per the law. However, despite this, "the traditional Gram Sabha is functional in varying degrees" (Bijoy et al 2013: 21). District level autonomy by inclusion under the Sixth Schedule requires extending the purview of Article 244(2) to the States having Fifth Schedule areas to include the identified districts through constitutional amendments. Alternatively, the States can enact laws within the contours of the subjects that fall within the purview and power of the State, the State list and the concurrent list, to define the powers of the autonomous structures at the district and sub-district level without of course the legislative powers as exist for the Autonomous District Councils in the Sixth Schedule. In fact, 14 sub-state Autonomous Councils are in existence in the States of Assam and Manipur, and the Union Territory of Ladakh. Besides, there are various other State and Autonomous District Council legislations devolving specific powers and functions to the structures below, particularly at the village.

4. Harmonising powers

All the areas that have varying degree of autonomy under the Constitution, the Central and State laws, as mentioned above, experience conflicts and contestations between the structures - the Centre and State, and the structures within the State including traditional institutions, arising out of lack of harmony between the subjects and domains of power of these structures. This is true of Nagaland and Mizoram, the Sixth and Fifth Schedule areas and the sub-state autonomous council areas in varying degrees.

For instance, take the Fifth Schedule that covers more area and population. None of the 10 States have complied fully with the PESA (Kurup 2008:87-126 and Bijoy 2015:16-8) in their amendments to the respective State Panchayat Raj Acts, nor have they amended various subject laws to comply with PESA and FRA. Many crucial Central laws [35] too have not been made harmonious with PESA and FRA. To add to these are the functioning of the unconstitutional institutions due to legal vacuum. The 74th Amendment to the Constitution required the Parliament to enact a separate legislation for the municipal areas in Fifth Schedule areas. Accordingly, the Provisions of the Municipalities (Extension to the Scheduled Areas) Bill was introduced in the Rajya Sabha in 2001, referred to the Parliamentary Standing Committee on Urban and Rural Development who submitted their report in 2003 [36] and last listed for discussion in 2010 but has since fallen on the wayside. This resulted in a legal vacuum in the municipal areas of Fifth Schedule areas; ironically about 181-200 municipalities function unconstitutionally by applying the general municipal laws that are prohibited by the Constitution. Panchayat areas in Fifth Schedule areas are being upgraded to municipal areas taking them out of the purview of the protection under PESA. Both these are contested legally.

Embarking on the trail to reconfigure governance and democracy by consolidating the progressive past to leap frog into the future requires taking forward this legacy forging newer meanings.

Epilogue

Article 40 of the Directive Principles of State Policy states that “the State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.”TM In March 2010, the Ministry of Panchayat Raj, drawing from the Sixth (Government of India 2007) and Seventh (Government of India 2008a) Reports of the Second Administrative Reforms Commission, Report of an Expert Group to Planning Commission on ‘Development Challenges in Extremist Affected Areas’TM (Government of India 2008b), Mungekar Committee Report (Government of India 2009b), Bhuria Committee Report etc drafted three sets of amendments to the Constitution to restructure local governance to combine or fuse the Sixth Schedule and Fifth Schedule and, significantly, applicable to the whole country, and sent them to the States for comments to open up a process for a radical restructuring of governance and democracy. But strikingly, nothing has been heard of this since.

The first was the amendments to Article 243 [37] to make it mandatory for the States to devolve powers to Panchayats and Municipalities (Article 243G and 243W), create elected District Councils (Government of India 2007:30-2) with regard to State subjects [38] listed in Eleventh and Twelfth Schedule modeled on the Sixth Schedule, do away with the artificial urban-rural divide with the District Collector as its Chief Executive Officer accountable to the District Council (Article 243B and 243ZD amongst others), do away with the District Panchayats, add a new Schedule 13 listing the powers and functions of Gram and Ward Sabha (modeled on PESA) and prohibit the state to “make any law which is at variance with the entries in Schedule 13”TM, make the Gram Panchayat accountable to Gram Sabha as in PESA rather than Panchayat Raj Laws, empower the Gram Sabha on the lines of PESA (Article 243 A and other Articles) and repeal the provisions to make Members of Parliament, Members of Legislative Assembly and Members of Legislative Council members of Panchayats amongst other amendments.

The second set of amendments [39] is focused on the north-east, which broadly comprise three typologies, viz. (i) Sixth Schedule frame (Meghalaya, parts of Assam, Mizoram and Tripura), (ii) State legislation frame (Nagaland and non-Council Areas in Mizoram), and (iii) National frame (Arunachal Pradesh, Sikkim, Manipur excluding hill areas and non-Council areas in Assam and Tripura). The primary focus of the amendments was the Sixth Schedule to delineate the village, Gram Sabhas which “shall have all the powers conferred on Gram Sabha as per Schedule 13”TM (see above), Village Councils for a village or a group of villages accountable to the Gram Sabha, Intermediate Councils and Municipalities etc in order to harmonise the traditional-formal interface.

The third is a set of amendments to PESA [40] that clarifies that the “geographical jurisdiction of the village shall be deemed to extend to the physical boundaries that may have been so accepted by communities concerned according to their tradition”TM, Gram Sabhas have precedence and primacy over the Panchayats in terms of decisions and recommendations with Panchayats accountable to the Gram Sabhas, and “recommendations of Gram Sabha shall be binding unless it is decided otherwise by the State Government reasons to be recorded in writing”TM on land acquisition, rehabilitation, minor minerals etc amongst others. The objective was further strengthening the autonomy and authority of the Gram Sabhas within relatively autonomous districts.

(Author: C.R. Bijoy examines natural resource conflicts and governance issues)

NOTES

[1] Open -Statement “ Government of National Capital Territory of Delhi (Amendment) Act, 2021, 9 April 2021, <https://constitutionalconduct.com/2021/04/09/open-statement-government-of-national-capital-territory-of-delhi-amendment-act-2021/>

[2] For instance, on environmental clearances, see James and Nayana (2020); for forest clearance, see Bijoy (2020); for agriculture, see Rao (2021) and for labour, see Sundar and Rahul (2020).

[3] See

<https://www.dimapurpolice.in/Acts%20And%20Rules/Bengal%20Eastern%20Frontier%20Regulation,%201873.pdf>

[4] See

<http://bareactslive.com/JH/JHR062.HTM#:~:text=The%20Scheduled%20Districts%20Act%2C%201874%20Act%20No.%2014,parts%20of%20British%20India%2C%20and%20for%20other%20purposes>

[5] Section 20, the main protective clause in the Act, prohibits any transfer of a raiyatTMs land by sale, gift, mortgage, will, lease or any other contract or agreement, either expressed or implied unless the right to do so has been recorded in the record of rights. See

https://www.indiacode.nic.in/bitstream/123456789/8120/1/santhal_parganas_tenancy_laws_full.pdf

[6] Section 46 of the Act states very clearly that under the raiyati, land belonging to a tribal can only be transferred to another tribal living under the same police station area. Similarly, a raiyati land belonging to a person of the Scheduled Caste or Backward Caste can only be transferred to another person of the Scheduled Caste or Backward Caste respectively within the same district. See <http://www.bareactslive.com/JH/JHR055.HTM>

[7] See https://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf

[8] See <https://api.parliament.uk/historic-hansard/lords/1936/feb/25/government-of-india-excluded-and>

[9] See <https://indiankanoon.org/doc/371998/>

[10] See <https://indiankanoon.org/doc/1184172/>

[11] For instance, both Nagaland and Mizoram assemblies have not resolved to extend the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest

Rights) Act 2006 to these States yet. They recently also passed resolutions opposing the Forest (Conservation) Amendment Act 2023.

[12] See

https://www.constitutionofindia.net/constitution_of_india/the_scheduled_and_tribal_areas/articles/Article%20244

[13] Notified in 10 of the 28 States - Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Rajasthan and Telangana.

[14] See <https://www.mea.gov.in/Images/pdf1/S5.pdf>

[15] See <https://madc.mizoram.gov.in/uploads/files/the-sixth-schedule.pdf>

[16] State wise Autonomous District Councils with the year of formation: (1) Assam: Dima Hasao District Autonomous Council [North Cachar (1951, 1970) for Dimasa, Kuki, Hmar, Zemei and Hrangkhawls]; Karbi Anglong Autonomous Council [Karbi Anglong (1951, 1976) for Karbis, Dimasa, Rengma, Kuki, Garos, Tiwas, Khasis, Hmars, Mizos and Chakmas] and Bodoland Territorial Council [Bodoland (2003) for Bodos, Koch Rajbongshis and smaller tribes]; (2) Meghalaya: Khasi Hills Autonomous District Council [Khasi Hills (1972) for Khasi and smaller tribal groups], Garo Hills Autonomous District Council [Garo Hills (1972, 1979) for Garos and smaller tribal groups] and Jaintia Hills Autonomous District Council [Jaintia Hills (1972) for Pnar, Jaintia and Khasi]; (3) Mizoram: Chakma Autonomous District Council [Chakma (1987) for Chakma], Mara Autonomous District Council [Mara (1987) for Mara] and Lai Autonomous District Council [Lai (1987) for Lai], and (4) Tripura: Tripura Tribal Areas Autonomous District Council [Tripura Tribal Area (1982) for Bhil, Bhutia, Chainel, Chakma, Garo, Holan, Kuki, Lepcha, Lushai, Mog, Munda, Moatia, Orang, Riang, Santal, Tripura and Uchai].

[17] Assam: (1) Rabha Hasing (South Kamrup & Goalpara districts, 1995); (2) Sonowal Kachari (Dibrugarh, Tinsukhia, Dhemaji, Lakhimpur, Sivasagar & Jorha districts, 2005); (3) Mising (Dhemaji, Sonitpur, Lakhimpur, Dibrugarh, Tinsukhia, Sibsagar, Jorhat & Golaghat districts, 1995); (4) Lalung (Tiwa) (Morigaon, Nagaon & Kamrup districts, 1995); (5) Deori (Lakhimpur, Dhemaji, Dibrugarh, Tinsukhia & Sibsagar districts, 2005) and (6) Thengal Kachari (Jorhat, Sibsagar, Dibrugarh & Lakhimpur, 2005).

Manipur: (1) Senapati; (2) Sadar Hills; (3) Ukhrul ; (4) Chandel; (5) Churachandpur and (6) Tamenglong

Ladakh: (1) Ladakh Autonomous Hill Development Council, Leh (1995) and (2) Ladakh Autonomous Hill Development Council, Kargil (2003)

[18] See

https://www.indiacode.nic.in/bitstream/123456789/10572/1/the_nagaland_tribal_area_range_and_village_council_act_1966.pdf

[19] See

https://indiacode.nic.in/bitstream/123456789/11037/1/the_nagaland_village_area_and_area_councils_act_1979.pdf

[20] Three village level services (Elementary Education Institutions, Health Sub-Centers and Village Electricity Management) and one at group of village level (community Health Centers and Primary Health Centers) were brought under the purview of this law in 2002 itself. See

https://indiacode.nic.in/bitstream/123456789/12187/1/the_nagaland_communitisation_of_public_institutions_services_act_2002.pdf

[21] See <https://www.indiacode.nic.in/bitstream/123456789/1973/1/A1996-40.pdf>

[22] See <https://tribal.nic.in/downloads/FRA/FRAActnRulesBook.pdf>

[23] See

<https://cdnbbsr.s3waas.gov.in/s3c8758b517083196f05ac29810b924aca/uploads/2019/11/2019112096.p>

[24] See https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

[25] The 73rd Amendment (see <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-third-amendment-act-1992>) had clear injunctions to exclude the Fifth and Sixth Schedules areas, besides the states of Nagaland, Meghalaya and Mizoram, the hill areas of Manipur and the Gorkha Hill Council Area. The Parliament was to enact a separate law for Fifth Schedule. This opportunity was seized by the tribal organisations who mobilised and got the Parliament to enact PESA in 1996 modeled on their traditional democratic governance at the hamlet level.

[26] The overall all India Panchayat Devolution Index was only 39.92 as assessed in 2013-14. The devolution index measures the functions, finance and functionaries of the PRIs as also accountability in the institutions, and accordingly ranks states. Refer, The Indian Institute of Public Administration and Ministry of Panchayati Raj 2014: 6.

[27] See <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-fourth-amendment-act-1992>

[28] See <http://sezindia.nic.in/upload/uploadfiles/files/SEZAct2005.pdf>

[29] SEZ Sec.34(1):an authority shall be constituted for the SEZ to undertake such measures as it thinks fit for the development, operation, management and maintenance. The Central government can modify or repeal any Central law / any rules or regulations by mere notification in its application to SEZs with the exception of matters relating to trade unions, industrial and labour disputes welfare of labour including conditions of work, provident funds, employers liability, workmen's compensation, invalidity and old age pensions and maternity benefits applicable in any Special Economic Zones (Sec.49). State by law to make available water, uninterrupted electricity and such other services to the SEZ Units and Developer (Rule 5(d)). Powers of Development Commissioner appointed by the State include: infrastructure and public services by agreement with the Developer (s 3(11)); no investigation, search or seizure by anyone without the permission (Sec.22) except in notified offenses notified by the Central government (Sec.21); offence falling within the Zone are to be tried only by the special courts set up in SEZs (Sec.23) provide ID card to regulate all those who enter (Sec.46) .

[30] Scheduled under Fifth and Sixth Schedule. The scheduled areas under Sixth Schedule are also referred to as "Tribal Areas".

[31] As on 30 June 2023, about 7.2 million ha of the minimum potential of around 40 million ha of community forest resources in about 1.79 lakh villages have been titled for transfer to village level democratic institutions amounting to 18% of forest land. For further details, see Bijoy 2021:20-39

[32] See Criteria for declaring Scheduled Area, Ministry of Tribal Affairs, GoI, <https://tribal.nic.in/Clm.aspx>

[33] Principal Secretary, SC/ST Development Department, Government of Kerala.

Declaration of Scheduled Area, Letter to Ministry of Tribal Affairs, Government of India No. 3432/D1/15/SCSTDD dated 07-04-2015.

[34] Such as the Union Territories of Dadra (enclave within Gujarat) and Nagar Haveli (between Maharashtra and Gujarat), Daman (enclave within Gujarat) and Diu (an island off the coast of Gujarat) and Puducherry (also includes MahÃ© within Kerala, Yanam within Andhra Pradesh and Karaikal within Tamilnadu. The Tripura Tribal Areas Autonomous District Council Area has non-Autonomous District Council areas within it (See https://images.firstpost.com/wp-content/uploads/2017/07/TTADC_GOI.jpg).

[35] Such as the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Mines and Minerals (Development and Regulation) Act, 1957, the Indian Forest Act, 1927, the Forest (Conservation) Act, 1980, Compensatory Afforestation Fund Act, 2016 and the Indian Registration Act, 1908, and national policies as the National Water Policy, 2002, National Minerals Policy, 2003, National Forest Policy, 1988, and Wildlife Conservation Strategy, 2002 etc

[36] See

https://www.prsindia.org/uploads/media/1190951016/scr1193221700_Provisions_of_the_Municipalities.pdf

[37] Ministry of Panchayat Raj, Government of India, D.O.No.M-11011/3/2009-P&C (AR) dated 17.03.2010

[38] Constituting District Councils through amendments was also recommended by the Second Administrative Reforms Commission.

[39] Ministry of Panchayat Raj, Government of India, N-11019/108/2006-Pol.I(Vol.II) dated 19.03.2010

[40] Ministry of Panchayat Raj, Government of India, D.O. No. N-11012/3/2010-PESA dated 31.03.2010

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