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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
Madhu Ramnath

**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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Constitutional Provisions, Laws and Tribes

Virginus Xaxa



It is ironical that despite a large number of well meaning constitutional provisions and laws aimed at protecting and safeguarding the welfare and interest of the tribal communities, the process of marginalization of the tribals has gone on unabated. Paradoxically, at the root of such marginalization are the laws themselves

TRIBES IN India have come to be conceptualized primarily in relation to their geographical and social isolation from the larger Indian society and not in relation to the stage of their social formation. This is why a wide range of groups and communities at different levels of the social formation have all come to be categorized as tribes. By virtue of the fact that tribes lived in isolation from the larger Indian society, they enjoyed autonomy of governance over the territory they inhabited. They held control over the land, forest and other resources and governed themselves in terms of their own laws, traditions and customs. It was the advent of colonial rule that brought tribes and non-tribes into one single political and administrative structure by means of war, conquest and annexation. This was followed by introduction of new and uniform civil and criminal laws as well as setting up of administrative structures that were alien to tribal tradition and ethos.

All these developments led to large-scale alienation of land from tribes to non-tribes through such processes and means as fraud, deceit, mortgage, etc. This being the case, the nationalist

leadership showed special concern for tribes in the post-independent India. This is reflected in the provisions enshrined for them in the Constitution. Tribes as citizens of free India were extended civil, political and social rights in equal measure as others. Civil and political rights have been enshrined within the purview of the Fundamental Rights of the Indian Constitution while social rights have been envisaged in the Directive Principles of the Indian Constitution.

Besides the ones stated above, tribes were also extended certain special rights as being members of a distinct community. Such rights, among other things, include provisions for statutory recognition (article 342); proportionate representation in Parliament and state legislatures (articles 330 and 332); restriction on the right of the ordinary citizen to move freely or acquire property in them (article 19(5)); conservation of one's language, dialects and culture, etc (article 29). The Constitution also has a clause that enables the State to make provision for reservation in general (article 14(4)) and in particular, in jobs and appointments in favour

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of tribal communities (article 16(4)). There is also the Directive Principle of the Constitution that requires that the educational and economic interest of the weaker sections of society, including tribes, is especially promoted (Article 46). Besides these, there are provisions in the 5th or 6th schedule of the Constitution (Articles 244 and 244(a) that empower the state to bring the area inhabited by the tribes under special treatment of administration. The provisions in the Constitution range from creation of the scheduled and tribal areas, to providing representation in Parliament and State legislatures including special privileges in

Of all the provisions, protective discrimination has been seen as one of the most important rights given to tribal people. The government evolved specific measures with a view to executing rights conferred on tribal people in the Constitution. It earmarked 7.5 per cent of the jobs in government, semi-government and also educational institutions for people hailing from the scheduled tribe category.

the form of reservation of a certain per centage of posts in government services and seats in educational institutions. In short, the Constitution aimed at safeguarding, protecting and promoting the interest of tribal people.

Of all the provisions, protective discrimination has been seen as one of the most important rights given to tribal people. The government evolved specific measures with a view to executing rights conferred on tribal people in the Constitution. It earmarked 7.5 per cent of the jobs in government, semi-government and also educational institutions

for people hailing from the scheduled tribe category. Protective discrimination in favour of the group is also evident in relaxation granted to candidates from the scheduled tribe category.

Despite these provisions, the result is far from satisfactory, more so in the case of scheduled tribes than scheduled castes. Nevertheless, the inability of the State to fill up the quota is not considered as a violation of the rights enshrined in the Constitution. This is so, because in the first place, necessary measures have been taken in pursuit of the rights enshrined in the Constitution. Secondly, the extensions of reservation to candidates from the category are not automatic. Rather, it is contingent upon certain conditions stipulated in the Constitution itself. Article 335, for example, stipulates that the claims of the scheduled castes and scheduled tribes can be taken into consideration, consistent with maintenance of efficiency of administration in making appointments to services and posts. Thirdly, though such rights have been given to tribes, they can avail of them only as members of the tribal community.

It is an individual's right to secure access to these provisions on equal terms with others. The right is also individual in the sense that the individual is required to take some action to ensure that he gets it. In view of issues such as these, there is an inbuilt difficulty in challenging the negligence or indifference of the state in the court of law. Only specific cases of discrimination or denials can be taken to court, but these could be defended by taking recourse to article 335 of the Constitution. In short, the provision of protective discrimination is not sufficient in itself. To become effective, the provision must be supplemented by what may be called substantive equality i.e. ability, resources and actual opportunity must be created to make the formal equality or in the case of tribes,

even protective discrimination, effective.

This means there was a need for making provisions for economic and social rights for the tribes not only through legislation or constitutional provision but also through effective legal, administrative, infrastructure and financial support. In respect of provisions for which, certain support systems were made available, for example, the provision of protective discrimination. Such arrangements did lead to some results, no matter how inadequate they might have been. However, where such measures were non-existent or largely ineffective, the provisions made in the Constitution have hardly led to any desirable results in favour of tribes.

It is not only that effective social and economic rights were not evolved and extended to tribes, but even rights that they enjoyed, such as rights over land and forest were taken away from them by the colonial state to begin with and later by the post-independent

It is not only that effective social and economic rights were not evolved and extended to tribes, but even rights that they enjoyed, such as rights over land and forest were taken away from them by the colonial state to begin with.

Indian state. It is a well-established fact that tribes live mainly off land and forest. Yet, the process of land alienation that began during British rule has gone on unabated in the post-independence period. This has already been referred to earlier. In order to deal with the problem of land alienation to non-tribals, laws have been enacted in almost all states where there are tribal populations. In some parts, such acts have been in existence since the British period like, Chotanagpur Tenancy Act 1908 and The Santhal Pargana Tenancy Act 1940. The British initiated such measures not

so much out of concern for the tribes but for reasons of administrative and political expediency. These were more in the direction of protection from land alienation of the tribes and restriction of the movement of the non-tribal population into tribal areas.

In the post-independence period, all states with tribal population enacted legislation, not only for prevention of alienation of lands from tribes to non-tribes, but also for its restoration. In some states, acts have even been amended with a view to protecting the interest of non-tribes. The Andhra Pradesh (Selected Areas) Land Transfer Regulation, 1959, was amended in 1970, in an attempt to accommodate the interest of non-tribes. The Kerala Scheduled Tribes (Regulation of Transfer of Land and Restoration of Alienated Land) Act, 1975

In some states, Acts have even been amended with a view to protecting the interest of non-tribes. The Andhra Pradesh (Selected Areas) Land Transfer Regulation, 1959, was amended in 1970, in an attempt to accommodate the interest of non-tribes. The Kerala Scheduled Tribes (Regulation of Transfer of Land and Restoration of Alienated Land) Act, 1975 has even been repealed to give effect to concessions made to non-tribes.

has even been repealed to give effect to concessions made to non-tribes (Verma 1990; Rao 1996; Bijoy 1999). As a result of such acts, tribal land continued to pass from tribes to non-tribes.

To reinforce the constitutional provisions for protection of the tribals, two important laws have been enacted in more recent years. One was the Provisions of the Panchayat (Extension to the

Scheduled Areas), Act, 1996. The act empowers the scheduled tribes to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution through the Gram Sabha. Interestingly, the provisions of the Panchayat Act hardly find its due place in letter and spirit, for example, in provisions on the pattern of the sixth schedule, in the acts enacted by the different states. Further, though no enactment has been made to extend part IX A (The Municipalities) to the scheduled areas, the same is steadily being pushed in all states having scheduled areas. The other act in the direction has been the 'The Scheduled Tribe and Other Traditional Forest Dwellers Act, 2006. The act is aimed at undoing the age old injustice done to tribals by restoring and recognizing their pre-existing rights. The recognition and restoration has been, however passing through rough weather in respect of its implementation.

Under the Constitutional provisions of Directive Principles, the State's major concern for tribes has been their welfare and development. This was to be pursued under a kind of constitutional provision, the letter and spirit of which was the most evident in the five principles (Panch shila), Nehru is credited to have enunciated in a foreword to a book entitled, 'A Philosophy of NEFA' by Verier Elwin. Since then, those principles have been taken as the ethos of tribal development in post-independence India. The principles entailed development along the lines of their own genius, respect of tribals' right in land and forest, training and building up a team of their own people to do the work of administration and development, not over-administering the areas with a multiplicity of schemes, working through, and not in rivalry, to their social and cultural institutions.

Yet the approach adopted

towards tribes was quite to the contrary. This was mainly due to the imperatives of national development. The issue of tribal development could not be pursued outside of the issues of national development. In fact, measures undertaken for bringing about rapid national development were seen as a kind of important mechanism whereby integration of tribal society could be achieved. In fact, the national objective to build up

The issue of tribal development could not be pursued outside of the issues of national development. In fact, measures undertaken for bringing about rapid national development were seen as a kind of important mechanism whereby integration of tribal society could be achieved. In fact, the national objective to build up a productive structure for future growth and resource mobilization was far more important than issues concerning the welfare and interest of the tribes.

a productive structure for future growth and resource mobilization was far more important than issues concerning the welfare and interest of the tribes. So, tribal interest and welfare were invariably sacrificed in the name of national development.

Tribes have been unable to safeguard and promote their language, culture and religion; even though Article 19(5) of the Constitution states that a cultural or linguistic minority has the right to conserve its language and culture. This means that tribes as individuals and groups have right to use their own language, to practise their own religion, to study their own history, culture, tradition, heritage, etc. The state cannot, by law, enforce upon

them any other culture or language. While the state may not have enforced any language or culture on them, neither has it taken any positive steps worth the name towards meeting this provision of the Constitution. Rather, the steps taken are far from being in consonance with the provisions laid down in the Constitution. The posture they have adopted has invariably been in the direction of assimilation into the language and culture of the major community, rather than protection and promotion of the distinct language and culture of the tribes. Schooling extended to tribes, for example, has invariably been made in the language of the dominant regional community of the respective States. The result is that tribes are increasingly losing knowledge of their own language and culture. Indeed the promotion of language and culture has been left to tribals themselves. Yet, because of lack of control over human, organizational and financial resources, the tribes have not been able to take effective measures in this direction. Only where such support has been made available in some form or the other have tribes been able to protect and safeguard their culture. This explains why in western, northern and southern India, there has been much more erosion of the tribal language and culture. In eastern India,

especially the northeast, the scenario is somewhat better. This has been mainly due to the fact that in north-east India, there was a kind of institutionalized arrangement that facilitated such development. This has received a major boost with the creation of tribal states and autonomous districts. This shows that a collective right such as this can be better realized only where tribes see themselves as a nationality or nation, to govern themselves.

It is ironical that despite a large number of well meaning constitutional provisions and laws aimed at protecting and safeguarding the welfare and interest of the tribal communities, the process of marginalization of the tribals has gone on unabated. Paradoxically, at the root of such marginalization are the laws themselves. Tribes had no tradition of reading and writing and had, hence, no tradition of record keeping and dealing with such laws. The court language and practice had been alien to them. In the absence of such tradition, the non-tribes have taken advantage of such laws and have been depriving tribals of their lands through variety of ways and means. The local administration, which is generally manned by the non-

tribals, has been working hand in hand with their ethnic kinsmen to ensure smooth transfer of land from tribes to non-tribes.

Tied up with the above have also been laws that protect tribes and the laws that are meant for general citizenry and human beings. The latter is articulated in terms of citizenship and human rights. Indeed, rights meant for tribes have invariably been pitted against citizenship rights and more importantly human rights. In the process, specific laws meant for a group, even though marginalized, have invariably come to be subjected to general laws. On the same vein are the laws aimed at protecting tribes and those aimed at public interest such as land acquisition act, conservation act, forest act, wildlife sanctuary act, etc. The latter have invariably held sway over the former under the garb of public interest and purpose. Tribal rights have come to be sacrificed to the greater cause of the nation and public interest. In short, those who are in charge of tribal rights are in general insensitive to the constitutional provision and legal entitlements of the tribal communities. □

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