

Adivasis Betrayed: Adivasi Land Rights in Kerala

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Over the past century and more, tribal lands have been bought by non-tribals at throwaway prices. There has been legislation to check this trend and also to restore alienated lands to tribals. But the will to implement these laws on the part of the government has been missing. Kerala has recently passed a bill, purportedly to protect the interests of the tribals, which makes restoration of land to tribals almost impossible.

THE Kerala government has done it again. In another desperate attempt to hoodwink the adivasis (tribals) and of course, the Constitution, 'The Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Bill, 1999' was passed by the Kerala assembly as Bill No 163 on February 23, 1999. This bill also repeals the 'Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975.

Last time around, faced with the angry and resolute adivasis and possible contempt of the high court for not implementing the 1975 Act, the then United Democratic Front (UDF) government attempted to bring an ordinance to amend the act in early 1996. Shiv Shankar, the then governor, refused to approve the ordinance on the plea that it was election time and the election code did not permit this. The Left Democratic Front (LDF) government, on ascending to power, promptly passed another similar ordinance, but failed to get the clearance from Kurshid Alam Khan, the governor of Karnataka who was then also in charge of Kerala. Faced with the deadline of September 30, 1996 set by the high court, the government passed 'The Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Amendment Act, 1996' on September 23. This amendment was aborted by president K R Narayanan when he returned it withholding his assent. Obviously, the Kerala government was not able to convince the centre and the president on the genuineness and legality of the act.

The aborted ordinances as well as the amendment were intended to subvert the very intent of the 1975 act – of restoration of alienated lands back to the adivasis. These also go counter to Section 3(1) IV and V of the SC and ST (Prevention of

Atrocities) Act, 1989 which prescribes punishment between six months and five years imprisonment to those who wrongfully occupy or cultivate any land owned by or allotted to or notified by the government to be allotted to a member of ST or gets the land allotted to him transferred and wrongfully dispossesses a member of ST from his land. (The act also provides for punishment of officials for neglect of duties prescribed under this act.)

They were also violative of Articles 3, 13 and 14 of the ILO Convention 107 which has been ratified by India. These articles relate to protection of properties, respect of customary procedures of transmission of traditional ownership of lands, prevention of non-tribes from securing ownership or use of lands belonging to tribals and provision of more land when they have not the area necessary for providing the essentials of normal existence. They are also violative of Section 2 of ILO Convention 169 on Indigenous and Tribal Populations (which India is yet to ratify) which explicitly recognises the concept of territoriality of the tribals and the relationship it has with their identity, and their right of ownership and possession over lands traditionally occupied. In addition, they are also violative of Part VI of the UN draft Universal Declaration of the Rights of Indigenous Peoples which is being discussed at the level of the UN Commission of Human Rights.

The unanimous position of both the LDF and UDF was that the 1975 Act was unjust to the non-adviasi migrant settlers who had, through deceit and cunning, grabbed the lands of adivasis. A subcommittee constituted by the Kerala state assembly in 1976 visited Wayanad district which has the largest adivasi population in the state. They conducted a rapid survey on land alienation. Of the 298 cases pre-

sented to them, it was found that 71 (24 per cent) were grabbed by force, 67 were grabbed for measly sums while the rest for a small amount. There were 14 cases where signatures were obtained on blank papers without any money being paid, five did not receive the stipulated amount and two had their money taken away. An official ITDP survey of February 15, 1977 reveals that in Attapady of Palakkad district, another major adivasi belt, 10,106.19 acres of adivasi lands were alienated.

As early as 1960, the Dhebar Commission recommended that all tribal land alienated since January 26, 1950 – the day the Constitution came into force – should be returned to the original adivasi owners. A meeting of state ministers on April 1, 1975 passed a resolution: "Legislation for prevention of land alienation should be undertaken immediately. This work should be done within six months. More important is the legislative measures for prevention of land alienation and restoration of alienated land. A crash programme for effectively implementing these laws within two years may be prepared in each state setting targets for each year which should be periodically reviewed."

The 1975 Act was enacted unanimously by the late Achutha Menon government as Act 31 of 1975. It was published in the *Kerala Gazette* extraordinary No 673 on November 11, 1975 after the mandatory assent of the president of India on November 11, 1975. This act was further included in the ninth schedule of the Constitution to ensure that the act itself is not challenged in any court of law. However, the rule operationalising this act was formulated a full decade later in 1986 with retrospective effect from January 1, 1982. After all, the adivasis with a population of about 3.21 lakhs constitute just 1.10 per cent of the total population of the state. Moreover, the settlers dominate the political parties even in the adivasi belts.

Under this act, all transactions of adivasi lands during the period 1960 to 1982 become invalid and are to be restored to the original owners. It is estimated that 8,553 applications for restoration of lands totalling some 10,177 hectares were filed till the last date of receipt of applications. The number has since risen to 8,879. The adivasi beneficiaries have to pay a sum which is the total of the amount received, if any, as consideration for the transaction and the amount spent for improvements on the land before the commencement of the act, as compensation for the restora-

tion of 'their' lands. This amount will be determined by the revenue divisional officer (RDO) of the concerned district. Taking into consideration the incapacity of the adivasis to pay this amount, the act also generously provides for loans to them which are to be paid back in 20 years. The act is silent on the loss incurred by the adivasis whose lands were grabbed by the settlers. Naturally this clause acts as an outright disincentive to the adivasis to apply for restoration. Where compensations are payable, the beneficiaries, if they avail of the loan, would irrevocably be pushed to debt bondage defeating the very purpose of rectifying the past injustice. The government has admitted that, "for example, in the case of revenue divisional office, Ottapalam, compensation has to be paid in as many as 974 cases involving an amount of Rs 317 lakhs, but so far no tribal has even applied for a loan".

The act also stipulates that all transfer of adivasi lands to non-adivasis are restricted from 1982 without the prior consent of the authorities. Despite this restriction, in blatant violation of the act, transfer of lands continued unabated. Despite the 1986 rules operationalising the act, the government made no real attempt to implement the act. The government, unwillingly, had to act when the high court passed an order on October 15, 1993 on a petition filed in 1988 by Nalla Thambi Thera, a non-adivasi resident of Wayanad, directing the government to "dispose of the applications pending before them within six months". It was also the year when the young C K Janu, a brave Adiya woman from Wayanad, declared that they would forcibly occupy lands that were rightfully theirs.

The assurance given by the then additional advocate general that "utmost steps would be taken for the disposal of the applications and that the act would be enforced in all its rigour" recorded by the high court in 1993 was just plain doublespeak. The government appealed for more time again and again. The high court kept extending the time. The RDOs were ordered to file affidavits once a month in the high court showing the progress of the disposal of applications during that month. Left with no other option, the dusty files were retrieved and opened. The RDOs, the authority under the act, had to process over 8,000 applications. The applicants were to prove prior ownership of the lands applied for. The RDOs are empowered under the act to summarily determine the validity of the applications. Naturally, the fact that adivasis, by virtue of their ignorance of the complex laws and procedures,

invariably could not get their land rights recorded, were largely ignored by the RDOs. The non-recording of land rights of adivasis by the corrupt revenue department as well as the rampant manipulation of land records by the influential were historical facts that were best kept under wraps. What remained was just 4,524 valid applications for some paltry 7,640 acres. By administrative sleight of hand, about half the claims were rejected outright. Even this, the government was unwilling to restore.

Ultimately, as most of the applications were disposed of, a number of orders for restoration were issued. Stray and insignificant actual restoration did take place. Instead of standing by the law, the government and the political parties instead encouraged the settlers to resist the implementation of the high court orders. This they did by declaring repeatedly that the act was unjust to the settlers and that the act itself was impractical thus requiring immediate amendment. Encouraged with such political and official patronage and protection, in some places the settlers attacked some upright officials who actually attempted to physically restore the lands as in Attapady and elsewhere.

These incidents were then shown in the high court as evidence of the organised attempt made by the non-tribal occupants in thwarting implementation. The high court asked "Can a democratic state with the rule of law as its beacon light, bow to such illegal resistance to the implementation of a welfare legislation to benefit the oppressed classes? Clearly it cannot." The court ordered that the "state and the district superintendents of police of all districts are directed to afford the needed protection to the RDOs to carry out their duty of restoring possession to the tribals".

The non-availing of loans by adivasis for payment of compensation to the occupant of the adivasi land was another excuse raised by the state. The court turned around and asked why lands in which no compensation is payable and for which appeals are not pending have not been restored. The state had no answer.

The government then claimed that the lands cannot be restored 'overnight'. The court reminded that the act was passed in 1975, the judgment was passed in 1993 and it was then the year 1996. The court asked "Is it 'overnight' according to the deponent? I can assume that he had not fully informed about the fact." The court declared that the government has "no will to implement the legislation".

Left with no other plausible argument and faced with possible contempt of court,

the amendment was passed in the Kerala assembly, once again unanimously, on September 23, 1996, with only Gowriamma (the suspended CPM veteran) abstaining from voting. The secretariat that day saw the angry outburst of the agitation adivasis with C K Janu attempting to forcibly enter the assembly. The CPI(M-L) Red Flag also had launched their agitation in support of the adivasis. The passing of the amendment, which in effect denies the restoration of alienated lands with vague promises of alternate land and cash, only helped in further alienating the adivasis whose frustration and anger rose as at no other time in the state's history. The adivasis instead took the morally and socially just and valid position that their lands be returned to them and the settlers be provided adequate compensation by the state. In this, they were willing to forgo the funds allocated for the welfare of the STs which could be diverted for compensation to the settlers – indeed a magnanimous and civilised gesture of a peace-loving people.

Matters came to a head with the sensational hostage taking by an until then unheard of group calling itself 'Ayyankali Pada'. W R Reddy, the then Palakkad collector, was taken hostage by four youths on October 4, 1996 demanding the withdrawal of the amendment. This nine hour tense drama, the first such incident in the state, ended with the hostage takers being allowed to go free after releasing the collector. This was reason enough for the state to terrorise the adivasis to cow them down. The returning of the amendment by the president who has the special constitutional obligation to protect the adivasis, withholding his assent, once again shifted the drama to the high court.

The popular struggle for land by the adivasis across the state was belittled. The contrived pervert logic to delegitimise their struggle was that the adivasis, ignorant as they are, are instigated by 'outsiders'. Left to themselves, they are very docile and undemanding. Imperialist agents and extremist elements from within the state and outside were pointed out as the culprits. Thankfully, the all-time favourite ISI was spared! The innocent adivasis, it was claimed, are being misled. A civil war between the minuscule adivasis and the majority settlers was conjured up.

The government then put together an act that does not have to wind its way through the Rashtrapathi Bhawan. This can be achieved only if the bill is formulated under one of the state subjects. 'The Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Bill,

1999' was enacted on February 23, 1999 to once again deny the restoration of adivasi lands. All in a state which had the courage and political determination, not so long ago, to implement the Land Reforms Act of 1963, unlike the other states barring, to some extent, West Bengal.

As per this 1999 Act, only land in excess of 2 hectares will be restored, while alternate land would be given elsewhere in lieu of alienated land up to 2 hectares. The number of applicants claiming land in excess of 2 hectares would be negligible, largely negating the very title of the act itself, making a farce of 'restoration'. This is applicable to lands alienated between January 1, 1960 and January 24, 1986. The 1975 Act prohibits land transactions since 1982, but the 1996 act exempts lands alienated between 1982-86 up to 2 hectares. The eagerness of the government to placate the land grabbers is naked.

The 1999 Act also, in addition, has brought into its ambit the provision to provide land of up to 40 acres (or 10 hectares) to the landless adivasis in the district they reside in, within a period of two years. The government estimates that there are about 11,000 such families. In essence, by bringing in a new set of beneficiaries, the government hopes to divide the adivasis between the beneficiaries of the 1975 Act and the new set of beneficiaries to further complicate the matter. It must not be forgotten that there is yet another piece of legislation titled 'The Kerala Private Forest (Vesting and Assignment) Act, 1972' under which some 23,000 hectares were to be given to landless adivasis. This too remains on paper despite the committee constituted under the act specifying the exact lands to be given to landless adivasis. The Forest Conservation Act, 1980 is blamed for not providing the land to adivasis in this instance, as forest land should not be alienated for non-forestry purposes under this act. What is conveniently glossed over is that forest lands can be alienated with the prior permission of the ministry of environment and forest and the proposals to alienate lands prior to 1980, when the Forest Conservation Act came into effect, would be favourably considered by the centre. Once again this points out the lack of will of the government, seriously bringing into question the very intention to now provide land to the landless adivasis under the 1999 Act.

To make the 1999 Act further attractive, the act also creates a fund called 'The STs Rehabilitation and Welfare Fund'. This is to provide funds for the adivasis as loan to be paid as compensation to the settlers

wherever necessary as well as for construction of houses and other welfare measures.

By enacting the law under 'agricultural lands' which is a state subject, the government need not refer the 1999 Act to the president of India. The repeal of the 1975 Act, which is included in the ninth schedule, by this act is also questionable. Moreover, rules and regulations have to be framed to operationalise this new act which, from past experience, is going to take another long wait. Even if all these are carried out, there is the question whether the government would finally implement even this new act, as it clearly lacks the will which was also pointed out by the high court earlier. Meanwhile, the legality of this new act will also be questioned.

All these pretensions would mean that restoration of alienated lands, or alternate lands as the case may be, would continue to remain in the statute book and the courts while the crisis of survival intensifies. Kerala has by far the highest incidence of land alienation by adivasis amongst states in the country. Fear of ethnocide are voiced on account of hunger deaths, deaths due to malnutrition and diseases. The incidence of mental illness is also high. The phenomenon of the huge and rising number of 'unwed mothers' amongst adivasi women in these belts forcing the government to launch DNA testing to identify the fathers, points to the horror that these communities face as their mainstay – their home lands – are invaded by others backed by the state apparatus.

Unlike others, adivasis have a special relationship and dependence on land which gives them the notion of territoriality. Their existence as communities is possible only if their inalienable right to their territories is acknowledged. This is increasingly being acknowledged in international law and the UN which has even drafted a 'Universal Declaration of the Rights of Indigenous Peoples'.

The KST Act, 1975 is part of a history of similar legislation elsewhere in the country, both during the pre-independence as well as the post-independence period. As early as 1879 the Bombay Province Land Revenue Code also prohibited transfer of land from a tribal to a non-tribal without the permission of the district collector. In 1901, in Gujarat, some measures of protection were provided (when it formed part of the Bombay Province) by amendment of Section 73-A and 79-A in the Bombay Land Revenue Code, 1879 and a ban on transfer of land of tribes in those scheduled villages in which survey and settlement had not been

introduced, without prior permission of the collector. In Bihar, the Chhotanagpur Tenancy Act, 1908 prohibited transfer of lands by sale, etc, except with the sanction of the deputy commissioner. In Karnataka, the Bombay Tenancy and Agricultural Lands Act, 1948 was made applicable in Bombay region of Karnataka. The Mysore Land Revenue (Amendment) Rules, 1960 were suitably amended and the Karnataka SCs and STs (Prohibition of Certain Lands) Act, 1978 imposed restriction on alienation of lands allotted to SCs and STs without the permission of the government. The Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and the Bihar Scheduled Areas Regulations, 1969 also prohibit the alienation of land of the tribals. These regulations also provide for restoration of alienated land to the tribals or when converted for urban use, to give them equivalent lands. The Rajasthan Tenancy Act, 1955 as amended in 1956 prohibits such transfer of lands. In Madhya Pradesh, the MPLP Code, 1959 under Section 165(6) and 168(1) prohibits alienation of land and remedy of restoration is provided. The Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959 and amendment of 1970 (Regulation 1/70) provides for restoration and restriction. Similarly, the Orissa Scheduled Areas (Transfer of Immovable Property) Regulation and also Orissa Land Reforms Act, 1960 were made for the same purpose. In Tripura, the Tripura Land Revenue and Land Reforms Act, 1960 imposes similar restrictions. In Assam, the Assam Land and Revenue Regulation Act, 1964 was enacted. In Himachal Pradesh, the HP Transfer of Land (Regulation) Act, 1968 was made. In Manipur, the Manipur Land Reforms and Land Revenue Act, 1970 was made. The Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 and the Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974 (and second amendment in 1976) also prohibit alienation and ensure restoration of alienated lands to the tribes. In Sikkim, which became an Indian state only in 1974, the Sikkim Revenue Order, 1977 and the Sikkim Agricultural Land Ceiling and Reforms Act, 1977 was enforced.

A number of these legislations, as the Chhotanagpur Tenancy Act, 1908, the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1940, the Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974 (and second amendment in 1976), the Himachal Pradesh Transfer of Land (Regulation) Act, 1968, the Karnataka SCs and STs (prohibition of

Certain Lands) Act, 1978 and the Andhra Pradesh Scheduled Areas Lands Transfer Regulation, 1959 and its amendment of 1970, were included in the Ninth Schedule of the Constitution to prevent them being challenged in any court of law. Similarly, the KST Act, 1975 was also inserted in the Ninth Schedule.

The KST Act, 1975 also flowed directly from Clause (1) of Article 244 in Part X of the Constitution titled 'The Scheduled Areas and Tribal Areas'. The provisions under Schedule V of this clause is not only applicable to the administration and control of areas notified by the president of India as 'scheduled areas' but also to those notified as 'scheduled tribes in any state'.

CONSTITUTIONAL OBLIGATIONS

The KST Act, 1975 and other similar acts mentioned above are the direct result of constitutional obligations. The Constitution demands that legislative or executive measures for the reconstruction of the unequal social order by corrective and distributive justice through the rule of law. The fundamental rights and the directive principles are the means to achieve the above object of democratic socialism. The word 'socialist' used in the Preamble must be read from the goals in Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate articles. We must seek to reduce inequalities in income and status and to provide equality of opportunity and facilities. Pragmatic, broad and wide interpretation of the Constitution makes social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to 'we, the people of India' who include the STs. All state actions should be to reach the goal of establishing a socialist, secular, democratic republic under the rule of the law.

Article 46 mandates the states to promote, with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the SCs and STs, and protect them from injustice and all forms of exploitation. This article embodies the concept of 'distributive justice' which connotes the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society. It means that those who have been deprived of their properties by unconscionable bargaining should be restored to their property. By taking recourse to this article, the law invalidating transfers of land belonging to a member of STs and restoration of such land to the original owner was held constitutionally valid. Similarly, when Article 39(b) of the

Constitution enjoins upon the state to frame its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to serve the common good, what it connotes is a duty of the state for building a welfare state and an egalitarian social order. The object is that the basic needs of the common man must be fulfilled and that the state should endeavour to change the structure of the society. There cannot be any dispute that the neglected tribals do not get equal opportunity with their counterparts in other developed parts of the state and the state should be empowered to make laws for protection of tribals from being exploited by the non-tribals. The state should take all effective steps to eradicate inequalities. This is also to make socio-economic justice, assured in the Preamble and Articles 38, 39 and 46, a reality to the tribals.

Moreover, the legislative power of the state under Article 245 is subject to Schedule V. In other words, as the scheduled tribes come under the purview of Schedule V, it is constitutionally obligatory on the part of the state government that the state legislation does not violate the objects of Schedule V and that state legislation is required to be enacted to fulfil the objects of the Schedule V. The KST Act, 1975 therefore is in partial fulfilment of the requirements of Schedule V as applicable to the STs of Kerala.

The constitutional scheme embodied in Article 15(4) and Article 46 as well as the power conferred upon the governor of the state under Schedule V are intended to preserve and protect the interests of the tribals. Considering the past experience and the exploitation of the tribals' ignorance by the non-tribals, it became imperative by statutory safeguards to preserve the land which is their natural endowment and mainstay for their economic empowerment. The Schedules V and VI constitute an integral scheme of the Constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment, to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person. The predominant object of para 5(2) of Schedule V of the Constitution is to impose total prohibition of transfer of immovable property to any person other than to a tribe, for peace and proven good management of a tribal area and to protect possession, right, title and interests of the STs held in the land at one time by the tribals.

In addition to the applicability of Sched-

ule V to the STs, through the formation of scheduled area, the object is also to preserve tribal autonomy, their culture and economic empowerment to ensure social, economic and political justice for the preservation of peace and good government in the scheduled area. The notification of certain tribal dominated areas as 'scheduled area' by presidential order enables the governor of the respective state to hold and use immense power to ensure peace and good governance. Scheduled areas have been notified in the states of Himachal Pradesh, Bihar, Orissa, Andhra Pradesh, Madhya Pradesh, Maharashtra, Rajasthan and Gujarat. However, the tribal areas of Kerala as also in the states of Tamil Nadu, Karnataka and West Bengal are yet to be scheduled despite increasing demands for the same. The flourishing plantation economy that was established during British times by British companies and by Indian big business in these areas seems to be the obvious reason for the denial of the scheduled area provision for the adivasi areas in these states. Scheduling tribal areas would in effect have prevented or possibly slowed down the ruthless expansion of these private estates infamous for their lend grab. Nevertheless, under Schedule V, the government of Kerala is obliged to enact such legislations as the KST Act, 1975 even when a scheduled area is not notified.

It is settled in law that the transfer of immovable property between a member of the ST and a non-ST member in the scheduled area in states where protective land legislation exists is null and void. The non-tribal transferee acquires no right, title and interest in that behalf in furtherance of such sale. The Supreme Court in *Machegowda vs state of Karnataka* (<1984>3 SCC 301) had declared such sales to be voidable. In *Lingappa Pochanna Appelwar vs state of Maharashtra* (<1985>1 SCC 479), the Supreme Court upheld the constitutionality of similar provisions of the Maharashtra Restoration of Lands to STs Act, 1974. In *Rami Reddy vs state of Andhra Pradesh* (<1988>3 SCC 433:1988 Supp (1) SCR 443) the Supreme Court upheld the constitutional validity of the aims of the regulation to restore the lands to the tribals which originally belonged to them but passed into the hands of non-tribals. It would be unjust, unfair and highly unreasonable, merely to freeze the situation, instead of reversing the injustice and restoring the status quo ante.

Though the restoration causes hardships to the non-tribals, it equally alleviates hardships of the tribals. The non-tribals could reasonably be expected to disclose

their titles to the properties. The tribals, due to handicaps and ignorance of modern law, are unable to prove their right to the land. The burden to prove the title to the land therefore is shifted to the non-tribals. The revenue minister is solely, legally and morally responsible for actions and inaction, duties performed and policy laid down. Therefore, he is indictable for his conduct.

HISTORICAL OVERVIEW

Before the colonisation of the country by the British, the adivasis were self-governing 'first nations'. Though some of the adivasi regions were part of various kingdoms, the rule of the realm was notional and did not extend to these regions which had their own chiefs and politico-administrative system. The adivasis always resisted any imposition of any alien rule. The British colonial rule systematically attacked the self-sufficient and self-governing autonomous adivasi societies by bringing adivasi homelands under their control legitimised by legislations as the forest laws. The persistent revolts, the inability to bring the adivasis under actual subjugation and control, inhospitable terrain, lack of established economic interest and immediate economic potential compelled the British to enact special legislations that made autonomous governance possible in those areas and also bought peace.

The stated aim of government policy was to protect the tribals from the twin dangers of land alienation and indebtedness. At first individual laws were enacted, applicable to particular areas with simple and elastic judicial and administrative procedures. The Scheduled Districts Act, 1874 appears to be the first measure adopted to deal with these areas as a class. The 'scheduled districts' defined in the 1874 Act were treated as excluded and partially excluded areas. The administration was exclusively vested in the governor of the province with the powers to exclude these areas from the normal operation of ordinary law and give them such protection as they may need.

The Montague and Chelmsford Report, 1918 contained a brief reference to these areas suggesting that the political reforms contemplated for the rest of India could not apply to these backward areas where the people were primitive and 'there was no material on which to found political institutions' and excluded them from the jurisdiction of the reformed provincial governments. The administration was entrusted to the governors of the provinces.

The government of India Act, 1919 divided the area into two categories – 'wholly excluded and partially excluded areas from the scope of reform'. In the former only the centre, and in the latter, the governor and the governor general-in-council jointly had the responsibility. The Simon Commission Report in 1930 indicated that these tribal areas covered 1,20,000 sq miles with a population of about 11 million located mostly in Bihar, Orissa, Andhra Pradesh, Madhya Pradesh, Bengal and Assam. The report is worth extracting here: "There were two dangers to which subjection to normal laws would have specially exposed these peoples, and both arose out of the fact that they were primitive people, simple, unsophisticated and frequently improvident. There was a risk of their agricultural land passing to the more civilised section of the population, and the occupation of the tribals was, for the most part, agricultural and, secondly, they were likely to get into the 'wiles of the moneylenders'. The primary aim of the government policy then was to protect them from these two dangers and preserve their tribal customs and this was achieved by prescribing special procedures applicable to these backward areas". The report felt that these backward tracts was a deficit area and no provincial legislature was likely to possess either the will or the means to devote special attention to its particular requirements. Hence, it recommended that responsibility should be entrusted to the centre through the governors. But this centralisation was not carried out in the Government of India Act, 1935 which dealt with excluded (about 18,600 sq miles in Assam) and partially excluded areas (10,000 sq miles in the rest of India) as per the 1936 order issued under Section 91 of the Government of India Act, 1935.

The Government of India (Adoption of Indian Laws) Order, 1937 repealed the 1874 Act and brought excluded and partially excluded areas directly under the governance of the governor of the province in the Government of India Act, 1935. The Cabinet Mission's statement of May 16, 1946 mentioned excluded, partially excluded and tribal areas as requiring the special attention of the constituent assembly. The advisory committee on fundamental rights and minorities set up by the constituent assembly at its meeting on February 27, 1947 set up 3 subcommittees – one to consider the tribal, excluded and partially excluded areas in Assam, one to consider the tribal areas of North-Western Frontier Province and Baluchistan and the third to consider the position of excluded

and partially excluded areas in provinces other than Assam. This third Committee submitted its interim report on August 18, 1947 and final report in September of the same year.

The joint meeting of the first and third committees in August 1947 summed up the problems though colonial and paternalistic in their approach, thus: "The areas inhabited by the tribes, whether in Assam or elsewhere, are difficult of access, highly malarial and infested also in some cases by other diseases like yaws and venereal disease and lacking in such civilising facilities as roads, schools, dispensaries and water supply. The tribes themselves are, for the most part, extremely simple people who can be and are exploited with ease by the plainsfolk, resulting in the passage of land formerly cultivated by them to moneylenders and the erstwhile non-agriculturists. While a good number of superstitions and even harmful practices are prevalent among them, the tribes have their own customs and way of life with institutions like tribal and village panchayats and councils which are very effective in smoothing village administration. The sudden disruption of the tribal customs and ways by exposure to the impact of a more complicated and sophisticated manner of life is capable of doing great harm. Considering past experience and strong temptation to take advantage of the tribals' simplicity and weaknesses, it is essential to provide statutory safeguards for the protection of the land which is the mainstay of the aboriginals economic life and for his customs and institutions which, apart from being his own, contain elements of value."

The subcommittee also found that the administrative distinction should be maintained to protect them from being reduced to a state of virtual serfdom and that the areas predominantly inhabited by tribal people should be known as 'scheduled areas' (the intention being that these areas should figure in a schedule to a notification) and special administrative arrangements made in regard to them. At the same time, the responsibility for the betterment and welfare should be with the provincial government (the state), the ultimate responsibility should be with the centre. With regard to land, the report of the subcommittee said: "The importance of protection for the lands of the tribals had been emphasised earlier. All tenancy legislation which has been passed hitherto with a view to protecting the aboriginal has tended to prohibit the alienation of tribals land to non-tribals. Alienation of any kind, even to other tribals, may have to be

prohibited or severely restricted according to the different stages of advancement. We find however, that provincial governments are generally alive to this question and that protective laws exist. We assume that these will continue to apply and as we have made *special provision to see that land laws are not altered to the disadvantage of the tribals in future*, we do not consider additional restriction necessary (emphasis added). As regards the allotment of new land for cultivation or residence, however, we are of the view that the interests of the tribals need to be safeguarded in view of the increasing pressure on land everywhere. We have provided accordingly that the allotment of vacant land belonging to the state in scheduled areas should be made except in accordance with special regulations made by the government on the advice of the Tribal Advisory Council.”

The recommendations of the two sub-committees were not considered by the constituent assembly in its session in July 1947, when the broad principles of the constitution were settled since, as explained by Ambedkar, they were received too late. The drafting committee however, considered these proposals at the stage of drafting and suitable provisions were included in the draft constitution of February 1948 in which it was indicated that the transfer of land in scheduled area from tribal to non-tribals was forbidden and the state government was also prohibited from allotting the state lands in the scheduled area except in accordance with the rules which may be made by the governor after consulting the Tribal Advisory Council.

The Tribal Advisory Council (TAC), of which three-fourths were to be the elected representatives of the STs in the legislative assembly, was a body recommended to advise, both the provincial (state) government and the governor, on the needs of tribals of that province in regard to the laws affecting social matters, occupation of land including tenancy laws and setting apart of land for village purposes and village management, including the establishment of village panchayats. It was obligatory for the governor to act on the advice of the Tribal Advisory Council with regard to the applicability of laws.

The joint report on partially excluded areas other than in Assam and North-East Frontier of August 25, 1947 stated that: “we are of the view that the interests of the tribals need to be safeguarded in view of increasing pressure on land everywhere. We have proceeded accordingly that the allocation of vacant land belonging to the state in scheduled area should not be made

except in accordance with special regulation made by the government on the advice of the Tribal Advisory Council.” It would therefore be seen that before the draft constitution became paramount law and Schedule V as its integral part, the members of the constituent assembly deliberated to protect land, the precious asset to the tribals, for their economic empowerment, economic justice, social status and dignity of their person by retention of the land with the tribals, not only belonging to them but *also allotment of government land* (emphasis added). The proposal of allotment of government land to the non-tribals, though was initially proposed, but was ultimately dropped.

After restructuring Schedule V, as presently found, the specific provision in the draft report to allot land to non-tribals was omitted which was accepted by the members of the constituent assembly without any demur or discussion. It would therefore be clear from the debates in the constituent assembly that various drafts were placed before it. Suggestions, and ultimate approval of Schedule V, would manifest the decision of the founding fathers that land in the scheduled areas covered by the Schedule V requires to be preserved by prohibiting transfers between tribals and non-tribals and providing for allotment of land to members of STs in such area. The important provision to be noticed in the draft Schedule V prepared by the drafting committee is that a total ban was placed on the transfer of lands by a member of ST to a non-tribal and that no government land in a scheduled area could be allotted to a non-tribal except in accordance with the rules made by the government after consulting the TAC in respect of states of Madras, Bombay, West Bengal, Bihar, the Central Provinces, Berar and Orissa.

In October 1948 the drafting committee recasted the provisions in the draft. Before Schedule V was adopted by the constituent assembly, there were debates on every clause. For example, Brijeeeshwar Prasad suggested, “I want, sir, that no land in the scheduled areas belonging to adivasi should be allowed to be sold or mortgaged even to tribal without the permission of the deputy commissioner. I am not in favour of dispossessing those non-tribals who have got lands or property in the scheduled areas, but no further lands should be given to non-tribals.” Jadubans Sahay forcefully argued that “lands should not be settled to anyone except the tribal people”.

In the constituent assembly, when draft Schedule V was considered, the members

were conscious of the fact that the special privileges and special status enjoyed by the tribals should not be disturbed by allowing non-tribals to enter into that area. Chapter VI, Part X of the Constitution deals with ‘Scheduled Tribes and Tribal Areas’. Article 244 provides that the provisions of Schedule V shall apply to the administration and control of scheduled areas and scheduled tribes in any state other than the states of Assam, Meghalaya, Tripura and Mizoram. Special duty has been entrusted to the governor of each state having scheduled area to report to the president on the administration of scheduled area. The governor of each state having scheduled areas shall give directions to the state as to the administration of the said area. Para 5 (2) provides that the governor may make regulations for the peace and good government of scheduled area under Clause (a) to prohibit or restrict the transfer of land by or among members of the STs and under clause (b) to regulate the allotment of land to members of STs in such area.

In the Constitution, the expression ‘scheduled area’ has been defined to mean such area as the president may by order declare to be scheduled areas. Clause (2) of para 6 provides that the president may at any time (a) direct that the whole or any specified part of the scheduled area shall cease to be a scheduled area or a part of such an area; (b) increase the area of any scheduled area in a state, after consultation with the governor of that state; (c) alter, but only by way of rectification of boundaries in any scheduled area; (d) on any alteration of the boundaries of the state or on admission into a union or the establishment of a new state, declare any territory not previously included in any state to be or to form part of a scheduled area; and (e) rescind, in relation to any state or states, any order or orders made and in consultation with the governor of the states concerned, make fresh orders refining the areas which are to be scheduled areas.

The president of India issued the Scheduled Areas (Part ‘A’ States) Order, 1950 declaring specified areas to be scheduled areas within the states specified in Part ‘A’ of the First Schedule (The States and Union Territories) to the Constitution of India. Subsequently, the president issued the Scheduled Areas (Part B States) Order, 1950, the Scheduled Areas (Himachal Pradesh) Order, 1975 and the Scheduled Areas (States of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977.

The above legislative history indicates that from the 19th century, scheduled areas

inhabited by the tribals have been exclusively under the control of the central government through the governor of the state by providing special statutory measures. It is obvious that from the earliest time till the making of the Constitution, it was all along felt that the transfer of land in the scheduled areas by a tribal to a non-tribal be totally prohibited and if such a transfer was made, it was to be treated as null and void. Government land in the scheduled areas could also not be allotted to them but only under the regulations made by the governor. The basic concept was that the land of the STs should be protected and should neither be frittered away by transfer nor any non-tribal be allowed to infiltrate into the scheduled area by getting allotment of land made in his favour. In case of transfer of land which was void, the power to restore land to a tribal or his heirs after evicting the non-tribal was also vested in the government.

Article 40 of the Constitution states that the state shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-governance. After a long wait of 42 years the Constitution was amended through the 73rd and 74th Amendments regarding panchayats and municipalities respectively. These amendments had the clear injunctions to exclude the Schedules V and VI areas besides the states of Nagaland, Meghalaya and Mizoram, the hill areas of Manipur and the Gorkha Hill Council Area, for which the parliament was to make separate enactments. In 1994, the government appointed a 22 member committee to recommend guidelines for the law to extend the panchayat raj to Schedule V areas. The committee submitted their report in 1995. Finally, after a long delay, the Provisions of the Panchayats (Extension to the Scheduled Areas) Bill, 1996 was enacted becoming law on December 24, 1996.

Section 4(d) of this act provides that "notwithstanding anything contained under Part IX of the Constitution, every gram sabha shall be competent to safeguard and preserve...community resources" and under Clause m (iii), the power to prevent alienation of land in the scheduled areas and to take appropriate action to restore any unlawful alienation of land of a member of ST. This provision makes a significant departure in that the power regarding prevention of alienation of lands and restoration of illegally alienated lands is vested in the gram sabha.

From the Kerala experience, it is clear that the rights of STs enshrined in the Constitution have been consistently violated by the coalition governments that have ruled the state, despite specific acts as the KST Act of 1975, by avoiding their implementation under one pretext or another. It must also be clear that any amendments to existing legislations or newer legislations will also not mean anything as there is the lack of will by governments to implement them. Besides, the short-term and vested interests that embedded in the body politic and the parliamentary political system, will not permit the protection of the STs, who constitute just about 1 per cent of the population of the state. The tribal areas provide immense natural wealth and fertile lands for cash crops and plantations. Some of these areas, once an adivasi majority area, have now been reduced to an adivasi minority area: for example in Attapadi, where the 63 per cent adivasis in 1961 have been reduced to just 30 per cent in 1991 by the state induced and supported trans-migration policies. The absence of the militant naxalite movement as in the seventies also means that these adivasi areas are no longer politically 'dangerous' requiring appeasement of the adivasis. Only the desperate but spirited struggles by the adivasis organised at a local level and of course, also the 'sympathy' of vast non-tribal sections of the population hold out hope.

The lessons from Kerala are that: (1) The present arrangement for protection of the interests of adivasis in the state has clearly failed in carrying out its responsibility meaningfully; (2) nor does the present arrangement in the state have the inherent capacity to carry out its constitutional obligations; (3) the judicial response is inadequate; and (4) paternalism and sympathy for the plight of adivasis, including their land problem, pretended or genuine, are insufficient by themselves to provide the necessary impetus or the will to implement the acts that protect the adivasis.

It thereby means that constitutionally the current arrangement in Kerala has failed. And the only other constitutional arrangement that is available is the arrangement of declaring adivasi majority areas as 'Scheduled Area' under Schedule V. The provisions for the Panchayat Raj (Extension to Scheduled Areas) Act, 1996 then becomes automatically applicable to the area which also provides for the incorporation of Schedule VI in it. Adivasi

majority areas (beginning with the level of hamlets) can be declared as 'Scheduled Area' by the president with the state government and the governor being politically forced to accept this demand. Besides, the Bhuria Committee set up by the central government, which made recommendations for provisions for the extension of panchayat raj, states in 7(2): "The process of scheduling was commenced in the fifties and was resumed in the seventies as a part of making the tribal sub-plan and scheduled areas co-terminus. But somehow it has remained incomplete. It is necessary that the remaining tribal sub-plan and MADA areas as well as similar pockets in West Bengal, Tamil Nadu, Kerala and Karnataka should be covered by scheduled areas notification." And in 21(3) it says: "Many of the present-day administrative boundaries were determined during colonial times based on colonial compulsions... By and large, the earlier boundaries have stayed, with the resulting situation that tribal people are located, be it state, district or block, marginalising them in every way and fragmenting larger communities and areas. states should consider, say within a period of two years, reorganisation of the boundaries based on ethnic, demographic and geographic considerations."

In this new scheme of the Constitution, the onus of implementing the restriction on transfer of lands and restoration of illegally alienated lands is shifted from the state/district bureaucracy to the gram sabhas and structures above it which are subject to the local needs, realities, compulsions and sense of justice. Constitutionally, therefore, the adivasis of Kerala have not much use of legislations as the 1975 Act or the 1999 Act that pretend to rectify some part of the injustice historically perpetrated on them without the aid of the 'Scheduled Area' provisions to go by. This remains the only constitutional option available for ensuring that the legislations serve the interests of adivasis and that they are implemented for ensuring the very survival of adivasis as communities in the future. This, of course, has to be politically forced.

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