Adivasis: A Longterm Policy Perspective

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DISCLAIMER

All the articles in this volume have been re-typed from manuscripts made available to SADED by the late Prof. B.K. Roy Burman.Some editorial corrections were made without violating the original text. Before this work was completed Prof B K Roy Burman was no more. Any oversight or typographical errors are sincerely regretted.

The articles in this volume hope to offer insights on subjects discussed and any legal or other professional guidance.

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Decolonizing Governance

Savyasaachi

This collection of articles by B K Roy Burman is concerned with the question-are the structures of governance by law and policy adequate and appropriate to address issues that affect the lives of people? It is argued that this requires making explicit the 'indeterminate' of governance namely, the underlying categories, terms of reference and theoretical assumptions.

This necessary political exercise is a significant contribution to the debates and practices for the decolonization of governance. Decolonization it is argued in these articles is concerned with not being fixated to the State and its institutions of governance, for in a democratic society the notion of political is at all times accessible, to everyone in a diversity historical situations.

In these articles B K Roy Burman exposes an indeterminate namely, the idea of 'below' that informs governance of the marginalized people. He argues that there can be no 'below' without an 'above', the below only exists in relation to the above. It legitimizes a hierarchical structure. The theoretical perspectives, concepts and categories that are generated with this notion don't engage with society and culture of people.

For social justice therefore it necessary that the 'above and the below' be done away with!

He argues that this indeterminate has driven the tribal people to political extremism. The tribal people are viewed as positioned 'below' by both the State and Maoists. This in fact leaves no time and place to engage with tribal society and culture. Both view land as physical resource, development as use of land resources. This excludes the most important relation between land and culture in the lives of people.

This is the basis of the State view that the Maoist challenge be met with development and police action. This combination of

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development and police action, in fact legitimizes the political will to not let the structure of 'above and below' dissolve. Further, the political confrontation articulated here between the State and the Maoists is also an expression of a political will 'to not make explicit' the trauma and cultural predicament of the people when their land is taken away forcefully for development programs and,to not take responsibility or be accountable for it.

Under these circumstances, the discussion concerning social justice cannot be concerned either with policy implementation and its related legal regimes or with legal/judicial activism. Such a discussion is meaningless for it will not question the assumption, the terms of reference, concepts, categories and theories that determine the form and content of policy and associated legal regimes!

According B K Roy Burman this 'indeterminate' is a construction is with legal positivism. It defines property, its legal regimes, and policy. It prevents law from being open to interpretation and revision in the light of changing circumstances. This he argues is untenable because it distorts the tribal notion of property. This distortion needs to be corrected by in-depth-enquiry' of the variety of relations between people and property in diverse social-cultural systems.

In his view, instrumentalism of legal positivism needs to be countered with legal pluralism. This can be done by encouraging the incorporation of social knowledge into law and locate law in society and not with official agencies of the government. From this perspective property in tribal society is complex of sites for interactions. Each of these sites is imbued with collective responsibility, aspirations, liabilities and functions. Property is not a relation of dominance over things and people.

Articles in this volume suggest social justice is deeply embedded in the way society and culture of people shape the understanding of property relations.

B K Roy Burman points out that the 'repugnance clause' was constructed and introduced by colonial governance, and is based on legal positivism. This clause became a common feature in all British dependencies and it continues to be active. According to this clause, 'the rule of customary law may be enforced if it found by the state court to be not repugnant to natural justice, equality and good conscience'. This clause he argues determines the subjugation of the former by the latter.

He argues that because of the repugnance clause people's rights to their construction of property relations have not been taken into consideration in the surveys and settlements. Land surveys are indifferent to the people's customs and conventions regarding these relations. In most communities alongside excusive rights of households over specific areas, there are shared rights with other members of the community. This is not recognized because according to Government all property belongs to the State.

What is suggested here is that 'customary law' is a contradiction in terms, for custom and law are different with reference to their legitimacy: community tradition and rational thinking, respectively. Customary law by not including all the norms and customary practices that constitute property and ownership transplants the lives of people onto legal rational grounds.

B K Roy Burman argues for a more inclusive context specific approach. There should be limits to adverse possession, particularly with the State. Land reforms are to be grounded in the historically determined contexts, needs and aspirations of the people. The adverse possession by the State is a colonial distortion. The correction that needs to be made here is that the legitimacy comes from society and not from the State.

His articles argue for giving importance to the difference between common facilities and communal property. The former are enjoyed by persons as members of a village and as citizens of a nation and the latter as members of a particular community. As and when a community acquires regulative and allocative powers common facilities become communal property. For instance, in the course of my fieldwork with the Koitors of Shringar Bhum in north Bastar I learnt that the headman facilitates equal access to natural resources. He has no allocative function. He acts on behalf of 'mother earth' as caretaker, a trustee as it were. His responsibility is to ensure that, the rules and conventions-created with the hard work (labor) of several generations to share natural endowments-are understood and not violated by the people. The design of these rules is to maintain the complementarities between individual household rights and rights shared by the collective.

Neo-feudalism he argues comes about when the State undermines mutuality between the individual and the collective rights and encroaches on people's resources. This it does by freezing customary practices in time and space and by changing

the definition of forest to forest-land. The former is a necessary step to limit access to land and the latter transforms a three dimensional space with a slope to a two-dimensional flat plain land.

B K Roy Burman point out that with the coming of neo-feudalism the method of land survey changed from chain survey method, to plain-table survey method. The plain-table method was much cheaper for the operative agency and,with this method land beyond 10% slope could not be accurately measured. Hence, a very reduced size of the holding is recorded.

The plain-table method used by the State to encroach on people's natural resources is designed to not recognize the mutuality of collective and individual rights. The justification for this according to B K Roy Burman was the disintegration of communal rights. This method establishes the hegemony of the State over the living practices of the people'.

This in my understanding is demonstrated in FRA 2006.

Further, the repugnancy clause frames criteria for social justice and self-determination.

B K Roy Burman points out that the criteria for inclusion into the Category of Scheduled tribes are presence of primitive traits: economic backwardness, shy contact with society at large, isolation and distinct culture. These he argues were formulated in the 1950'sand are outdated and in the present context repressive.

In the light of historical change, these criteria need to be based on the dialectics of inequality, he argues. The tribal people need to be looked at as part of the larger social context. The new criteria would position them in a just way in the larger social context.

In his keynote address to the 'National Center for Labor" Ranchi, he highlighted the importance of differentiating a diversity of forest workers in terms of their relative proximity and dependence on the forest (not forest-land). This is the basis for 'self-identification' and 'self-determination'.

The notion of self determination by self-identification, according to B K Roy Burman is central to the process of decolonizing this notion. This process has two aspects: external and internal. The former is the right of a people to be organized and to be free from external domination and latter is the right of a people to a

government that reflects their wishes.

It emerges from these articles that State-absolutism is the most violent form of external domination. By use of force and/or by constitutional measures it sets limits for self-determination. In several countries particularly in Rawanda and Somalia forces was used for genocide and ethnic cleansing.

B K Roy Burman suggests that in India constitutional provisions set limits to self-determination. In his analytical appraisal of PESA he shows that the right to self-determination is premised on the 'repugnancy clause', which is subjugated to the statutory law. This alienates customary practices from the lives of people. He argues for instance, that the definition of a village is an imposition. A habitat settlement where a group of households live is not equivalent to a village that manages its own affairs in accordance to tradition and custom.

This informs the Bhubaneshwar Declaration to demystify PESA.

This declaration raises some crucial questions. Is it not true that all tribal populations in the country do not live in the tribal areas covered by the two schedules? Is it that all provisions of the fifth schedule are meant to promote self-rule? Will the state legislature conform to these diverse customary practices that shape a village? Is there a competent statutory authority to make a legally binding pronouncement that any particular legislation enacted by the state legislature is/is not harmonious with customs and practices?

Self-determination according to him is the counter to the State-Absolutism. It frees from colonial domination; assures independence and, begins the process of constructing new social formations.

WHAT HAS DRIVEN THE TRIBALS OF CENTRAL INDIA TO POLITICAL EXTREMISM? *

* Mainstream, Vol. XLVII, No. 44, October 17, 2009

According to the Ministry of Home Affairs, Government of India, 125 districts spread over nine states in Central India and adjoining areas have come under the influence of Left radical groups, losely called Naxalites. On June 22, 2009, the Government of India has declared the most important among the Naxalite groups, the Communist Party of India (Maoist), as a terrorist organization, and banned it.

The precursors of the present phase of Naxal activities first surfaced in Naxalbari of North Bengal; Gopiballabhpur and Nayagram Police Station areas close to the meeting points of West Bengal and Jharkhand; Srikakulam in Andhra Pradesh; Malkangiri in Orissa; the adjoining areas of Bastar in Chhattisgarh and Gadchiroli in Maharashtra mainly among the tribal people. Currently, though many areas and peoples in North India outside the predominantly tribal region have come under Naxal influence, it seems from the report of the Expert Group constituted by the Planning Commission to examine the development challenges in extremist affected areas that the epicentre of the upsurge "is the region in Central India with concentration of tribal population, hilly topography and undulating terrain". This may not be fortuitous.

On August 18, 2009, addressing a meeting of the Chief Ministers, the Home Minister of the Government of India, P. Chidambaram, stated that the Maoist challenge would be met by development activities and police action. This was an utterly unrealistic approach; he was silent about the most important issue, namely, the systematic dispossession of the tribal people from land resources, which they have been holding for generations.

Here it would be noted that the dispossession I am referring to is very much different from development related displacement.

Conceptually at least, project related displacement is not dispossession. Displacement is the unwanted outcome of a particular type of development, and the government accepts the right of the displaced persons to be compensated. It is a different matter that compensation may not be adequate, or only notional.

As against involuntary displacement, in many predominantly tribal areas the tribal people are deliberately dispossessed of their lands and resources thereon in a meticulously planned manner. This is a serious charge; but this is true. I shall now give the relevant information in support of what I have stated.

In November 1985, the Planning Commission had set up a Study Group on Land Holding Systems in Tribal Areas with myself as the Chairman and Dr. Bhupinder Singh (at that time Adviser, Planning Commission with the rank of an Additional Secretary, Government of India) as Member-Secretary. The other members included one retired High Court Judge, one retired Chief Secretary (who also had served as the Adviser to the Governor during President's Rule in Nagaland), one former member of the Union Public Service Commission, the Agricultural Commissioner of the Government of Bihar, one Professor of History, Economics and Sociology each. I am a retired Professor of Anthropology.

We made a field study in Orissa and found that during the land survey and settlement operation carried out in the late 1950s and continuing in the 1980s, in some areas of Koraput district, hardly one per cent land in actual possession of the tribal communities was recorded in their favour. The Study Group could not visit other states because of the inability of the Planning Commission to provide logistic support.

In fulfilment of an assurance in respect of a Lok Sabha USQ No. 678 dated April 15, 1987, a statement was tabled in Parliament vide Planning Commission QM No. Pc/Bc/16—(67)/87 dated 1988. It inter alia mentioned:

As regards cad astral survey and settlement operations above 10 degree slope which have been declared forest, there may be some difficulty in carrying out these operations because this may come in conflict with the provisions of the Forest (Conservation) Act, 1980. Even in cases where the provisions of the Forest Act are not attracted, the State Government of Orissa seems to have avoided such a survey in order to prevent alienation of fragile hill-slopes.

During our visit to Orissa, apart from interacting with the tribal people in their habitats, we had held discussions with leading citizens, the concerned Minister, Commissioner-cum-Revenue Secretary, Member - Board of Revenue, Land Reforms Commissioner, former Survey and Settlement Officer, Koraput district, District Collector, Keonjhar, and other officials. Nobody mentioned that cadastral survey could not take place on a slope beyond 10 per cent because most of these were declared forests. Perhaps some of these areas were declared village forests under the Village Forest Act, 1972 after the survey-and-settlement started in the late 1950s. The time when some of the areas beyond 10 per cent slope might have been declared village forest should be checked.

However, the Planning Commission's statement submitted to Parliament admits that even in those areas beyond 10 per cent slope that did not attract the provision of the Forest (Conservation) Act, the rights of the tribal people were not recorded as "the Government of Orissa seems to have avoided even a survey in order to prevent alienation of fragile hill slopes". Here it should be noted that the statement of the Planning Commission is incomplete. On behalf of the Government of Orissa, the Deputy Director, Land Records and Survey had submitted a note in which it had been mentioned that the land beyond 10 per cent slope was entered in 'Government Khata'. The note has been attached to the report of the Study Group as Annexure V. Perhaps, the officer of the Planning Commission who drafted the statement failed to take cognizance of the note submitted by the Government of Orissa. Otherwise, the statement submitted to Parliament would have clearly mentioned that the areas beyond 10 per cent slope were recorded as state land in a single entry.

Details of why lands beyond 10 per cent slope, which were under actual possession of the tribal people, were not recorded in their favour have been furnished in the annual report of the Commissioner of Scheduled Castes and Scheduled Tribes for the year 1960-61. During its visit to Orissa in 1986, the Study Group found that the position had remained unchanged even after the lapse of a quarter of a century, and no remedial measure had been taken even though the Commissioner's report was presented to Parliament.

The report of the Study Group had included extracts from the report of the Commissioner of Scheduled Castes and Tribes at para 8.4. The relevant portion from the same is reproduced here.

During the Second Plan period, an amount of Rs. 6.93 lakhs was provided for implementation of the Jhum control scheme on Assam pattern and an amount of Rs. 30.00 lakhs was provided for implementation of rehabilitation and soil conservation schemes. The Soil Conservation Department of the State has mainly concentrated on two types of activities, viz., (1) contour bunding below 10 per cent slope, and (2) plantation above 10 per cent. Figures published by the Soil Conservation Organisation show that 6,574 acres were bunded and 28,103 acres of land were terraced. Three new watershed management units were also started during the year under the report, bringing the total number of units to eleven. These units covered a total area of 6.8 lakh acres.

As a result of perfunctory entry in the record-of-rights, in one village of Bissamcuttack Block while out of 936.13 acres of land only 2.50 acres below 10 per cent slope was recorded in favour of the 44 households of Dongria Kondh (a community listed as primitive tribe in the State), around two thousand mango trees located above one to ten gradient slope which were owned by the Wadaka lineage, were recorded in favour of the State Government. The value of these trees was estimated to be around Rs. 40 lakhs.

In Bondo Hills, less than one per cent land owned by the tribals belonging to the Bondo tribe who are also categorised as primitive, were recorded in their favour. In a recent communication Prof. L.K. Mahapatra, a former Vice-Chancellor of Utkal University, informed me that in the Upper Bondo Hill only around 0.25 per cent land owned by the Bondo people was recorded in their favour.

In Keonjhar district, the data supplied by the Survey and Settlement Officer in respect of another officially listed primitive tribe, the Juang, show that 2.48 per cent to 23.50 per cent land owned by them in different villages were recorded in their favour.

Massive dispossession of the tribal people from their life support resource base had taken place because of the government policy of treating tribal possessions beyond 10 per cent slope in the hills since time immemorial, as encroachment.

It should not cause any surprise that today some of these areas are hotbeds of political extremism.

As regards the effect of these measures and attitude of the tribals, the Commissioner reported as follows:

"No attempt has been made to obtain the consent of the population concerned for undertaking the scheme and for ensuring their active participation. There has not also been any follow-up programme and maintenance of the contour bunds has posed a difficult problem."

Thus, what the Commissioner revealed was that land structure and land use of about eight lakh acres of land under occupation of the tribal people were changed without obtaining their consent. But the Commissioner did not end here. What he further revealed was unthinkable in any democratic polity. As mentioned by the Commissioner –

"At present an attempt is being made to obtain the consent from the families concerned to the effect that these will be maintained and repaired by the Government and the cost will be realised from the families concerned."

As maintenance is a continuous affair, the people were required to pay all through their life, for what the functionaries of the state had imposed on them without obtaining their consent. But the story does not end there. There were more shocking things to come. As the human drama unfolds in the Commissioner's report:

"There are several other clauses in the bond. Some of the more important ones are (i) the assessment on land where contour bunding work has been executed shall not be reduced merely on the ground that the unprofitable area has increased as a result of any work; (ii) the "beneficiary" shall give up cultivation above 10 per cent slope; (iii) the beneficiary agrees that in view of the benefit accrued and accruing to him because of contour bunding, he shall transfer a portion of his land as may be decided by the Collector to the government free of consideration for giving the same to other persons who may be losing cultivation above 10 per cent slope."

While the Commissioner's report gives the key to the mystery of non-recording the land rights of the tribal people beyond 10 per cent slope, they were expected to part with such quantum of land as the Collector might decide, because of the so-called benefit accrued to them through the action of the minions of the state, without their consent.

Naturally, as reported by the Commissioner, "the people concerned did not agree to sign the bond and the revenue personnel have

now been entrusted with the task of getting the bonds signed by tribals concerned."

While the mix of cynicism and environmental fundamentalism in the actions of the Orissa Government, as revealed by the Commissioner of Scheduled Castes and Scheduled Tribes as early as in 1960-61, and the continuation of which was confirmed by the Study Group on Land Holding Systems in Tribal Areas in 1986, is unfortunate, the presentation of a sanitized version of the same in the statement submitted on behalf of the Planning Commission in Parliament would certainly cause doubt about the nature of India's democracy.

I visited Sundargarh district in 1991 at the invitation of an NGO. I learnt that the tribal people had successfully resisted the coercive measures unleashed by the state to sign a bond to relinquish their right in full on lands located above 10 per cent slope, and in part below 10 per cent slope. I was also told that their right above 10 per cent slope was not recorded as a confiscatory action on the part of the state. This is a serious charge, but as it targets the subjective attitude of the policy-makers, I would like to keep my judgment in suspense till I get more clinching evidence.

In 1989, I paid a short visit to Orissa as the Chairman of the Sub-Committee on Indigenous Systems of Conservation in the Tribal and Hill Areas, set up by the Committee on National Strategy of Conservation, Ministry of Environment and Forest. The Committee and Sub-Committee were set up as preparatory to the Earth Summit held in Rio in 1992. On this occasion, I enquired about the functioning of the Watershed Management Units and contour bunds. I was told that in many areas the tribal people had damaged the contour bunds, as these had been constructed without taking care about the flow of water. I could sense that tension was mounting up.

The Secretary of the Harijan and Tribal Welfare Department gave me some interesting information. The Government of Orissa had approached the International Fund for Agricultural Development (IFAD) for assistance to take remedial measures against drought in the Kalahandi district where it had become endemic for years. At the insistence of the IFAD, the Orissa Government had agreed to allow cultivation up to 30 per cent slope. It was good news and bad news. It was good news - in that the right of the tribal people was at least partially restored; it was bad news - as the government, which ignored the report of the Commissioner of

Scheduled Castes and Scheduled Tribes and the report of a Study Group of which a retired judge of the High Court was a member, yielded readily to the pressure of an international funding agency. However, later I learnt that the government agreed to make relaxation only in the Kalahandi district, where the funds provided by the IFAD were used.

Official sources have tried to justify the government approach by telling me that the real intention of the government in de-recognising the rights of the tribal people beyond 10 per cent slope was to discourage shifting cultivation. I enquired whether there were any scientific data in Orissa on the extent of soil erosion caused by shifting cultivation. I was told that no scientific data had been collected in Orissa. It is unfortunate that without scientific data non-stop campaigns against shifting cultivation had been carried on and are being carried on in the name of scientific land use. This is like a modern-day witch-hunt.

The ICAR Regional Research Complex in Shillong collects data from time to time by fixing a measurement gauge in the experimental field at a place called Barpani near Shillong. The data show that depending on the degree of slope of all farming technologies, next to bamboo shifting cultivation, if carried on below 40 per cent slope, has the lowest soil erosion. But if carried out on 60 to 70 per cent slope, it has the highest soil erosion. Unfortunately, to persuade the people to give up shifting cultivation, the National Committee on Development of Backward Areas in the report on the North-Eastern Region has published data on soil erosion in case of shifting cultivation carried out on 60 degree to 70 degree slope only. And for comparison, it has included corresponding data in respect of the natural bamboo forest.

At a seminar held in the North-Eastern Hill University, the tribal students accused a member of the National Committee, who was attending the seminar, of presenting the data in a perfunctory manner. They pointed out that less than one per cent of the farmers could have practised shifting cultivation on 60 degree to 70 degree slope. Shifting cultivation was normally carried out on lands below 45 degree slope. They asked why data relating to normal practice in shifting cultivation were not given. They pointed out another bias in the report. While in most tribal areas individual ownership of land is subsumed within community rights, the report under reference suggested that district and village councils should be persuaded to adopt a "progressive policy" of individualisation of their lands. This,

they alleged, was interference with their system and that this would accelerate alienation of their land. In protest, they would not allow the gentleman to speak. I was present at the meeting. With great difficulty the students could be persuaded to allow the gentleman to speak. I mention this incident to highlight the point that while bias against shifting cultivation per se is contributing to the alienation of tribal land, this in its turn is alienating the administration from the tribal people. In fact, the report of the Commissioner for Scheduled Castes and Scheduled Tribes, already referred to, has given an example of the same. It is reproduced here:

Cashew nut plantation has been taken up by the Soil Conservation Organisation of the Orissa State Government on hillocks, some of which were used by the tribals for grazing their cattle or collecting dry shrubs for use as fuel. Some of the tribals even used to cultivate some of these highlands and had title deeds and paid rents for the lands utilised by them; but the Soil Conservation Department did not give them any share of the amount realised by the sale of cashew nut plant on eight hillocks.

During the visit of the Study Group, this matter was further examined. We were told that in great frustration the tribal people had burnt cashew nut land on one hillock in the early 1960s. Prof. Mahapatra, the former Vice-Chancellor of Utkal University, provided us more information. In Koraput district, cashew nut plantation had been carried out on around one thousand acres of hill slope lands, out of which only 56 acres were passed on to the tribal people. He was not aware of any justification given by the government for appropriating more than 900 acres of land, which were under possession of the tribal people from time aeon. After it became clear that the government had no intention of giving them just share of the plants grown on their land, the tribal people uprooted the cashew nut plants on one hillock. Even then, the government action of dispossessing the tribal people of their land by carrying on cashew nut plantation on hill slopes under the shifting cultivation control scheme was extended to other areas also; but the tribal people did not acquiesce passively. In 1984, they uprooted cashew nut plants on 95 acres of land at Jiljira at Kashipur Block. During a subsequent visit to Koraput district in mid-1990s, I enquired from a senior official of the Orissa Government about the Kashipur episode. He confirmed the correctness of the information given by Prof. Mahapatra and added that in addition to uprooting cashew nut plants, the tribal

people had also burnt some plants. I was told by a social activist that most of the cashew nut plants grown over tribal land had been handed over to a corporate body, and that the tribal people were extremely sore about it. I, however, could not verify this information.

Already mention has been made of the concern of the tribal students of the North-Eastern Hill University, Shillong about their community land. In Orissa, we found that not only the tribal people, but even some conscientious social activists and government officers were deeply concerned about it.

It was Gopinath Mohanty, the great humanist of Orissa, who pointed out that Kondh villages were sacred space to them. They occupied the villages after getting divine omens. The tribals considered that not only did they own the village, but also the village owned them.

This is a very significant observation. In this perspective, the attempt made in some quarters to equate the World Bank-sponsored entity "common property resource", community land and resources is denial of tribal heritage.

In my keynote address at a seminar on "Communal Land System", organised by the Indian Social Institute on August 28-29, 2002, I had spelt out the differences between the communal land holding system and common property resources system as follows:

1. Communal Land Holding System (CLHS) versus Common Property Resources System (CPR)

A. Modality of delineation of territorial jurisdiction:

CLHS: Belief in supernatural bestowal or sanctification by long historical association with or without concurrence of any centre of power including State CPR—assigned/ endorsed by the state or ancillary centre of power.

B. Sustenance of relationship with delineated territory:

CLHS: Conviviality orientation encompassing animate and non-animate phenomenal world.

CPR: Power orientation underpinned by the ego-centric need satisfaction as in village commons in rural India.

C. (a) Nature of right of community in CLHS:

CLHS: (i) Jurisdictional right as well as undifferentiated economic right of the community as a whole. Individuals

have the right to a fair share but not the right to a specific area or plot within the jurisdictional right of the community.

(ii) Within jurisdictional rights of the community economic rights of clans or lineage and of functionaries serving different needs of the community or enjoying special prerogatives derived from some events supposed to have taken place in the past.

(iii) Jurisdictional right of the community exercised by special functionaries belonging to particular clans or lineage in mundane aspects together or separately and individual rights of different types being conferred/recognised by the special functionaries as in modified Khuntkatti system of the Mundas, and Bhuihari system of the Oraons.

(iv) Jurisdictional right of the community exercised by special functionaries belonging to a particular lineage who secures assistance of different lineage or clan elders and balances power equation among them according to his own prudence and assigns fair share to the members of the community with the assistance of the lineage or clan elders (Kuki-Mizo system).

(v) Access right of specific community to specific resource for sustaining a specific livelihood pattern within the territorial jurisdictional right of a larger community with primarily a different livelihood pattern (Birhor's right to siyari plant for rope making within the territorial jurisdiction of the Santal, Kheria and other tribes).

(vi) Access right of different communities to the same territory in different hours of the day.

(a) Fishing right of the Keot in early morning and of the Kandra during other hours of the day in shallow water near the coast of Chilka Lake.

(b) Nature of right of community in CPR

Usufruct right according to rule framed by the authority/ recognising the right.

2. Change in case of Non-traditional Use of Traditional Right

The Rongmei Naga people of Manipur have the traditional right of barter by individuals of the forest produce grown in nature in their respective shifting cultivation (Jhum) fields during the

inter-Jhum period. When some of the Rongmei villages were connected by national highways, some people in a village started to extract large quantity of forest produce and transport the same by trucks. This was a non-traditional use of resources. If large numbers of individuals transport forest products in this manner, there will be ecological degradation. The village council decided not to allow the individuals to make this non-traditional use of traditional resources. Instead, it decided that truckloads of forest products from inter-Jhum fields would be marketed in a planned manner to ensure that environmental degradation did not take place. Further, the council decided that the money thus earned would be used to appoint an additional teacher in the local school. Thus, it endorsed the view that a living traditional system itself has within its ambit the provision for change.

3. Viability of Communal Land System

A recent report from Panama indicates a trend of revival of the communal land system to provide a frame for collective resistance to encroachment as ancestral domain by unscrupulous operators who mercilessly exhaust the land resources leading to environmental degradation. Besides, with appropriate institutional arrangement, the communal land right has been found to provide collective security to productive investment.

With growing awareness, unbridled consumerism of the West has created a condition that unless massive environmental retrieval is brought about within a short time, continuation of life on planet earth by the end of the century may become problematic; the whole of humanity is tending to become a moral community at the global level. At the same time, there is a parallel development. Of late, scientific resources' appraisal at the surface and sub-surface levels has generated a realisation that there is a concentration of major resources of the earth in the ancestral domains and current habitats of the tribal and analogous peoples (known as indigenous peoples in the United Nations parlance). Though defined in a manner which is not wholly satisfactory, global networking of the indigenous peoples has already taken place. With the creation of a Permanent Forum under the aegis of the United Nations, the indigenous existence as a part of an emerging global connectivity is becoming politically and legally surcharged, though currently on a low key. The significance of the presence of communal land and resource management systems of the tribal people is to be understood with a mix of ethical-cum-politico-juristic matrix as the backdrop.

In a general way, the Study Group on Land Holding System of the Tribals was sensitive to the foregoing emerging reality. Perhaps this has scared the policy-makers at the mid-level. It is a pity that we were not allowed to complete our task. In the report itself it was indicated that it was an exploratory one. The nation deserves a complete report.

Though our report was presented to Parliament in 1987, the then Commissioner of Scheduled Castes and Scheduled Tribes did not make any mention of it in his annual report. I personally handed over a copy of the report to him and drew his attention to the fact that to a large extent the core finding of our report was tied up with what one of his predecessors had reported a quarter century ago. I thought that he would like to inform the nation through his report that the serious malaise of the system that one of his predecessors had revealed a quarter century ago had remained to be redressed. Instead of referring to the concrete dereliction, which had become public knowledge, he published a political manifesto-type write-up of a hypothetical problematic about tribal command over resources. It was an act of magnificent evasion and this was not the first and last act of such evasion.

We were, however, impressed by the sense of commitment of the local officers in general in Orissa. The note submitted by the Collector of Keonjhar categorically mentioned that traditionally the Juangs and Bhuriyans residing in the respective pirs (village clusters) considered that the lands of the village belonged to the village community and they were free to use the same in any manner they liked. The pirs were not subjected to any land survey and settlement operation till the operation was taken up in the year 1970 and completed recently. It was further mentioned in the note that shifting cultivation was indirectly recognised. The village headman had the power to distribute land for cultivation and to apportion the produce rent. Even then, in the survey and settlement operation the land subjected to shifting cultivation had not been recognised, although the practice was still in vogue.

It was brought to the notice of the Study Group that in many tribal areas legal recognition of possession of individual and raiyati holdings did not cover all possessions. In fact, the State Tribal Research Institute had already reported that among some tribes, individual rights were subsumed within community control, management and ownership. But no heed was paid to this. The survey and settlement rule was not adjusted to this

contingency. It is obvious that as a sequel to non-recognition of communal rights, the embedded rights of the tribal individuals also failed to be recognised. The operation for preparation of record of rights turned out to be operation denial of tribal rights in respect of their land resources.

While formulating the recommendation, the Survey Group observed that where individual rights are embedded in communal rights, removal of the community as the intermediary, removes the necessary condition for the concerned individuals to enjoy their rights. The Study Group recommended that keeping the foregoing fact in view, the land reform policy and programme in the tribal areas should be subjected to most thorough re-examination.

The statement, placed in the Lok Sabha on behalf of the Planning Commission, mentioned that the Department of Rural Development agreed with our recommendation about the need for an intensive study of the communal land system, their persistence, change, decay and reinvigoration, with a view to identifying measures which might lead to the formulation of policy guidelines regarding the communal land system.

Two decades have lapsed since the commitment made to Parliament that intensive studies would be made based on which the land reforms policy focusing on communal land ownership, management and control among the tribal people, could be formulated. It is not known whether studies, as promised, have been done and whether any policy formulation in the near future is under consideration. In the meantime, two developments are taking place:

- First, there is more awareness about the importance of the communal land holding system among the tribal people.
- Second, in the absence of a clearly formulated policy, dispossession of the tribal people from their life support resource base is going on and there is reason to believe that this will further roll up in the future.

As regards the first, it is encouraging to note that the Expert Group on Prevention of Alienation of Tribal Land and its Restoration, set up by the Ministry of Rural Development, in its report (2004-06) has acknowledged that community ownership of land continues to be the dominant mode in the tribal societies and takes precedence over that of individual ownership (p. iii). On page

157 of the report, it has been recommended that in addition to individual land rights, the rights of the communities are also identified and recorded. On page 158, the recommendation is that the entire land traditionally used for shifting cultivation on rotational basis shall be recorded in the name of the tribal community and individuals who cultivate particular patches of land on rotational basis, rather than being recorded in the name of the government or any agency.

As regards the second, I would like to present here the processes through which dispossession of the tribal people from the resources under their command are currently taking place.

Dispossession Through Neo-Feudalisation

The neo-feudalisation process was started by the colonial rulers. Faced with resistance against encroachment in tribal areas, in strategically located places they adopted a policy of co-opting local warlords as subsidiary allies by declaring them as owners of the lands under their political-military control. But due to underdevelopment of communication and administrative infrastructure, this policy could be implemented only in some areas. In other areas, these remained paper laws. In the post-independence period rather than re-negotiating on the paper laws, these were treated as the framework of administration. In those areas, the tribal people felt that they were being dispossessed of their rights in independent India.

The neo-feudalisation process is currently taking place in other forms also, frequently under the cover of the economic development programme. A case study relating to a Munda village in Khunti district of Jharkhand will highlight some aspects of the process.

Sutilong is a Khuntkatti village, which is in existence since the pre-colonial period. There are 84 households in the village (ST 40, SC 7, and OBC 37). While 488.46 acres of land are held by the 84 households, there are 129.06 acres of gairmazurwa khas land (non-revenue paying wasteland) and gairmazurwa aam land (state owned common land).

Mundas of Kamal lineage are considered to be the original settlers of the village. Currently, in Sutilong there are 15 Munda households belonging to Kamal lineage and as such, traditionally they are considered to be joint owners of all land of the village. The post of the headman is hereditary in a family. The households

belonging to Kamal lineage individually do not make any payment to the government other than what the headman pays on behalf of the entire brotherhood. But the headman appropriates to himself the entire amount received from the non-Khuntkattidar households. While gairmazurwa aam is mostly used as grazing land and cannot be converted into korkar or land which can be leased out by the headman, gairmazurwa khas is exclusively at his disposal. He generally leases out portions of the khas land to non-tribals of a different village. When asked about the reason for doing like this, the headman and his lawyer explained that if a resident raiyat, particularly a tribal of the village, was allowed to carry on cultivation on any part of gairmazurwa khas land, he might later on claim occupancy right on it. Traditionally, the headman did not enjoy this prerogative. The households other than those belonging to the Khuntkatti lineage were regarded as tenants of the entire Khuntkatti lineage.

Since 1977 the Revisional Land Survey and Settlement Operation is being carried on in this region. It has been suspended several times because of strong opposition from the people. One of the reasons centres on the issue of the nature of entry in the record-of-rights. In the previous survey operation the name of the Raja of Chhota Nagpur was entered in Khewat No. 1. As since then zamindari has been abolished, the Mundas demanded that instead of the Raja of Chhota Nagpur, the names Khuntkattidars should be entered in Khewat No. 1. But the government had decided that the 'Government of Bihar' should be entered in Khewat No. 1. As there was no agreement on this issue, the survey and settlement operation was suspended in some areas. However, the government could win over the headmen of some Khuntkatti villages by showing them separately from the other Khuntkattidar members, and conferring special prerogative on them. Sutilong was one such village the collaboration of whose headman could be obtained by conferring on him the special prerogative indicated. It was a development veering towards the neo-feudalisation process.

State-sponsored feudalisation came out very sharply in some parts of North-East India, particularly in the Kuki area of Manipur. During the colonial period, the Kuki-Mizo chiefs were projected almost as landlords. After independence, on the initiative of the Mizoram Autonomous District Council, the Chiefship Abolition Act was passed.

It is significant that at the time of abolition of chiefship in

the early 1950s, in Mizoram the Autonomous District Council decided to pay compensation to the chiefs for the number of households under them and not for the quantum of land within their jurisdiction. The chiefs had control over the labour of the persons, not over land. For instance, when a person hunted a game, the chief had a share of it. Even if the animal ran away to the area in the jurisdiction of another chief and the hunter bagged it there, he gave to his own chief a part of the animal as his share.

In Manipur in Naga areas, the village council as a whole controls and manages the resources of the village; the headman does not enjoy any special prerogative. In Kuki area, the chief has the political right of management of community resources. He has the right to determine which plot of land to be allotted to which person for cultivation. But he has to exercise this right in consultation with the clan elders. Ordinarily, the Chief-in-Council cannot deny altogether the right to fair share of a resident member and cannot reduce the aggregate share of the members of the community. The Kuki chief is entitled to some payment from the members of the village community. This is considered as tribute for the responsibility he bears. Though in some quarters there is a tendency to project the payment as rent, on a holistic analysis, it becomes clear that it is not so.

The Manipur State Assembly enacted the Manipur Land Reform Act, 1960. It recognised only individual rights on land, not community right. Originally, it was confined to the valley, but in the early 1970s, the State Assembly decided to extend its operation in the hills. The tribal people offered resistance. The Governor informally sought my view in this matter. I suggested that appropriate sections should be inserted in the Act covering the systems prevailing in the hills and with such modifications as may be agreed to. Accordingly, the Governor withheld his consent. But in the early 1980s, the new Governor gave his consent. The Directorate of Land Survey and Settlement issued a circular that land survey would be carried out with the cooperation of the chiefs. It was interpreted to mean that the chiefs would be paid compensation as owners of land, and with their collaboration, survey and settlement would take place. This attempt to take over tribal land by arbitrarily abrogating the collective right of the village community and by vesting feudal right on the chiefs, did not, however, meet with much success.

It is to be noted that till the 1980s though there were inter-tribal

conflicts and organised violence, there were not much violent anti-India activities in the hills, except for Ukhrul district to some extent. It is only since the early 1980s that the anti-India insurgent activities have gained momentum in the West and South districts. Some ascribe it to the attempt on the part of the government to usurp the collectively owned resources of the people by promoting the neo-feudalisation process in the hills and thereby dispossessing the hill dwelling tribals from their traditional land rights.

Dispossession Through Primitivisation

Since the Fourth Five Year Plan, within the category Scheduled Tribe, a sub-category, 'primitive tribe', is recognised for being provided special assistance for coming up at the same level as the rest of the population. Certainly among the Scheduled Tribes, the people categorised as 'primitive tribes' constitute in general, the most disadvantaged and vulnerable segment of the population. But some of us opposed the use of the term 'primitive', primarily for three reasons: (a) The term 'primitive' is a pejorative term. Historically it means that they are having lower level of mental capacity. Researches have established the fact that the average intelligence quotient of different human groups does not differ much from one another. Their behaviour patterns differ from one another through adaptation to different ecological niche including human ecology and due to differences in historical experiences. (b) When some people are called 'primitive', the onus for not being able to take advantage of development inputs provided by the state and other agencies lies with them. (c) Categorising the people as 'primitive' provides rationale for intervention in the affairs of the people thus categorised by the politico-administrative establishment of the state. As early as 1784, the German philosopher, Herder observed that by stigmatising a people as 'primitive', invasion and conquest of lands across the oceans were legitimised.

Apart from the primary objection, we had a secondary objection. One of the main criteria for identification of primitive tribes is that they are in the pre-agricultural stage of the economy. We hold that some of them may be non-agricultural, but it need not necessarily mean that they are in the pre-agricultural stage. In the contemporary world, there is no economy which is not in direct or indirect symbiotic relation with agricultural economy. Besides, there is no consensus about what is agricultural economy. There are many people, particularly among the policy-makers, who do

not consider shifting cultivation as agriculture. They consider it as a rudimentary form of cultivation which has to be carried through to the level of agriculture "proper".

Currently, many of the so-called primitive tribal people are engaged in gathering forest products and trapping wild life for bartering the same with agricultural and village industrial products. Some of them process the forest products and dispose of them in local markets. Some of the goods collected by them have an international market. Pulses, oil seeds, spice and cotton grown by the shifting cultivators are on record to have had demand in the regional and national markets even in the 19th century. Harvey Feit [Politics and History of Band Societies, (ed.) Eleanor Peacock and Richard Lee, Oxford University Press, 1982] suggests that the societies of this category should be helped to specialise in their respective fields by providing them appropriate technologies, linkages and networking. But as the stereotype in respect of them is that they are pre-agricultural people, the action agenda for state intervention in respect of them is to transform them into agricultural people. The experience so far is that this has a disastrous effect.

One such so-called primitive tribe is the Toto in West Bengal. They live in only one village - Totopara, located at the meeting point of West Bengal and Bhutan. In 1951, their number was 319; currently it is more than 600. In the Survey and Settlement Report of 1907-14, the entire land of Totopara was recorded in the name of the headman "on behalf of the community". This was the only case in West Bengal of a community being recognised as owner of the entire village land. They were engaged in shifting cultivation, with barter in horticultural and forest products as subsidiary occupations. After independence, the welfare state decided to develop their economy as settled agriculture economy. To facilitate this, it was further decided to parcel out the community land into individual holdings. A survey and settlement operation was undertaken in 1958. The lands, which were under shifting cultivation of different households that year, were recorded in their favour. The Totos were told that in future they would have to practice settled agriculture on those very lands. As the Totos did not have plough and cattle for settled agriculture, and were not adept at adjusting the operations with the climatic conditions, they entered into share-cropping arrangement with Nepali farmers of the area. During this very period I visited Totopara in connection with my research

and came to know of the development. I immediately got in touch with the Survey and Settlement Officer and impressed upon him the inappropriateness of parcelling out community land to individuals without the consent of the legal owner—the community. Besides, by doing this, the government's objective of transforming the shifting cultivators into settled agriculturists would not be served, as the lands would pass out of their hand. B. Raghavan, the Settlement Officer, was a sensible person. With the permission of the Secretary, Revenue Department, the operation was cancelled.

Two decades after the episode of 1958, when the Totos were officially declared as a primitive tribe, prodded by the Centre, the State Government decided to implement a big programme in Totopara. For 74 Toto families a Junior Secondary School, a Grameen Bank, a large Agricultural Multipurpose Co-operative Society, and a Maternity and Child Welfare Centre were sanctioned. The Totos were persuaded to spare land not only for the offices but also for the staff quarters of these institutions. But after settling down in Totopara, the Grameen Bank threw a bombshell. They argued that, as without having separately delineated lands in their favour, the individual Toto households were not in a position to offer any collateral, it would not be possible for the Bank to advance any money to them for productive and other purposes. To meet the requirements of the Grameen Bank, the government took a quick decision to get a survey and settlement operation done. Because of their experience of 1958, this time the Totos were more cautious. They got only their homestead and adjoining kitchen garden land recorded in their favour. In this way, out of around 2,100 acres of land, only around 300 acres could be covered. The survey staff did not know what to do with the remaining 1,800 acres. The then Land Reforms Commissioner was approached for advice. As normally a community is not recognised as a legal person, he advised the remaining 1,800 acres to be provisionally recorded in a single entry as government land. On these lands, there were thousands of catechu trees, worth several million rupees. The district level revenue officers quickly got these auctioned and felled. The landscape of Totopara completely changed. The vacant lands, however, did not remain vacant. Large numbers of immigrant population were settled on them. The Totos became completely marginalised. Not only did they lose their land, but they also lost their homes. Mandarins of welfare decided that the stilt houses in which they were living for generations were not good for them;

they were "persuaded" to change their house type. Though the homes with the social and cultural functions bequeathed to them by their ancestors had gone, mercifully they still had shelters where they could continue to "exist".

I have got a pathetic letter from the son of the last Toto chief describing the calamity that had befallen them. Even before I got this letter, I was informed of the catastrophe by a visiting anthropologist on phone, and I had taken up the cause of the Totos with the then Revenue Minister of West Bengal. He was a very sincere person. After due inquiry, he told me that while he shared my agony about the tragedy of Totopara, the thing had gone completely out of his hand. At that stage it was politically impossible for him to intervene. It was decided in the Advisory Committee of the State Tribal Research Institute that the Minister of Tribal Welfare, an MP who was an eminent economist, and myself would visit Totopara to ascertain what could be salvaged, but it never materialised due to bureaucratic intransigence.

Not only the Totos, but it appears to me that as a rule the so-called primitive tribes are destined to be victims of welfare.

In 2004, accompanied by activists of an NGO, the Orissa Development Action Forum (ODAF), I visited a hamlet of Birhors - a traditional hunting and gathering tribe of Orissa, West Bengal and Bihar. As a part of the Primitive Tribes Development Programme, a good number of them were removed from their forest abodes and made to stay in small hamlets on the outskirts of settled agricultural villages. I was surprised to see that all the houses in which they were sheltered, were ramshackle leaf structures. I have seen them living in similar hut-like structures in the forests of West Bengal, Bihar and Orissa. But while in the forest environment, they harmoniously fitted into the rhythm of life - the whisper of the silence and the muse of the cosmos. In the backdrop of the mud houses of the farmers, they tell the story of distant approximation, with condescending accommodation of homeless shelters.

Some farmers in the main village were having houses constructed under the Indira Awaas Yojana (IAY) scheme. I asked a Birhor elder why they could not have at least a few houses under the IAY. Without batting an eyelid, the elder replied: "We cannot have it, because we are a primitive tribe." One of the officers accompanying me, however, explained that they could not have the benefit of the scheme from the local panchayat or the

integrated Tribal Development Agency, as there was a separate Primitive Tribes Development Officer and specially earmarked fund for the primitive tribes. As the Special Officer's headquarters was located at a distance of around 30 km from the Birhor colony I visited, it was not possible for the Birhors to visit the Special Officer's headquarters too often. They, therefore, could hardly derive any benefit from being categorised as a primitive tribe.

Prof N.K. Behura of Utkal University, in a paper contributed to a seminar jointly organised by the Kolkata University and Indian Council of Social Science Research in 2004, has pointed out that though a good number of the tribal communities have been categorised as primitive tribes in Orissa and though a number of administrative establishments have been set up to take care of them, actually they have not derived commensurate benefit from being put in a special category. Further, he suggested that rather than being called a primitive tribe, they should be called vulnerable tribe.

The vulnerability of this category of people came out sharply in case of the Sauria Paharias who were settled on the Rajmahal Hill in the Santal Parganas by the British as early as 1778.

In 1990, along with several members of the Committee on Indigenous Systems of Environmental Management and accompanied by several officers of the undivided Bihar Government, I visited Dumka, the headquarters of the Santal Parganas district. We were told by the district officials that for protecting the environment and improving their quality of life, the Sauria Paharias, who had been categorised as a primitive tribe, were being brought down from their habitats on the hills and settled in a colony constructed for them on the outskirts of Dumka itself.

The background of the Sauria Paharias is as follows:

In the third quarter of the 18th century, in the wake of colonial expansion, large scale influx of migrants took place in the areas of traditional jurisdiction of the Sauria Paharias. They considered this as encroachment. They did not fight the British in the open, but from time to time swooped down on the highway located close to the foothills and then retreated deep inside the hills. This disrupted trade. The British ultimately adopted a practice of pacifying the Paharias by making periodical stipendiary payments to the chiefs and headmen. This was initially started by Captain Robert Brook in 1772 and was successfully implemented by

Cleveland in 1780. The essence of this system, called "indirect rule", was to co-opt the leaders of the community in a system of sharing power. Earlier, this system was tried in Africa also.

In 1782, the Rajmahal Hill Tract was withdrawn from the jurisdiction of ordinary courts and the hereditary leaders (called sardars) constituted a sessions court, which used to meet twice a year and try offences. Besides, the lands under the occupation of the Paharias were pooled together to constitute a government estate. Legally the Paharias were dispossessed; but it seems that they were not aware of it. The government allowed them to continue where they were, free of rent. In lieu of this concession made to them, the Saurias accepted the overlordship of the British.

It seems that in and around 1990, the Bihar Government decided to end the façade of Saurias occupation of land, which the British manipulated to be government land under law two centuries ago. Environmental protection and concern for the welfare of primitive tribes provided a good alibi for bidding farewell of the Saurias from what they knew to be their ancestral home.

Some officers of the Bihar Government, who accompanied us, told us informally, that Saurias were maintaining the environment at the hill-top quite well; the real purpose of the government was to get the hill slopes vacated, so that commercial forestry could be undertaken thereon. However, we could not visit the traditional Sauria habitat to check the correctness of the allegation.

We visited the colony established by the government. We were shocked to find that a barrack-like structure had been constructed to shelter people who had been living in spacious, though kachcha, houses for centuries. Then we found that the government could not reclaim the barren land in the proximity of Dumka, which was planned to be allotted to the Sauria Paharias, because of the opposition of the Santal villagers in whose jurisdiction the barren lands were located. In the alternative, the government had given them hand-pulled rickshaws for eking out their livelihood. No wonder they fled back to the hills. We were told that thrice they went back to the hills and thrice they were brought back to the colony. During our visit we found that many of the apartments were unoccupied.

Years afterwards, during a short visit to Dumka, I learnt that in the long run the government had succeeded to dislodge the bulk of the Saurias from the hill-top and cover their erstwhile habitat

with commercial plantation. I could not personally verify it, but there is no reason to think that the information was not correct.

Primitive development planning of a modern state snatched away from the so-called primitive people their home and whatever had been given was a caricature of dignified living. Nothing had been given to them so that they could at least dream about the future. Under the canopy of unpunctured emptiness, they lost their capacity to dream.

By a time machine, as it were, they have been transported to the world of eternal nothing.

They have been primitivised.

Dispossession Through Fractured Humanitarianism

At the core of humanitarianism is compassion. It is a subjective attitude of mind. It can be admired; but it cannot guide action. Humanitarianism with vision of expansion of human freedom - freedom from hunger, from threat to living and life, from submission to indignity, from being forced to action or inaction and so on - is humanism. Humanitarianism is a fractured approach to reality; humanism is an odyssey for a holistic approach to reality. In humanitarianism there is the illusion of knowing the final word; in humanism there is no final word. Humanitarian action in closed orbit may strengthen human bondage and intensify human misery. This is what happened in a specific situation in Orissa.

In the Koraput district of Orissa, the zamindar of Jeypore had a category of hereditary functionaries called mustajars. Though they were revenue collectors, they had developed feudal pretensions. In the pre-independence period, they used to exact four days forced labour from all the households under their respective jurisdictions. Very rightly, the mustajari system was abolished after India attained her freedom. But along with the mustajar the corporate character of the village was also abolished. Earlier, through mustajar the households collectively used to make payment for the village land as a whole including the wasteland. After abolition of the mustajari system, the villagers were required to pay revenue only for the lands recognised by the state to belong to respective individual households. The wasteland in the new dispensation became state land. During one of my visits to the interior of Koraput district, the village elders told me:

"When mustajari was abolished we celebrated it. But when we

came to know that along with the mustajar our access right to our life support resources had also gone, we wailed in our heart both for the mustajar and for our right. We feel cheated."

But there is another side of the story. There is one more entry in the deficit column of the national account book of humanism.

Dispossession Through Withholding Decision

In the hot summer of 1980, as the Chairman of the Forest and Tribal Committee, Government of India, I was in Chhota Nagpur. At about 11 pm, there was a mild knock on my door. When I opened it, I found about half-a-dozen senior officers of the Bihar Government of the ranks of Joint Secretary, Director and so on, belonging to the Munda community, standing before me. They told me that they had arrived all the way from Patna to meet me for half-an-hour and then they will go back to Patna the same night. They requested me to keep to myself their meeting me in this manner. Now all of them must have retired. I, therefore, feel free to narrate the incident. They asked me whether I knew that next day I was scheduled to distribute pattas for 36 acres of social forestry land to six leading persons of a village. When I confirmed that I knew about it, they made a request to me. They wanted me to ask the Forest Officers to show me the 300 acres of the Khuntkatti forest within the jurisdiction of the village, which the Forest Department had taken under its management control in 1948 for protection and scientific development. I wanted them to tell me some more about it. But they submitted that as they were senior government officials, they should be excused from telling me more. Within ten minutes of their arrival, they left.

Next day, along with the Forest Commissioner-cum-Secretary and the Additional Chief Conservator of Forests, I reached the Forest Bungalow about 50 km away from Ranchi. As scheduled, I distributed the pattas. After that, while taking tea, I casually asked in the presence of the villagers about the 300 acres of scientifically managed Khuntkatti forest. There was an embarrassed silence. Then an ill-clad tribal elder stood up. He begged to be excused, as he did not know about scientific forestry. Then he showed me a barren land by the side of the Bungalow. It was having barbed wire fencing. He said:

"This barren land was a dense forest when the Forest Department had taken it over. Now through scientific management, the forest has become invisible. But the Forest Department is there."

When I asked him what he meant by what he said, he replied:

"If through breaches in barbed wire our goats stray into the barren land, they disappear. This is a clear proof of the presence of the Forest Department."

The Secretary of Forest was an IAS officer. It seems that he was not aware of all this. He asked the Additional Chief Conservator of Forests to explain what all this meant. The latter explained that on the eve of independence and immediately after independence, the zamindars and other private forest owners, under apprehension that in independent India forests would be completely nationalised, started cutting down trees on a large scale and then selling the same to timber merchants. To protect the forests, the Bihar Private Forest Act was passed in 1946. The Khuntkatti forest was also treated as a private forest. Under the 1948 Act, the Khuntkatti forest, along with other private forests, was taken over. For scientific management, the forest in this village was clear felled around 15 years ago. The felled trees were auctioned and sold out. The sale proceeds were deposited in the treasury. As no rules had been framed as to how to disburse the money to the owners of the forests, no disbursal could be made. Similarly, as no rules had been framed about how to invest money for afforestation of private land after clear felling, no afforestation was done and the erstwhile forestland was remaining barren all these years.

I wrote to the Chief Secretary narrating what I had learnt in the village. He did not send me any reply, but I understand that the Forest Secretary was transferred to another department and that the Forest Officers were unhappy for his inviting me to visit the area. Had I not visited the area, the embarrassing facts would not have become public.

In November 1980, Dr. K.S. Singh, who was for some time the Commissioner of South Bihar, published more details about the state takeover of the Khuntkatti forest.

Under the Bihar Private Forest Act, the management and control of Mundari, Khuntkatti forest vested in the Forest Department, but the Khuntkattidars remained legal owners and proprietors. In 253 villages, 53,000 acres of forests have been demarcated. An unknown quantum of the Khuntkatti forest still remained to be demarcated. The Mundas were to be paid 10 paise per acre as rent, but during the 30 years after the Khuntkatti forest was taken over, payment had been made only in seven cases. For

many years no Forest Settlement Officer had been posted, and the Mundas also did not press their demand - of late, however, they were agitating on this issue. They were also angry that while clear felling of forests had been done in some areas, the owners had not been paid anything. Also, they were angry that some forest land had been used for non-forest purpose.

During a later visit to Ranchi, I enquired about the matter. I was told that feudal rights of the former zamindars and members of the erstwhile royal family had been raked up by vested interests to complicate the problem. I shall not be surprised if the bureaucratic-feudal nexus is still continuing to be able to deny the tribal people their rightful dues.

A senior Forest Officer, who himself belonged to a tribal community, confided to me that apart from the 53,000 acres of the Khuntkatti forest, there were several thousand more Khuntkatti forests, which the government could not take over due to lack of communication infrastructure. Later, those forests were also connected by good roads and the government made a bid to takeover the forests. But the Mundas offered stiff resistance. They themselves took up the management of the forests and these were managed much better than even the reserved forests. But even then the covetous eyes of the Forest Department were there. He, however, felt that if necessary, the people might go to the extreme, to prevent any further takeover of their forests. Since then, I have not heard anything about further development on this tricky issue. I presume that no news is good news.

Dispossession Not Through Amnesia

When formats for preparation of records-of-rights of Jharkhand and Orissa are compared, it is found that in Chhota Nagpur community rights are also recorded; in Orissa this is not done. It seems to be a deliberate omission. A comparison of the records-of-rights of all states will perhaps bring out many such cases, which are not the result of amnesia.

Dispossession Through State-Centric Command Law Sidetracking Living Law of Life

In 1960, the Judicial Commissioner of Manipur, who had the status of a High Court Judge, in his judgement on a civil writ petition filed by Luitang Khullakpa and others, decided that in the hills of the state the village communities were the ultimate owners of the land and land related resources [AIR 1961 Manipur 31

(V48C10)]. In making this judicial pronouncement, the Judicial Commissioner took the following facts into consideration.

In the absence of other records, the Judicial Commissioner had mainly depended on information available in T.C. Hodson's book, The Naga Tribes of Manipur, published in 1911. As described by Hodson:

(a) Each village possesses a well-defined area within which the villages possess paramount rights of hunting or fishing and of development of cultivation.

(b) In the case of villages which possess terraced fields, there is customary stipulation of equitable distribution of water throughout the terraces.

(c) While land is held in several ownerships, no alienation outside the clan is permitted.

(d) The Manipur State Hill Peoples (Administration) Regulation Act, 1947 indicates that each village has a Khullakpa or Chief and other officers like the Luklakpa, who collect from each household or family house tax at a fixed rate.

There is no system of assessment of lands in separate ownership and possession of lands among villages. But there is a provision in Sections 60 to 64 of the Regulation of 1947 for settlement of disputes regarding ownership of land or the right of cultivation of land, and also regarding village boundaries. This would show that while ownership of land and right to cultivation are recognised in the hill villages, the actual enjoyment of the same appears to be a matter of internal arrangement in the villages, and the government does not interfere.

After taking note of the facts on the ground, the Judicial Commissioner concluded:

"It is too late in the day for the Government to say that the villagers are in possession only during the pleasure of the Government. The Hill villagers have been dealing with the lands in their possession with heritable rights and with rights of alienation at least within their own clan and within their own villages."

"Such rights amount to property within the meaning of Article 31 of the Constitution."

Mandarins of the Manipur Government never concealed their unhappiness about this judgment. In Manipur, more than 90 per cent of the area constitutes the hills; only around nine per cent

is the valley. On the other hand, three-fourths of the population lives in the valley. It is extremely difficult for any government to ignore the demographic imperative, but the hill people also cannot be expected to gift away their right based on the principle of lex loci rei sitae. Thus, the polity in Manipur has always been marked by an undercurrent of tension centering on this conflict of interests.

Frequently the political and administrative establishment in Manipur would take the stand that the judgment in the Luitang case related to the specific area of Luitang only, it did not cover the whole state. But except for attempts here and there by the administration, there is no general attempt to sidetrack the operation of the judgment by administrative action.

In 1995, the Government of Manipur set up a Social Policy Advisory Committee with myself as the Chairman, one former Chief Minister, three Cabinet Ministers, Chairman, Hill Area Committee of the Assembly with Cabinet rank, one former Cabinet Minister, two educationists and one former MP, as members. Along with other matters, we examined the issues of communal land system in the hills. We found that in some cases the concerned village communities had proportionately very large areas within their jurisdiction. We suggested that the state should not interfere with their ownership rights. But like the Maori incorporations of New Zealand, the state can regulate their resource use pattern and appropriation pattern. Out of the income generated through regulated use of the resources, income that can be accrued to a household through the extant Land Ceiling Act of the State can be equitously distributed among all the households of the village; the surplus income should be utilised to create institutions and facilities to which all citizens of Manipur, irrespective of whether hailing from the hills or from the valley, would have equal right of access. In the presence of the Chief Minister, the report was signed by all the members who represented both hills and plains, and all the major ethnic entities of the state. But later, on a very different issue, some differences had surfaced. As a result, this attempt to reform the communal land resource management system did not receive the attention it deserved.

I was hoping that after the other issue was resolved, this one will be taken up and a bridge of understanding will be built between the peoples of the hills and the plains. But then came the shattering blow from an unexpected quarter. While delivering the judgment on a case lodged by the people of a different hill village claiming

compensation for appropriation of the community land by a public sector undertaking, the Supreme Court not only rejected the claim of that village, but also passed an order setting aside the judgment of the Judicial Commissioner four decades ago.

In a single stroke of the pen, the hill tribal people of Manipur have been legally disposed of thousands of kilometres of community land. It is a different matter that politically it may not be possible for the state or any agency to physically take possession of all those lands. But the judicial time-bomb for a future explosion has been laid.

This raises the question about the source of law. With exceptions, by and large the judiciary in India seems to be informed by the Austinian orientation of state-centric command law. Today, when the state is receding from many of its functions, such orientation is more likely to serve the interests of the corporate sector.

An all-out discourse should be launched relating to the relative significance of Austin's command law orientation, Duguit's social solidarity orientation, and Kelsen's living law orientation. If dispossession of millions is to be averted, judicial pronouncements must be required to make the underlying epistemic orientation clear.

Like any other fundamentalism, judicial fundamentalism also must be subjected to social x-ray, so that dispossession of the type mentioned above does not go unchallenged.

In the early part of this paper, I referred to the statement submitted to Parliament on behalf of the Planning Commission about the main thrusts of the report of the Study Group on 'Land Holding Systems of the Tribals' and the response of the State Government of Orissa. From the details of the Study Group's report and of the State Government's action I have presented in this paper, it would be obvious that the statement given on behalf of the Planning Commission was an incomplete version of what the report revealed and what the state did.

If one has to conclude what has led a large section of the tribal people to political extremism, obviously it cannot be ascribed to any particular cause in isolation. But apart from the executive and the monitoring organisation, roles of institutions like the Planning Commission and judiciary will also have to be examined and analysed in great depth.

FIFTH SCHEDULE OF THE CONSTITUTION AND TRIBAL SELF-RULE *

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Article 244(1) of the Constitution lays down that the "provision of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any state other than the states of Assam, Meghalaya, Tripura and Mizoram". In contrast, Article 244(2) lays down that the "provisions of the Sixth Schedule shall apply to the administration of tribal areas in the states of Assam, Meghalaya, Tripura and Mizoram".

It is noteworthy that while the Sixth Schedule speaks of "administration of Tribal Areas", the Fifth Schedule speaks of "administration and control of the Scheduled Areas and Scheduled Tribes". The difference in the language of the two schedules is not just semantic, it has deeper implication which has been brought out in the report of the Working Group on Development of Scheduled Tribes during the Seventh Five Year Plan (1985-90 p. 12). It reads as follows "the Fifth Schedule tends to be protective and even paternalistic, while the grain of the Sixth schedule veers towards self management".

Keeping this generalised perspective at the back of the mind, rapid appraisal will be made in this paper of the provisions of the Fifth Schedule.

Para 6, sub-para (1) stipulates that "The expression 'Scheduled Areas' means such areas as the President by order declares to be Scheduled Areas". Besides para 6 sub-para (2) vests several ancillary powers with the President in the matters of annulment,

alteration of boundaries and redefinition of boundaries of the Scheduled Areas.

In exercise of the foregoing powers, Scheduled Areas have been notified in the following states: Andhra Pradesh, Bihar (now the entire Scheduled Areas have been located in Jharkhand carved out of undivided Bihar), Gujarat, Himachal Pradesh, Madhya Pradesh (a large chunk of Scheduled Areas has been included in the new state of Chhattisgarh carved out of M.P.), Maharashtra, Orissa and Rajasthan.

In all these states, only few districts, sub-districts, tehsils (Land Revenue Administrative Units), Development Blocks, and in some states even villages, have been notified as Scheduled Areas.

The position as in 2001 is indicated in the table below:

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*
State	*Total No. of Districts*	*No. of Districts Totally Scheduled*	*No. of Districts Partly Scheduled*	*Total No. of Sub-Districts (Tehsils/ Blocks) Including Those in Col. 3*	*No. of Sub-Districts Within 3 But Outside Col. 4*	*Total No. of Villages*	*No. of Villages Outside 3 and 6 Scheduled*	*Remarks*
Andhra Pradesh	*23*	*Nil*	*6*	*1,125*	*3*	*28,123*	*420*	*Lists of villages of two sub-districts are not available*
Gujarat	*25*	*1*	*6*	*226*	*31*	*18,536*	*Nil*	*One Mandal in Vadodra district has been treated as sub-district*
Himachal Pradesh	*12*	*2*	*1*	*109*	*2*	*20,118*	*Nil*	
Madhya Pradesh	*45*	*2*	*13*	*259*	*32*	*55,393*	*600*	*No. of villages include 51 Patwari circles, each on average is presumed to have 10 villages*
Maharashtra	*35*	*Nil*	*11*	*353*	*17*	*43,711*	*2,182*	*Col. 6 includes 20 fully scheduled Tehsils. 1 town in Nanded district is separately mentioned as scheduled*

Orissa	*30*	*7 (new)*	*6*	*398*	*16*	*51,349*	*Nil*	
Rajasthan	*32*	*2*	*3*	*241*	*8*	*41,353*	*81*	
Jharkhand	*18*	*5*	*2*	*210*	*8*	*32,615*	*Nil*	
Chhattisgarh	*16*	*2*	*4*	*97*	*21*	*20,308*	*Nil*	*One Revenue Inspector's circle in Bilaspur has been treated as a sub-district*
TOTAL	**236**	**17**	**52**	**3,021**	**145**	**311,506**	**3,283**	

Out of 236 districts in the 9 states where the Fifth Schedule of the Constitution has been in operation, only 17 districts are fully covered by the Fifth Schedule; another 52 districts are partly covered. Aggregation of sub-district and village has not been made, as in some states the sub-district data are available at the tehsil level, though there are Development Blocks within Tehsils; in some other states, sub-districts data are available at Block level. Again in one state, namely Andhra Pradesh, it is at Mandal or village cluster level. Aggregation at village level would also be misleading as while in some states the names of the villages included in operational jurisdiction of the Fifth Schedule have been notified, in some others the names of the villages excluded, but not the names of the villages included, have been notified. Even then total spatial and population coverage under the Fifth Schedule is possible, as in India for each village information is available since 1961 census. But as thousands of villages are involved, it is extremely difficult for an individual to locate the villages in the census publication, with reference to the territorial jurisdiction of the Fifth Schedule; the Ministry of Tribal Affairs could have done it. But it has been ascertained that they have not made any attempt to compute the territorial and population proportion by social groups of the Scheduled Areas to the respective total at the State and district levels even 54 years after the commencement of the Constitution.

No comment on this strange lapse is necessary.

However, information about the districts which are fully or partly covered by the Fifth Schedule is furnished here, as the same has important policy implications.

Percentage of Tribal Population to the Total Population of the Districts Fully or Partly Covered by the Fifth Schedule

As in 1991 Census

State	District	Total Population of District	ST Population of the District as % of the Total Population of the District
Andhra Pradesh	Vishakhapatnam	3,385,092	14.3
	East Godavari	4,541,222	3.9
	West Godavari	3,517,568	2.4
	Adilabad	2,082,479	17.0
	Mahabubnagar	3,077,050	7.4
	Warangal	2,818,832	13.7
Gujarat	*Dang	144,091	94.0
	Surat	3,397,900	36.1
	Baruch	1,546,145	45.5
	Valsad	2,173,672	54.9
	Panchmahal	2,956,456	47.2
	Vadodara	3,089,610	26.6
	Sabarkanta	226,652	18.4
Himachal	*Lahaul and Spiti	31,294	77.0
	*Kinnaur	71,270	55.6
	Chamba	363,286	28.46
Madhya Pradesh	*Jhabua	1,130,325	85.7
	*Mandla	129,103	60.8
	Dhar	1,367,412	53.7
	Khargone (W.Nimar)	2,028,145	46.2
	Khandwa (E.Nimar)	1,431,662	26.8
	Ratlam	971,888	23.3
	Betul	1,181,501	37.5
	Seoni	1,000,831	37.0
	Balaghta	1,365,870	21.9
	Hoshangabad	1,267,211	17.4
	Rajgarh	942,764	3.3
	Sidhi	1,373,434	4.8
	Sahdol	1,743,869	46.3
	Morena	1,710,574	5.6
	Chhindwara	1,568,702	39.5

Chhattisgarh	*Bastar	2,271,314	67.4
	*Surguja	2,082,630	53.7
	Raigarh	1,723,291	47.7
	Bilaspur	3,793,566	23.0
	Raipur	3,908,042	18.2
	Rajnandgao	1,439,952	25.2
Rajasthan	*Banswara	1,155,600	73.5
	*Dargurpur	874,549	65.8
	Udaipur	2,889,301	36.8
	Sirohi	654,029	23.4
	Chittorgarh	1,484,190	20.3
Orissa	*Mayurbhanj	2,802,417	57.9
	*Sundargarh	1,573,617	50.7
	*Koraput	3,012,546	54.3
	Sambalpur	2,607,153	27.4
	Keonjhar	1,337,026	44.5
	Ganjam	3,158,764	9.4
	Kalahandi	1,707,753	31.0
	Balasore	5,522,659	7.1
	Kandhmal	647,912	-
Jharkhand	*Ranchi	2,214,048	43.6
	*Lohardaga	288,886	56.4
	*Gumla	1,153,976	70.8
	Godda	861,182	25.1
	Palamau	2,451,191	18.1
	*Paschim Singbhum	1,787,995	54.7
	*Purba Singbhum	1,613,088	28.9
Maharashtra	Thane	1,096,592	18.1
	Nasik	3,881,352	24.2
	Dhule	2,535,715	40.9
	Jalgaon	3,187,634	9.8
	Ahmednagar	3,372,935	7.1
	Pune	5,532,532	3.9
	Nanded	2,330,374	11.8
	Amravati	2,200,057	14.0
	Yavatmal	2,077,144	21.5
	Gadchiroli	1,771,994	38.7
	Chandrapur	787,010	19.7
* The asterisk marked districts are fully scheduled.			

All the fully or partly scheduled districts of Bihar have been included in Jharkhand; hence Bihar is not mentioned here. On the other hand, a large number of fully or partly scheduled districts of undivided Madhya Pradesh remain in the mother State, though a few have been included in the new state of Chhattisgarh carved out of Madhya Pradesh. While computing the total number of scheduled and unscheduled districts, the number as it was in undivided Madhya Pradesh has been considered, as the relevant details about Chhattisgarh are not readily available to me.

It requires to be mentioned that the picture given here does not fully reflect the current position. A few districts, particularly in Orissa and those located in Jharkhand, have been reorganised and several new districts have been carved out during 1991-2001. Some of the reorganised districts or new districts seem to include the scheduled portion of old districts. As a result, a few of the newly formed districts may be within the ambit of the Fifth Schedule regime. However, based on the current imperfect and incomplete information, the pattern that emerges is as follows:

There are 15 fully scheduled districts where the ST population constitute more than 50 percent of the total population. Among them the district with lowest percentage of ST population (50.7) is Sundargarh in Orissa; the district with highest percentage of ST population (94.0) is Dang in Gujarat. There are two fully scheduled districts with less than 50 percent tribal population, i.e., Purva Singbhum (28.9%) and Ranchi (43.6%), both in Jharkhand.

Among the partly scheduled districts, there are five with 5 percent or less ST population. In this category, the lowest position is that of West Godavari district of Andhra Pradesh, with 2.9 percent ST population.

There are:

6 districts with	6-10% ST population
4 districts with	11-15%
16 districts with	16-25%
11 districts with	26-40%
7 districts with	41-50%

Interestingly, there is one district, Dhar in Madhya Pradesh with 53.7 percent ST population, which is not fully scheduled.

At this stage, digressing from the analysis of the other paras of the Fifth Schedule, one policy implication of the foregoing pattern underlying the demographic profile will be discussed here. One of the Directive Principles of State Policy as enshrined in Article 40 of the Constitution provides 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-government". As a follow-up of the foregoing Directive Principle "The Constitution (Seventy-Third Amendment) Act" and "The Constitution (Seventy-Fourth Amendment) Act" were adopted by Parliament in 1992. In April 1993 these were

incorporated in Part IX and Part IX-A of the Constitution. Article 243G of the Constitution as amended in 1993, provides that the Legislature of a State may by law, endow the panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for devolution of powers and responsibilities upon panchayats at the appropriate level". Article 243B(1) stipulates that "There shall be constituted in every State, Panchayats at the village, intermediate and district levels." Some exceptions were also indicated. Article 243M inter alia stipulates in Clause (1) that "Nothing in this Part shall apply to the Scheduled Areas referred to in Clause (1) and the Tribal Areas referred to in Clause (2) of Article 244 of the Constitution". Article 243M(4)(b), however, inter alia stipulates that "Notwithstanding anything in the Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the Tribal Areas referred to in Clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368".

In accordance with the foregoing authorisation, the Parliament enacted "The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996", in short PESA 1996. Clause 4(g) of PESA 1996 stipulates as follows:

(1) The reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX* of the Constitution*.

(2) Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats.

(3) Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes.

(*Part IX provides for reservation for Scheduled Castes and Scheduled Tribes).

The foregoing provisions of PESA Act, 1996 when examined with the pattern inherent in the demographic profile, as already indicated in this paper, bring out in sharp focus several problems, as follows:

In a fully scheduled district like Purba Singbhum where the STs constitute only 28.9 percent of the population, it is safe to

presume that there would be many villages without presence or with nominal presence of ST population. Will such villages be required to import tribal persons to become heads of the panchayats?

Perhaps the same type of problem would arise in respect of some intermediate level panchayats even in fully scheduled districts like Surguja (with 53.7% of the population being tribals).

At the district level, from the wording of the law it is not clear whether even in partly scheduled districts with tribal population of 2.9%, 3.3%, 4.8% and so on, the provision that all seats of chairpersons of panchayats at all levels shall be reserved for the Scheduled Tribes would apply. If not, what is the cut off point?

As already indicated, out of 236 districts in the nine states where the Fifth Schedule operates, only in 16 districts (including one which is only partly scheduled) the STs are in the majority. In the others their percentages vary from around 3% to 48%. The PESA Act, 1996 does not give any indication that the policy formulators have applied their mind to the problem in respect of the districts of the latter category. In fact, it appears that the policy formulators never cared to examine the population composition of the areas covered by the Fifth Schedule and in an amateurish manner went ahead with policy formulation based on wrong assumptions. While introducing the Bill for the extension of the provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas, the concerned Minister stated in Parliament that the bulk of tribal population live in the Scheduled Areas and Tribal Areas; but this is not a factually accurate statement. Based on 1991 Census, it is estimated that when the minister was making his statement, only around 50% of the tribal population of the country were living in Tribal and Scheduled Areas. In fact, in some states, Andhra for instance, only around 20% ST population of the state lived in Scheduled Areas. It seems that his advisers had also assumed that the bulk of the population in the Scheduled Areas always belongs to ST category, which has already been indicated is not correct. In fact, the first Scheduled Areas and Scheduled Tribes Commission (Dhebar Commission) had given an indication of this in its report submitted in 1960. However, unless an early policy decision is taken on this issue of considerable importance, it will be difficult to operationalise the PESA Act in the bulk of the Scheduled Areas.

As a heuristic device, assuming that the Sixth Schedule and the

Fifth Schedule provide appropriate instruments for tribal self-governance, when it is found that only one-half of the total tribal population in the country lives in the Tribal Areas and Scheduled Areas covered by the two schedules, a question naturally arises: what is the state policy to especially facilitate self-rule of ST peoples living outside these two categories of areas?

But, are the provisions of the Fifth Schedule really meant to promote tribal self-rule? Already, mention has been made of the Report of Seventh Plan Working Group for Scheduled Tribes, Government of India, which has categorised the Fifth Schedule as paternalistic in its thrust. The rationale of this categorisation needs a careful look.

Para 1 of the Schedule reads as follows "In this schedule, unless the context otherwise requires, the expression "State" does not include the states of Assam, Meghalaya, Tripura and Mizoram". It is because parts of these four states including Meghalaya (which contain a few mauzas or cluster of revenue villages, which are not covered by any schedule) contain areas within the Sixth Schedule regime.

Para 2 stipulates that subject to the provision of this schedule, the executive power of a state extends to the Scheduled Areas therein. It is interesting to note that some leading campaigners for extension of the Fifth Schedule to all ST predominant areas of the country and at the same time ecstatic about the PESA Act, 1996 (going to the extent of terming it as a revolutionary Act), complain that one state, even after enacting the state legislation completely in the model of the central legislation, makes the panchayatiraj institutions in the Scheduled Areas submit to the executive power of the state. Their allure to see the logical contradiction of their position is rather surprising.

They cannot campaign for extension of the Fifth Schedule in an unqualified manner and at the same time resent the exercise of the ubiquitous power conferred on the state by para 2 of the schedule.

The ubiquitous power of the IndianState in the Scheduled Areas is further reinforced by provision 3 of the Schedule. It stipulates that the governor of each state having Scheduled Areas therein shall annually or whenever so required by the President make a report to the path regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the state as

to the administration of the said areas. The deeper implication of this provision in the Fifth Schedule comes out in sharp relief when it is examined along with the powers exercisable under the 73rd and 74th amendments of the Constitution as contained in the 11th and 12th Schedules of the Constitution. One of the powers exercisable by the Panchayati bodies is Agriculture, including Agricultural extension. Under the WTO agreement, the Union Government may adopt an agricultural policy of allowing terminator seeds, developed by the multinational corporations, to be introduced in any area. The panchayats outside the Scheduled Areas may try to offer resistance to the policy as it would disrupt the agricultural economy of the region; but panchayats under the Fifth Schedule regime will have no option but to fall in line. The third para of the Fifth Schedule is a negation of tribal self-rule.

Part B of the Schedule relates to administration and control of Scheduled Areas and Scheduled Tribes. It consists of two paras, namely para 4 and para 5.

Para 4 provides for a Tribes Advisory Council (TAC) to be established in each state having Scheduled Areas and also if the President of India so directs, in any state having Scheduled Tribes but no Scheduled Area, of which as nearly as possible three-fourths shall be representation of the STs in the legislative Assembly of the state. If, however, the number of tribal MLAs of the state is less than the number of seats in the TAC, the remaining seats will be filled up by the other members of the TAC. If, however, the number of tribal MLAs in a state is more than 20, there is no indication in the Schedule how the 20 members out of them would be chosen. Sub-para (3) of para 4 however lays down that the governor may make rules prescribing or regulating as the case may be (a) the number of members of the council, the mode of their appointment and the appointment of the Council, and the officers and servants thereof, (b) the conduct of its meetings and its procedure in general, and (c) all other incidental matters. The string is thus held by the governor as the constitutional head of the state.

Most important, however, is sub-para (2) of para 4 which stipulates that it shall be the "duty" of the TAC to "advise" on such matters pertaining to the "welfare and advancement" of STs in the state, as may be referred to it. It is to be noted that the TAC can only 'advise' on such matters, as are referred to it by the governor. TAC on its own cannot get its meeting convened, decide what are the matters of relevance for the "welfare" and

"advancement", whatever these terms mean, on which it should render its advice. There are several other issues involved in this sub-para. For instance, one is perplexed by the use of the word "duty to advise" in this sub-para. What happens if the TAC refuses to advise on a matter referred to it and thus fails in its "duty"? There is also no indication whether the TAC can take remedial measures if the governor fails to abide by the advice.

Para 5 deals with laws applicable to Scheduled Areas. What follows, however, is not law or a visible and coherent general principle, but specific laws in the sense of specific legal instruments. Sub-para (1) stipulates, "Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the state subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect".

Sub-para (2) of para 5 stipulates, "The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area".

"In particular and without prejudice to the generality of the foregoing power, such regulations may (a) prohibit or restrict the transfer of land by or among the members of the Scheduled Tribes in such area; (b) regulate the allotment of land to the members of the Scheduled Tribes in such area; and (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area".

Sub-para (3) of para 5 enables the governor to repeal or amend any Act of Parliament or of the Legislature of the State, or any existing law which is for the time being applicable to the area in question. However, unlike in case of sub-para (1) of para 5, sub-para (4) of para 5 stipulates the regulations made under para 5 shall have no effect until assented to by the President; besides sub-para (5) of para 5 stipulates that no regulations shall be made under para 5 unless the government making the regulation, has in the case where there is a TAC for the State, consulted such council.

There are many grey areas and disturbing questions in the whole of para 5. These are as follows:

1. In sub-para (1) use of the qualifying word 'this' in respect of the Constitution is rather perplexing.

2. While the word 'governor' has been uniformly used all through the schedule, the word 'government' has been used in sub-para (5) of para 5 in a context which also seems to be perplexing. As already mentioned, sub-para (5) of para 5 requires the government not to promulgate a regulation without consulting the TAC in case there is a TAC in the state. This seems to imply that:

(i) There may be states with Scheduled Areas but without TAC.

(ii) Government can promulgate regulation on its own in respect of Scheduled Areas in the absence of a TAC in the state. But para 4 makes it mandatory for states having Scheduled Areas to have a TAC. Besides, there is no overt provision in the Schedule enabling the government to suspend a TAC. One wonders whether there is a covert provision under para 4(3)(c) which authorizes the governor to make rules in "all other incidental matters"? In that case has the word 'government' been used in para 5(5) for a special unsavoury and potentially undemocratic situation, or has it been used to reiterate that keeping to the basic structure of the Constitution the word 'governor' whenever used in the schedule means nothing more than the constitutional head of the state? Or does it mean that except where the word 'government' has been used, 'governor' means, governor's authority to exercise his discretion? It seems it is necessary to obtain legal opinion on the issues raised here.

(iii) Para 5(1) mentions governor's far reaching power manifested through simple public notification, on the other hand paras 5(2), 5(3) and 5(4) mention governor's restricted regulation making power. Prima facie exercise of power by "simple public notification" is very different from exercise of power by "promulgation of regulation". If jurists confirm that these are powers of two different categories, then governor's power as depicted in para 5(1) is thoroughly undemocratic and may be subversive of the basic structure of the Constitution, particularly when it is noted that in his exercise of power under this sub-para the governor is not required to obtain advice of the TAC or assent of the President. It may be a hidden explosive in the Constitution and should be defused as early as possible. It is to be noted

again that it is para 5(2) and not para 5(1) which may not be fortuitous.

(iv) Many Scheduled Areas are highly resource-rich and many non-tribal persons and corporate bodies have acquired vast tracts of land in such areas legally or illegally. Para 5(2) (a and b) make specific mention about land transaction of tribals but does not make any mention of control of land transaction by non-tribals. It may be argued that governors can control and regulate such transactions by exercise of the generality of their law making power. In the era of hegemonic globalisation when covetous eyes are focussed on the resources of the Scheduled Areas, it is necessary to know whether the governors have actually exercised their power to cover the emerging menace.

Part C of the Fifth Schedule deals with the procedure for specification of Scheduled Areas. This has already been discussed and flawed functioning of the concerned authorities has been highlighted.

Part D provides procedural details about the amendments of the Schedule. It mentions that no law in this regard shall be deemed to be an amendment of the Constitution for the purposes of Article 368. No comment is called for on this.

PATERNALISTIC PHILANTHROPY Vs. DIALECTICS OF INEQUALITY: CONSIDERATIONS FOR INCLUSION IN OR EXCLUSION FROM THE CATEGORY OF SCHEDULED TRIBES *

* Keynote Address at Seminar organized by Anthropology Department, Delhi University, May 2006

A. Context of 1950s

In the 1950s when the criteria for the determination of STs were being discussed and debated in different forums, the implicit ideas underlying the discourse were broadly as follows:

(i) Stage theory of evolution of human social and political organization (or in other words, a crude form of Social Darwinism) along with technological evolution held the ground.

(ii) (a) In the stage theory framework, a broadly conceived western life-style was considered to be at one polar end, life-styles of tribal peoples in general were considered to constitute the other polar end.

(b) Agriculture was considered to be in the mid-position between hunting and gathering economic pursuits, moving towards industrial production. The non-agricultural hunting and gathering peoples were considered to be pre-agricultural peoples at the lower rung of the evolutionary schema.

(iii) Community or communal resource holding system was considered to be the residue of a political economy, which

through the transformational law of historical materialism, had moved towards individual resource holding system. While those with Marxist orientation looked forward to state takeover of private productive resources and then through the continued operation of the law of dialectical materialism to the withering away of state; corporate take-over of the resources was not much in the consciousness of many scholars – whether of Marxist or of non-Marxist orientation, though the process had already started.

(a) As a heritage of the freedom struggle, there was an overriding sense of responsibility among the leaders of the struggle who had come to power in the post-independence period, to provide immediate relief to the mass of the population who had lived a life of woe and misery during the colonial dispensation.

(b) Among the more perceptive section of the leadership there was an awareness that many legacies of feudal control and management of resources and life-ways, which were allowed to continue (if not always nurtured by the colonial rulers particularly in the rural and outlying tribal areas), were fairly strong in many parts of the country. The imposition of the comprador bourgeoisie was no less galling. Hence, the tribal and other vulnerable sections of the populations required protection from all these forces of domination, exploitation and marginalization of the population.

(iv) Leaders of freedom struggle were also aware of the fact that colonial rulers had successfully kept the bulk of the peoples in the periphery of the territorial, political, and social network of the country, aloof from the rest of the countrymen. However, they were not equally alert of the fact that in the 19th century the nationalist leadership of the country had failed to make a common cause with the resistance movement of the tribal peoples against colonial encroachments on their lands and resources. Even then a language of integration in the "mainstream" entered in the social and political vocabulary not only of India, but of many of newly independent countries particularly of Asia. In this again many failed to differentiate between integration and assimilation. Besides, 'mainstream' seemed to implicitly mean North Indian brahmanical cultural postulates.

B. Present Context

Currently the context of recognition of STs has radically changed.

(i) While technological evolution and such additive changes had taken place and are taking place, crude Social Darwinism has by and large been discarded.

Under influence of the concept of Social Darwinism even in the first half of the 20th century, many entertained negative views about the mental capacity of the tribal peoples, but since then experimental psychology and research in brain-neuroscience have discarded the negative valuation of such people's mental capacity. On the other hand, Chomsky's linguistic theory focusing on presence of universal grammar has established the unity of human mind.

(ii) Stage theory with reference to core livelihood activity (e.g., hunting and gathering, fishing, etc.) which is somewhat tied up with a version of historical materialism (bereft of dialectical materialism) is now questioned by many. Palaeonthropological research shows that in some sites diverse modes of livelihood coexisted. Current ethnographic studies show that in many cases hunters and gatherers are involved in trade not only in the local markets but even in national and international markets, and the commodities marketed by them constitute important components of agricultural and industrial economy. While it is amateurish to categorize such peoples as bearers of pre-agricultural economy, the plans and programmes that logically follow from such categorization have sometimes been found to be harmful to the concerned peoples.

(iii) It is frequently forgotten that today non-agricultural peoples with simple technology have many options other than agriculture if they want to change their sources of livelihood. Besides, agricultural economy is going through a phase of stagnation, and employment potential of agriculture is very limited. Hence, movement from non-agricultural less-sophisticated technology-based occupations to agricultural sector is not always inevitable. Awareness of all these realities also have a bearing on laying down the criteria for recognition of STs and their sub-categorization as Primitive Tribal Groups (PTGs).

(iv) As already mentioned, stereotype of undeveloped mental

capacity of STs has no scientific base. Even then the stereotype of the irrationality and superstition in regard to the psyche of the tribal peoples is entertained by many. In India, in official parlance the words 'primitive trait' occur frequently without indication of what the primitive traits are. There are, however, some unstated (unspecified) indicators of the matter, which are covered by 'primitive traits'. One of the most important markers centres round the aetiology of diseases and the therapeutic practices as found among many tribes. But recent researches in neuroscience, psychiatry and psychotherapy indicate that far from being irrational, these practices convey a lot of prudence developed through generations of observation and trial and error. Particularly the recent discovery of "empathy neuron" in neuroscience has helped to see many tribal practices in a completely new light.

(v) Another instance of so-called superstition of the tribal peoples focuses on their veneration of nature, and of the various endowments of nature by cognition of them as spiritual entities or containers of spiritual entities. For all these beliefs and practices the term animism is used in a pejorative sense.

Modern studies of comparative religion, however, show that there is hardly any religious system which does not contain similar elements. The main difference is that while many tribal peoples consider their grasp of the essential nature of the phenomenal world as knowledge of concrete reality, the interpreters of the so-called universalistic religions go in for theorizing the same and for more open interface with the phenomenal world. Perhaps in philosophical terms, the first pattern of approach to the phenomenal world can be described as 'onto-epistemological' with the phenomenal world; while the latter system provides some space of accommodative articulation, but the articulation is not of simple additive nature. It is dialectical in nature in which a dimension of power and domination is involved.

(vi) What has been hinted here about the relationship between direct experience-based tribal religion and so-called universalistic sacred text-based religion holds good for cultures (not only tribal cultures but all cultures) and their encompassing civilizations. The relationship is not just additive or huddling in nature; it is dialectical. As in

the case of the relation between folk religions and so-called universalistic religions, in case of culture and civilization also domination and hegemonic imposition tend to operate. There is a point of view that conviviality nurtures culture, hegemons impose civilization. This formulation deserves deep reflection in the context of the eco-crisis of unprecedented scale currently staring mockingly at humanity as a whole.

(vii) The root of ecological crisis may be traced to the anthropocentric world-view projected and promoted by European renaissance and later in the 17th century era of enlightenment. Renaissance and enlightenment by extolling conquest of nature, and not harmonization with nature as the supreme value, has legitimized unchecked exploitation and extraction of the endowments of nature to the extent that many life-forms have already become extinct; some other life-formshave become endangered; and continued existence of many more life-forms - including that of the species homo-sapiens - is now being questioned. As Levi Strauss points out, it is not fortuitous that ideological thrust of enlightenment and on-march of colonialism coincided in time.

Pushed to the brink, a large segment of humanity now feels humbled and a process of reassessment of the life-ways of the tribal peoples geared to the empathetic extension of the self to the surroundings, and to the harmonization with the diverse endowments of nature is also taking place. Besides, growing awareness of the rich indigenous knowledge system relating to the dynamics of bio-diversity, is exuding admiration of many all over the world.

(viii) If eco-crisis has made the more perceptive segment of humanity come down from the pedestal and seek in tribal life-ways the magic-formula for self-protection by protection of nature, the ethos of sharing with and caring for progressively inclusive others inside that marks life-ways of many tribes (though incompatible with the classical mode of capital formation), is now being looked upon by many with new appreciation. Recent researches in ethnology, by locating altruistic behaviour even in many lower life-forms like insects, have given tremendous boost to the rationality, ethics-aesthetics and in many cases to

trans-rational creativity, informing the life-ways of many tribal communities.

(ix) Discovery of altruistic behaviour even in some lower life-forms and in social behaviour of most tribal societies confirms that sociologist Max Weber's description of tribal societies as regulated anarchies as against Hobbes formulations that 'in the state of nature humans are in war of all against all' is not an empty rhetoric, it offers an extremely important criterion for recognizing tribal social formations.

(x) When tribal communities are described as regulated anarchies, it means that the regulatory powers of the tribal communities do not derive their legitimacy from the superior coercive power of the state but from the internal regulatory mechanisms of the communities themselves. Presence of altruism in lower life-forms suggests that the internal regulatory mechanisms of the tribal societies may be basically rooted in species attributes of humans. These species attributes then are, in the conceptual frame of historical fern and braided, the conditioned facts of human life, which the trivial communities try to abide by, but which become deflected in certain contingent situations. The non-tribal societies, which are generally the victims of contingent situations of life, are trying to retrieve their species attributes. It is in this perspective that the tribal peoples are perceived as indigenous, as distinct from the non-tribal peoples; in the sense that they continue to live by the species attributes of humans and can be described as moral communities or homo-sociologic.

(xi) Ethnographic literature suggests that kinship ties are quite strong among most tribes; also such literature indicates that they entertain a sentiment of custodial relation with specific endowments of nature, including land and forest, which are traditionally associated with them. These two attributes functioning conjointly establish a moral bond with the specific endowments of nature. This tends to enhance their concern for eco-conservation of, as well as for equitable entitlement to nature's wealth.

(xii) Equity imperative, primarily associated with kinship-based social organization, has as an important factor contributed to the emergence of humans as a bio-social

entity, while a streak of embedded altruism also contributes to the adherence to the cause of justice in all fields of individual and/or collective social relations. According to Rawls's postulate of justice - equityand justice do not necessarily go together. An individual or a collective has to struggle hard to ensure justice. But for such struggles to be sustainable, requires at least an optimum differentiation within the community, so that a specialized segment of the society can play the vanguard role. Imperative of justice-right moderated by the embedded equity concern, helps the process of holding on to an optimum level of differentiation and not excessive differentiation or inequity. In laying down the criteria for recognition of STs, the strategic need of accommodating limited inequity will have to be kept in view.

(xiii) (a) Commitment to the principle of justice has assumed a critical dimension in the contemporary world. In the era of IT revolution with the help of satellite imageries and sophisticated technology to assess the quantum of subsoil resources, it has now come to light that major resources of the world, relevant for social production, have a high concentration in the traditional habitats of the tribal peoples and of others analogous to the tribal peoples who are now described by UN, and agencies linked up with the UN, as indigenous peoples. But such peoples constitute only around 4 percent of the world population. Also, while the STs constitute only around 8 per cent of the population, major resources for social production and consumption have high concentration in traditional tribal habitats. The other side of the picture is that by perpetuating the myth of tribal and indigenous people's backwardness and under the cover of the agenda of their development, they are progressively being dispossessed of their life support resource base. If in the 19th and 20th centuries, the working class constituting the proletariat tended to play a similar role, it is interesting to note that the neo-Marxist sociologist Giovanni Arrighi has described them as 'status class'.

(b) Growing threat (through the predatory legal instrument of intellectual property right) to the life support resource base and to the tribal and indigenous peoples knowledge system underlying the utilization of the resources has currently enhanced the potential role of resistance of such peoples

against global hegemons similar to that of the working class against the monopoly bourgeoisie in the mid 19th -mid 20th century.

(xiv) With progressive dispossession of resources, frequently through the operation of the residue of colonial jurisprudence also with massive displacement of population, the era of prehistory of capital as postulated by Adam Smith, which until recently continued for most of the tribes, is coming to the end. The spurt of Naxalite militancy is to be seen with this as the backdrop.

In India one need not agree with the operational mode of the Naxalites, as can be seen in the tribal predominant east, south-east and west central tribal belt, where they are espousing what they consider to be the cause of justice, particularly for the tribals and other vulnerable segments of the society, but it is difficult to say that it is always the concern to safeguard the interest of the tribal and other vulnerable social segments that motivate their action; sometimes pure party interest may take the upper hand. Limited social differentiation (as in ranked society as distinct from stratified society) of the tribal and vulnerable peoples should be considered a positive criterion for identifying ST category.

(xv) The teleological view held by a section of Marxist scholars and non-Marxist scholars in general, that communal land and resource holding systems will have to be replaced by individual or individuals in free association or corporate, of state resource, holding systems for the sake of progress is now questioned in the light of experiences in Africa, insofar as non-Marxist scholars are concerned. The Marxists scholars have also been profoundly influenced by discovery of Marx's early manuscripts which when read along with his letter of 1882 to Vera Versluys, establishes that direct movement from communal systems to socialism is possible without passing through the capitalist path of development.

(xvi) Self-definition as reinforcement of the criteria otherwise identified.

During the early 1980s to mid 1990s, under the aegis of the United Nations Working Group for Indigenous and Tribal Populations, annual meet of the tribal and indigenous peoples used to take place in Geneva. Thus,

a global network of such peoples has come into existence. Since late 1990s, such meets are taking place under the aegis of UN Open Ended Working Group. In these meets, at the beginning, the term 'indigenous' tended to be defined broadly as 'autochthons' but now, rather than the chronological sense, the term 'indigenous' is being defined in normative sense as peoples and their cultures rooted in their immediate social and physical environment and who constitute sharing and caring societies, committed to reciprocity and equity, who are being dispossessed and marginalized from their life support resource base. Such self-definition when harped on repeatedly year after year, particularly in a charismatic situation like world meet of tribal and analogous peoples hitherto not known to one another, tends to become a reality in real life, even for those whose life-ways were considerably different. One should not cynically undermine the value of the secondary dawn of normative self-creation of indigenous and tribal peoples. The secondary socialization of the tribals to this normative self-definition as and when it takes place, is a positive asset for humanity as a whole struggling to avert a cataclysmic ecological disaster and to overcome the schizophrenic alienation from self, from fellow human beings and from de-humanizing aggressive individualism.

Broad Consensus Prevailing Since 1950s in the Absence of Criteria for Recognition of the STs

While scheduling of sections of Indian citizens as STs under the provision of the constitution of the country is a matter of policy, the constitution has neither defined ST nor laid down the criteria for statutory recognition of ST. In the absence of the same, through a consultation meet of policy makers, academics and social activists, a broad consensus was generated in the early 1950s. With slight variation here and there, coloured by pragmatic considerations, the broad contour of the consensus has continued to exist even now. The main features of the same are as follows:

STs are people who:

(a) live in comparative physical and social isolation;

(b) have distinct social organization in which primacy is accorded to kinship ties over all other types of regulatory mechanism of the society;

(c) have languages and cultures of their own;

(d) while some system of ranking, particularly prestige ranking may be found, there is no persistent intra-community stratification and hierarchy underpinned by the ideology of inequality;

(e) entrain religious faiths and practices broadly termed as animism, which focuses on veneration and/or management of the forces and endowments of nature by supernatural means;

(f) by and large involved in non-monetized barter economy, featured by mix of economic and social considerations and also have low level of technology.

While what has been described here as consensus of 1950s, is by this time almost outdated, the Tribal Affairs Ministry, Government of India, has circulated a set of criteria, which most generously speaking, can be described as regressive.

The essential characteristics of the tribal peoples as described by the Government of India (website http://tribal.nic.in/index1.html) are: (a) primitive trait; (b) geographical isolation; (c) distinct culture; (d) shy of contact with community at large; and (e) economic backwardness. On 19th November 2004, Government of India, however, presented slightly differently worded criteria. In place of the words 'community at large' one finds the words 'public at large'.

As already mentioned, there is hardly any community anywhere in the world which does not share one or another of the beliefs and practices of the tribal peoples. One may ask whether prejudice against number 13 as found among many sophisticated peoples of the West is a primitive trait or not. Again, what about prejudice against black cats among many Hindus, or against chameleons among many Muslims? As regards geographical isolation, in most cases it is either outcome of colonial policy or by default of the non-tribal political elites, or the outcome of shift from one mode of transport and communication to another. Distinct cultures certainly exist, but this distinctiveness woven around the basic unity of human mind shyness of contact, is not a basic attribute of mind. As in the well-known case of the Jarawas, it must be examined contextually and historically. Again, there are studies which suggest that sometimes backwardness is imposed by dominating neighbours. Eklavya may not be a historical person,

but the Eklavya myth is a social fact - his thumb was mutilated when it was apprehended that he might do better than prince Arjun in archery. In such cases the tribals remain backward so that others may go ahead.

In the altered paradigm, complementarity of diagnostic criteria by a set of functional criteria will have to be envisaged.

Suggested Diagnostic Criteria for Statutory Recognition of STs in the Present Context

With the present context, as already described as the backdrop, the following diagnostic criteria are suggested:

A Scheduled Tribe is a people whose self-definition is that of:

(a) Collective of citizens as an organic whole, who while committed to constitutional obligation of citizens constitutes a distinct social entity with own niche of cherished history (empirically validated or not), language (or distinct dialect) and ways of life which are accepted as identity markers by the concerned individual or group or their neighbours.

(b) Has a social organization that may have horizontally compartmentalized segments which are not primarily ranked high or low, which however may be considered to be close to or distant from the internally embedded centre(s) of political/administrative power due to historical (or believed in historical) reasons.

(c) The social organization is primarily focused on kinship ties, and only secondarily on territoriality (that is living in and/or deriving livelihood from a common space or repository of shared resources).

(d) In consequence of primacy of kinship ties, major chunk of social regulatory mechanism is woven around kinship system or interlaced with kinship system giving an image of state indifference (though not necessarily state antagonism).

(e) Entertains a sense of custodial or jurisdictional right (more of the nature of para-political right rather than of the nature of proprietary right) in respect of territories or endowments of nature (which may/or may not be located in their traditional habitats or ancestral domains).

(f) Through myths, legends, other narrations, social injunctions and stipulations are having an internalized commitment of sharing of goods and services with fellow members belonging to the same social orbit and of caring for the satisfaction of their needs, rather than strictly going by their socially prescribed entitlements.

(g) Enjoying the sublime bliss of reciprocity as an aesthetic-ethical compact with various entities rather than as a pragmatic contract.

(h) While not averse to sophisticated technology, acceptance of the same predicated to the harmonization with culturally prescribed roles of the diverse segments of the community.

The criteria mentioned here are illustrative and not exhaustive. Such criteria are not strictly objective, these are to be applied through inter-subjective discourse and again these cannot be applied in isolation.

Functional Criteria in Current and Emerging National and International Situation

While functional criteria are explicitly being suggested here as complementary to the updated diagnostic criteria, some anthropologists had even four decades ago postulated the presence of functional criteria. In 1966, in a professional journal, this author expressed the view that recognition of ST is a matter of policy. He was more explicit in his keynote address delivered in 1974 in a tribal policy workshop organized by the National Institute of Community Development (now National Institute of Rural Development). It was published by the institute the same year. Extract from the keynote address is included here. "When Indian society as a whole is class-ridden and when exploitation marks the social relations in almost every field, can the emerging tribal elites be very much different?"

"Is it not correct to observe that the emerging tribal elites are very much likely to be the nuclei of social transformation of the tribal societies? If so, is it… difficult to envisage that the crucial functions of the nuclei are not only to create aggregation of functions but also to generate a system of linkages? This is the first historical step towards breaking the barrier between the tribals and the national society - the crucial question is how in the modern context one is to look upon the tribal programme? Is it basically a task of philanthropy, whose task is status quo; or

a task of nation building which welcomes social transformation? If it is the latter, how can one ignore the historical need of tribal elite of transformation?"

"It is the legacy of old paternalistic attitude toward the tribals that gets scared when sections among the erstwhile wards show that they intend to throw overboard the wardship"…

"A strategy of nation-building will in some context, require that the rate of advancement of the advanced sections among the tribals should be accelerated."

What was presented in 1974 can be aptly described as dialectics of inequality.

With the foregoing perspective at the back of the mind, listing of some people as ST should be considered as part of a totality of social arrangement.

It will require examination of (a) Which other peoples are included in what category within the framework of the constitution? (b) What would be the likely effect of including some people in a particular category or of excluding them from a particular category?

If different communities belonging to the particular political administrative entity under consideration are found in other states/countries, it will also be necessary to examine whether there are social, cultural, economic and political linkages among them and how the inclusion in or exclusion from a statutory category would have bearing on the neighbouring entities, or on the social and political process of the region, or of the country as a whole, or on the analogous sans border entities and vice versa.

Further, the relevant policies, plans and programmes operating in the specified social milieu should be examined, and how categorization of some peoples in one manner or the other would be related to the same.

The following illustration would further clarify the issues:

If, for instance, when two communities, one with a weak and the other with a strong resource-holding capacity are included in the same statutory social category, there is a possibility that the sources would flow out from the weaker entity to the stronger entity. In such a situation, depending upon the policy objective, along with listing of communities, appropriate

juridical instruments will also have to be provided for.

Another situation, which is of international relevance, may be considered. In the present era of neo-liberal economy-based globalization, while state is becoming bereft of many of its regulatory functions, and there is growing free movement of capital and capitalist entrepreneurs, in the gap created by the erosion of state's role, NGOs - including international NGOs, are being increasingly inducted to fill up the gap; similarly, private sector entrepreneurs are encouraged to step into the vacated space of the public sector enterprises. In such a situation, the existing paternalistic approach and the criteria for recognition of STs described in the Government of India website would be quite relevant. But there could also be an alternative policy of, community rather than NGOs and private enterprises, filling up the vacated space of the state. In this shift in policy orientation, encouragement of the segments of the community, or in some cases encouragement of the more strategically placed community as a whole, would be a positive step.

In such a dynamic approach, listing of communities in statutory social categories would require examination of the following:

(i) Whether inclusion in or exclusion from a specific statutory social category along with appropriate legal and other programmed instruments would help to release the social forces, which will thwart the march of hegemonic globalization and in its turn promote the advent of the neo-international economic order as envisaged in the UN Declaration in this regard in 1974.

(ii) Whether such inclusion or exclusion will promote the realization of the Millennium Development Goals (MDG) as adopted by heads of 171 sates in 2000 AD?

The functional criteria indicated here are illustrative, not exhaustive. Essentially, the approach here is informed by what Upendra Baxi describes as dialectics of inequality.

The decision should not be akin to the fancies and objectives of the policy makers only; it should be through the modality of inter-subjectivity discourse.

Primitive Tribe

During the Fifth Five Year Plan, the Government of India creamed a sub-category, Primitive Tribal Group (PTG) within the category of ST. The criteria laid down for the identification of PTGs as

described in the website are as follows: (a) pre-agricultural level of technology; (b) very low level of literacy; and (c) declining or stagnant population.

It can be easily seen that in the perception of the Government of India, the regnum criterion in identification of STs in general also is possession of primitive trait, which as already indicated, may mean nothing more than subjective bias of the policy makers or programme framers. A more serious problem is when tribe itself is loaded with the attribute of alleged primitive trait, what does the repetition of the same load in case of the primitive tribes mean? Does it mean that their primitiveness is quantitatively or qualitatively more than that of the tribal peoples? In that case how to measure primitiveness? Or how to qualitatively delineate one type of primitiveness from another type in a ranking order.

It has already been indicated that delineation of pre-agricultural stage except perhaps, in the cases of the Jarawa, the Sentinelese, the Shompen, the Onge and the Great Andamanese of Andaman and Nicobar Islands is conceptually a flawed one. Even in case of most of the tribes of Andaman and Nicobar Islands, it is not empirically a fully correct one.

As regards stagnant or declining populations, it should be realized that many European countries are having significantly low or declining population. In India, the Parsees are having oscillations between tangent and declining populations, but none would dare to call them a primitive tribe.

Perhaps some tribes may be vulnerable to various types of negative forces. They should better be called 'vulnerable tribes' rather than being encumbered by the term 'primitive tribe'. However, it is not the policy or programme associated with the category mentioned here.

Denotified Tribe

During the colonial rule some communities or sections within communities were from time to time declared as criminal tribes. Frequently, such declarations had nothing to do with the practice of criminal activities by them; often such declarations were made on political considerations. In 1949, Government of India had set up a Criminal Tribes Enquiry Committee and on the recommendation of the Committee, the Criminal Tribes Act was repealed. For the purpose of rehabilitation, the ex-criminal tribes were declared as 'denotified tribes'.

It is to be considered whether even after half-a-century, the label 'denotified tribe' should be tagged on to those who were earlier notified as 'Criminal Tribes', or whether it would be better to call them also 'Vulnerable Tribes'.

Besides, it was found that in many states the communities now treated as 'denotified tribes', were not actually listed as 'criminal tribes', as found in the list included in the Criminal Tribes Enquiry Committee Report. It is to be examined whether there was any other list of Criminal Tribes, not covered by the Criminal Tribes Enquiry Committee Report.

BHUBANESHWAR DECLARATION ON DEMYSTIFYING PESA

[PANCHAYATS (EXTENSION TO THE SCHEDULED AREAS) ACT, 1996] *

* Workshop organized by
Institute of Socio-Economic Development,
Bhubaneshwar on 18-20 May, 2006

The participants of the workshop on "Demystifying PESA" held in Bhubaneshwar during 18-20 May 2006 thank the Institute of Socio-Economic Development, Bhubaneshwar for taking the initiative of getting a threadbare analysis made of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996.

Further, the participants thank Prof. B.K. Roy Burman, an eminent anthropologist and policy analyst of the country (and former Member, Central Advisory Board for Scheduled Tribes Development and also the Central Advisory Board for Scheduled Caste Development), and Prof. L.K. Mahapatra, an eminent anthropologist and former Vice-Chancellor of Utkal University (Bhubaneshwar) and Sambalpur University (he was also Member of the Central Advisory Board for Scheduled Tribes Development), for serving as resource persons of the workshop.

The workshop records its profound thanks to Shri Chaitanya Prasad Majhi, Hon'ble Minister, ST and SC Development, Orissa for actively participating in the deliberations of the workshop and hearing the views of the tribal leaders and headmen from almost all Schedule-V districts of Orissa. The workshop also expresses deep appreciation to Dr. Giridhar Gomang, M.P. (who was former Chief Minister of the state) for his valuable contribution during the deliberations of the workshop.

The workshop, after taking into consideration the grassroot level

experiences of the participants and detailed discussions with the resource persons, hereby proclaims that the PESA suffers from the following infirmities:

(a) Whereas the PESA requires the State legislations to conform to tribal customs and practices, and as on the other hand most of the Scheduled areas are multi-tribal, it is not clear as to whether the state legislation will conform to the customs and practices of which tribe.

(b) As there is no statutorily competent authority to make a legally binding pronouncement that any particular legislation enacted by the State Legislatures is/is not harmonious with the customs and practices, etc., of the concerned tribes, the provisions in the PESA in this regard are nothing more than a pious sentiment.

(c)(i) Whereas according to section 4(b) of the PESA, 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, it is not clear as to who will authenticate the tradition and custom, and how.

(ii) Besides, whereas in section 4(b) the term 'community' has been used in micro-territorial sense, in section 4(g) it has been used in the sense of ethnic segment, thus revealing inconsistency in respect of a core concept of the PESA.

(iii) Whereas, either in the sense of a micro-territory or in the sense of ethnic segment, the PESA has equated physical space with social space, in real life the nature of resource management entity differs from tribe to tribe and region to region.

Whereas, by ignoring these ground realities and by defining 'village' in a uniform manner, the PESA as a Central Act, has violated the spirit of the edict it has prescribed for the State legislation. The workshop expresses its considered view that rather than creating new territorial entities through legal instruments, the appropriate course would be to recognize the existing village boundaries, leaving to the concerned people to pass a resolution indicating with reason the changes that they want in their spatial jurisdiction.

(d) Whereas by requiring in section 4(c) that every village shall have a Gram Sabha (GS) consisting of persons whose names are included in electoral rolls for the panchayat at the village level, the PESA has failed to recognize that in many villages in the Scheduled Areas there are tribal peoples generally constituting moral communities at the level of ethos and non-tribal population claiming inalienable rights of civic democracy, and thus has failed to address the problem of reconciling the roles of these two categories of social entities. In this context, the workshop takes note of the fact that in some states attempts have been made to reconcile the two roles by providing that the head of the traditional council of the major tribe of the village would serve as the chairperson of the GS, which would consist of all adult persons of the village - whether tribal or non-tribal. There are also other ways of reconciling the two roles, but the simplest one is being suggested for the scheduled areas. The workshop is of the view that this should be incorporated in the statute, by an amendment of the PESA.

(e) Section 4(d) stipulates to the effect that every GS shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of conflict resolution. Whereas the stipulation in this section is of the nature of a proclamation, one would like to know to whom is it addressed. If it is addressed to state functionaries and/or non-state interests prowling around to siphon off resources under custodial jurisdiction of the tribal peoples, it does not require much intelligence to appreciate that the concerned segments of the bureaucracy and the vested interest would be too happy to deal with each territorial unit separately (as this will be unviable to collectively resist undemocratic and obscurantist imposition of any exploitative intention). If on the other hand, the proclamatory assertion in this section is addressed to the tribal habitats in isolation, to cut off their collectivist ties, it is to be considered whether in their isolated action they will not become pliable entities at the mercy of external agencies.

Leaving aside the ambiguity and misplaced emphasis on competence of tribal communities in functioning in isolation at the village level to safeguard and preserve their tradition, custom, etc., the workshop is of the view

that the proclamatory statement in section 4(d) is factually incorrect. Most tribal peoples have their inter-village social organizations, through which they decide the modality of safeguarding and preserving their traditions, customs, etc. The workshop takes note with disfavour of this proclamatory statement and looks upon it as a crude attempt to intervene with the system of self-management of the tribal peoples.

(f)(i) Whereas section 4(e) vests every GS with the power to approve the plans, programmes and projects for social and economic development at the village level, the participants in the workshop note with dismay that the Act does not recognize the right of the GS to generate its own plan for social and economic development.

The workshop further emphasizes that whereas logically the core activities of the GS should be preparation and implementation of the plan, programme and strategy for development, drawing primarily on its traditional systems of recognition, identification, mobilization and utilization of resources, in the absence of any mention of its traditional resource management system-related core activity, section 4(e) of PESA seems to have no function other than verbal ornamentation.

(ii) Whereas section 4(e) also speaks of the responsibility (not right) of GS for identification and selection of beneficiaries (not active participants) the language used is language of patrimonialism. In other words, the participants in the workshop view the passive role envisaged for the GS of just selecting the so-called beneficiaries and monitoring the implementation of the prefabricated plans and programmes as a mockery of tribal self-rule. It is a journey to bondage, not to freedom.

(g) Whereas section 4(f) provides that every panchayat at the village level shall be required to obtain from the GS a certificate for utilization of funds by that panchayat for the plans, programmes and projects mentioned at 4(e), and whereas the workshop is of the view that notwithstanding the extreme limitation of section 4(e), the provision of section 4(f) has some use; it is noted that the usefulness is circumscribed by several lapses in the Act, to which the Act does not indicate who would be the convenor-cum-presiding officer of the GS meeting and who will maintain

the minutes of the meeting. Besides, while the Act requires panchayats to obtain a fund utilization certificate from the GS, it is silent about the requirement of other functioning authorities within the jurisdiction of the village, to do the same.

(h) Whereas section 4(g) provides that reservation of seats in the Scheduled Areas at every panchayat shall be in proportion to the population of the communities in that panchayat, for whom reservation is sought to be given under Part IX of the Constitution;

Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats.

Provided further that all seats of Chairpersons of panchayats at all levels shall be reserved for the Scheduled Tribes.

The workshop noted that the foregoing provisions do not conform to the demographic realities. It notes that out of 236 districts in 9 states having Scheduled Areas, only the case of 17 districts as a whole has been scheduled. Of these 17 districts, in two districts STs are in the minority. Again, out of the 52 partially scheduled districts as in 1991, in 5 districts STs constitute less then 5 per cent of the population. In the case of districts with a very small percentage of ST population, reservation of seats in the manner indicated would cause unnecessary conflict and tension.

(i) Whereas section 4(h) provides that the State Government may nominate persons belonging to such STs as have no representation in the panchayat at the intermediate and district levels, the workshop notes that this provision may open up floodgates of political manipulation by state level political bureaucratic nexus. The workshop suggests that if the system of cooption by the elected tribal members from the concerned tribal community is adopted, it is likely to cement solidarity among the tribal peoples.

(j) Whereas section 4(i) provides that the GS or the panchayats at the appropriate level shall be consulted before making the acquisition of land in Scheduled Areas for development projects and before resettling persons affected by such projects in the Scheduled Areas, the workshop considered

this as a very weak framework of tribal self-rule. It requires the GS or panchayat at the appropriate level to be consulted only before making acquisition at the respective level; it does not require the approval or consent of the GS or the panchayat at the appropriate level. To add insult to injury, it makes a vague stipulation that actual planning and implementation of the project would be coordinated at the state level; it does not clearly demarcate that the coordination at the state level will be done among whom and through what mechanism.

(k) Whereas section 4(j) provides that planning and management of minor water bodies in the Scheduled Areas shall be entrusted to the panchayats at the appropriate level, the workshop wonders, the act of entrustment would be done by whom and under what authority? Besides, does the OBC foregoing stipulation hold good only for state projects or for central projects also?

(l) Whereas section 4(k) lays down that the recommendations of the GS or the panchayats at the appropriate level shall be made mandatory prior to grant of license or mining lease for minerals in Scheduled Areas, the workshop is of the view that the language of the section is ambiguous. It may mean recommendation for undertaking prospecting or lease holding. Also, it is not clear whether prospecting for minerals would be held back if the GS or panchayat does not recommend prospecting for minor minerals within its jurisdiction. Besides, the word 'recommendation' is inappropriate; it should be replaced by 'consent'.

(m) Whereas section 4(l) requires that the prior recommendation of the GS or the panchayats at the appropriate level shall be made mandatory for grant of concession for the exploration of minor minerals by auctioning. The workshop is of the view that as in case of section 4(k), this section is also marked by ambiguity.

(n) Whereas section 4(m) reads as follows: "while endowing panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the panchayats at the appropriate level and Gram Sabha are endowed specifically with - (i) the power to enforce prohibition or to regulate or restrict the sale and

consumption of any intoxicant, (ii) the ownership of minor forest produce, (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe, (iv) the power to manage village markets by whatever name called, (v) the power to exercise control over money-lending to the Scheduled Tribes, (vi) the power to exercise control over institutions and functionaries in all social sectors, and (vii) the power to exercise control over local plans and resources for such plans including tribal sub-plans".

The powers envisaged are dual in nature, namely: (i) executive and judicial power, and (ii) legislative power. As the State Legislature is competent to confer the panchayat bodies with powers of executive and judicial nature, without invoking the authority of the Fifth Schedule of any central act, it is not clear as to why such conferment of power should be confined to Scheduled Areas and not all such areas in the State where the STs are found in sizeable numbers. On the face of it, the PESA seems to be an exclusionary device rather than an encompassing device to empower the STs all over the country.

As regards the legislative power, in view of the famous Delhi Judgment of 1950 delivered by Justice Mahajan in the Supreme Court, it is obvious that the State Legislature cannot confer such power to panchayat bodies notwithstanding whatever has been stipulated by PESA. The only way legislative power can be conferred on statutory bodies below the State Legislature is by introducing the Sixth Schedule of the Constitution.

In view of the restrictive character of the Fifth Schedule, which the 7th Plan Working Group for the STs has dubbed as paternalistic in thrust, and in view of the recommendation of the PESA of conferring power of legislative nature on the panchayat bodies, the workshop recommends that the Sixth Schedule, which the 7th Plan Working Group has recognized as having the grains of self-management of the Constitution, should be introduced in all ST predominant areas.

Self-management provision for the ST peoples through the institutional arrangement of the Sixth Schedule will not, however, serve its purpose; it may rather backfire unless the strategic entities of the nation recognize and respect the dignity of the ST peoples and their life-ways - particularly their creative engagement with the endowments of nature.

Unfortunately, the role of the most important strategic entity, the Tribal Affairs Ministry, Government of India, seems to be negative in this regard. In their website, the Ministry has put the following indicators for identification of the Scheduled Tribes (a) primitive traits (without specifying what they are), (b) economic backwardness, (c) shy of contact with society at large, (d) isolation, and (e) distinct culture.

Various authorities have suggested various other criteria, but the Ministry, for reasons unknown, selectively adopted the foregoing criteria. While distinct culture is unexceptionable, others are either a-historical or non-fact and biased. This, in its turn, has set in motion another unfortunate trend. Of late, many communities are trying to get recognized as STs and to support their claims they selectively put forward, or sometimes even concoct traits, supportive of the presence of the foregoing traits among them. Thus, a trend of self-denigration, for the sake of some benefits of concessions, is surfacing.

The workshop is firmly of the view that the root must be stemmed. The Workshop calls upon the social scientists to develop a set of criteria more reflective of current thinking about the significance of tribal people's life-ways, particularly about their sharing with and caring for persons in the same social orbit, their extension of self in the surroundings, their veneration of the endowments of nature and their internal self-regulation rather than over-dependence on state machinery.

The workshop strongly discourages some sections of the tribal population from being stigmatized as primitive tribes, because of alleged primitiveness, pre-agricultural economic pursuit and stagnation in population growth. As already noted, all tribal peoples are claimed by the state to be identified by possession of so-called primitive traits, without indicating what the primitive traits are. If it is not bad enough, the problem is further compounded by ascribing that the 'Primitive' tribe also possess primitive traits. Then at the conceptual level they are primitive of primitives. This is negatively running amok. As regards stagnation of growth, it is found among many highly sophisticated people in the West. In India, the past also shows stagnation of growth. As regards pre-agricultural stage of economy, there is hardly any person anywhere in the world who does not have at least a symbiotic relation with agricultural or post-agricultural production system. There are, however, people among the STs who are more vulnerable than others, to economic, cultural and

social onslaughts. The workshop strongly suggests that the term 'primitive tribe' may be replaced by the term 'Vulnerable Tribe'. Also, the workshop strongly suggests that the term 'de-notified tribe' should be replaced by the term "Vulnerable Tribe', as use of the term 'de-notified' inevitably rakes up the unpleasant memory, that rightly or wrongly, the concerned peoples had sometime been notified as 'criminal tribe.'

Post Script

Prof. Mahapatra suggested that in those cases in which State legislations fall short of the positive elements of the central law, the latter will prevail. This was accepted.

Sri Giridhar Gomang, M.P. (former Chief Minister of Orissa) who attended the session, moved an amendment to the effect that the State Government may be requested to enact a legislation taking care of the infirmities of the PESA, incorporation of all the positive provisions of PESA, and also providing that the scope of the same Act should be extended to all MADA (Mining Area Determined Annually) and tribal cluster areas. The amendment was unanimously accepted.

ANALYTICAL APPRAISAL OF THE PANCHAYATS

(EXTENSION TO THE SCHEDULED AREAS)

ACT, 1996 *

* Mainstream, 25 December 2004

During the last phase of India's freedom struggle from colonial domination, considerable emphasis was laid on enlarging its social base, both as a strategic need as well as fulfilment of the moral ethos of human dignity and fraternal ties intensified by the struggle. This concern found expression in regenerating institutions of local self-government, particularly in rural areas. This endeavour, however, did not always have smooth sailing. Traditionally, Indian villages were highly stratified with higher castes dominating in almost all spheres of life and the Dalits being looked upon almost as non-persons. But Gandhiji launched a dauntless fight against this iniquitous situation; sections of Dalits also launched their own struggle, particularly under the leadership of Dr. B.R. Ambedkar. Slowly, a qualitative change began to take place in the humanscape in rural India. In the context of this emerging social ferment, the Directive Principles of State Policy in Part IX, Article 40 of the Constitution stipulated 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".

The Directive Principles of State Policy are not on their own enforceable by law. These give direction in which the state should move. And certainly the Indian state made several significant moves by carrying out land reforms (though not to its logical end), passing laws and carrying on campaigns against

untouchability, against atrocities perpetrated on the Dalits and the tribals, making provisions for empowering the marginalized sections of the society through reservations in legislatures, jobs and educational institutions, and so on. Thus, the ground for the functioning of grassroot level democracy was prepared and in 1992 the Constitution was amended (73rd and 74th Amendments), which made the setting up of panchayatiraj institutions mandatory not only in the rural areas, but also in the urban areas of all States and Union Territories. It was, however, laid down that the amendment in the form as adopted by Parliament will not apply to certain areas, including areas covered by the Fifth Schedule of the Constitution. At the same time, it was indicated in the Amendment Act itself that "Parliament may, by law, extend the provisions to the Scheduled Areas and Tribal Areas subject to such exceptions and modifications as may be specified in such law". [Article 243 M4(b)]

As a follow-up of this provision in the Constitution, "the Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (No. 40, 1996)", commonly known as PESA, was enacted by Parliament on December 24, 1996. In the present paper the various provisions of PESA are presented and analyzed.

Some activists entertain a view that PESA constitutes an integral part of the 73rd Amendment; hence its contents have the mandatory status of the provisions of the Constitution. But there is also a view that while the idea of having a PESA is an integral part of the Constitution, its contents are ancillary to the same and do not enjoy the mandatory status of the different Articles of the Constitution. This debate is not merely academic in nature. The holders of the first point of view want to force the states to adopt the provisions of PESA as they are; the holders of the second, on the other hand, want the specific provisions, not PESA, to be considered on their merit for adoption or rejection or modification. It is in the context of this debate that an analytical appraisal of the provisions of PESA is being made in this paper, for the jurists to decide on the legal status of the specific provisions of PESA.

1. Scope of State Legislation

Section 4(a) of the PESA Act stipulates as follows: "A State Legislation on Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources."

Analytical Appraisal of Section 4(a)

(a) Many scheduled areas are multi-tribal; ethnographic studies all over India show that customary laws differ from tribe to tribe and sometimes even within the same tribe in different eco-cultural zones. One wonders the State Legislation will conform to the customary law of which tribe.

(b) Is there any statutorily competent authority/process, other than the long drawn judicial process, to make a legally binding statement that any particular legislation enacted by the State Legislature is/is not in consonance with customary law, etc., of the concerned tribe/tribes? Apparently, only the Sixth Schedule of the Constitution provides for statutory authority of a sort, though in this also there is a mix of the juridical process and political process. But the Fifth Schedule does not provide for any such mechanism.

(c) Reference to traditional management practices of the resources opens up complex issues. First, of course, is the problem of authentication of traditional management practices. On this matter, two decades back an interesting case study was published by the author of this paper. The second is the problem of harmonization of traditional resource management practices of diverse people laying claims over resources in the same geographical space. Third, and perhaps the most important issue, is the problem of harmonization of traditional resource management practices with emerging non-traditional uses of the same resources. Speaking in universalistic terms in this matter, balancing/synthesizing procedural law and substantive law is involved.

In taking a decision on such controversial matters, the judicial authority takes cognizance of the travaux preparatoire. Perhaps the Bhuria Committee Report and the documents related to the preparation of the Report may be considered as the travaux preparatoire insofar as the PESA Act is concerned and as it is understood that the Bill was adopted without any discussion in Parliament, the documents relating to the decision that the Bill would be adopted without discussion would also constitute travaux preparatoire. Any serious discussion on the PESA Act and the State Acts (conforming or non-conforming to the provisions of the PESA Act) will require these documents to be examined.

2. Definition of Village — PESA Contradicts Itself

Section 4(b) defines a village as follows: "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 tradition and customs".

Analytical Appraisal of Section 4(b)

(a) As in the case of section 4(a), here also one faces the problem of authentication of tradition and customs.

(b) In this sub-section, the term "community" seems to have been used in a micro-territorial sense, but in section 4(g) the term "community" has been used in an ethnic sense. Thus, there has been code-switching in the Act from one meaning of the term to another, creating confusion thereby.

(c) While in section 4(a) it has been stipulated that the State Legislation shall be in consonance with customary law, etc., by analogy it is expected that the PESA Act would also be governed by the same spirit and approach. In many parts of India, the tribal habitats consist of a core ethnic entity or a segment of it (for example, a lineage) and a small number of households belonging to other distinct ethnic entities rendering specialized functions and services. The core ethnic entities have trans-territorial linkages for safeguarding their interest vis-à-vis the apparatuses of the state and against increasingly large numbers of non-state agencies. Small ethnic entities, which earlier had symbiotic relations of varying degrees of intensity with the core entity in proximity, maintain trans-territorial ethnic linkages to safeguard their interest vis-à-vis the core dominant ethnos as well as new existential challenges from external sources. Thus, different tribal predominant areas have multi-faceted ground realities. In this context, the attempt to impose a definition of "village" in a uniform manner (and with internal semantic inconsistencies) cannot claim to be in consonance with tribal customary law.

(d) Available ethnographic literature shows that most of the tribal villages are existing in their current habitats with their territorial jurisdiction from the hoary past. This does not mean that status-quo must be maintained in all cases. But rather than creating new territorial entities through legal instruments, the best course would be to recognize

the existing villages and village boundaries, and leave it to the people as a whole to formally pass a resolution indicating, with reasons, the changes they want in their spatial jurisdiction. It is quite likely that there will be a conflict in this matter among adjoining villages. In such cases, intermediate level panchayats, rather than the state bureaucracy, may be vested with the power of arbitration and reconciliation.

3. Gram Sabha: Village Moral Community

Section 4(c) stipulates, "Every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at thevillage level".

Analytical Appraisal of Section 4(c)

Without opposing this provision, one may ask whether it is always in consonance with tribal traditions and customs. In many tribal villages, a few non-tribal households and establishments are found to exist for quite some time, with varying degrees of concentration of economic, social and political power. Though they are residents of the tribal villages, they are not considered to be members of village moral community and they are not expected to participate in the tribal village meetings convened through their traditional channels to settle their own affairs. Their enfranchisement may expand the participation of the territorial population, but may erode the authority of the tribal moral community. Though on the face of it, this looks like an intractable problem, to one acquainted with different systems of tribal self-rule, reconciliation of the two principles, namely, functioning of universal territorial citizenship and functioning of historical ecology rooted moral community may not appear beyond human ingenuity. But before addressing this problem, some of the incongruities embedded in the PESA Act require to be cleared first. The problem of reconciliation of the two principles will be dealt with in the latter part of this paper. In the meantime, it may be asked that if some State governments deviate from section 4(c) of the PESA Act on the ground that it is not in consonance with the customs and traditions of hardly any tribal people, then can the concerned State Government be forced to fall in line by taking recourse to the specious logic advanced by some enthusiastic campaigners of the PESA Act that it is an integral part of the Constitution?

4. Competence of Gram Sabha to Preserve Tradition

Section 4(d) to the effect that "Every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution" reads like a proclamatory statement. Anyone acquainted with the tribal communities, not as an administrator, but as a systematic researcher, knows that there is hardly any tribe, which lives in isolation from its compeers inhabiting more than one habitat. Otherwise, continuous inbreeding within a single habitat would lead to genetic aberrations and ultimate extinction. There are hierarchies of behavioural norms, which are regulated at different levels. There are behavioural norms which are decided at the household level; there are norms which are decided at lineage level; norms enforced at territorial-community level, and norms amplified, reinterpreted, redefined and enforced at a much larger community level. It is a continuous process. In the context of the proclamatory nature of the stipulation in the Act, one wonders, it is addressed to whom? Is it addressed to the state functionaries and/or non-state vested interests prowling around to siphon off the resources under custodial jurisdiction of the tribal people? In that case, they will be only too happy to deal with each territorial unit separately, which will be unviable to collectively resist any exploitative intrusion or any undemocratic, obscurantist imposition. Or is it addressed to the tribal habitats in isolation, to sunder their collectivist ties so that they become pliable entities at the mercy of external infringing agencies? Or is it addressed to the inter-habitat larger tribal organizations, which after moribund existence for sometime, are showing signs of revitalization of organizational structure, reinvigoration of their functional relevance by creative engagement with the challenges of contemporary life situation and by focusing on the dialectical relations between customs and traditions? [Customs are contingent behaviour related to specific situations; traditions have an ethical aura rooted in the conviviality orientation of human nature.] If the proclamatory statement in section 4(d) is not to be considered as antinomous to the humanist resurgence of the tribal people through their collective dialogue with the age old externalities, the only ground on which the doubt can be kept in abeyance is recognition of the ignorance of the formulators of this proclamatory statement about the dynamics of tribal life process and about the conviviality oriented ferment taking place among the tribal and indigenous people, at all levels, all over the world.

5. Role of Gram Sabha in Planned Development

Section 4(e) inter alia provides that "Every Gram Sabha shall (i) approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level; and (ii) be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes."

Analytical Appraisal of Section 4(e)

a) It is assumed that the right to approve plans, programmes and projects also implies the right not to approve plans, programmes, etc., though this right is not clearly stated in the Act. What, however, is significant is that the Act does not recognize the right of the gram sabha to generate its own plan for social and economic development as it perceives to be relevant not only for it, but for the larger society. One finds in this a logical discontinuity in the structure of the Act. As already mentioned, this Act considers "gram" as a spatial expression on a self-managing community in accordance with its traditions and customs. The 'gram sabha' is only a legally structured expression of 'gram samaj' (village community). Logically, therefore, the core activity of the gram sabha should be preparing and implementing the plan, programme and strategy, drawing primarily on its traditional system of resource mobilization and utilization; externally sponsored other activities should be ancillary to its core activity. In the absence of any mention of its traditional resource management related core activity, section 4(e) seems to have no function other than mere linguistic ornamentation.

b) Section 4(e) reveals a mind-set not committed to tribal freedom of action but to tribal bondage. It speaks of the "responsibility" of the gram sabha (not the right of the gram sabha) for identification and selection of persons as 'beneficiaries' (not active participants) in "poverty alleviation" and other programmes. Here, the language used is the language of patrimonialism, not of partnership. One certainly is entitled to ask whether this approach in the Central Act is in consonance with the "customary law, social and religious practices and traditional management"

according to which State Legislatures are to enact their respective laws.

c) Here, it is necessary to mention that the internal inconsistencies in the linguistic structure of the Act are not just to prick holes, they have a more substantive purpose. Available information indicates that there is a very high concentration of productive resources in ancestral domains and current tribal predominant areas of the country. If, in spite of this, the percentage of tribal people below the poverty line is almost double the national average, it is because of the pursuit of aberrant policy decisions in planning. The wrong policy decision in their turn seems to be related primarily to the technocratic approach to planning, without adequate understanding of the social processes and people's resource management system on the ground. The Planning Commission had set up a Committee on India Vision 2020. The report of the Committee was published in 2003. As soon as it was published, analytical studies carried out by various agencies and public discourses, including one on Food Security in India sponsored by the National Institute of Rural Development, showed that some of the important assumptions particularly relevant to tribal areas were wrong. Again, an analysis of the data relating to forestry, published by the Government of India in the year 2000 and then in 2004, shows that the assumptions about relative efficiency of forest management by the Forest Department and tribal communities, respectively, are not validated by hard facts, including those available through aerial survey and ground level appraisal of management structures.

d) In the light of these revelations, the passive role envisaged for the gram sabha of just selecting the 'so-called' beneficiaries and of monitoring the implementation of pre-fabricated plans and programmes is a mockery of tribal self-rule.

But the gram sabha in isolation cannot make much dent on the national planning policy. Interlinkages of tribal organizations of different levels, and networking not only among the organizations of different tribes but also involving organized forums of peoples of broadly similar socio-economic category, would be necessary. With this

perspective, the other provisions of the Act would be examined and analyzed.

6. Structural Limitation of Gram Sabha

Section 4(f) provides that "Every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilization of funds by that Panchayat for the plans, programmes and projects referred to in section 4(e)".

Analytical Appraisal of Section 4(f)

a) Notwithstanding the extreme limitations of section 4(e), the provision in section 4(f) has some use, but its utility is constrained by lapses in the Act. The Act does not indicate who would be the convenor-cum-presiding officer of the gram sabha meeting and who will maintain the record of the meeting. Field investigations show that while in some States the sarpanch is the convenor-cum-presiding officer of the meeting of the gram sabhas and the Secretary of the gram panchayat prepares the proceedings of the meetings, in some other States the members of the gram panchayat (in whose constituency the concerned gram sabha is located) are the convenors-cum-presiding officers of the meetings. In all cases, however, the proceedings are prepared by the Secretary of the gram panchayat. In either case, the high possibility of the gram sabha meetings turning into a mere formality with hardly any bearing on the substantive matters cannot be ruled out. Here, it is to be noted that while the Bhuria Committee has been almost ecstatic about the role of traditional panchayats of the tribal people, the Act, supposed to be based on the report of the Bhuria Committee, does not make any provision for interarticulation of traditional and statutory panchayati raj institutions. At least a symbolic link can be established by stipulating in the Act that the head of the traditional panchayat will be the convenor-cum-presiding officer of the gram sabha and that the traditional village hawker will communicate to the villagers the venue and time of the meeting. It may also be provided that the headmaster of the village primary school, or a teacher deputed by him, will maintain the records of the meetings.

b) While the Act requires the panchayats to obtain a fund utilization certificate from the gram sabha, it is silent about other organizations functioning within the jurisdiction of the

village. For instance, in some States there are Joint Forest Management Committees functioning autonomously of the panchayats. These and similar other institutions operating within the jurisdiction of a village should submit themselves to the planning, monitoring and scanning functions of the gram sabha. And the Central Act itself should be clear on this matter.

7. Reservation of Seats in Panchayati Raj Institutions (PRIs)

Section 4(g) provides that "The reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution;

> Provided that the reservation for Scheduled Tribes shall not be less than one-half of the total number of seats;
>
> Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes".

Analytical Appraisal of Section 4(g)

a) As mentioned earlier, while in section 4(b) the term 'community' has been used in a micro-territorial sense, in section (g) the term has been used in an ethnic sense. It should be added that in section 4(a) the term community has been used in an ambiguous manner. It can be interpreted to mean a micro-territorial pluri-ethnic community; it can also mean an uni-ethnic community with spatial nexus.

b) There are many villages in Scheduled Areas without any tribal population or with a miniscule number of tribal persons. Again, there are many taluks and districts, only small territorial segments of which have been notified as Scheduled Areas. In such areas it is not unusual to find that the Scheduled Tribes constitute much less than 50 percent of the population. It seems that when section 4(g) of the Act was drafted, the demographic profiles of the concerned areas were not examined in quantitative terms. In the situation, as it obtains at present, implementation of section 4(g) would obviously create manifold complications.

c) It is argued by some that the problem can be skirted by redefining the village taluk and district boundaries. Such a mechanical approach to a complex problem seems to

ignore that most villages, and many taluks and districts, do not mean dead space to those who have inhabited them for generations. These are replete with histories, sacred memories, and fond whispers of the ancestors. Techno-bureaucrats may disfigure them with pencil marks on the maps, but many will look upon this as administrative vandalism.

d) There are, however, more mundane considerations as well. Carving out new administrative entities, particularly at the taluk and district level only on considerations of ethnic homogeneity will, while in many cases promote ethno-regionalism, retard rationalization, or interdependent functional differentiations of different orders. There is a fundamental difference between regionalism and regionalisation. Regionalism is an exclusivist subjective attitude over-focused on a limited number of traits in a selective manner; regionalisation on the other hand is a process of creating functional interdependence of economies and services of different levels of specialization. Given the fact that in most of the tribal predominant areas infrastructure for services and marketing are inadequate, and the percentage of tribal population with effective education (School Final and above) and with vocational education is also generally low, the predominantly tribal taluks and districts may be rich in natural resources but for extraction of the same in a viable manner and processing the same for the market either they will have to induct non-tribal labour force on a massive scale, or they would have to export unprocessed resources to areas outside their administrative jurisdiction, thus risking social tension or debilitating the economy. It is not known whether those who advocate large-scale reorganization of administrative units have given enough thought to this problem.

e) There is another mundane problem, which also must be kept in view. Carving out a large number of taluks and districts from the existing ones, to create homogenous predominantly tribal entities, will create a large number of government posts, particularly at the higher level. While techno-bureaucrats will be happy at this prospect, the cost of governance will go up and, rather than self-rule, the prospect of the tribal peoples being under more intensive techno-bureaucratic control would become a distinct possibility.

8. Nomination of Unrepresented Tribes

Section 4(h) provides that "The State Government may nominate persons belonging to such Scheduled Tribes as have no representation in the Panchayat at the intermediate level, or the Panchayat at the district level;

Provided that such nomination shall not exceed one-tenth of the total members to be elected in the panchayat".

Analytical Appraisal of Section 4(h)

Nomination of members from unrepresented communities will open up the floodgates of political manipulation by State level politician-bureaucratic caucus. It smacks of a divide and rule strategy. Rather, the system of cooption by elected tribal members from the concerned tribal communities should be adopted. It is likely to cement solidarity among the tribal peoples.

9. Consultation with Gram Sabha before Land Acquisition

Section 4(i) provides that "The Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level".

Analytical Appraisal of Section 4(i)

This is a very weak framework of tribal self-rule. It requires the gram sabha or panchayats at the appropriate level to be only consulted before making acquisition of their land. It does not require the approval or consent of the gram sabha or the panchayat at the appropriate level. To add insult to the injury, it makes a vague stipulation that the actual planning and implementation of the projects shall be coordinated at the State level. It does not make it clear the coordination at the State level will be done among whom and through what mechanism. There is no indication as to whether in planning and coordination the panchayat bodies at appropriate level would be involved. While hair-splittingcontroversies are carried on about how to legitimize or delegitimize the status of the tribal villages, which are there for ages, it is strange that hardly any critical position has been taken by those who are campaigning for the PESA Act in its present form to be

accepted by all States having Scheduled Areas within their jurisdiction, almost as a sacred testament of tribal self-rule, on this matter involving the life-support resource base of the tribal peoples.

10. Planning and Management of Water Bodies

Section 4(j) provides that "Planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level".

Analytical Appraisal of Section 4(j)

a) One would like to know planning and management of minor water bodies in the Scheduled Areas would be entrusted with the panchayats by whom? Earlier it has been noted that section 4(b) of the Act speaks of village as the spatial base of a community managing its affairs in accordance with traditions and customs. Section 4(a) stipulates that the State Legislation should be in consonance with the traditional management practices of community resources.

One wonders whether the foregoing stipulations hold good only for State Legislation or whether they hold good for Central Legislation also. Any rational person would say that stipulation at 4(a) and the descriptive enunciation at 4(b), whatever may be its worth, hold good for Central Legislation also.

b) One would now like to ask: how do those who are responsible for the PESA Act, 1996 know that the provision at section 4(j) is in consonance with "traditional management practices of community resources"? Ethnographers know that among many tribes water body management is a dimension of village moral economy and the entire community is involved in the decision-making process in this matter. But the PESA Act constricts this process.

c) In the context of the foregoing fact, "entrusting" the management of minor water bodies would have two alternative implications: (a) the State takes away from the village community the right of managing water bodies and vests this right with the panchayat, or (b) the village community surrenders its traditional right of the water resources management to the panchayat, which is a creation of the State through the legislative process.

Certainly, this is not a paragon of tribal self-rule. Besides, this is an infringement of the moral economy of the tribal peoples.

[Moral economy implies non-implementation of fixed rules, but a process of continuous adjustment in resource allocation and utilization harmonizing with culturally embedded ethical principles.]

11. Grant of Prospecting or Mining Lease

Section 4(k) lays down that "The recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting license or mining lease for minor minerals in the Scheduled Areas".

Analytical Appraisal of Section 4(k)

a) The language of this section is ambiguous. It may mean (i) recommendation for undertaking prospecting, or (ii) recommendation in the matter of selection of the prospecting license of leaseholder.

b) One would like to know whether prospecting for minerals would be held back if the gram sabha or panchayat does not recommend prospecting for minor minerals within its jurisdiction.

c) The word 'recommendation' in this section seems to be inappropriate. The appropriate word should be 'consent'.

12. Exploitation of Minor Minerals by Auction

Section 4(l) requires that "The prior recommendation of the Gram Sabha or Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction".

Analytical Appraisal of Section 4(l)

(a) As in the case of section 4(k), this section is also marked by ambiguity. It speaks of mandatory recommendation of gram panchayat for exploitation of minor minerals according to certain procedures. It is to be examined whether in case of adoption of a different procedure, recommendation of the gram panchayat would be mandatorily required under law.

(b) As in the case of section 4(k), in this section also it seems that the appropriate word should be 'consent' and not 'recommendation'.

13. Empowering Panchayats as Institutions of Self-Government

Section 4(m) reads as follows: "While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with — (i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant, (ii) the ownership of minor forest produce, (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe, (iv) the power to manage village markets by whatever name called, (v) the power to exercise control over money-lending to the Scheduled Tribes, (vi) the power to exercise control over institutions and functionaries in all social sectors, (vii) the power to exercise control over local plans and resources for such plans including tribal sub-plans".

Analytical Appraisal of Section 4(m)

a) The powers mentioned in this section are of two categories: (a) powers which are of executive nature and can be delegated by the concerned State government, (b) law-making powers which can be exercised by various entities only by conforming to the basic structure of the Constitution as spelled out in the Keshavananda Bharati case.

b) Ownership of minor forest produce, power to manage village markets by whatever name it is called, power to exercise control over institutions and functionaries in all social sectors, power to exercise control over local plans and resources for such plans including tribal sub-plans are of executive nature and can be delegated by the State Legislatures on other entities within their respective jurisdiction. But by endowing such powers through delegation of authority to the panchayats, the State Government will make the latter subordinate organs of the state. This is a far cry from the thrust towards tribal self-rule.

c) The power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant, the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe, the power to exercise control

over money lending in Tribal Areas, to be effective, and self-regulatory will require law-making power, judicial power and power of control over the law enforcing machinery to be vested with the panchayats. In view of the famous Delhi judgment by Justice Mahajan in 1950, it is unlikely that State Legislatures can vest law-making powers on panchayat bodies. Judicial power and police power up to a certain extent can of course be conferred by the State Legislature, but it will require radical transformation of the political climate of the country. In fact, conferment of all the powers mentioned not only in section 4(m) but also in 4(k) and (l) will require radical political mobilization on a massive scale. It is doubtful whether the dominant political class in the country, irrespective of party affiliation, is ready today for such a radical political mobilization.

14. Nature of Relation among PRIs at Different Levels

Section 4(n) stipulates that "The State Legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions of self-government shall contain safeguards to ensure 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".

Analytical Appraisal of Section 4(n)

One would like to know whether those in formulating this section of the PESA Act can vouch that it is in consonance with customary law, social and religious practices and traditional management practices of all or at least the major tribal communities of the country. Are they aware of the Pargana system of the Santal and the role of Lo Bir among them? Or are they aware of the Parha system of the Oraon, Pir system of the Munda, Manki Munda system of the Ho, inter-village organizations of the Bhils sometimes going beyond the jurisdiction of revenue districts, mother village and ancillary village of the Abujhmaria, traditional Gond political structure, and so on? In the traditional systems almost among all the tribes of India and even outside India, powers and functions of their territorial and kinship based institutions at different levels are well defined. Functions of more elementary level are discharged by minimal level kinship and territorial institutions, and through hierarchical channels certain functions relevant for the entire tribe are discharged at the maximal level of traditional territorial and kinship entities. Without clarifying the general

principle, vesting power with State organs to interfere with the tribal systems tantamount to a blatant infringement of tribal self-rule. Bureaucratic rationality has overshadowed historical normative reasoning of the concerned peoples at a time when the tribal peoples and their resource base have become vulnerable to the exploitative policies and programmes over which the authority of even the national government are being diluted. The stipulation in this section lacks perspective and understanding of the ground reality. The matter should have been left to the tribal peoples themselves to determine the patterns of relations among the panchayati raj structures at different levels according to their own customs, traditions and emerging need perception.

15. Adoption of Sixth Schedule Model at District Level

Section 4(o) provides that "The State Legislature shall endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at the district levelsin the Scheduled Areas".

Analytical Appraisal of Section 4(o)

One wonders whether those responsible for the insertion of this section in the PESA Act are aware that there are no uniform administrative arrangements in the tribal areas covered by the Sixth Schedule. If they are aware of any particular pattern they have in mind, the same should have been spelt out in the PESA Act itself.

16. Politics of Continued Transition

Section 5 of the Act is a transitional arrangement, but in some States the transition has continued for too long. It should not be considered as a mere technical legal lapse; it should be looked upon as a political problem and its implication should be analyzed from the political perspective, and not merely from the legal administrative perspective.

Reconciling Territorial Citizenship and Moral Community

Mention was made earlier of reconciling the principles of territorial citizenship and historical ecology rooted moral community. One of the ways of doing it is by introducing a system of functional differentiation of gram sabha in two categories, namely, (a) civil and traditional, and (b) ethno-social. For dealing with matters of common civic interest, the membership of the gram sabha should be open to all residents of the village. For dealing with matters of ethno-social and customary nature, the gram sabha

will recognize a core unit - the membership of which would be confined to tribal peoples of the village. This is a minimalist approach, combining the procedural aspect and substantive aspect of the law. What is needed is the "will" to find a solution.

There should be other solutions as well, by highlighting more the substantive aspects. But as the basic structure not only of the PESA Act, but also of the 73rd and 74th Amendments and even of the Bhuria Committee Report (which is supposed to have provided the frame of the PESA Act), are by and large informed by the Austinian paradigm of command law with loosely fitted sprinkling of Roscoe Pound's paradigm of sociological law, greater emphasis on substantive law moving towards the social solidarity function of the law, as envisaged by Duguit, will require the PESA Act to be discarded and even the 73rd and 74th Amendments of the Constitution to be further amended.

Tribal self-governance is not merely a matter of conformity to certain procedural rules, but also of active engagement in a wide array of substantive issues. In the latter aspect, the Act is extremely narrow in focus. Space will not allow to further elaborate the point in this paper.

SELF-DETERMINATION OF PEOPLES IN THE CONTEXT OF SHIFT FROM STATE-CENTRIC WORLD ORDER TO THE SPECTRE OF GLOBALIZATION AND HUMANITARIAN INTERVENTIONIST WORLD ORDER *

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ABSTRACT

While since its inception, the concept of right to self-determination of peoples has revealed diverse nuances of late, the concept of state sovereignty has also been put to severe strain, particularly in the context of hegemonic globalization and so-called humanitarian intervention. The paper examines various declarations, conventions, and resolutions adopted by the UN and ancillary international agencies, as well as some of the empirical situations to face the changing character of and linkages between the people's rights, state sovereignty and humanitarian intervention.

PROLOGUE

In international legal parlance, the struggle for 'self-determination' is intertwined with the notion of sovereign absolutist state system (SSS), formalized in Europe through the Treaty of Westphalia in 1648. The struggle for self-determination represents a centrifugal tendency of the oppressed towards state absolutism. In fact, in 1920, the League of Nations held that oppression should be a factor in allowing secession from a state[1].

[1]Report of the Commission set up by the League of Nations to consider claim of Åland Islands for secession from Finland in 1920 referred to by T.D. Musgrave in Self-Determination and National Minorities. Oxford: Clarendon Press, 1997.

In view of the intertwining as mentioned above, a preliminary appraisal of the concept of state, sovereignty, people, and self-determination will be made at the outset.

Gettel defines state as a community of persons permanently inhabiting a definite territory, legally independent of external control and possessing an organized government, which creates and administers law over all persons and groups within the jurisdiction[2]. As defined by Jackson, sovereignty strictly is a legal institution and authenticates a political order based on independent states whose governments are the principal authorities, both domestically and internationally[3].

The concept of sovereignty has, however, been undergoing subtle changes over the centuries. In the 18th century, the dominant concept of sovereignty was that of supreme authority of the state over its citizens not restricted by law. In the 19th century, it was supreme absolute authority, which was not controlled or restricted by any external agency. In the 20th century, it meant the ability of the state to exercise its internal and external authority independently[4]. As will be discussed later, there are already indications that in the 21st century, state sovereignty is likely to suffer massive erosion.

The exact connotation of the term 'people' is a matter of unfinished debate. Article 1(2) of the Charter of the United Nations seems to equate 'people' with the state. The travaux preparatory of the charter, however, reveals that those who drafted Article 1(2) did not intend to equate the word 'people' with 'state'. This fact was confirmed in the UN Resolution 2625(XXV). During the drafting of the UN Charter, Belgian delegates maintained that the term 'people' in Article 1(2) referred to 'national groups, which do not identify themselves with the population of a state'. In the coordination committee, France argued that as international relations were conducted between states and not nations, inclusion of 'people' in Article 1(2) in conjunction with 'nation' appeared to include within the ambit of the term, the right to

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[2]Quoted by B.N.M. Tripathi in a 1990 Jurisprudence. Allahabad: Allahabad Law Agency, (1999, p.113).

[3]Jackson, Robert (1999). 'Sovereignty in World Politics', in (ed.) Jackson Robert Sovereignty at the Millennium, Blackwell, USA.Quoted by Jasjit Singh in Challenge of Sovereignty, in International Conference on State Sovereignty in 21st Century, organized by Institute for Defence Studies and Analysis (IDSA), New Delhi, 23-24 July 2001.

[4]Masalha, Md. (2001). 'State Sovereignty' contributed to seminar on 'State Sovereignty in 21st Century', IDSA and ICWA, 23-24 July 2001.

secession. The United States of America, however, felt that as there could be parties to the charter who would not be states in the strict sense of the term, the concept of 'people' should be considered to have a broader connotation[5]. The International Commission of Jurists set up in 1972 to investigate the events of the then East Pakistan defined 'peoples' as within the realm of ethnic category[6].

Like 'people', the conceptual regime of 'self-determination' is a slippery one. Some start with the meaning of 'self' itself. There are those who speak of 'self' in the metaphysical sense. For our present purpose it is, however, not necessary to go into the metaphysical discourse about the meaning of 'self'. But there are those who, rather than accepting the state-centric realist paradigm of approaching the self in self-determination, prefer to go in for an idealist or ideological paradigm in which state is not at the centre of the stage, but has only an incidental presence or is a contingent fact, which one can deal with as a 'need right' and not as 'suigeneris' right. In this paradigm, "true self-determination is not expressed in the normal functioning of existing participating process and in the duty of other states not to interfere, but in the existence and free cultivation of an authentic communal feeling, a togetherness, a sense of being 'us' among the relevant groups. If in extreme cases, which may be possible only by leaving the state, then the necessity turns into a right National self-determination, then has an ambiguous relationship with statehood as the basis of international legal order. On the one hand, it supports statehood by providing a connecting explanation for why we should honour existing de facto boundaries and the acts of the state's power-holders as something other than gunmen's orders. On the other hand, it explains that statehood per se embodies no particular virtue and that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be over-ruled or its consequences modified in favor of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined[7]. It seems that the position taken here

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[5]Musgrave, Supra, p. 141 and p. 155.

[6]ibid, p. 161.

[7]Koskenniemi, Martti (1996). 'National Self-Determination Today: Problems of Legal Theory and Practice' in (ed.) H.J. Steiner and P. Alston, International Human Rights in Context. Oxford: Clarendon Press.

is a mix of companionate value orientation[8] and syndicalism. One should not miss two key concepts in the foregoing formulation. These are 'authentic communal feeling' and 'acts of state's power-holders as something other than gunmen's order'.

In the Ottoman Empire, non-Muslim minorities, for instance, the Jews, the followers of the Greek and the Armenian churches, had collective rights to observe their faiths and govern internal affairs at a time of Christian persecution of the Jews, Muslims and the Gypsies in the Iberian Peninsula following conquests. However, while under the Ottomans, the non-Muslims could practice their religions within self-governing communities (millet), there was non-individual right to religious autonomy. Non-conformist non-Muslims, like the Muslim subjects of the Ottoman Empire, were persecuted as heretics and apostates within their own communities[9]. Hence, millet was not an authentic companionate value oriented system; it was certainly a power-oriented system under state tutelage[10].

The caste system in India also represents self-governance under tutelage. In the Hindu caste system, once a component caste that recognized the superiority of the Brahmin, it was free to manage the affairs within the overarching norms set by the Brahmin lawgivers, or acquiesced to by Brahmin lawgivers. In case of violation of the norms by a caste as a collectivity, or by individuals belonging to a caste by defying the norms laid down by the caste council, it was the king's duty to exercise his coercive power to make the caste of the individuals within the caste, as the case may be, to behave appropriately.

Certainly, the millet system or the caste system, seen as static structures, does not come within the ambit of self-proclaimed essence of its structure also in terms of the dynamic processes that take place within its ambit. Over a length of time, one wonders whether the almost continuous struggles that go on both within the millet system and the caste system for reforms, demolishing the dehumanizing edifices of the systems, and human dignity, for respect for socially concerned individuals within and outside

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[8]Roy Burman, B.K. (1994). Indigenous and Tribal Peoples - Gathering Mist and New Horizon, pp. 7-8. New Delhi: Mittal Publications.

[9]Talsuo, Inade (1999). Liberal Democracy and Asian Orientation p. 45 in (ed.) J.R. Bauer and D.A. Bell, The East Asian Challenge for Human Rights, University Press Cambridge.

[10]Assucs, W.J. (1994). Self-Determination and the New Partnership, p. 83 IWGIA, and University of Copenhagen, Document 76, p. 83.

the realm of the state do not qualify them to be recognized as struggles of self-determination. This line of thinking may be compared with Laski's pluralist theory of sovereignty[11], which recognizes the roles of other institutions along with that of the state in regulating human affairs in their respective spheres.

Article 1(2) of the Charter of the United Nations speaks of the 'principle of equal rights and self-determination of peoples'. The very first Article of the two Human Rights Covenants of 1966 states in identical words: "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."

STATE SYSTEM AND RIGHT TO SELF-DETERMINATION

All rights including right to self-determination are embedded in specific historical circumstances[12]. As already indicated, the right to self-determination is an anaclitic counter mirror of state absolutism.

But absolutist state established through the Westphalia Treaty has been changing all the time and/or synchronously in different parts of the world. Responding to the same, degrees and faces of self-determination take different forms.

Changing charters of state absolutism, not necessarily in a strictly non-linear chronological order, would be briefly discussed first.

The Treaty of Westphalia (1648) obliged all its signatories to defend and protect all and every Article of peace against any one and to join those injured and assist them with counsel and force to remove the injury. But in the post-Napoleonic Congress of Vienna in 1815, state absolutism was subjected to a mild trimming. Russia, Prussia, and Austria agreed to grant national representation to the Poles living within their boundaries, and the establishment of their national institutions. Thus, in a way the Vienna Congress of 1815 was the milestone in the roadmap towards national self-determination. Later, in 1830 when Greece attained its independence it promised in a protocol to guarantee civil and political liberties of all its subjects regardless of religious beliefs. At the Congress of Berlin in 1878, this was the principle established to admit any state to the community of

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[11]Laski, Harold (1960). A grammar of Politics. London: Geroger Allen And Unwin.

[12]Crawford, James (1998). The Rights of Peoples, p.127.Oxford: Clarendon Press.

European nations. As a result, in the Treaty of Berlin, the states of Pennsylvania, Montenegro, Romania, Serbia, and Turkey were required to guarantee the rights and freedom of all their subjects without discrimination. Growth of national consciousness in multiethnic Austro-Hungarian Empire was a contributing factor to such a development.

However, through these treaties and similar ancillary moves elsewhere (Sultan Abdul Mejid's Tanzimat or benevolent reform in Turkey, which recognized the social equality of the non-Muslims for instance), the harsh countenance of the state absolutism was relaxed to a considerable extent. Today, democracy at the level of ethos is flaunted by almost every state member of the United Nations, though skeletons of undemocratic practices, even in respect of their own citizens, not to speak of the citizens of other states, are also found in the cupboards of almost all the states.

DEGREES OF SELF-DETERMINATION[13]

Corresponding to the characters of the states, there are different degrees of self-determination claims among different people. An inventory of those is as follows:

1. Establishment of the right to be free from colonial domination (e.g., almost all countries formerly under colonial domination).
2. A right to remain dependent, if it represents the will of the dependent people who occupy a defined territory (e.g., MayotteIsland in the Comoro, Puerto Rico).
3. The right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one (e.g., Czechoslovakia, former USSR).
4. Disputed right to secede (e.g., Bangladesh, Eritrea).
5. The right of divided states to reunite (e.g., Germany).
6. The right of minority groups within a larger political entity recognized in Article 27 of the Covenant on Civil and Political Rights, and in the UN General Assembly's 1992 Declaration on the Right of Persons belonging to national or ethnic, religious and linguistic minorities.
7. The right of limited autonomy, short of secession, for

[13]'International Human Rights in Context' (ed.) Steiner and Alston, 1996.Oxford: Clarendon Press.

groups defined territorially, or the common ethnic, religious or linguistic bonds (confederations like Canada).

8. Internal self-determination, i.e., Freedom to choose one's form of government or even more sharply, the right to democratic form of government (e.g., Haiti).

Though published in a prestigious journal, namely, the American Journal of International Law, it does not appear that all the items in the inventory merit to be called rights and also the right to self-determination. For instance, the wish on the part of Puerto Ricans to remain dependent on USA can hardly be called a right. Of course, some scholars differentiate between need right and power right. Even then it is difficult to categorize the wish to remain dependent as a need right. Again, reunification of Germany can be called a right of self-determination only on one or both of two premises, namely (a) state can be equated with people, and (b) right claim, can be exercised not only in relation to a state but also in relation to the international community. The first premise has been discussed earlier and has been negated. The second premise seems to require the presence of a world government, which is not there.

The value of this paper is the observation that 'a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination, but a claim of right by the indigenous groups within the democracy to use their own languages and engage in their own non-coercive cultural practices is likely to be recognized, not always under the rubric of self-determination…' Conversely, a claim of a right to secede from a repressive dictatorship may be regarded as legitimate. That not all secessionist claims are, however, equally destabilizing will depend on such things as the plausibility of the historical claim of the secessionist group in the territory it seeks to slice off.

While the foregoing observation does not go much beyond a statement of political principle, the paper also raises the question of the legal status of each variant of the rights in the inventory in the international law regime. But this has not been systematically followed up.

It is now proposed to examine the status and the content of the right to self-determination in international law.

RACIST BIAS IN THE APPLICATION OF RIGHT TO SELF-DETERMINATION DURING AND IN THE AFTERMATH OF THE FIRST WORLD WAR

It was during the First World War that the issue of the right to self-determination got the real impetus. The Germans were the first to try to exploit the national sentiments of subject nationalities of the opponents in Europe, like the Sinn Féin in Ireland and Flemish separatists in Belgium. They encouraged separatism from Russian Lithuania and other Baltic provinces. On the German initiative, a Congress of Nationalists was organized at Lauzanne on 16 June 1916. As the United Kingdom and France had forged an alliance with Russia (allies), and the subject nationalities of the latter in Central Europe were involved, they were constrained in their response. The British foreign office, however, made an inane declaration, which interalia stated that "the principle of nationalities would be one of the governing factors in the consideration of territorial arrangement after the war... we are limited in the first place by the pledge already given to our allies which may be difficult to reconcile with the claim of nationalities".[14]In the meantime, the allies promised to Italy all those territories inhabited by an Italian lrridenta. Both sides were also seeking support of the Poles by promising some sort of a resurrected state in an ambiguous manner.

In March 1917, the Tsarist government in Russia was overthrown and a Provincial Government headed by Kerensky took over. On 29 March, the new Government declared its policy not to dominate or conquer any nation and sought 'a durable peace on the basis of the right of nations to decide their own destinies'[15]. At the same time, the Provisional Government did not pull out of the war and did not repudiate the secret treaties that Russia had made with the allies. It was, therefore, lukewarm in responding to independence claims of nationalities like the Finns, Ukrainians, etc. But when the Bolsheviks came to power in October 1917, in general they strictly supported self-determination claims even to the extent of secession. However, Rosa Luxemburg, one of the topmost communist ideologues, considered national independence as a bourgeois concern and rejected the Polish claim to independence as it contravened proletariat internationalism[16].

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[14]Musgrave, T.D. (1997). 'Self-Determination and National Minorities'. Oxford: Clarendon Press, p.15.

[15]ibid. p.16.

[16]ibid. p.18.

"But Lenin recognized that right to self-determination could be used to purge out the legacies of the Tsarist regime. While they moved out of the war, they recognized the independence of other national territories under their occupation.

With Russia out of the war, the British and French, freed from the requirement to respect the multinational charter of the Tsarist regime, began to make vigorous declarations in favour of self-determination of peoples in order to weaken the central powers and to counteract the advantage that the Bolsheviks gained through espousing the political doctrine of self-determination of the peoples. It was at this stage that US President Wilson's idea of self-determination played a significant role in determining the course of events.

Before entering the war in favour of the allies in April 1917, Wilson obtained assurance from the latter, more or less in support of the principle he was espousing. In June 1917, Wilson declared the war aim of the USA - to the effect that it would fight for liberty, self-government and indicated development of all peoples[17].

Subject nationalities everywhere interpreted Wilson's declaration as a commitment to supporting each ethnic group to form its own nation-state. In Wilson's celebrated 'Fourteen-Points' speech to the United States Congress on 8 January 1918, the phrase 'self-determination' was conspicuous by its absence[18], even though the speech dealt with specific territorial settlements, including creation of independent states out of the remnants of the Austro-Hungarian and Ottoman Empires. Subsequent developments showed that neither Wilson nor other allied leaders believed that the principle was absolute or universal.

National territories outside Europe were out of bounds of the concept of self-determination of peoples. During the war, the allies occupied provinces of the former Ottoman Empire and German colonies outside Europe. They could neither return the same to their former masters nor annex them without repudiating their declarations during war. Rather than harping on self-determination, Wilson favoured some sort of trusteeship. After much haggling, the mandate system was imposed on the concerned peoples of Asia, Africa, and Oceania[19]. Racist bias

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[17]ibid. p.23.

[18]'International Human Rights in Context' (ed.) Steiner and Alston (1996).Oxford: Clarendon Press.

[19]Musgrave, T.D. (1997). 'Self-Determination and National Minorities'.Oxford: Clarendon Press.

was obvious in the sordid game. Even in respect of Europe, a Commission of Jurists appointed by the League of Nations held that the principle of self-determination was not in normal circumstances a part of international law[20].

RIGHT TO SELF-DETERMINATION UNDER THE UN REGIME

The Treaty of Versailles took into cognisance the political principle of the right to self-determination. As a result, sizeable minorities continued to exist within the new nation-states. Moreover, wherever the principle was applied, it was in respect of the territories of defeated powers. All these contributed, not to a mean extent, to the outbreak and prolongation of the Second World War. The principle of self-determination had to be pulled out from the limbo and converted into right, though in a halting manner.

In 1944, at Dumbarton Oaks, the first conclave of the allies took place to draw up a charter for a post-war, international organization. There is no document to show that self-determination was discussed in the conclave. But in 1945, when the United Nations Charter was finalized, on the initiatives of the USSR, the self-determination of peoples was included in Articles 1(2) and 55. But even these two articles refer to self-determination only in subordinate clauses, and do not primarily address the issues of self-determination at all[21].

The sub-committee, which initially discussed self-determination, noted that among the sponsoring governments, there were two views. One was that the principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the charter only insofar as it implied the right of self-government of peoples and not right of secession. The full committee, which adopted the Articles, provided little clarification of the meaning or import of self-determination[22].

The Universal Declaration of Human Rights (UDHR), with the General Assembly of the United Nations proclaimed as a common standard of achievement for all peoples and all nations… to secure their universal and effective recognition and observance, both among the people of the Member States themselves and among the people of territories under their jurisdiction, was adopted on

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[20]ibid. p. 34.

[21]ibid. p. 66.

[22]ibid. p. 64.

10 December 1948. A Soviet proposal to include right to self-determination in the Declaration was rejected[23]. As a result there was no reference to self-determination in UDHR. One can draw two conclusions from this. First, at least at that point of time among the majority of the members of the UN the view that right to self-determination did not imply right to secession prevailed. Second, the spectre of secession by the exercise of the will of the people hovered over the power elites of most states, and that there was a nervousness among them that through a process of transmutation, the phrase 'right to self-determination' might serve as the medium for the expression of this will. Hence there was an allergy to the term.

But after passing through the dark tunnel of the war ending in the nuclear blast, there was a period of a new dawn of humanity. The thunder of humanist assertion could not be drowned through the blast of eerie silence.

On 4 December 1950, the UN General Assembly by Resolution 421(D) asked the Economic and Social Council (ECOSOC), United Nations to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination and to prepare recommendations for consideration by the General Assembly.

In 1952, it was decided that ancillary to UDHR, there would be two covenants on human rights: International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). It was also decided to open these two covenants for signature simultaneously. Again USSR proposed inclusion of an Article on self-determination. But as in the days of the League of Nations, states with colonial possessions, like the United Kingdom, France, and Belgium argued that self-determination was not a legal right, but rather a vague political principle, usually attained through extra-legal processes, often involving secession[24].

When the resistance of western countries failed, they made a move in the UN Human Rights Commission to widen the term of the proposed Article, so that not only the peoples in colonial situations but even peoples in sovereign countries were covered. At first, the USA did not oppose the inclusion of the Article on

[23]ibid. p. 67.

[24]ibid. p. 68.

self-determination within the ambit of the human rights regime. But when Chile made a proposal of their natural resources according to their free choice, the USA backed out on the ground that it would inhibit foreign investment. In its perception, self-determination was to be tethered to the political space allowed by the capitalist market. However, in 1955, the Resolution on recognition of right to self-determination as a fundamental human right was adopted with the overwhelming support of the communist and third world (better to say, historically disadvantaged) countries, with most of the western countries opposing it[25].

SELF-DETERMINATION LINKED TO DECOLONISATION AND PERHAPS MORE

On 14 December 1960, the UN General Assembly adopted Resolution 1514 (XV) entitled the Declaration on the Granting of Independence to Colonial Countries and Peoples. Para 2 of the Resolution declared: All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social or cultural development. Further, it stated that inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

A fundamental limiting principle had, however, been laid down in Para 6 of the Resolution: Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

One of the internationally recognized authorities[26] on the self-determination discourse, commenting on the resolution observes:

> "The thrust of the declaration is clear: all colonial territories have the right of independence. However, a closer reading reveals uncertainties arising from varying uses of the terms 'peoples','territories', and 'countries'. Although the title of the declaration refers only to 'colonial countries' and peoples, operative paragraph 2 refers expansively to the right of 'all peoples to self-determination'."

While Resolution 1514 of 1960 is generally acclaimed as a landmark

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[25]ibid. p. 68.

[26]'International Human Rights in Context' (ed.) Steiner and Alston (1996).Oxford: Clarendon Press.

in the self-determination discourse, to have a further insight, the UN Resolution 2625 (XXV) of October 24, 1970 (Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations) requires to be examined. It covers a wide range of issues. Relevant paras from the section concerned with equal rights and self-determination of peoples are reproduced here[27]:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of this Charter.
>
> The territory of a colony or other non-self-governing territory, has under the charter, a status separate and distinct from the state administering it, and such separate and distinct status under the charter shall exist until the people of the colony or non-self-governing territory have exercised their right to self-determination in accordance with the charter, and particularly its purposes and principles.
>
> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action, which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as the race, creed or colour".

The Declaration further stipulates that the territorial integrity

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[27]ibid. pp. 974-975.

and political independence of the state are inviolable and that each state has the right freely to choose and develop its political, social, economic, and cultural systems.

Expert opinion[28] in respect of the Declaration is that while no definition of peoples has been provided, neither of the two purposes it sets forth suggest that self-determination is intended to provide every ethnically distinct people with its own state. One observation made by the same expert is particularly important. While the Declaration on friendly relations places the goal of territorial integrity or political unity as a principle superior to that of self-determination, this:

> "Applies only to those states which conduct themselves in compliance with the principle of equal right and self-determination of peoples as described above and are thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. The only requirement of representativeness suggests internal democracy. However, such a requirement does not imply that the only government that can be deemed representative is one that explicitly recognizes all of the various ethnic, religious linguistic and other communities within a state".

Proceeding further, he observes, "A more persuasive interpretation… is that a state will not be considered to be representative if it formally excludes a particular group from participation in the political process on that group's race, creed or colour".

The disclaimer in the 1970 Declaration was reiterated in the Vienna Declaration emanating from the 1993 UN World Conference on Human Rights, with one significant change. The Vienna Declaration exempted only a government representing the whole people belonging to the territory without distinction of any kind.

SELF-DETERMINATION IN THE TWO COVENANTS OF 1966 ON HUMAN RIGHTS

Mention has been made earlier of the two covenants of 1966 as ancillary to the Universal Declaration on Human Rights. Article l of both the covenants speaks about the right to self-determination exactly in the same language as Para 2 of Resolution 1514 of 1960.

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[28]ibid. p. 975.

India expressed her reservation in respect of Article 1 in both the covenants:[29] 'With reference to Article 1 (of both Covenants), the Government of the Republic of India declares that the words 'the right of self-determination' appearing in those words do not apply to sovereign independent states or to a section of people or nation which is the essence of national integrity.

Three states, each a former colonial power, filed formal objections to India's reservation. The Federal Republic of Germany particularly reacted to India's reservation stating[30]: "The right of self-determination... the Federal Government cannot consider as valid an interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants."

It is, however, to be noted that at the preparatory state, though many countries were opposed to the inclusion of the right to self-determination in the covenants, India's representative is reported to have extended support to it and stated that "if the right meant the right of peoples to decide for themselves in political, social and cultural matters, such a right was recognized in every truly democratic state"[31]. The later allergy to the term in several quarters in India is to be understood in the context of the trend toward a hegemonic world order, where there is a feeling that there is need for collective self-determination of disadvantaged countries and peoples against manipulative intervention. But for the generation which was directly involved in the freedom struggle of the country, this lack of self-confidence is shocking. It seems that in the 1990s there was again a rethinking on this matter. On 18 October 1995, the External Affairs Minister of India made a statement during a meeting of Non-Aligned countries that India would not have any difficulty with the term 'right to self-determination' as it did not imply right to secession[32].

SELF-DETERMINATION AND RIGHT TO SECESSION

As an authority[33] on international law,Hurst Hannun observed,

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[29]ibid. p. 976.

[30]ibid. p. 976.

[31]Quoted by A.R. Vajapur 1991 in 'Self-Determination, A Perennial and Preparatory Norm of International Law'. South Asia Publishers Ltd.

[32]The Hindustan Times Press Conference of Pranab Mukherjee, October 18, 1995.

[33]Hannun, Hurst, Supra, p. 977.

although it is debatable whether right to self-determination has attained the status of a right in international law, at the same time he observed that examination of various texts and the travaux preparatories of the two Covenants of 1966 on human rights did not establish that the right to self-determination, defined as a unilateral right to independence, was intended to apply outside the context of decolonization. He also stated that despite the apparently absolute formulation in various UN resolutions and the two international Covenants on human rights, self-determination has never been considered an absolute right to be exercised irrespective of competing claims or rights, except in the limited context of classic colonialism. Here, the position taken by the Secretary General of UN in 1970 also needs to be noted, 'As an international organisation the United Nations has never accepted and does not accept and one does not believe it will accept the principle of secession of a part of a member state'[34].

The foregoing declaimers, however, do not relate to other aspects of self-determination. The right of a people organized as a state to a government that reflects their wishes are essential components of the right to self-determination. These rights have universal applicability, and the statement that no state has accepted the right of all peoples to self-determination is correct if one equates self-determination exclusively with secession or independence.[35]

In 1974, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated a study by Hector Gros Espiell, whose report affirms that right to self-determination in the sense of right of secession is 'confined to peoples under colonial and alien domination from an external source. A concern for preservation of territorial integrity is the countervailing and prevailing consideration. In the classical colonial context, the colonized peoples right to self-determination permits (if not mandates) the opinion of secession to sovereign independence'[36].

The report of another study commissioned by the UN on the Developing content of the concept of self-determination was published in 1981. Its author Cristescu, 'anchored the concept of self-determination' around the fairly particular circumstances

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[34]Quoted by L.B. Macfarlane, 1985, The Theory and Practice of Human Rights. London: Maurice TempleSmith.

[35]Hannun, Hurst, Supra, p. 977.

[36]Espiell Gros, Hector (1980). 'The Right to Self-Determination – Implementation of United Nation's Resolutions' Quoted by Nathien Garth 1998: Peoples and Population (ed.) James Crawford, Supra, p. 12.

of the past decolonization of Asia, Africa, and Oceania. Claims to the assertion or reassertion of complete self-determination, the study suggested were by right available, and available only to those who were subject to alien subjugation, understood as subjugation by non-contiguous population[37].

It, however, seems that the disclaimer in Resolution 2625 of 1970 had been ignored both by Gros Espiell and Cristescu, when they had spoken in such absolute terms. A group of 20 social scientists issued a statement in Shimla (India) to the effect that 'in the emerging world moral order, if a state indulges in acts like genocide or liquidation of peoples, the right of secession cannot be denied to the affected peoples even though the UN system may not support it'[38].

From what has been claimed as the viewpoint of the liberals, four criteria have been enunciated as qualifications for secession from an existing modern state, which are as follows:[39]

1. Secession might well be thought justifiable if the region had originally been included in the state by force, and its people had displayed a continuing refusal to give full consent to the union. There must have been a history of reservation about the union, even if not one of active protest.
2. If the national government had failed, in a serious way, to protect the basic rights and security of the citizens of the region. This failure must either have been continuing, or, if not continuing, was so drastic that a reasonable person in the region could be expected to feel fearful for his future security and freedom.
3. If the political system of the country had failed to safeguard the legitimate political and economic interests of the region, because the executive authorities had contrived to ignore the results of that process. For this condition to apply, it would be necessary to show that the failure was prolonged and likely to continue; that it had resulted in relative deprivation of some kind for the region, and

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[37]Referred to by M.C. Lam, 1990: 'Indigenous Hawaiian Option for Self-Determination under US and International Law', Proceeding of the 6th International Symposium, Commission Folk Law and Legal Pluralism, Vol. 1, 14-18, Ottawa, Canada.

[38]Roy Burman, B.K. (1995). Indigenous and Tribal Peoples and the UN and International Agencies.New Delhi: Rajiv Gandhi Institute of Contemporary Studies.

[39]Brich, Antony (1989). Nationalism and National Integration, London, Unwin Hyman. Quoted by R.Vasum 2001 Indo-Naga Conflict.New Delhi: Indian Social Institute.

that politicians in power could be held responsible for the adverse consequences that had followed.

4. If the national government had ignored any explicit or implicit bargain between regions that was entered into, as a way of preserving the essential interests of a region that might find itself outvoted by a national majority.

In a state-centric realist paradigm, it is difficult not to agree to the aforesaid criteria for legitimate right to secession. But it would also be necessary to keep in view a rider advanced by a scholar. In his words, "It is fundamental to self-determination that the power demanded by a group must be equally shared. Hence, elites which determine power be supported by the claimant group as a whole."[40] One also wonders whether the geopolitical context of hegemonic globalization and the so-called humanitarian intervention-based emerging world order should be considered as a backdrop and in that case to what extent. One should not rule out the possibility of manipulative action by world power-holders to create a situation where armed actions by irredentists can be legitimized taking advantage of the UN Freedom and Independence Resolution 33/24 of 24 November 1978. Perhaps in this context, fresh affirmation by the Eijde Committee in mid-1990s that right to self-determination does not automatically imply secession, acquires special significance.

INTERNAL AND EXTERNAL SELF-DETERMINATION

A point of view seems to exist[41] that external self-determination and internal self-determination are mutually exclusive. The right of a people organized as a state to freedom from external domination is external self-determination. The right of the people of a state to a government that reflects their wishes is internal self-determination. As discussed, if para 2 of Resolution 1514 of 1960 is interpreted as right to self-determination of all peoples in non-self-governing territories, once this right is exercised by the concerned peoples there cannot be any external self-determination for any of the minorities. But the indigenous peoples are not mere minorities; they have traditional jurisdictional rights in respect of specific territories and resources within sovereign states. In their case, external self-determination cannot be completely ruled out. UN Draft Declaration (UN Doc. E/CN.4/Sub.2/1994/

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[40]Suzuki, 1996, Quoted by R. Vasum, Supra, p. 816.

[41]Musgrave, Supra, p. 73.

Add. 1, 20 April, 1994) on the Rights of Indigenous People in Article 3 states that indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. This seems to include both internal and external self-determination[42]. Articles 4, 19 and 20 also seem to leave external and internal self-determination as matters of choice for the indigenous peoples[43]. But Article 31 of the Declaration fully enshrines the right of internal self-determination for the indigenous peoples. It states: 'Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy of self-government in matters relating to their internal and local affairs…' This leaves open a number of issues, to wit the pattern of articulation of self-governance institutions of the indigenous peoples with national institutions, and also whether conflict resolution in this matter would be under the purview of international law. However, the draft declaration itself and the issues raised seem to confirm that self-determination as right to secession is not an absolute right[44].

CONTEXTUALITY IN DETERMINING THE FORM OF SELF-DETERMINATION CLAIMS

North American indigenous movements tend to equate self-determination with sovereignty, taking the histories of treaties between the USA and indigenous peoples as a framework of reference. Some of the indigenous movements in Latin American countries by contrast propose self-governance within the structure of existing states, which would have to become multi-ethnic and 'plural-national'[45].

SELF-DETERMINATION AS A PROCESS

The transformation of self-determination claims from vague political aspirations to a right under international law. With the coming into force of the two Human Rights Covenants of 1966 is itself the outcome of a process. But the process takes diverse forms keeping to the geo-political imperatives and constraints.

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[42]Assucs, Supra.

[43]Roy Burman, B.K. (1998). UN Declaration and Safeguards for Protection of Rights of Tribal and Indigenous Peoples in (ed.) B.K. Roy Burman and B.G. Verghese.Aspiring To Be - Commonwealth Human Rights Initiative. Konark Publishers Pvt. Ltd.

[44]Hannun, Supra p. 977.

[45]Assucs, Supra p. 77.

In many countries, there are groups identified by ethnicity or religion, who acutely feel that there can be no solution to their plight unless they gain full autonomy or independence. During the Cold War, these potential sources of conflict tended to be managed by the superpowers or their allies so as to avoid the possibility of their leading to consequences disturbing the power equation between the two blocks[46].

On the whole, until the collapse of the Soviet Union, right to self-determination was mainly invoked and relied upon by peoples formerly under colonial rule to remove the legacies of colonialism in political, economic and other relations, and to gain full control of their destiny. With the fall of communist power centres, ethnic groups (a term used here to cover nationalists also) invoke the right to self-determination, claiming political rights, which range from internal autonomy to a right of secession[47].

Interestingly, one keen observer of the unfolding scenario points out that the development process of self-determination claim is not nonlinear. There has been a shift from the territoriality based right to self-determination developed by the UN in the context of decolonization, to the ethnic, linguistic principle of self-determination. This apparently means a reversal to the principle advocated by Wilson and others in 1919[49].

SHRINKING POLITICAL SPACE OF THE SELF-DETERMINATION CLAIM

If the focus of self-determination claims has shifted from territoriality to ethnicity, the sociological meaning of the same requires to be explored. Basically, territoriality is tied up with statehood; ethnicity in the long run is tied up with peoplehood. Under the UN regime with its decolonization thrust, state is the beating board of the protagonists of self-determination but under impact of privatization and consolidation of free-floating international trade, and the explosion of information technology, state as an institution is in the process of decline. The estimated turnover of five top multinational corporations (MNCs) is equal to that of 132 states[49]. More frequently than not, the weaker states are to submit to the dictates of MNCs at tandem with the World

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[46]Koboyashi, Sonji (2001). 'State Sovereignty in the 21st Century', International Conference on State Sovereignty in the 21st Century by ICWA and IDSA, Delhi on 23-24 July, 2001.

[47]International Human Rights in Context (ed.) Steiner and Alston (1996).Oxford: Clarendon Press.

[48]Hannun, Supra, p. 977.

[49]Pascal, Boniface (2001). Is Sovereignty Still A Valid Concept, ICWA and IDSA, Supra.

Bank and IMF in their economic and social policies. For some powerful countries, erosion of state sovereignty in the global order is not only a process but a project[50]. In this context, the irredentists cannot fail to realize that carving out new states will make them more vulnerable to the supra-state domination. Shift of focus from power-right of classical state system and state security system to need-right of human security is surfacing as a natural outcome. In terms of values, human security encompassed a state of well-being, in which individuals or groups of individuals are assured of protection from physical and mental harm, and are freed from fear and cultural identities. Threats to the same are reckoned as direct and indirect from state or non-state actors and structural sources, arising from power equations at various levels. In this paradigm, the state is no longer the sole target of political action of the protagonists of self-determination claims[51]. But as neither psychologically nor in terms of strategic thinking they are prepared to cope with the challenge from the non-state sources, who either do back-seat driving or are seen to act on their own, the political space for action of the protagonists of self-determination claims go on shrinking.

HUMANITARIAN INTERVENTION AND NEMESIS OF RIGHT TO SELF-DETERMINATION

Article 39 of Chapter VII of the United Nation's Charter authorizes the Security Council to determine the existence of any threat to the peace, breach of peace or act of aggression, and decide what measures are to be taken to maintain or restore international peace and security. In the Articles that follow, it has been made very clear that military intervention should take place only after adequate non-military action has taken place. Chapter VIII of the Charter authorizes UN-recognized regional agencies to make every effort to achieve pacific settlement of local disputes. While the Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements, the Security Council shall where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangement or by regional agencies without authorization of the Security Council. Chapter VI of the Charter provides for pacific settlement of disputes, which may endanger the maintenance of international peace and security (Article 33). Article 36 requires

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[50]Garba, J.N. (2001). Concept of State Sovereignty, ICWA and IDSA Supra.

[51]Dasgupta, Sumana and Gopinath, Meenakshi (2001).From Conflict to Roadless Travel, ICWA and IDSA, Supra.

the Security Council to recommend appropriate procedures or methods of adjustment at any stage of the nature referred to in Article 33 or of a situation of like nature[52]. In practice, the appropriate measures include maintenance of peacekeeping force.

It is to be noted that unilateral humanitarian intervention contravenes Article 2(4) of the UN Charter. It is on this ground that US intervention in Nicaragua was invalidated by the International Court of Justice[53]. After the end of the Cold War, in the contemporary virtually unilateral world order, unilateral intervention by big powers, particularly the three permanent members of the Security Council, namely the USA, the UK and France, is a growing phenomenon. In the case of Kosovo, even the US backed regional military alliance, the NATO undertook the so-called Humanitarian Intervention, without the authorization of the Security council (for fear of veto by Russia and China), on the plea of preventing ethnic cleansing of the Albanians by the Serbs. But there was ethnic cleansing in several other countries, particularly in Rwanda and Somalia. But after half-hearted peace-keeping operations, the genocide was allowed to continue. There is a criticism that there is an unfortunate tendency among commentators and political leaders to dismiss crises as unsolvable, once they have been branded ethnic or tribal. The USA, which had the capacity to halt the killings, declined to intervene as it viewed the conflict as internal[54], and more importantly because its national interest was not significantly affected. While unauthorized humanitarian intervention is legally invalid, selective resources to such intervention is patently immoral.

In the present discourse what is however most important, is that even though the minority groups supposed to be protected by intervening forces aspired after independence for their lands so as to avoid the repetition of persecution by the central government in future, the international community has no system to accommodate their desires, applying the principle of self-determination for them[55]. As the case of Kosovo brings out, it is not only the Serbs, but also the Albanians who have suffered and are suffering as a sequel to humanitarian intervention. If the state of Yugoslavia is in shambles, self-determination aspirations of the Albanians of Kosovo are also in shambles.

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[52]Naidu, M.V. (2001). State Sovereignty and Legal Aspect, ICWA and IDSA, Supra.

[53]Awaad, Soliman (2001). Sovereignty and Legal Aspect, ICWA and IDSA, Supra.

[54]Mills, Greg (2001). Breaking the Logic of African Conflict, ICWA and IDSA, Supra.

[55]Koboyashi, Sonji, Supra, p. 46.

DARKNESS AT NOON FOR FOREST WORKERS AND THEIR CHARTER OF DEMANDS *

* Keynote Address at Seminar on
'Rights of Forest Workers'
Convened by National Centre for Labour at Ranchi
on 17 September 1998

Forest Workers in Population Census of India

The Census of India has categorized full time forest workers as follows: Foresters and related workers (A: 70,517; B: 121,606); Harvesters and gatherers of forest products including lac except log (A: 30,980; B: 46,207); Log fellers and wood cutters (A: 111,981; B: 169,254); Charcoal burners and forest produce processors (A: 14,977; B: 20,533); Loggers and other forest workers (A: 22,846; B:22,352); Hunters (A: 5,175; B: 7,067); Trappers (A: 3,340;B: 3,216); Hunters and related workers (A:1,957; B: 2,086).

Note: The figures in parenthesis represent census data; those marked 'A' stand for 1971 Census and 'B' stand for 1981 Census.

Since 1961, in Indian Census, work has been defined as participation in any economically productive activity. Such participation may be physical or mental in nature. Work in this concept means not only actual work but also effective supervision and direction of work. It also includes unpaid work on farm or in family enterprise.

It is interesting to note, that there had been some increase in the overall number of persons retaining forestry and related work as their main occupation during 1981 Census over that during 1971 Census. When the 1991 data are available, the implication of this trend will become clearer. It should be noted here that all the persons enumerated in the Census as main workers in the forestry sector are not necessarily entirely dependent on forestry

for subsistence. Some of them may derive income from other sources though their working time is mainly related to forestry sector in one way or the other. Hence, while the census data provide some quantitative indication, the same require to be underpinned by field investigation.

The census data also require a closer look as to whether the approximately two lakh workers in about 5,000 forest villages established by the State Forest Departments have been included in the category of forest workers. Doubt has arisen about their actual status. Forest villages were constituted by the Forest Department to ensure timely availability of labour in outlying forest areas. They suffered from many inequities. The system was declared by Kerala High Court as ultra vires to the constitution. Besides, the 1978 StateForest and Tribal Welfare Ministers' Conference had recommended conversion of Forest Villages to Revenue Villages. But the working group on Ninth Plan for Tribal Development has recorded their presence even at present. There is a tendency in Census operations in many countries including India not to record information that is not legally admissible. One cannot, therefore, be sure about actually how the forest villages have been enumerated.

Categorization of Forest Workers

I would like to categorize the forest workers as follows:

a) Full time or part time wage labour employed by Forest Departments, Forest Development Corporations, Cooperatives and ancillary bodies operating in the forestry sector or working as employees of contractors, forest lessees operating in this sector based on rights directly or indirectly obtained from the concerned Forest Departments.

b) Artisans, craftsmen dependent on forest produce.

c) Hunters normally inhabiting the forests and fully or partly deriving livelihood (in the form of direct consumption, local barter, wider commercial linkage) by hunting mainly by traditional method including trapping birds and animals.

d) Extractors of grass, bamboo, logs and timbers as headloads for personal consumption, barter or local sale.

e) Gatherers of non-wood forest products (NWFPs) for personal consumption, barter or local sale.

f) Practitioners and users of herbal medicine system.

g) Farmers particularly belonging to tribal communities and other small and marginal farmers whose economy is by and large subsistence economy, which is to a very substantial extent dependent on forest ecology or changes in forest ecology.

h) Population affected by creation of sanctuaries, national parks, and closed areas under the Indian Wildlife Protection Act, 1972 or by other activities having bearing on forest ecology.

i) Population subjected to bio-piracy under bio-diversity convention and or its preceding scientific poaching at national or international levels.

j) Population adversely affected by manipulation of the endowments of nature through the instrumentality of unscrupulous use of bio-technology.

k) Participants in social forestry programmes (other than recreational forestry) and Joint Forest Management Programme (JFM) primarily for meeting basic consumption needs or for creating social infrastructure especially meant to serve the vulnerable sections of the society.

l) Population below the poverty line in the category of forestry work.

Extent of Dependence on Forest

The Committee on 'Forest and Tribals of India' (Government of India) reported in 1982 that the tribal communities have been occupying forested regions from the hoary past and living in harmony with nature. The forests not only provide them food, material to build houses, fuel for cooking, light and warmth, fodder for their cattle, but also satisfy deep-rooted spiritual quest.

A survey done in forest regions of Gujarat revealed that 22-27 percent of the elderly persons and 70-72 percent of the children go to the forests for collection of tubers, leafy vegetables, bamboo shoots and a host of other forest products. A survey conducted in 1980-81 in Bastar district of Madhya Pradesh revealed that in dense forest areas, the elderly persons collect materials from forest in the proportions as follows. Food (31.11%); agriculture and allied activities (11.11%); fuelwood (30.23%); saleable objects (22.22%); socio-religious activities (5.33%). An average household (having two adult members, at least one child and

an old person) on an average earns Rs. 1,500 a year (against total annual income of Rs. 1,750) from sale of NWFPs (non-wood forest products) without any initial input or risk. A study conducted in Andhra Pradesh, Bihar, Madhya Pradesh and Orissa and a study regarding the impact of MFP (minor forest produce) collection on the socio-economic life of tribals in the Panchmahal district of Gujarat conducted in the early 1980s showed that about 35 percent of the earnings of the tribal peoples was from these items.

A recent study carried out in West Bengal shows that while on an average around 17 percent of the income of the tribal households is related to the activities in the forests, in some areas it goes upto 25 percent. It had been reported by a Dehradun F.R.I.-based forester in 1996 that in Rajasthan approximately five million persons belonging to various tribal communities earned their livelihood through collection, transport, processing and marketing of NWFP or MFP. Even in a disturbed and degraded forest of Aravalli, 32 useful items were collected by the tribal peoples.

In Maharashtra, about 30 percent of the diets of the tribal population is obtained from the forests in the form of leaves, vegetables, tubers, fruits, nuts, bamboo, shoots, small animals, honey, etc. In the forests of the southern parts of West Bengal, the tribal peoples collect 27 commercial products and 37 medicinal herbs for humans and animals.

In North-East India, the bulk of the tribal population (except those living in the plains of Brahmaputra valley and Imphal–Barak valleys) live in the hills. About 70 percent of the region is hilly and mountainous. In the rural areas of the hills, their economy even in the farming sector is primarily related to forest ecology. The tribal peoples in Brahmaputra valley also have their habitats frequently in the proximity of forests. They are partially dependent on forests for maintaining their pattern of life and have to spend considerable time working in the forests.

Taking an overall view, bulk of the 70 million tribal population in India depend to a varying extent on the output of labour input in the forests. But apart from the tribal population, there are Dalit artisans like the Doms, and Bhanjra (basket makers of north Haryana), who depend on forest products almost entirely for their livelihood.

Currently, with the introduction of Social Forestry and Joint Forest

Management Programme, populations even other than the tribals and Dalits are also being drawn into a symbiotic relationship with forest in the economic sphere, apart from traditional, social and cultural spheres in different parts of the country.

Forest is no longer the mysterious wilderness. Its domestic presence is the emerging reality even for many non-tribals, while tribal presence in the forests is becoming more and more problematic.

Extinction of Rights of the Forest Dwellers

Since the early 19th century, the British tried to convert much of the forest to agricultural land and during almost the whole of the19th century, they encountered tribal resistance.

In their approach to forests, the colonial rulers primarily drew upon the legal epistemology centering the concept of res nullius (that which has not been assigned by the sovereign belongs to the sovereign).

But the economic dependence, and in many cases politically organized control of the tribal peoples of their forests, through their traditional social organization, could not be completely ignored by the colonial rulers, faced as they were with relentless armed struggles of the sturdy tribal warriors. In 1894, a Forest Policy Statement was adopted by the British, partially recognizing the tribal rights in respect of forests by calling them privileges. Thus, the core concept of res nullius continued to inform the colonial legal system in respect of forests.

In implementation of the forest policy, legal frauds were perpetrated on the people. Under some regions, areas intended to be delineated as 'Reserved Forest' or 'Protected Forest' were notified and the affected people were required to submit their objections or claims if any, within a period of three months. A forest settlement officer was appointed in each case. He would take the objections and claims into consideration in finally delineating the area. It is alleged that in most cases, the affected people, who were mostly tribals, were not even aware of the notifications and hence hardly any objection was raised or claims proffered. Thus, the legal status of forests changed unaware to the peoples: their resistance mounted up only when the government started operations in the forest according to their working plan. But now the tribal peoples are awakening to the fraud. They are even going to the court for undoing the wrong done to them decades

ago. The people of the Ri Bhoi forest in Meghalaya for instance, have challenged in the court, the reservation of their forest made around the beginning of the 20th century.

After independence, nothing was done to undo this legal fraud perpetrated by the colonial rulers. Rather, the tribal claims were further eroded. Forest Policy Statement of 1952 demoted the privileges of 1874 to concessions. On the one hand, resources from tribal areas were siphoned off to support the growing capital intensive industrializing economy; on the other hand, welfare measures were held out to sustain political equilibrium. But the strategy did not work as expected. Apart from insurgency in some parts of the country, there have been militant assertions in the form of regional movements, or radical ideological political movements like naxalism in the tribal inhabited forest tracts in many parts of India.

Forest and Status of Forest Health in India

Land use statistics indicate that 7,488 million hectares of land (22.7 percent of the geographical area of the country) constitute legally defined forest. Forests claimed by the state as owned by it, constituted 77.2 percent of the total forest area in 1949-50, rising to 92.3 percent during 1967-68 and 95.2 percent in 1973. Around 3.01 percent forest area was owned by corporate bodies and 1.7 percent by private owners in the country. Since then state claim to ownership has further gone up.

The area under forests also includes perpetually snow-bound alpine areas, deserts, extensive marshy areas, degraded rocky areas bereft of any vegetation and large stretches of scrubland. The Forest Survey of India in its latest report estimates the forest cover in the country to be about 19.4 percent. But if the dense forest category (which means foliage coverage of 40 percent or more in a unit of area) is considered, the effective forest coverage of the geographic area of the country is currently only 11.7 percent. This is the outcome of a process. During 1951-75, the forest area in the country had receded to the extent of 4.134 million hectares, since then protective measures have been vigorously stepped up and massive afforestation programmes have been put into operation. But even then the recession of forests has not stopped. During 1975-97 another approx. 1.2 million hectares of forest have been laid bare.

Who is Responsible for Recession and Denudation of Forests?

About two decades ago, the Chief Minister of a tribal predominant state in North-East India told me that he was puzzled by the fact that while there was not much denudation of forests and no frequent land slides in his state before scientific forestry and conservation measures were introduced, massive denudation of forests has taken place after the introduction of scientific forestry and conservation measures.

One requires to seriously ponder over the implication of what the tribal leader has observed. One has to examine whether scientific forestry is really scientific? Whether the conservation measures are actually related to all the relevant parameters that require to be taken care of.

Very frequently, shifting cultivation is held out as the main culprit for denudation of forests, particularly in North-East India. But the data published by the Ministry of Agriculture, Government of India, during the sixth plan showed that out of the total environmentally degraded area in the country, not more than 2 percent could be linked to shifting cultivation.

On the other hand, an examination of forest working plans in several states in the late 1980s showed that these gave more importance to balancing of powerful economic interest groups than to ecological considerations. More importantly, it is to be noted that till about two decades ago, while there was much research on commercially valuable timber growing and profit maximizing use of the same, there was not much research on phytosociology or plant community in terms of mutual inter-relationship of plants and also of plant and other biotic (including microbes) and abiotic elements of nature. It is, therefore, difficult to say that much scientific basis for scientific forestry really existed. A serious attempt in this direction has started only recently.

It is also pointed out by some conservationists that monoculture forestry, which was mostly in practice, was violence of nature's way. Particularly the coniferous forest type did not give adequate foliage coverage against soil, water and sun; on other hand, multi-storeyed diversified forests, including those which were not considered to be commercially significant, gave more protection against soil erosion and water splash leading to floods.

While the allegations that forestry operations themselves are responsible for much of destruction of forest should not be accepted without careful examination, these should not also be brushed aside lightly.

It should, however, be recognized that even if forestry as operated by the Forest Departments played a negative role to some extent, the entire responsibility for denudation and degradation of forests cannot be attached to the Forest Departments.

Hurried extension of road network, to serve military and commercial interests, without adequate protective measures against soil erosion, construction of massive dams, and failure to control toxic industrial discharge, are also responsible for damage to forests. Recently bio-technological manipulation for destroying competing species has also been reported.

Such damage and denudation of forests affect the forest workers in two ways:

First, denudation, degradation and recession of forests reduce base of their livelihood. Second, it forces them to depend more on the depleted forest resources thereby accentuating the degradation. While a vicious circle is created through the action of others, the elite strata of the society tend to make a scapegoat of the forest workers for the unfortunate run of things.

Light and Darkness: Hare and Hounds Game in Respect of Forests

As already mentioned, the tribal peoples themselves are on the warpath. Besides, in the long run, depletion and denudation of forests affect the people by way of flood and shortage of goods normally procured even at long distances from forests. It is no longer possible to turn a blind eye to the misdeeds of unscrupulous forest contractors, lessees and many functionaries of the Forest Departments.

The initial reaction of the Indian state was to go in for draconian measures. In 1976, 'forest' was included in the list of concurrent jurisdiction of the union and state through the 42nd Amendment of the constitution. In 1980, Forest (Conservation) Act was passed by the Parliament, banning extraction of trees, except for maintenance of the forest without permission of the Union Government. It caused endless difficulties even to meet the basic needs of the forest dwellers. In some places repair of houses, digging wells for drinking water and such essential works related to the right to live, were held up. Faced with protests and resistance from all quarters, the Act was slightly amended.

Even before the draconian measures were introduced, the government launched a social forestry programme. It included

recreational forestry, farm forestry, roadside or canal-side strip forestry, involving village communities in reclamation and afforestation of degraded forests. At the outset, this programme received positive response from most quarters. But later, it was found that rich farmers were taking advantage of the programme to plant commercially valuable trees even on good agricultural lands. This rendered many cultivators landless agricultural labourers and many of them were forced to migrate to cities to inflate the number of urban slum dwellers. Greening of the countryside took place to a certain extent at the cost of tears and torments of the heart of the marginalized population. Maintenance of the roadside and canal-side forests also proved to be a serious problem. In many states, the government adopted Tree-Patta Scheme. But this caused factionalism in the rural communities and did not prove to be a success.

While all these aberrations surfaced, social activists pressed for a participatory approach to the forestry sector. In 1988, the Union Government came out with a National Forest Policy Resolution, which was passed by the Parliament in December of the same year. The resolution states that the derivation of direct economic benefit must be subordinated to the principal aim of ensuring environmental stability and maintenance of ecological balance including atmospheric equilibrium. The national goal should have to be a minimum of one-third of the total area in the country under forest or tree cover. Minor Forest Produce should be protected and improved so as to continue to provide sustenance to the tribal population.

The Forest Policy Statement of 1988 was followed by an apparently attractive project, namely Joint Forest Management, mainly financed by the World Bank. But here again, the hare and hounds game is taking place.

Joint Forest Management (JFM)

On 1st June 1990, the Ministry of Environment and Forests sent out a circular supporting the involvement of village communities and NGOs in the regeneration, management and protection of degraded forests.

There are state-wise differences in the procedures for identification of the areas to be covered by JFM, unit of operative community, role of traditional tribal leaders, role of Panchayat, involvement of government departments other than Forest Department, procedure for induction of NGOs, status of Forest Protection

Committees, etc. An analysis of the JFM scheme, as in operation in the different states, shows that almost at all levels, the string is held by forest officials. In some states, the JFM scheme is operated even on revenue land. And in many states, the Forest Protection Committee, bypassing the elected panchayats or the traditional leadership structures, are promoted as conduits for implementation of welfare schemes. Thus, dual centres of power at village or village-cluster level are being created dividing the village communities. Most galling is, however, the stipulation directly or indirectly made in different states making availability of JFM to the community dependent on performance appraisal by the Forest Officials. If Joint Forest Management was true to the spirit of the term, performance of the forest officials should also have been subjected to the scrutiny of the local organization of self-government.

Supreme Court's Judgment and Status of Forests Grown Under JFM, Particularly on Revenue Land

In 1997, in a public interest litigation case (C-202 of 1995), the Supreme Court has made a judicial pronouncement that all forests, irrespective of their legal status or ownership, including community forests, come under the purview of the Forest (Conservation) Act of 1980, and any cutting of trees, not covered by the forest working plan approved by the Union Government, is banned. This means considerable chunks of revenue land, particularly so-called waste-land, which by serving as grazing land and as repository of roots, tubers, fruits, edible plants and medicinal herbs grown in nature provide source of livelihood to the rural poor and which have already been covered by the JFM, will automatically come under the control of techno-bureaucrats at the state and union level. The right to life of the rural and tribal poor is now in jeopardy as never before.

Biodiversity Convention and Biopiracy

The Biodiversity Convention adopted during the Earth Summit at Rio de Janeiro in 1992 and ratified by India, requires knowledge and skill of the indigenous population about conservation and use of biodiversity to be respected and documented: but it does not provide for conferring intellectual property rights to such knowledge systems on the plea that the same belong to public domain, no element of innovation is involved.

Even before the adoption of the convention, many institutions including the Government of India, state governments,

universities and research institutions had started to document and publish tribal peoples' knowledge and use of the floral and faunal varieties in their habitats. It is not infrequently that multinational and national monopoly concerns took advantage of such documentation and went on an extraction spree without taking care about replenishing the stock, as the tribal peoples usually do. Since 1982 the government of India has been implementing an ethno-biological survey project. It has led to controversial practices by vested interests, which have been challenged even by a Government Department in Kerala.

Threat to Indian Democracy

It is not only the right to life of the tribal peoples that is under threat: the Indian democracy is under threat.

India Today (10 August 1998) had published an interview with Shri Suresh Prabhu, Minister of State for Environment & Forests, Government of India. He mentioned that while 3.5 million hectares of land covered by JFM were being looked after by 28,000 village forest protection committees, he planned to extend the programme to 2 lakh villages. In these villages, all developmental activities would be routed through the Forest Administration. This means that the decades long experiments to strike a balance between bureaucratic structure and democratically constituted panchayat bodies will be given a short shrift. Perhaps, Shri Prabhu himself did not realize the implication of his statement. But the fact that such a statement has been made by a responsible authority at this level should make every one vigilant about the future of Indian democracy.

Charter of Demands

1. A high-powered commission should be set up in every state to review all cases of delineation of forest land and state forest area and to make fresh settlement with the concerned communities.
2. All Forest Working Plans should be reviewed at the Forest Division level by Committees, which would include non-official experts, social activists and tribal representatives.
3. All practices in the name of science which make biopiracy possible should stop until intellectual property rights of the peoples in respect of their knowledge systems are given due recognition under law.
4. All monopoly rights, including those of Forest Development

Corporations (FDCs) in respect of trade in forest products, should be abolished. FDCs and their ancillaries should compete in the market but should offer floor price in respect of all commodities.

5. Operation of Forest Protection Act, 1980 not only in areas covered by JFM and social forestry but in all categories of forests, should be monitored by committees at all levels with which tribal representatives, social activists and experts identified by Panchayat Raj bodies and/or traditional tribal institutions should be associated.

6. Forest Protection Committees should operate on authority delegated by the Panchayati Raj bodies and/or traditional tribal organizations of self-management.

7. Existing structures of self-management of the forest workers should be reviewed and brought in line with the spirit of the Sixth Schedule of the Constitution, which also would require much improvement and strengthening vis-a-vis the apparatuses of the state.

8. Community rights of different orders, of the forest workers in respect of land, forest and land based resources must be recognized, and banking laws, cooperative laws and other laws relating to institutional finance, must be amended to harmonise with the community rights.

9. State-forest workers' relationship must be that of partnership in a frame of multi-tiered sovereignty in respective jurisdictions in the same manner as in the case of Union-state relationship spelt out in the Seventh Schedule of the Constitution.

10. National Policy of Rehabilitation of the project affected forest workers must be formulated in a manner so as to ensure tangible and intangible improvement in the quality of life of such workers in their family and community settings.

11. In constituting biosphere reserve, sanctuaries and national parks, local culture, demographic structure, political economy, social organization and people's system of environment management must be taken into consideration. Besides, people's institutions must be involved in the management of such eco-protection tracts. Indian Wildlife Protection Act, 1972 should not function as a one-dimension techno-bureaucratic operation.

TRIBAL AND INDIGENOUS RIGHTS AND WRONGS *

In: B.K. Roy Burman and B.G. Verghese (eds.)

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A CONCEPTUAL FRAMEWORK

Indigenous and tribal peoples are treated alike by the ILO, with self-identification as "indigenous" or "tribal" being regarded as a fundamental criterion for determining the categorization of groups (Chandra Roy). There is, however, a snag in this approach. Thornberry reports the stir caused by the appearance of Boers (claiming to be indigenous) in a meeting organized by the UN Working Group on Indigenous Populations in Geneva. The self-identification criterion has not been given up but there is more than one sense in which the term is used. While most speak of self-identifications of groups, others refer to self-identification by individuals claiming 'indigenous rights'. Still others believe that while any social group may identify itself as indigenous, recognition of this by the core indigenous people, who through their endeavours created an indigenous platform within UN framework, would legitimise such a claim. The proprietary/ propriety? of vesting "patent rights" on any group of people claiming to be indigenous is, however, questionable.

The path-breaking ILO publication on 'Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent

Countries' (1953) devoted a chapter to defining "indigenous". The study could only offer an empirical guide which was used to categorise 'indigenous' along with tribal and semi-tribal populations in ILO Convention 107 of 1957 (refer: Annexure II of Aspiring To Be – The Tribal/Indigenous Condition: Konark Publishers).

Convention 107 refers to tribal and semi-tribal populations and then mentions indigenous populations as a special category within their social orbit.

Roy Burman (1992) drew attention to two important implications of the foregoing formulation. It tended to project a teleological world-view of the tribal and semi-tribal peoples, shedding their distinct identity. Though 'indigenous' populations possess tribal and semi-tribal attributes, they are defined as a distinct international entity as victims of external conquest or colonialisation as in the Americas, Australia, New Zealand and some other Pacific Islands.

In the case of the tribal and semi-tribal people, 'integration' is highlighted, whereas in respect of the mainstream 'indigenous', the focus is negatively on conformity with mainstream social, economic or cultural institutions which implies assimilation.

This patronizing ethnocentric bias in ILO Convention 107 dismayed a lot of people. However, the new ILO Convention 169 of 1989 adopted a different approach (refer: Annexure III of Aspiring To Be – The Tribal/Indigenous Condition: Konark Publishers). While Article 1 of Convention 169 also stipulates self-identification as a fundamental criterion, it eschews the concept of stage of advancement and focuses on its distinctiveness. But it is silent about the nature of this distinctiveness. Besides, while in ILO 107, indigenous social entities have been explicitly stated to be a special category of tribal and semi-tribal social formation with a history attached to them, no such link is explicitly mentioned in ILO 169. Because tribal and indigenous peoples have been clubbed together, they may be considered analogous to one another as a logical corollary. But as an empirical reality, this may or may not be so.

In 1982, on the initiative of certain West European countries (Sander, 1989, p. 415), the Sub-Commission of the Human Rights Commission on the Prevention of Discrimination and Protection of Minorities set up a Working Group on Indigenous Populations without defining the indigenous. However, a working definition that had been developed in 1972 by a Special Rapporteur,

Martinez Cobo, was used. Cobo had been appointed Special Rapporteur by the Sub-Commission in 1971 to report on the problem of discrimination against indigenous populations in the context of international publicity about threats to isolated tribes in America (Ibid, p. 406).Sanders (1993,p.7) alleges that Cobo was not involved in the drafting and that the entire work was done by Williemson Diaz, a UN official. The 1972 Cobo definition is furnished at Annexure IV (refer: Aspiring To Be – The Tribal/ Indigenous Condition: Konark Publishers). This UN definition relates primarily to the pre-invasion peoples of the Americas, Australia and New Zealand (ICIHI, 1987,p. 6).

In 1983 a paragraph was added to the original definition in the name of Cobo to cover isolated and marginalized populations (UN Document No. E/CN.4/Sub.2/1983/21 Add para 379) (refer: Annexure V of Aspiring To Be – The Tribal/Indigenous Condition: Konark Publishers).

In one way, this marks a clear shift from the 1972 approach. The earlier approach is definitional; the latter descriptive. But there is another way to look at the matter. Based on Kunz, Rehman in his paper presented at the Workshop stated that "colonization is no less colonization if it is made by territorial contiguity rather than by overseas expansion". It is the latter perspective that informs the Washington-based Centre for World Indigenous Studies. A publication of this Center has identified 120 indigenous peoples in Europe including Skanians in Sweden, Cornish in Wales, Shetlanders in the U.K., Basques in France and Spain and a number of people in North Italy and beyond (Griggs, 1993).

Obviously, West Europe and North America are polarised in different directions in the matter of identification of indigenous peoples/populations. In his analytical appraisal of the problem (1995), Roy Burman has suggested that while the American perspective is reflected in ILO 169, the West European perspective is reflected in the UN Working Group's Draft Declaration. Thornberry in turn suggests that the 'mechanism' for recognition of indigenous claims is the United Nations itself. But, according to Julian Burger, General Secretary of the UN Working Group on 'Indigenous Populations', the UN does not recognize indigenous peoples as such (Burger,1992, p. 144). He lays emphasis on self-identification. The whole issue seems to be moving in a circular fashion. We are not helped by the restatement once again made in the name of Cobo in 1986, that "indigenous communities, peoples and nations are those which, having a

historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continuous existence as peoples in accordance with their own cultural patterns, social institutions and legal systems" (E/CN.4/Sub.2/1986/7 Add 4 para 379).

It is noteworthy that by reimposing invasion and colonization as contingent facts, the revised definition has moved towards excluding indigenous people from the category of indigenous by contiguous rather than overseas conquest. This is as the Washington-based Centre for World Indigenous Studies would wish.

Rehman observes that identification and definition of indigenous peoples has proved to be controversial and politically sensitive. According to the World Council of Indigenous Peoples (perhaps one of the "core" indigenous groups attending the UN Working Group-sponsored meets), "Indigenous peoples are natives, usually descendants of earlier populations of a particular country, composed of different ethnic or racial groups, but who have no control over the government." One wonders whether the indigenous claims of the Dalits (erstwhile untouchable castes of India), many of whom claim occupation of several regions of the country even prior to the tribal peoples, would be accepted as one of them by the "core'' indigenous peoples.

An earlier NGO Workshop in India asserted that Martinez Cobo's definition was largely based on Western experience. It instead suggested the following criteria for identifying adivasi/indigenous tribal peoples in India: (a) relative geographical isolation; (b) reliance on forests, ancestral lands and water bodies within the territory of the community for food and other necessities; (c) a distinctive culture which is community-oriented and gives primacy to nature; (d) relative freedom of women within their society; (e) absence of division of labour and the caste system; and (f) lack of food taboos. (Quoted by Thornberry)

It is not proposed to discuss whether all the foregoing criteria hang together. The NGO Workshop significantly did not go by the term indigenous alone but clubbed indigenous and tribal peoples in a single category.

Ram Dayal Munda, Member of the Presidium of the Indian Consortium of Indigenous and Tribal Peoples, while addressing agenda item 4 in the meet organized by the UN Working Group at Geneva in 1993 said that "in the Indian context, unless definitionally specified, everyone could be called 'indigenous' after the British colonizers left the country in 1947. Non-specification of the term has led to our Government's refusal to equate the Scheduled Tribes with the Working Group intended for indigenous peoples." He added that the term "tribal peoples, though considered somewhat pejorative in the Indo-European countries, is relatively more acceptable in India for this purpose. We therefore strongly suggest that the expression 'indigenous and tribal peoples' form a single segment when it comes to defining the peoples concerned, particularly in the Indian and Asian context."

In his inaugural remarks at the present Workshop, Soli Sorabjee endorsed the position taken by Ram Dayal Munda and observed: "The eternal problem of definition, the ceaseless struggle with words and concepts, still persists." How right he is comes out in the discourse opened up in the two papers of Thornberry and Rehman relating to the conceptual differences and similarities between the social categories 'indigenous' and 'minority'.

INDIGENOUS AND MINORITIES

For the purpose of the International Covenant on Civil and Political Rights, the UN Special Rapporteur, Capotorti, defined a minority as "a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members being nationals of the state possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (UN Sales No. E 91 XIV No.2, Para 68). Capotorti's formula differs in significant detail from that offered in Recommendation 1201 of the Parliamentary Assembly of the Council of Europe. Even then, as pointed out by Thornberry, use of adjectives like 'national, ethnic, religious and linguistic' in the report of the Working Group which drafted the UN Declaration on the Minorities are indicative of the categories covered by the concept of minority.

Rehman observes that indigenous peoples, in general parlance and in many ways, epitomize the minority syndrome. In a number of instances, indigenous peoples occupy the position

of minorities and, being weak and inarticulate, many of their demands coincide with those of other minorities. The limited jurisprudence that exists on the position of minorities is closely related to that of indigenous peoples.

But "while similar concerns are shared as regards both indigenous peoples and other minorities, there remains a pronounced view that the indigenous peoples belong to a distinct category". Rehman quotes Thornberry, according to whom "in many ways the demands made by indigenous peoples are more forceful with a higher threshold, claiming to be more than minorities and asking for an entitlement of two sets of rights, one as an indigenous group and the other as a minority". Further, "there remains an uneasiness that the claims of indigenous peoples, if applied generally to minorities, may threaten the established world order". Perhaps the last word has not been said in this regard.

Taking a clue from the foregoing formulation, one may ask whether according to powerful lobbies, indigenous are minorities on whom rights may be conferred without disturbing or indeed reinforcing the established world order? The doubt arises because of the utter insensitivity shown by the concerned UN fora to the view of Ram Dayal Munda (expressed in his capacity as president of the organization projected by the concerned UN forum as the most representative organization of the "indigenous" peoples of India).Munda had said that in Asia, where around 80 per cent of the indigenous and tribal peoples (according to ILO's description) are found, the term 'indigenous and tribal' rather than 'indigenous' alone is more suitable. Doubts also arise because of the silence of campaigners of 'indigenous rights' about the pastoral peoples of Greece, the Gypsies (Romas) and Basques of Europe or about the Kurds and the Bedouins of the oil exporting countries of West and South West Asia. This does not mean that recognition of indigenous rights is wrong; rather, that the denial of indigenous rights to many social entities by manipulating the terms "indigenous" and "minority" is wrong.

COUNTRY PROFILES OF INDIGENOUS AND TRIBAL PEOPLES

Skeletal historical and social profiles of countries from which participants attended the Workshop are presented here with particular reference to indigenous and tribal peoples. This could usefully background the CHRI-MRG deliberations.

Rehman's paper gave an overview of the tribal situation in South Asia. Of particular interest was his write-up about the indigenous peoples in the Andaman Islands. There are four distinct peoples living in these Islands; Andamanese, Onge, Jarawa and Sentinelese. They are small groups of hunter-gatherers, who have no written language and have drastically declined in number over the last two centuries. In the aftermath of the Great Indian Revolt of 1857 against foreign rule, when a penal settlement and a jail were established in South Andaman, the strength of the Andamanese was 4,800. It came down to 625 in 1901; 90 in 1930; and 28 in 1988. There was a similar decline in the case of the other tribes.

Like other scheduled tribe peoples in India, the indigenous peoples of the Andamans enjoy special protection under the Constitution. The main threat to them comes from the development of the Islands through large-scale settlement and deforestation. Rehman quotes the late Prime Minister, Indira Gandhi, who in 1971 observed, "Neither resettlement nor development should be made an excuse to uproot tribal groups or cut down forests."

In Bangladesh, the tribal peoples constitute less than one per cent of the total population. While there are many differences among them, what they have in common "is their readily apparent differences from the Bengalis: ethnic, cultural, religious and linguistic." According to official figures, the total numerical strength of the adivasis in Bangladesh was 623,216 in 1981. Of these, 43.7 per cent were estimated to be Buddhists, 24.1 per cent Hindus, 13.2 per cent Christians and the rest "others". Many observers of the tribal situation in Bangladesh, however, feel that there has been deliberate undercounting to emphasise the marginal importance of the adivasi population.

Among the tribal peoples of Pakistan, Rehman particularly mentioned the Baluchis and the Pakhtuns. The Baluchis are tribal pastoralists inhabiting the hostile mountain and desert region of the border areas of Pakistan, Afghanistan and Iran.

The Baluchis are Sunni Muslims of the Hanafi school. They share elements of a common cultural and linguistic heritage despite variations in life-style and environment. Originally a warrior people, they are divided into tribes, clans and sub-clans which fall under the authority of powerful chiefs. Cultivable land is scarce in Baluchistan and most families live by combining subsistence farming with semi-nomadic pastoralism. Among the Baluchis, a

sizeable population are speakers of Brahui, a Dravidian language. Conservative estimates place 2.5 million Baluchis and about a million Brahuis in Pakistan.

Baluchistan has economic resources which successive Federal Governments have explored and exploited. Natural gas deposits were found in the Sui areas and have been used to fuel the needs of most provinces. The Baluch nationalists claim that the royalties received are negligible. Similarly, coal is exploited largely by non-Baluchis. A new port was developed in the 1960s at Gwader. The benefits from these projects to Baluchistan have, however, proved negligible and as Baluchi consciousness has expanded, the people have begun to protest the exploitation.

The Pakhtuns or Pathans are the inhabitants of the mountainous areas straddling the Pakistan-Afghanistan border. They speak Pashtu, an Indo-European language. The main Pakhtun tribes fall into three divisions: the Western Afghans, Persian-influenced and often Persian-speaking and settled mainly in Afghanistan (such as the Durranis and Ghilzaris); the Eastern Afghans, Indian-influenced and mainly settled in the trans-Indus plains of Pakistan (such as the Yusufzais); and, in between these two, the highlanders of the tribal belt, sometimes considered the 'true' Pakhtuns (such as the Waziris, Mahsuds, Afridis, Mohmands, Bangash, Orakzai and others).

Like the Baluchis, the Pakhtuns have an ancient history, culture and tradition often identified with the Pukti kingdom as mentioned in the ancient work of Herodotus. The Pakhtun culture and tradition was firmly established between the 12th and 15th centuries and Pakhtun nationalism was subsequently reinvigorated by the lyrics of Khushal Khan Khattak. Current Pakhtun nationalism alleges discrimination against the NWFP in the allocation of development expenditure in agriculture and industry. Punjabi civil servants play a dominating role in the provincial administration and Islamabad allegedly resists Pakhtun nationalist efforts to upgrade the Pashtu language in higher education.

The materials provided by Khurshid Kaim Khan cover the tribal and analogous peoples in the Sindh province of Pakistan many of whom have their counterparts in India. They have been living in their present habitats since long before the partition of the sub-continent. Khan classifies these peoples in three groups; namely, nomadic, semi-nomadic and settled. Among these, the semi-nomadic Bhils are most important. They are numerically

one of the largest tribes in India. They are treated as low-caste Hindus but occupy an important place as cultivators and farm labourers in Sindh.

Among the settled tribal peoples, the Shidhis deserve special mention. They are descendants of African slaves brought to the sub-continent by Arab Slave traders during the medieval period. A large number of them still serve as domestics in feudal homes.

Khan mentions that among all these peoples, the Kolhis, Bhils and Meghwars are the worst victims of Sindhi feudalism. Even after the enactment of the Bonded Labour Act, 1992, the Human Rights Commission of Pakistan has had to condemn feudal farm-owners for keeping bonded labour in private jails.

Rehman has also provided some information about the struggles of the tribal and analogous peoples in Pakistan. As mentioned in the fourth session of the CHRI-MRG Workshop, the Baluchis were primarily a pastoral people subject to customary tribal law and enforced by tribal councils under the Frontier Crimes Regulation, 1901. The Brahuis of Kalat had a special position among them. According to an agreement reached between the British Government, the Government of Kalat and Government of Pakistan on August 4, 1947, the Government of Pakistan "recognised the status of Kalat as a free and independent state, which has bilateral relations with the British and whose rank and position is different from that of other Indian States".

On August 15, 1947, the Khan of Kalat declared the independence of Kalat, which decision was endorsed by the Kalat Assembly. The newly-formed Government of Pakistan immediately repudiated the declaration of independence; but joining Pakistan or dismemberment of Kalat was equally unacceptable to the Khan. As a counter, the Pakistan authorities relied on the decision of Baluch leaders in Quetta to merge with Pakistan, ignoring the fact that these leaders had been appointed by the British and their Assembly's jurisdiction related only to the small tract of land known as British Baluchistan. The ruling class of the erstwhile Khanate territory remained unhappy and often rebellious. Despite constant threats of coercion and actual use of force, it was not until 1955 that they agreed to formal merger with Pakistan. Rehman observes that a probable move to secede on the part of the Khan of Kalat was used as a major issue which led to the abrogation of Pakistan's Constitution in October 1958, the arrest of the Khan, and the promulgation of martial law.

Australia

Out of a total population of 17.3 million (1991) in Australia, some 250,000 are indigenous. It is uncertain when the pre-invasion indigenous peoples began to inhabit Australia, but anthropologists and archaeologists are of the view that this must have been 50-60,000 years ago.

The first European settlement in Australia in 1789 was a penal colony. The indigenous people claimed that while certain elements forcibly encroached on their lands and claimed it for the British Crown, there was stiff resistance. Historians, however, project the occupation as peaceful in intent though there were several "terrible mistakes". This rationalization presents modern Australia with a dilemma.

In 1991, the Queensland Government passed the Aboriginal Land Bill as a sequel to which approximately 95 per cent of traditional land cannot be reclaimed. The land that may be claimed is decided by the Governor-in-Council and must be gazetted as vacant Crown land, a national park or aboriginal land held under deed or grant. The indigenous peoples' spokesmen referred to this issue at the 9th session of the Indigenous meet organised by the UN Working Group in Geneva. They also described the Federal Government's new education policy (AEP) as cultural genocide. AEP strategies and programmes have, by and large, been written by non-aboriginal bureaucrats and academics who have little understanding of aboriginal cultural differences and educational needs.

Juli (1994, pp. 92-97) reports that during 1992 and 1993 there were several positive and negative developments. In June 1992, Australia's highest court found in a case filed by one Mabo (now well known as the Mabo case) that indigenous rights survived unless specifically removed by law or by sale of land or its utilization in a manner precluding indigenous use. The court rejected the legal fiction of terra nullius. However, it seems that there is considerable misconception about the implications of this judgement. Not all of Australia has been restored to the indigenous people. It only means that in respect of each claim, if it can be established that the territory in question was under the control of an indigenous organised entity, the claim will be entertained. In India, a similar judicial pronouncement was made by the Judicial Commissioner of Manipur as early as 1960 (Roy Burman, 1961) but has not received the attention it deserves.

Dahl (1990,p.89) reports that an Aboriginal and Torres Strait Islander Commission (ATSIC) came into existence in March 1990. It consists of 17 elected indigenous persons and 3 Government nominees. The elective members are sent up by 60 Regional Councils. The ATSIC is, however, not an instrument of self-government but a bureaucratic service organisation designated to administer policies drawn up by white politicians or by officers from the Department of Aboriginal Affairs who man the Commission.

New Zealand (Aotearoa)

Out of a total population of 3.4 million in 1991, as many as 12 per cent are indigenous Maori. It is believed that when James Cook landed in New Zealand in 1769, the indigenous peoples had lived in the island for over 1,000 years. McEwen (1979, p. 212) asserts that at the time of contact with European settlers in the early 19th century, there was no part of New Zealand unclaimed by one or other of the many tribes and sub-tribes. Now a Tribunal is examining who owns New Zealand (Hindustan Times, 1988). Spasmodic settlement by European immigrants began early in the 19th century and by 1840 considerable numbers, mainly from Britain, had settled in parts of the country. When a British company was formed to promote planned settlements in New Zealand, the British Government sent the Royal Navy to persuade the Maori Chiefs to accept British rule in return for British citizenship and protection. On February 6, 1840, the Maori Chiefs gathered at Waitangi to sign a treaty with the British.

The Treaty was drawn up in Maori and English and there are serious discrepancies between the two versions. In fact, the Treaty of Waitangi ushered in an era of systematic colonization and, with it, conflict between the Maori and Europeans over land. It is no wonder that in 1990, while white New Zealand celebrated the 150th anniversary of the Waitangi Treaty, many Maori went to Waitangi to protest at the failure of successive governments to honour it (Dahl, 1991, p.93).

In 1865, the New Zealand Parliament decided to create a permanent tribunal, the Native Land Court (later Maori Land Court), to investigate the ownership of Maori lands through public hearings and to issue title to such lands. The statute establishing the Court instructed that ownership be resolved according to Maori custom and usage, and that freehold title be issued to successful claimants (McEwen op. cit, pp. 214-215). A number of developments have taken place since, but the underlying

issues are far from resolved. In the federal election in October 1990, Maori communities were urged not to vote but, instead, to sign a register for Maori sovereignty. Unofficial figures suggest that a large majority of Maoris refused to vote and signed the sovereignty register instead (Dahl, op.cit, p. 94).

South Asia

Until 1947, India, Bangladesh and Pakistan shared a largely common history. Hence, facts of general relevance for the three countries can be put together.

There is an almost continuous belt of tribal and other forest dwellers from the north-west of the sub-continent to the north-east. If one looks beyond, mountain and forest-dwellers with interlinked social ties reach up to the Pacific Ocean in the east and through the Pamir, Hindukush and Elburz to the Caucasus to the west, with a lateral northern extension along the Tien-Shah and Altai to Central Asia. While interlinked social ties are not visible, the mountain dwellers of the Carpathians, Transylvanian Alps, Balkan Mountains, Dinaric Alps, Alps, and Pyrenees constitute continuity of another order. The tribal situation in the Indian sub-continent and the concomitant human rights issues are to be perceived as part and parcel of the ferment taking place in the mega-indigenous and tribal habitat joining the two oceanic regimes.

Within the sub-continent, the tribal habitats are generally at the meeting points of dominant linguistic-political groups or along international borders. For more than three decades, I have been highlighting their bridge and buffer roles. It is in the interest of the dominant politico-cultural entities to ensure that the concerned peoples maintain the core traits distinctive of their identity so that they can continue to play this bridge and buffer role effectively.

India

The advent of colonial rule, with its military might and expanding communications in the interest of trade and commerce and resource exploitation of the sub-continent rendered the historical bridge and buffer role of the tribal peoples largely dysfunctional. There was natural turmoil and restlessness among them. As mentioned by Sharad Kulkarni in his paper, the rulers enacted special laws to cope with the situation. Regulation XIII of 1833 declared Chhota Nagpur a non-regulated area. The Scheduled

Districts Act of 1874 (14 of 1874) had an exhaustive list of scheduled districts including regions in present-day Bangladesh and Pakistan. Local governments were empowered with the prior permission of the Governor-General to exclude these districts from the operation of provincial legislation.

The Government of India Act, 1919, empowered the Governor-General-in-Council to declare any territory in British India a "backward tract" and to direct that any Act or part thereof shall not apply to such territories except with specified exceptions or modifications. The Government of India Act, 1935 made special provision for the administration of areas "excluded" or "partially excluded" by the Governor-General-in-Council.

Thus, by and large,laws were linked to areas and not to tribes. But several Acts were also related to specific tribes. For instance, the Criminal Tribes Act, 1874, empowered the Governor to declare the entire population or part of a tribe as criminal. The Act was used by the administration against people who turned against the Raj mainly because of the loss of their traditional roles. The Criminal Tribes Act was repealed by independent India in 1950.

Specific constitutional safeguards protect customary tribal laws, language and culture, and various provisions provide that the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, and similar social laws shall not apply to Scheduled Tribes unless extended to them by a specific notification of the Union Government. This follows age-old tradition rooted in pragmatic prudence. In fact, during the four decades since the promulgation of these Acts, not a single Scheduled Tribe has been brought within their purview. Thus, the tribal peoples have been left free to follow their own customary laws. Similarly, the census practice of recording and publishing the language and religion returned by tribal persons in minute detail is in continuation of the same tradition.

In recent censuses, the proportion of tribal persons speaking distinct languages and professing their own religions with distinct names is going up in many parts of India. There is also an explosion of creative literature among the tribal peoples of India. In 1992, the Museum of Man, an autonomous body attached to the Ministry of Human Resource Development, collected about 4,000 books published in more than 50 tribal languages. These do not include text books at the primary level and religious tracts. About a dozen tribal languages are now taught in several universities up to the postgraduate level.

Notwithstanding the foregoing, it is difficult to say that there is much authentic concern for tribal peoples in India. Their exploitation and marginalization not only continues unabated but has gained momentum in the post-Independence period.

In 1961, the Committee on Special Multi-Purpose Tribal (SMPT) Blocks appointed by the Government of India reported that (i) throughout vast areas of tribal India, the last hundred years present a melancholy picture of encroachments, alienation and exploitation; (ii) it is doubtful how far legislative measures have been effective; (iii) forest rules, which continue as a legacy of the colonial period, are creating hurdles for development; (iv) the expansion of communications has brought in new diseases and caused moral decline and cultural decadence; (v) a majority of the schools in tribal areas are alien to the local culture and tradition; (vi) the fact that housing reflects a social philosophy and artistic and cultural values has too often been ignored; (vii) indebtedness among the tribal peoples cannot be effectively tackled without concerted efforts through legislative measures, administrative enforcement and an informed public opinion; and (viii) how to bring about a complementarity of traditional panchayats (councils) and state-sponsored statutory panchayats has not received enough attention.

The situation has not improved greatly since the publication of this Report. On the other hand, in the name of development through mega-hydel projects, mining and industrial enterprises with eco-damaging technology, acquisition of land, and reservation of forests under legal regimes which carry within their ambit colonial legacies of resnullius and terra nullius, the tribal peoples have to a considerable extent been divested by the state of their rights of access to and management and control of traditional life-supporting resources. The special provision of the Constitution to protect the interest of the tribal peoples has hardly been invoked by the Union Government and in some cases the State Governments have invoked it in a manner which harms their interest. Similarly, the Sixth Schedule of the Constitution, with its autonomy-thrust for the tribal peoples, has been rendered a political toy. Much of the massive investment for the development of the tribal peoples is either no more than accounting jugglery or is not central to their needs.

Tribal discontent is mounting. In some parts of the country, tribals have taken to arms. Rather than find democratic solutions

to problems through a paradigm shift in approach, the ruling class has indulged in administrative embroidery on the one hand and repressive measures on the other.

This sorry picture also holds good for Bangladesh and Pakistan. Even so, there is a sense of complacency among the elites of the sub-continent about what is being done for the tribal peoples. But a large proportion of the 70 million tribal population in India, 0.5 million in Bangladesh and approximately 0.3 million in Pakistan do not share this perception.

Bangladesh

Rehman mentions that in Bangladesh, the Chittagong Hill Tracts Regulation of 1900 confirmed the internal autonomy of the hill people. It delineated categories of land, notably khas (government) land, and specifically excluded non-indigenous peoples from settling in tribal areas. This special status was abolished in 1964. This has brought suffering to hill people in the Hill Tracts.

Pakistan

Bangash, in his paper contributed to the Workshop, has discussed in detail the administrative history of the tribal areas in Pakistan. These areas popularly known as FATA (Federally Administered Tribal Areas) comprise seven political agencies. The notorious Frontier Crimes Regulations, 1901, which served as the instrument of colonial rule, continues to reign supreme. Universal adult franchise is denied to FATA people.

Theoretically, the tribal areas enjoy certain rights of self-government. However, under the 1973 Constitution, the President of Pakistan is also chief executive of these areas. He is empowered to make, repeal or amend any regulations or amend any central or provincial law for the whole or any part of the area. He may at any time direct that the whole or any part of a tribal area shall cease to be a tribal area. However, the President shall ascertain the views of the people of the area concerned, as represented in their tribal jirgas (councils).

There are tribal peoples in the south and along the south-west borders of Pakistan with Rajasthan and Gujarat in India. They are mostly regarded as low-caste Hindus. Human rights activists in Pakistan have pointed out that, though not subject to political victimisation, they suffer feudal oppression as bonded and slave labour.

Sri Lanka

The hunting and gathering Wanniya-Laeto (Veddah) of Sri Lanka are original inhabitants but successive constitutions of the country do not make any mention of them. Official development policy has devalued the traditional Wanniya-Laeto mode of life. Stegeborn in his paper observes that Sri Lanka's constitutional ideology has all through been to undermine the suggestion of an aboriginal nationality.

OVERVIEW OF OTHER TRIBAL, INDIGENOUS AND ANALOGOUS PEOPLES

Africa

Thornberry quotes Mariamba (Indigenous Affairs, 1/94) to the effect that "the indigenous 'movement' in Africa grows from the policy adopted by independent post-colonial states. The transition to settled agriculture from hunting, gathering and nomadic cattle-herding has been instrumental in turning some communities into indigenous groups. The cultural domination of the new states by Bantu or Arabic-speaking groups marginalised others. Outright discrimination and violence in some states has also had its impact.

The Americas

"The Indigenous World 1993-94" gives country-wise profiles of the indigenous peoples of North and South America.

Canada

After 20 years of negotiation, the Inuit of the North West Territories entered into an agreement with the federal government which will set up a new territorial government before the turn of the century. The new self-governing territory, Nunavut, meaning "Our Land" will be dominated by the Inuit, who make up the majority of the population. The agreement also includes a land claims settlement. Under this, 18,000 Inuit will have ownership rights to 353,610 sq. kms. or 18 per cent of the land within the Nunavut settlement area. Within this region, the Inuit will have sub-surface rights (ownership of gas, oil and minerals) in 36,257 sq. km. Finally, the Inuit will get royalties from oil and mineral development" (Dahl, 1995, p. 30).

Despite this, "The Indigenous World 1993-94" reported that native peoples in Canada continue to suffer from extraction of resources on their territories. A large delegation of 45 Cree,

Salteaux and Dene people visited London in November 1993 to express their disgust at how their Treaty rights have been violated since the British Crown repatriated the Constitution of Canada in 1982.

In India there are four full-fledged States and two Union Territories where the tribal peoples are in a majority. An exchange of information about the rights enjoyed by the tribal states in India and the rights proposed to be conferred on the Nunavut will be useful.

In statements to the United Nations, Canada has explained that it refuses to recognise indigenous common tribes as 'peoples' because under international law 'peoples' possess the right of self-determination leading to independence (Moses, 1994, p. 41). Until recently the position of the Government of India was the same. But on October 17, 1995, the External Affairs Minister stated at a press conference that the Government of India does not accept self-determination as including any right of secession (Hindustan Times, 1995).

The United States

"The Indigenous World 1993-94" shows that native American languages and culture remain under threat. Financial desperation facing many native American nations has forced some tribal governments into making agreements which could cause native Americans long-term problems. A particularly pertinent example concerns the Mescalero Apache Tribal Council, which in February 1994 agreed to negotiate with Northern States Power (NSP) so that the company can store high-level nuclear waste on their territory.

Mexico

During 1993, six school teachers were assassinated in Quaxa for trying to encourage land recuperation by indigenous peoples. In case of the Chapas, there are Caciques (indigenous leaders) who have thrown indigenous peoples out of their communities because of their membership of a particular Protestant sect and, in a few cases, for becoming members of the Catholic Church (Ibid).

Brazil

The tribulations of the Yanomami date back to 1987, when the first invasion of gold prospectors took place. Since then, Yanomami population has been reduced by 20 per cent. Though there is an

agreement to demarcate indigenous territories, demarcation has been suspended for lack of funds and on account of pressure from landowners and mining companies.

The eclipse of the state of human rights of tribals and indigenous peoples is clearly not confined to any particular part of the globe. There is also a brighter side, which again is global. "The Indigenous World 1993-94" recounts that in Peru, the Inter-Ethnic Association for the Development of Peruvian Rainforests is implementing an extensive programme of demarcation and titling of communal territories. The project, financed by the Danish Ministry of External Relations via IWGIA, has placed in position more than 100 native communities, covering an area of almost two million hectares in the Ulayati region. The Bolivian Government has moved towards educational reform, which includes intercultural and bilingual education.

In Ecuador under the banner of the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE), the indigenous peoples have been working towards the creation of an indigenous parliament. This is not to form a parallel state but to emphasise that "we belong to a pluri-cultural country".

Europe

Under the Greenland Home Rule, adopted by the Danish Parliament, there is an elected Parliament with 31 members and a seven-member Cabinet headed by the Premier. Rasmussen, a former Greenland Minister of Social Affairs observes (1995, pp. 48-50). "The Premier is responsible for the administration of Home Rule, which has complete legislative power over internal affairs, with the exceptions of judicial and external and security affairs." "The Greenland Home Rule defines indigenous peoples as the first inhabitants of part or all of the country. The Greenlanders have collective ownership of their land and resources." At the same time, he mentions that "Greenlandic politicians in the Parliament and the government have recently promoted slogans such as self-government to the roots, self-government to the villages, and greater respect for the Greenlandic language in both the political and administrative instances." This shows that there are or have been problems concerning the implementation of home rule.

With the recent disclosure about the presence of nuclear weapons in the United States Air Force Base at Thule, the capital of Greenland, the opportunity has come to test how real Home

Rule is in Greenland. Orescov (1995, pp. 51-59) states that the procedure by which the suit for compensation was processed in the Greenland Ministry is not known; nor can it be ascertained whether the case was ever put before the Danish Government or the relevant minister, owing to the fact that the Ministry's dossier No.0440-01, "The Thule Council's Claim for Compensation for Lost Hunting Grounds", has vanished.

Nordic Saami Parliaments

The Swedish Saami Parliament was established in December 1992. But it was not followed by legal recognition of the Saami as an indigenous people. The same law that recognised the Saami Parliament also reduced Saami hunting rights. The latter action was based on the assumption that the mountains are state-owned. The Saami, on the other hand, dispute this and assert that the state has encroached on their right.

The Saami Parliament in Norway is also facing problems. The State lays claim to non-private lands in northernmost Norway which the Saami say is their territory. In 1994, the State transferred the land to a new public company called Finmark State Forest. It is mentioned that computerized procedures of recording titles is at the root of the dispute, but it seems that more basic questions are involved. As the case of the Saamis illustrate, the basic question is that of differentiation between state rights and community rights. As Stegeborn observes in his paper, the concept of separate state-rights is a dimension of non-indigenous thinking. But then the problem of synthesis of community and state rights remains to be resolved everywhere.

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POLICY ISSUES FOR NORTH-EAST INDIA AND TRIBAL PEOPLE OF INDIA *

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PART A

NORTH-EAST INDIA

The major issues related to ethnic diversity are: historical-political-cultural links of the peoples and their aspirations; rights in respect of lands and land-based resources, including sub-surface resources; mobilization of the resources for productive purposes; institutional arrangement for self-government; changing demographic pattern, security of life and living; and satisfaction of different levels of need.

In post-independence India, either the region as a whole or parts of it have almost always remained in political and social turmoil. A number of governmental or non-governmental forums are also frequently found engaged in carrying out hectic exercises to examine the problems of North-East India. Most of the exercises, however, cover segments of the problem in isolation. There is hardly any integrated approach to the problems of the region. A schematic outline of the policy issues involved in moving towards an integrated approach is suggested here.

Geo-Political Context of the North-East

North-East India is the meeting point of the historical-ecological peripheries of South, South East, East and Central Asia. This has created history's black hole in this region, which in its turn absorbs social and political bloomers of the mega regions of the continent, imparts to them from time to time sublime luminosity which is refracted back to the mega regions and conveys new

meanings to the history of these religions with their feedback. It is a continuous process of perceptual flux of history.

Stated in a different way, though North-East India is located in the geographical periphery of India, it is incorrect to perceive it as a geographical and cultural isolate. Before the development of trans-continental marine trade in the middle ages, the passes connecting this region with other parts of the world were well-frequented nature's highway. Many of the ethnic groups in North-East India have their counterparts in Tibet, Yunnan province of China, Thailand, Laos, Kampuchea, Myanmar and Chittagong Hill Tracts of Bangladesh. There are small enclaves of some of them even in Sylhet district and Mymensingh district of Bangladesh. There are some important communities like the Ahoms, whose cognate groups, though not in direct relations, are there in two or three countries of South East and East Asia. They have not only historical memories but also historical records of such relations.

Apart from ethnic ties, another binding force has been operative, particularly in the tri-function of South, South East and East Asia. All of them have large populations, who are having a relationship of political dissonance with their respective states. Though a large population in Tibet is also politically disoriented towards China, due to cultural and historical reasons, except for a small population, others do not appear to have much link with the peoples confronting their respective states in the tri-junction.

Policy Frame for North-East India

(i) In the historical and geopolitical context of North-East India, there must be a macro-regional approach covering some of the SAARC and ASEAN countries, so that the political and cultural aspirations of the peoples of North-East India and of their agnates and cognates in the adjoining countries (including those inhabiting the hills which cover about 70 per cent of the area though the population in these areas is hardly 30 per cent of the total) can be satisfied. While this implies that the Ministry of External Affairs must also be involved in dealing with the problems of North-East India, it is necessary to strike a note of caution. Democratic values are not very deeply rooted in many of the SAARC and ASEAN countries. There is a danger that the states in this mega region of Asia may come together to crush the authentic aspirations and rights of the peoples confronting them. This will be a short-sighted policy. They require to

come together so that when they move towards genuine democracy, they can withstand the global hegemonic and authoritarian forces, who will find democratic unity of SAARC and ASEAN countries as a threat to their position.

(ii) The starting point of authentic democracy in the tri-junction should be the outright rejection of Austinian legal epistemology, which informs the judiciary and land-resource based policy planning. This colonial concept was implicitly rejected by the All India Congress Committee in its resolution on land reforms passed in 1936 and by the Constituent Assembly's Sub-Committee on North-East Frontier (Bordoloi Committee). Also it was explicitly rejected by Nehru in his Panchsheel for the tribal. More than three decades ago, there was a judicial pronouncement in Manipur rejecting the concept of res nullius and expressly upholding the principle of lex loci rei sitae. But the state bureaucracy by resorting to dubious means evaded the judicial guidance. Later, Justice Hidayatullah, who was Chief Justice of India and then Vice-President of the country, questioned the validity of the legal positivistic concept-the main juristic prop for colonialism, in the social and cultural milieu of India. Currently, in almost all ex-colonial countries, legal thought has been moving in this direction; the Supreme Court of India is also seized with the issue. But it seems that the executive has turned a Nelson's eye to the presence of outmoded legal concept while most of the insurgencies in the tribal areas are related to it.

(iii) In the report of the Committee on Land Holding System of the Tribals, several incongruities in the technique of quantification of land areas for cadastral survey and settlement operations were pointed out. It seems that rather than taking corrective measures, the states have moved in a direction which will further accentuate the incongruity. The inevitable political task will of course be projected as a law and order problem.

(iv) In several published articles, I have highlighted the fact that land reforms without discarding the Austinian historical framework, coupled with land-based 'development' activities, are tending to create neo-feudalism on the one hand and land-mafia-contractor bureaucracy nexus on the other. For years, I have very strongly pleaded that the agenda for land reforms in the tribal areas, particularly of

the North-East, must change. However, it seems I have been knocking my head against a stone wall.

(v) About a decade ago, I pointed out in one of my publications that poverty alleviation programme without making adaptive changes in the structure and operational frame of financial institutions will remain inoperative and will legitimize corruption. An alternative approach attempted in Nagaland through VDBs and with promise of massive financial support and flexible operation of NABARD, has been derailed. An analytical appraisal of this aborted experiment is necessary.

(vi) Many of the productive activities, particularly in the agro-forestry sector, lack supportive techno-economic research, but the people are blamed for the failure of the concerned agencies. At the same time, spurious social science jargons are invoked as an intended or unintended cover-up.

(vii) The Sixth Schedule of the Constitution, which contains the rhetorics of self-management of the tribals, has proved to be nothing more than a political toy. On the other hand, even a tribal predominant state cannot meet the self-management urge of the tribal communities in the functional context of Indian federalism, which is becoming more and more dependent on techno-bureaucratic nexus and international compradors.

Besides, much confusion prevails because of the failure, even of the academics, to differentiate between community and state. As a result, today when some of the state level tribal leaders of the North-East speak of abolition of the Sixth Schedule, then academics tend to lend their support, without realising that whatever little space the Constitution has provided to the tribal peoples to function within the Indian polity as moral lean-tos will be fractured in the process. It is the same myopic vision of the social scientists and the academics, which is responsible for their failure to analytically bring out the incongruities of Bodoland accord and other accords on the anvil. One should understand that the cornerstones of such accords should be non-territorial federalism rather than creation of unworkable subservient carbon copies of the state. The present approach is marked by high skill of holding on to power but one does not find a trace of statesmanship in the same.

It is surprising that no serious analysis has been made

by anybody of the significance of the complimentary co-existence of moral polity and proto-state polity not only in Ahom Kingdom, but also in the adjoining areas of Tibet and Bhutan in an overt manner, and in Nepal, Thailand and some of the adjoining areas in a covert manner, in designing the structures and operative norms of the accords already drawn up, or under negotiation between the state and the communities. Even for amending the Sixth Schedule of the Constitution, the insight derived from the analysis of the historical structures that prevailed in the mega regions in this part of the world would be of great help.

(viii) Several analyses, particularly by B.G. Verghese, have pointed out that the demographic front in the North-East will remain fragile, unless integrated management of the watershed of the entire Himalaya is put into operation by involving the neighbouring countries to go in for labour-intensive technologies in the appropriate sections. These countries should also be persuaded to carefully examine the role of foreign funded NGOs in formulating and implementing their own need–based development plans and programmes. This is no reflection against the subjective attitudes of the persons working with the NGOs. But this certainly means that the current 'development paradigm', which is having an almost global sway, requires thorough re-examination.

(ix) In the long run, development pragmatics without ideological thrust erodes its operational base. Based on the onslaught of neo-colonialism, ideological and political communication must be built around Asian pride, as a stepping-stone to a move towards pan-human community. This is a tremendous task requiring massive preparation but it must be done.

(x) Resurrection of Asian pride, however, requires a congenial environment, which has been vitiated by the perfunctory functioning of the states in Asia on the one hand and the Euro-centric Human Rights doctrine of the West on the other. In fact, these two aspects are closely interlinked. The Human Rights platform, including the Universal Declaration of Human Rights (1988), is primarily rooted in the European history of confrontation between absolutist state and the individual. The community as a moral entity is just blacked out. But of late, the world hegemonic powers are trying to use the community card against the countries of Asia and

Africa where locus within the community is a conditioning fact for determining the relation between the individual and the state. This approach of the world hegemonic powers, backed by their economic and military might, has artificially ossified the relations between the state and the communities on the one hand and the communities and the individuals on the other. A complex problem is being dealt with, without any meaningful discourse.

In this context, Asian pride must assert itself and a broad-based discourse should start in that term. But so long as the Assam and Manipur Armed Forces Special Power Act remains in operation, no real discourse will be possible in this part of the country. The process of rescinding this Act should start without further delay. To facilitate the process, assistance of persons of goodwill like Justice Krishna Aiyer, Shri Mulk Raj Anand, Smt. Indira Miri, Baba Amte, Sardar Saran Singh, Shri M.K.P.B. Singh (Manipur), Shri Mir Kasim, Mother Teresa, and Shri Kaji Lhendup Dorji, should be obtained. I am broadly aware of the various cross-currents and I am convinced that given the 'will' to start a dialogue, there is no reason why it should not take place, provided that the eminent persons mentioned here can be persuaded to play a catalytic role.

PART B

TOWARDS A TRIBAL POLICY

While a policy frame for North-East India covers both tribal and non-tribal peoples of the region, a tribal policy for the country as a whole is needed. This will need much of what has been suggested in respect of the tribal peoples of North-East India.

Situational Appraisal

Though the Scheduled Tribes comprise about 8 per cent of the total population of India, the areas predominantly inhabited by the tribal population constitute about 20 per cent of the geographical area of the country. Much of mineral, hydel and forest resources are concentrated in these areas.

If the areas of tribal concentration upto the taluk and village cluster level are plotted on a map, an almost contiguous tribal belt is visible from Thane (district in Maharashtra) to Tengnoupal (district in Manipur). As already mentioned, some of the tribal peoples of North-East India have their agnates and cognates in South East Asian countries. If they are taken into consideration,

there is a contiguous belt from the Arabian Sea to Pacific Ocean, with lateral extensions moving north towards central Asia on the one hand, and along the south oriental sea-line of the Indian Ocean keeping some distance from the coast, on the other. The geopolitical implication of this pattern of dispersal of tribal predominant areas is obvious.

It is also to be noted that though in the country as a whole the tribal peoples constitute a small minority, about two-thirds of them live in areas where they are in the majority. Their self-perception is, therefore, an oscillating mix of minority and majority complexes.

Another fact to be kept in view is that during the last one decade, primarily through agencies which are part of or close to the United Nations, a global network of indigenous peoples (i.e., peoples of Americas, Australia and New Zealand as per definition officially accepted by ILO, there being no other officially promulgated definition by any agency including the UN), tribal and analogous peoples has come into existence. This is a positive development because at the level of ethos, most of these peoples entertain a world-view of ecological ethics, reciprocity and egalitarianism. In the era of ecological crisis and pervasive disruption of human relations, this conscious coming together of indigenous, tribal and analogous peoples to constitute a distinct segment of humanity or a "single people" in terms of universal ethical pragmatics can help mankind as a whole to come out of the morass of cynical self-abnegation and to become the indigenes of the earth. But there are many indications that this epochal potential of remaking the world system may be disrupted by the hegemonic interests by projecting non-issues as the real issues or over-emphasizing peripheral issues as the core ones.

Neither the tribal elites, nor the tribal and non-tribal intelligentsia, but to speak of the state bureaucracy seems to have grasped the meaning of this complex situation which contains within its ambit and at the same time entertains the siren-songs of enchanting falsehood to lure away those, who otherwise can play the vanguard role of emancipators of humanity as a whole.

If India is to recapture the ethos of its own freedom struggle, it must restate its tribal policy keeping the reality of the tribal situation.

Skeletal Outline of the Tribal Policy

(i) The dichotomy in the approach to the tribal peoples of North-East India and to those of the other parts of the country represents a perception lag. The rhetorics of self-management as contained in the Sixth Schedule and the illusion of paternalistic protection as contained in the Fifth Schedule of the Constitution should be replaced by an authentic partnership approach everywhere.

(ii) It should be kept in view that the tribal peoples in India represent about 25 per cent of the indigenous tribal and analogous peoples in the world. Also they represent the largest single majority population in any country among this category of population, if disaggregated countrywise. Hence, many among the tribal peoples in India would naturally feel concerned about what is happening to their counterparts elsewhere in the world. An authentic partnership would require the non-tribals in the country also to share their concern.

(iii) In designing the content of partnership, the aspirations and expectations of the tribal peoples (as reflected in ILO Conventions 107 and 169, and in the deliberations sponsored by the UN Working Group on Indigenous Populations), should be carefully examined. While rejecting the outdated assimilistic assumptions of ILO Convention 107, the Euro-centric bias of ILO Convention 169 and the barely concealed manipulative games of the UN Working Group, the humanistic, democratic contents of these documents should be sieved out and duly respected.

(iv) Institutional arrangement and ideological and social communication for the partnership to be made operative and sustainable should be planned with insight and vision. The 73rd and 74th Amendments of the Constitution relating to decentralization of power, notwithstanding their many limitations and ambiguities, have provided an opportunity to re-examine the issues, including those implied in the ethno-regional accords already in operation or in the process of being formulated. To avoid delay, as far as possible the instrumentality of the present constitutional provisions should be availed of at the first stage without prejudice to the possibility of fundamental restructuring, in the long run.

(v) Access, contra and management of resources in the tribal areas in an ecologically, culturally, economically and politically sustainable manner should be the kingpin of the new approach. Where GATT agreement and the globalization process run contrary to the rights of the tribal communities, the state must stand firm to uphold the tribal rights in this matter. International community should also be mobilized through different fora to support state's action in upholding tribal rights. There must not be any compromise with the multi-nationals and world hegemonies in the matter of upholding tribal rights, though some clauses of the draft declaration prepared by the UN Working Group show eagerness to whittle away tribal rights under cover of euphemistic language.

(vi) To uphold the tribal rights, concepts of tradition and custom will have to be re-

examined with the new insights of social sciences discarding the positivistic and utilitarian approaches which have guided several attempts towards codification of customary laws of the tribals by some persons and institutions, without adequate social science background.

(vii) Endogenous processes of accumulation of surplus and cultural orientation in the investment of capital, as prevail among the tribal communities, must be respected. Some attempts in this direction have been made in New Zealand through Maori Incorporation Act and also is being experimented within the cooperative banking system among the Basques of Spain.

(viii) While the rights of the concerned peoples over the resources in the tribal predominant areas should be respected, a normative framework for the utilization of the resources should also be drawn up through broad-based consultation, primarily with the multi-tiered autonomous bodies which should be set up for the tribal predominant areas. The first priority should be for the satisfaction of the basic needs of the population, next would be the satisfaction of the minimum needs which include productive infrastructure and servicing infrastructure upto a certain scale. Any deficit in the satisfaction of these two categories of needs should be met through the mechanism laid down in Article 275 of the Constitution. Surplus if any, after meeting

the basic and minimum needs, would be shared with the state and the Union, according to guidelines laid down by the Finance Commission constituted every five years, under the provision of the Constitution.

(ix) Apart from sharing of surplus as per guideline provided by the Finance Commission, formal and non-formal systems of the outflow of surplus resources or of income generated out of the same (including those through administered prices and operation of Public Sector Corporations with monopoly rights over products) require to be carefully studied and quantified. After considering the information thus obtained, adaptive changes will have to be made in partnership with the autonomous bodies so as to augment people-oriented production and social services with both horizontal and vertical linkages.

(x) Modality for choice of products and technology of production for satisfaction of needs according to priority determined through following appropriate procedure, should be laid down.

Here it is required to be emphasized that the partnership approach requires that priorities should be determined not merely through the so-called scientific techno-economic surveys, but also through drawing on the ecological prudence and value systems of the peoples.

(xi) There must be a built-in strategy of continuous de-bureaucratization of the apparatus for implementing the plans and programmes.

(xii) Education programme for the tribal communities will have to be so oriented as to accelerate the process of their self-assertion through expanding the horizon of their individual and collective knowledge and prudence. A thorough knowledge and insightful understanding of the creative literature of the tribal communities including written literature, which is rapidly coming up, is indispensable for meaningful partnership with the socially tribal personalities in generating appropriate educational programme and approaches for the tribal peoples.

(xiii) Participatory research for expanding the orbit of partnership aiming at one global community in the long

run and making the quality of life in its totality more real and existentially more relevant, will have to be carefully planned. This, however, is an extremely complex operation.

(xiv) Participatory monitoring and continuous broad-based communication of the findings should be part and parcel of the new approach. For this purpose, the existing system of reservation in educational institutions, jobs and services and elected bodies should continue for atleast one more generation.

(xv) As a logical outcome of the foregoing framework, the tribal sub-plan approach, which is frequently nothing more than an incoherent assemblage of fragments of plans and programmes in different sectors, should be discontinued. This approach does not take the tribal situation at any level in its totality and makes the plans and programmes for the tribals almost appendages of plans and programmes meant for the general population. The stipulation that every sector of activity should spend an amount of money proportionate to the tribal population in the state, sometimes leads to unnecessary and infructuous expenditure, whereas the sectors requiring additional financial support are neglected. The schematic approach through centrally sponsored schemes can hardly correct the distortions as these are generally based on perceptions of technocrats and bureaucrats without effective institutional arrangement for broad consultation with the concerned people. When examined in depth, it is found that the tribal sub-plan approach has stimulated the flow of a large amount of fund in the tribal areas, whereas in reality it has led to the proliferation of techno-bureaucratic apparatus and misleading accounting jugglery. Plans for the tribal peoples and tribal areas, while articulating with the regional and national plans, must be formulated in their respective milieu, in broad partnership with the concerned peoples and must be operated by multi-tiered autonomous bodies, keeping the scale and complexity of operation in view of each other.

REPORT OF THE STUDY GROUP ON LAND HOLDING SYSTEMS IN TRIBAL AREAS *

PROF. B.K. ROY BURMAN COMMITTEE - 1990

* Tribal Commissions and Committees in India.

N.P. Bhanage, Director - Tribal Research and Training Institute, Pune (Maharashtra).

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The Chairman of the Committee remarked as follows – "An Alienation of tribal land system through state action is becoming a very important fact of life and is the cause of much resentment in tribal areas. I would have been happy if it was otherwise."

Here I would like to make it clear that mere change in land-use pattern, whatever may be the scale of such change, is not alienation. Even transfer of rights by itself is not alienation. It is related to role dissonance in economic, socio-political and cultural milieu.

Broadly, there are three processes through which alienation of tribal land holding system takes place, out of which one is related to the colonial past of the country and the other two to the dominant social philosophy about the role of welfare state and of the generative source of science and technology. I am leaving out here transfer of land from tribal individuals to non-tribal individuals, as in recent years there has been a sharp decline in its magnitude in many states and also it is to be perceived as the outcome of several processes, which deserve a closer look.

As a legacy of the colonial past, there is considerable ambivalence and ambiguity in the matter of recognition of customary rights of tribal communities in respect of land and land-based resources. Traditionally, in most tribal areas, individual rights of enjoyment of land and land-based resources are embedded in communal systems of access to and management of resources. While in the middle ages in some of the tribal areas feudal control was imposed on communal system, during the latter part of the colonial rule attempts were made to convert the political rights of military overlords into proprietary right of feudal nature. But due to the lack of administrative and productive infrastructure, such attempts mostly remained on paper. In the post-independence period, rather than correcting these attempts towards feudal distortion, these were accepted as the crucial elements of the legal framework for implementation of policies and programmes in the tribal areas. Paper laws of the colonial dispensation were given the place of pride over the laws on the ground, by which the people lived, and by and large still live their life. The significance of the tribal upsurges in diverse forms, which have taken place from time to time during the last one century, for protection of their resource-based survival system, not only as biological entities, but also as social entities in specific historico-ecological niche, has not been adequately appreciated. On the other hand, the paper laws of the past have been used as an alibi to deny the customary rights of the people and in the process accommodative compromises have been made with the feudal pretensions in some areas and factional elites have been promoted in other areas. It is anybody's guess to what extent both have contributed to the stagnation of growth and corruption of the overall administrative political system.

Several qualitative and quantitative indicators can be given for the dispossession of the tribals that have taken place as a result of state policy regarding recognition of their customary rights. It has been found that only a fraction of the lands under possession of the tribals for generations have been recorded in their favour. It has also been found that they have been treated as encroachers, not only in respect of lands on which trees have grown in nature, but also in respect of lands on which trees worth several million rupees were planted by themselves and their forefathers. What makes the matter highly questionable is the use of the scientific method of land survey and concern for the protection of environment as the justification for these anomalies. This leads to the second

process, through which the tribal land-holding system is being adversely affected.

There are arguments advanced by well-meaning persons that one should not be too much bogged down with historico-normative issues; what is more important is the welfare of the people. From this point of view, the tribal people are considered as backward and can be manipulated by internal and external vested interests against the mainstream strategy and programme of national development, and hence direct take-over of the resources under the aegis of the technical and administrative bureaucracy is in the longrun in the interest of the tribals themselves. This argument is faulty on three grounds.

- First, it ignores the creative strivings of the tribal and other sections of the population at the grass-root level to harness the forces of nature, create their own environment and adapt themselves to the same.
- Second, it ignores the fact that bulk of the natural resources like minerals, timber, and hydel-power sources are located in tribal areas, and that tribal expectations and aspirations are as much important as those of any other section of population in determining the mainstream strategy and programme of development.
- Third, experience all over the world shows that there is a limit to the positive role of welfare state in human welfare. In fact, the welfare states have entered a grey area of uncertainties and crisis everywhere, and there is a growing quest for finding solutions to the environmental issues through people's creative partnership. But any land management system, which ignores the historical-ethical basis of people's rights and the process of democratic mobilisation taking place among them, will accentuate the environmental hazards.

The third factor affecting the tribal land holding system is the prevailing notion about the generative source of science and technology. For more than a century, an artificial separation has been created between life and laboratory as the generative source of science and technology. While technology has its own realm of autonomy, an integration of science and technology can take place only in real life situations.

As tribal life situation today mainly centres round the productive functions and relations of production-concerned land, the science

and technological development in the tribal areas has to proceed along two axes.

- One axis is the skill, knowledge and resource base of the tribal communities.
- The other axis is the common pool of technology, and knowledge about the axis is the common pool of technology available to mankind at the global plane for augmenting the quality of life and strengthening the forces of peace and human unity.

It has often been found that in the matter of technological development of tribal areas, the tribal people, as such, have been generally looked upon as marginal concerns. As a result, technologies are transplanted which make their skill, knowledge and adaptive mechanisms irrelevant. Lands, which have been considered by them for generations as of vital importance for survival, are marked in terms of exogenous technology as wastelands. Some of the recent legislations and administrative measures in respect of wastelands have tended to adversely affect tribal interest; it is not a reflection against the subjective attitude of the policy makers, but it speaks about the failure of the social analysis to critically bring out the issues.

In the light of the knowledge derived from the intensive study that has been carried out in Orissa, there was a general feeling among the members of the Study Group that land reform policy in the tribal areas is yet to be realistically formulated. The cornerstone of land reforms in India has appropriately been the abolition of exploitative intermediaries between the state and the land users. But where individual rights are embedded in communal rights, removal of the community as intermediary removes the necessary condition for the concerned individuals to enjoy their rights. There are, however, several complex issues involved in this generalised statement; in-depth examination of the issues in the light of the actual processes taking place on the ground will be necessary.

Formation of the Study Group

A Study Group was set up by the Planning Commission (Backward Classes Division) on Land Holding Systems in Tribal Areas on November 6, 1985 vide their Memorandum No. Pc/Bc/17-1(21)/85. The Group consisted of the following members:

Prof. B.K. Roy Burman Visiting Senior Fellow	Chairman
Centre for the Study of Developing Societies, Delhi	Member
Prof. G. Parthasarathy Prof. of Economics	Member
Andhra Pradesh University Visakhapatnam, A.P.	Member
Prof. Gangumei Kabui Prof. of History ManipurUniversity, Imphal	Member
Prof. Jagannath Pathy Department of Sociology SouthGujaratUniversity Surat	Member
Justice D.M. Sen (Retd.) Gauhati High Court	Member
Shri Murkoth Ramunni (Retd.) Adviser to the Governor of Nagaland.	Member
Smt. A.R. Bandopadhyaya Commissioner - Agriculture and Irrigation Government of Bihar, Patna	Member
Dr. Bhupinder Singh Adviser - Planning Commission	Member-Secretary

Terms of Reference

The terms of reference were as follows:

To consider-

(i) the nature and extent of land and land-based resources available in the tribal areas;

(ii) the extent of land-holding patterns obtaining among different Scheduled Tribe communities and the types of institutions as well as forms of institutional arrangements prevalent among them for regulation of the use of the land resources by individuals, LAMPS, village communities on the land resources;

(iii) the nature and extent of dependence of tribal communities on the land resources;

(iv) the extent and form of awareness of the individual tribal communities relative to the economic value of the land resources;

(v) the extent to which traditional access of the tribal communities to land and land-based resources is recognised under provisions of the various laws;

(vi) the overt and covert changes following implementation of survey and settlement operations in tribal areas; and

(vii) the changes in the matter of control and access to land and land-based resources in the wake of development activities and different administrative and legislative measures.

The present report is primarily based on the study in Orissa. But even this limited study has brought out certain issues of general nature which may have relevance to other states.

In the discussions and debates that preceded the preparation of the Seventh Five Year Plan, the fact that property relations based on land would be central to the future strategy of tribal development and to the integration of the tribal communities in the national polity was highlighted by the analysts of the tribal scene in various forums. It was argued that through the implementation of the six five year plans, the tribals by and large, had reached the take-off point from relief and welfare dimension to development dimension and that this point of consolidation of their traditional rights in respect of the resources was a matter of crucial importance for ensuring their enthusiastic participation in the development process.

Before going further into the issues relating to land holding pattern of tribal households, it is necessary to keep in view one contextual fact. A recent study shows that in the tribal areas of Orissa, 20.0 to 59.2 per cent of the population are engaged in the collection of minor forest produce - as one of the important sources of livelihood. Hence, information on individual land holding pattern of the tribal households is not an adequate indicator of the extent of their access to land-based resources. Any land administration or land reform policy which overlooks this fact, would be construed as a policy of curtailment of the traditional right of the tribals.

One dimension of persistence and change in the management and utilisation of land-based resources is formalised through the legislation enacted by the state in those fields. Another dimension

is expressed in the regulatory processes by which the people live with or without the intervention of the state. Analytical appraisal of the first draws upon the insights of anthropology of legal positivism along with those of other disciplines. Enquiry into the second requires an empathetic appreciation of the universality of legal pluralism. Attempt to reach both will be made here as indicative of the line of approach.

Legal Frame and Administrative Action Pertaining to Land Control and Management

The post-independence moves and counter-moves at the legal and administrative levels for bringing in changes in land control system have been discussed in some detail, as they provide an idea of the limitations of such actions as mere official programmes without strong political mobilisation of the concerned population. The compromises that the bureaucracy and feudal or feudalistic interests make, mutually push the people's disappointment underground, only to come out in an explosive form. Some of the political upheavals that have taken place in the tribal areas from time to time during the late sixties and seventies are perhaps to be seen in this context.

Along with crystallisation of bureaucratic management system, tenancy reforms in post-independence period in Orissa have moved towards making land a marketable commodity.

It is noteworthy that traditional institutions of the tribal communities having interest in land do not appear to have been included in any of the land holding categories, viz., tenant, ryot or privileged ryots. A statute on land reforms is expected to give the same respect to the social and cultural moorings of the tribals as those of the non-tribals.

It is, however, to be recognised that if there were acts of omission in the recognition of the customary system of access to land resources, serious attempts have been made by the government to prevent the alienation of such lands of the tribals, whichare dejure recognised by the state to belong to them.

Statutory Provisions on Prevention of Alienation of Lands from Tribals to Non-Tribals

The Orissa Land Reforms Act, 1960 itself contains important provisions for prevention of alienation of tribal land.

There is a separate statute to ensure effective protection to the Scheduled Tribes of the Scheduled Areas in the enjoyment of

their land and immovable property. The Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation 2 of 1956 was passed for this purpose. The Regulation provides that transfer of immovable property by a member of the Scheduled Tribe shall be absolutely null and void unless made in favour of another member of Scheduled Tribes or with the previous consent in writing of the Collector or any other competent authority.

Till the end of February 1986, 28,219 persons were benefited by the provisions of the Act; altogether 38,914.97 acres of land were ordered to be restored and 34,212.98 acres were actually restored under the Orissa Scheduled Areas Transfer of Immovable Property Act, 1956. Similarly, 6,708.540 acres were restored to 4,440 Scheduled Tribe persons under Section 23 and 23-A of Orissa Land Reforms Act of 1960.

The number of beneficiaries itself is an indication of the large-scale transfer of immovable property that is going on.

On examination of the survey and settlement report and other materials available to the Study Group, a few extremely important facts came out. Apart from the constraint of technical nature imposed by the method of survey in the matter of correct measure of the land, there was a policy decision ofthe Government, as a result of which the preparation of record of rights turned into denial of the rights which were enjoyed by the concerned population for generations. According to the Survey and Settlement of Shri Behuria, the Orissa Government had decided in the context of prevalence of shifting cultivation, that cultivation on hill slopes upto 1 in 10 gradient on every hill would be recongised and that cultivation further up would be treated as encroachment, liable to be evicted in due course. Here two issues are involved. One is the right of the state to disallow continuation of shifting cultivation on steep slope; the other is the right to treat persons carrying on such cultivation as encroachers and to evict them indue course. As regards the right to disallow continuation of shifting cultivation, certainly there will be a general agreement that the state has every right to stop it. It is a different matter when and in what manner the right should be exercised. But it does not follow from this that the shifting cultivators who are in the area for generations are encroachers and that the state has the right to evict them.

It was brought to the notice of the Study Group that in Kashipur area, Kudki pattas were issued by the Raja to the shifting

cultivators. Even now, these pattas are recognised though they have been made non-heritable. In fact, the shifting cultivators and other cultivators beyond 1 in 10 gradient slope, who are mainly tribals, cannot be treated as encroachers and evicted without attracting the provisions of law. In this connection, the relevant sections of the Madras Estates Land Act, 1908 which operated in the area until recently, deserve careful examination. According to Ch.1 Section 15 of the Madras Estates Land Act, 1908 'ryot' means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying the landholder the rent, which is legally due upon it. The crucial question here centres round the concept of agriculture. In Case No. II Commissioner Vs. Ram Krishna Das A 12, 1959 SC 239 it was observed that the term 'agriculture' in its ordinary sense means 'cultivation of field and would connote such basic operations as tilling of land, sowing of seed, plantation and the like'. Shifting cultivation thus is 'agriculture' within the meaning of the term under Madras Estates Land Act, 1908. Two other questions are also relevant in this connection: whether the shifting cultivators have continuous occupation of the land, and whether they paid rent prior to the policy decision of the Government not to recognise them.

The question of continuous occupation can be examined at two levels: one at the level of the community;and the other at the level of individuals belonging to the community. It has already been indicated on the authority of Orissa Government Publications that both at the community and the individual levels the system of continuous occupation prevails among sections of the Kondh and Bhuiyas. Ramdhyani's Report of the early '40s gives similar information for many other tribal communities of Orissa. The question of continuous occupation has assumed particular significance in view of another policy decision taken by the Orissa Government in 1972 to the effect that encroachments committed by the tribals prior to 10th October 1969 in certain areas should be recorded as their ryoti land without taking any further proceedings.

Apart from its questionable legal validity, treating of the cultivators beyond 1 in 10 gradient slope is, thus, contradictory to an important policy decision of Government. As regards payment of rent, mention has been made earlier of collection of the same under mustajari system in Koraput district. After the mustajari system was abolished with effect from 1st July 1957, rent began to be collected directly from the tenant. Thus, the cultivators

even beyond 1 in 10 gradient slope were on all counts ryots under the provisions of Madras Estates Land Act, 1908 and it is to be recalled that as early as 1824 Munro had observed that ryot is not a tenant - not 'removable'. It appears that while drawing up the guideline for survey and settlement operation, it is observed that the land control and management system actually prevailing on the ground and the historical roots of the same were not adequately kept in view. As a result, perfunctory entries were made in the record of rights. In some villages in Bondo Hills, less than 1 per cent of the total land under occupation of the tribals has been entered in the record of rights. In a good number of villages in more accessible parts of Koraput district, less than 10% of the land under occupation of the tribals for generations has been recorded in their favour.

By the system of survey and settlement operations, which was undertaken in Koraput district according to the guidelines provided by the Board of Revenue, the right of tribals not only in respect of their agricultural land beyond 1 in 10 gradient slope failed to be recorded, but also in some villages at least their right in respect of trees planted by them failed to be recorded. In one village of Bissamcuttack Block, while only 2.50 acres of land below 10 per cent slope (out of the total land of 936.13 acres in the village) was recorded in favour of the tribals, several thousand jackfruit trees (owned by individual households) and at least two-thousand mango trees (communally owned by Wadaka lineage group) located on higher slopes were found to be on lands which were recorded as state land. The market value of the existing stock of these trees was estimated to be around Rs. 40 lakhs. Incidentally, it is to be noted that this village is inhabited by a primitive tribe – the Dongria Kondhs, and that there are only 44 tribal households in the village who are poor not because they lack in resources, but because of non-recognition of the resources by the state either for determination of 'property rights' or for formulating the development strategy.

On behalf of the Government of Orissa, one note on the problem of cadastral survey beyond 10 per cent slope was given to the Study Group. It specifically referred to the survey in Bonda Hill and inter-alia stated as follows. "The problem of survey above 10% slope would be more acute when the cadastral survey of Upper Bondo Hill is taken up. Except the system of plain-table, no other accurate method of survey is available with us for doing this work and in case of survey of the area above 10% slope,

detailed survey by plain-table method will not be possible. During the detailed cadastral survey of a village, each individual holding to be surveyed including the home-stead lands, cultivated lands and other government lands in a particular scale of survey. As per the existing practice, in case a hill is situated inside a village limit, the cadastral details are surveyed upto a certain limit only - upto 9 (nine degree) slope and the rest extent are left unsurveyed. The higher portions are surveyed and shown as one plot only. So far no procedure has been laid down for survey of all details of the slopes of the hills in the plain-table method of cadastral survey."

Two facts come out from this. First, it has not been possible to make accurate measure of tribal land in the upper reaches of hill tracts. Second, in the hill tracts complete cadastral survey is yet to be done. What has been done is cadastral survey of land upto a certain degree of slope. In the context of this fact, the legal status of the survey documents requires a closer look.

Recapitulation, Supplementary Observation and Recommendation

In the recent decades, cadastral surveys have been carried out in the hills by plain-table method, which enables such surveys to be done upto 10 per cent slope only. As a result, though it is claimed that except for very small areas survey and settlement operations have been completed throughout Orissa, actually in many parts of the state cadastral surveys have been conducted upto 10 per cent slope only. *According to an official note submitted to the Study Group, all lands beyond 10 per cent slope have been shown in a single entry, because of the constraint imposed by the method of survey. In Keonjhar, it was found that even this 10 per cent slope was a theoretical proposition. As per guidelines evolved in 1974, for undertaking survey and settlement operations in Juangpirh, the upper reaches of the hills were to be earmarked for grazing purposes. While this had the effect of abrogation of community rights over varying extents of land on the hill slope in favour of the state, the line of demarcation between what might be called the 'upper reaches' and the 'lower reaches' tended to be determined subjectively. In some villages the slopes were entirely gentle and the drawal of lines between the upper and lower slopes was obviously arbitrary. The field situation was thus an eye-opener. Information available from the settlement report of Koraput also indicated that lands beyond 10 per cent slope were shown in the record of rights as pertaining*

to the state and the actual occupants of such lands were shown as 'encroachers'. The Study Group feels that the validity of the procedure in terms of the normative base of the laws of the country should be carefully examined.

The data available from Koraput show that in some villages even 1 per cent of the land under actual occupation of the concerned tribal communities has not been recorded in their favour in the record of rights. In those villages almost entire lands have been recorded in favour of the state. It has been mentioned to the members of the Study Group by knowledgeable persons that many tribals look upon the survey and settlement operations as an operation of confiscation of their land rights. The Study Group cannot help feeling that there is something in the tribal perception of the situation which merits a thorough probe.

Further, from the official note furnished to the Study Group on behalf of the Government of Orissa, it appears that the disturbing situation found in Orissa is partly the outcome of a practice, which is not exclusive to Orissa alone. The Study Group strongly feels that a thorough study of the effect of the various techniques of survey on the land rights of the tribals and other hill-dwelling communities should be carried out in all the hill areas of the country in consultation with the Surveyor General of India.

The second impediment in assessing the land-based resources is partly cultural and partly technological. The conventional practice is to consider those endowments of nature as resources which have known commodity value in agriculture, horticulture, forestry, animal husbandry, mining, etc. But in recent years there is a growing realisation that the endowments of nature like weeds and non-descript plants, which were so long considered waste and useless in terms of market economy, have great useful value for the tribal communities concerned. In fact, many of these constitute the core of the survival system, particularly of the more primitive tribal communities.

A comparison of the provisions in Orissa Survey and Settlement Act, 1958 and Chhota Nagpur Tenancy Act, 1908 shows that while some of the rights of communal nature are required to be entered in the record of rights in Chhota Nagpur, are not required to be entered in the corresponding documents in Orissa. The Study Group recommends that a comparative study of the provisions in the Survey and Settlement Acts or Manuals of the different states having tribal concentration about the nature of

entries to be made in the record of rights should be made so as to ensure that the rights relevant for the tribals are appropriately recorded.

It is obvious that as a sequel to non-recognition of communal rights, the embedded rights of tribal individuals also fail to be recorded. In this connection the Study Group would like to draw pointed attention to the insightful observation of Justice Hidayatullah that historically speaking separation of individual from the community in matters of property relations concerning land is not a part of Indian tradition, it is a colonial handover. The far-reaching implication of this observation requires to be worked out in detail.

The Study Group has tried to understand the factors inhibiting the recognition of corporate rights of the tribal communities. It has come across the following four major arguments in favour of non-recognition of communal rights: (a) communal rights have disintegrated and do not actually exist on ground, (b) communal rights provide cover for the influential sections of the community to usurp the rights, (c) communal rights are not compatible with market-oriented development process, (d) though communal rights as such are not recorded in the record of rights, these are often recorded as common facilities owned, controlled and managed by the State or other agencies on being assigned by the State.

The Study Group feels that rather than conjectural generalisation of the disintegration of the communal system, intensive studies of its persistence, charge, decay and reinvigoration (whatever may be the real fact) should be conducted in the relevant historical context.

The Study Group feels that comparative data from other parts of the world should also be taken into consideration in formulating policy decision regarding communal land system. As regards recording the common facilities as state property, the Study Group feels that this will weaken the process of participatory development and democratic decentralisation.

The Study Group feels that whatever facts on the ground so warrant, tribal community organisation should be recognised as a privileged ryot in the same manner as Lord Jagannath, or a plantation is regarded as a privileged ryot.

The right of preparing and approving the working plan vests with

Forest Department's officials, it is difficult to envisage to what extent the needs of the village communities will be satisfied through such arrangement.

In the Public Demands Recovery law of Orissa, certain institutions like banks and co-operatives have been assigned the privileged position in the sense that they can take over the land assets of the tribals in case of default and sell hem. The Study Group is of the view that while the institutions might continue to occupy the privileged position, operative norms should be laid down to ensure that the land is not sold to non-tribals and that through the disposal of the land, community's access to and control and management of land resources of corporate nature is not adversely affected. The Group is, however, aware that for operationalising the suggestion, it will be necessary to spell out the specific steps in some detail. This can be done only after comparative data have been obtained for the different parts of the county.

The Study Group has also addressed itself to the problem of transfer of land by individual tribals to individual non-tribals, and feels that this is a symptom of imbalance among the different elements of planned development. The nature of imbalance may, however, vary from area to area, and tribe to tribe. While the Study Group recommends a comprehensive study of the imbalance covering diverse socio-ecological niche in all the tribal areas of the country, as an interim measure it suggests that the authority for grant of permission for transfer of land from an individual tribal to an individual non-tribal should be exercised by the Collector or Deputy Commissioner only, and it should not be delegated to a lower level. Besides watchdog committees consisting of tribal representatives, social workers and social analysts should be constituted at the district level to maintain vigilance over the broad trend of alienation of tribal land to both public and private agencies, as well as to individuals.

REPORT OF COMMITTEE ON FORESTS AND TRIBALS IN INDIA *

DR. B.K. ROY BURMAN COMMITTEE - SEPTEMBER 1982

* Tribal Commissions and Committees in India.

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The Committee was constituted on 9.4.1980 to suggest re-orientation of the forest policy to serve the tribal economy in accordance with the resolution adopted at the Conference of the Ministers in charge of Forests and Tribal Development held in July 1978.

At the conference it was resolved that:

1. The development of forests, instead of being planned in isolation, should form an integral part of the comprehensive plans of Integrated Tribal Development.
2. Forest Department should constitute better organised forest labour co-operative societies within a time-bound programme of 2-3 years to undertake all forestry operations replacing intermediaries.
3. The right of collection of Minor Forest Produce (MFP) by tribals and its marketing for remunerative price to tribals should be ensured.
4. Forest villages should be abolished and be converted into revenue villages.

Guidelines will have to be prepared to enable states to orient these results into practice. For drawing up the guidelines, it has been decided to constitute a Committee having the following composition:

1.	Prof. B.K. Roy Burman	Chairman
2.	Shri S.A. Shaha	Member
3.	ShriN.J. Joshi	Member
4.	Shri Ranjit Singh	Member
5.	Shri J.N. Pande	Member
6.	Shri K.S. Chandrasekharan	Member
7.	Shri Munawar Hussain	Member
8.	Shri D.N. Tiwari	Member
9.	Dr. Bhupinder Singh	Member-Secretary

The following were the terms of reference for the deliberations of the Committee:

1. Appraisal of the nature of rights of tribals in respect of land and forest.
2. Review of integrated forestry development programmes with particular reference to social forestry.
3. Review of horticulture, agro-forestry and other productive programmes with particular reference to satisfaction of the basic consumption needs of tribals, generation of employment and creation of incremental income for the tribal and the non-tribal segments of the indigenous population.
4. Review of the activities of the various bodies concerned with forest and tribal economy with reference to their role in promotion of interests of tribal economy.
5. Concrete suggestions for guidelines to be laid down to re-orient forest policy so that inter alia it serves the interests of the tribal economy.

In a forwarding letter the Chairman of the Committee, Prof. B.K. Roy Burman has remarked as follows.

"It gives me great pleasure to submit to you the Report of the Committee on Development of Forestry keeping in view the interests of the tribals. Among the terms of reference of our committee, one was to suggest guidelines for orientation of forest policy in a way that it serves the interests of forests and tribal economy. We felt that there is a symbiotic relationship between the tribal social organisation and forest economy in the specific historical context of our country. The over-whelming majority of

the population living in forests are tribal communities. They are not only forest dwellers but also for centuries they have evolved a way of life which on the one hand, is woven around forest ecology and forest resources and, on the other, ensures that the forest is protected against depredation by man and nature. The symbiotic relationship suffered a set-back during the colonial rule when forest was looked upon only as a source of maximization of profit and not as a vital link between human habitat and the larger environment. Fortunately, in recent years there is an all-round recognition among many, including perceptive foresters, that this line of approach requires to be completely changed. There cannot be any development of forest without development of the forest-dwelling tribal communities."

INTRODUCTION

Directly or indirectly, in the tribal mind, forest symbolises life in its manifold manifestations, i.e., home, worship, food, employment, income, and the entire gamut. Tribals can, in fact, be regarded as children of the forest. It has been possible for tribal communities to subsist for generations with a reasonable standard of health, because forest provided them food such as fruits, tubers, leafy-vegetables, succulent shoots, honey, flowers, juices, gums, game, fish, etc.

The realisation that development of forests and well-being of tribals are interdependent should be deep-rooted for sound management of the eco-system; the relationship should not only be properly understood, but should also be made the bed-rock of the operational policy.

Integrated development of forests and rural (particularly tribal) areas has been a major concern in the recommendations of various bodies and individuals from time to time. The Dhebar Commission (1961), the Hari Singh Committee (1967), the National Commission on Agriculture (1976), the Conference of State Ministers in charge of Forests and Tribal Development (1978), the Working Group on Tribal Development during 1980-85, and the Central Board of Forestry (1950, 1956 and 1980) emphasised it.

In the background of the aforesaid desiderata, the growing alienation between the forest managers and forest dwellers (the thin wedge of which started dividing the two more than a century ago) has been a disturbing feature. The consensus among the ecologists, planners, administrators, foresters and sociologists,

has been that the gulf between the two can be bridged to the benefit of all, if the tribal is involved as an active partner in various forest operations like afforestation, harvesting, collection and processing of MFP, etc. With a view to achieving a co-ordinated policy, the Government of India in the Ministry of Home Affairs felt the need to constitute a committee to suggest guidelines for the re-orientation of forest policy. As will be seen from our recommendations, our main pre-occupation has been with reference to the last term, i.e., guidelines for the re-orientation of the forest policy so that it serves the interest of forest and tribal economy.

We hope that Government of India and the states would give serious thought to the recommendations. We feel these will go a long way in ameliorating the economic condition of tribals, increased production of forest produce, and protection and improvement of environment of the country.

FOREST IN INDIA

Forest have to fulfil three sets of needs:

(a) Ecological security

(b) Fuel, fodder, timber and other domestic needs of the population

(c) Needs of villages, small-scale, medium-scale and large-scale industries.

(a) Ecological Security

The extent of forest cover is a good indicator of the health of the land. The large-scale deforestation in recent decades has rendered the sensitive catchment areas in the Himalayan and other hilly areas particularly vulnerable to soil erosion. The country can hope to achieve ecological security only by increasing the vegetal cover to tackle the following problems of land degradation.

1. According to an estimate made by the Ministry of Agriculture in March 1980, as much as 175 million hectares (mh) out of the country's total land area of 304 mh for which records exist, are subject to environmental problem. The break up is as per Table 1 given below:

Problem	Area (million hectares)
1. Serious water and wind-erosion	150.00
2. Shifting cultivation	3.00
3. Water-logging	6.00
4. Saline soils	4.50
5. Alkali soils	2.50
6. Diara land	2.40
7. Other culturable wasteland fit for reclamation	6.60
Total	**175.00**
(57.2% of the Total Land Area)	

2. In a study made in 1972, it was estimated that on an average, India was losing about 6,000 million tonnes of top soil per annum through water erosion and that these represented, in terms of major nutrients N-P-K alone, an annual loss of Rs. 700 crores.

3. Again, according to the Report of the National Commission on Floods (1980), the losses on account of floods in 1976, 1977 and 1978 were Rs. 889 crores, Rs. 1,200 crores and Rs. 1,091 crores, respectively.

4. The Himalayan eco-system has considerably deteriorated, resulting in floods in the Indo-Gangetic plains thereby causing heavy damage to property and crops and untold human misery. Since the run-off of rainwater from denuded areas is far greater than from well-wooded slopes, a great deal of water which would otherwise have been retained as sub-soil and groundwater, is today being lost as surface run-off, often causing further erosion and floods in the process.

(b) People's Needs

Forestry has to provide fuel, human and animal nutrition, medicine and forest produce of daily needs.

1. A significant feature of the Indian energy scene is the important role of non-commercial forms of energy, namely firewood, agricultural waste and animal dung. The contribution from firewood, agricultural waste and animal

dung in the total non-commercial energy consumption is 65%, 15% and 20%, respectively. The rural communities will continue to depend heavily on firewood for several decades to come. A large programme of fuel and farm forestry is, therefore, being taken up in the Sixth Plan, the target being set at 13 million hectares of plantation.

2. The rural and urban population also depends on forest for supply of small timber, bamboo, cane, thatching grasses, resins, gums, leaves, oilseeds, tan dyes, fibre, flowers, aromatic products, medicinal plants and various other products.

(c) Industrial Raw Material

A number of villages, small, medium and large-scale industries depend on forests, for supply of raw material.

1. The importance of forest-based industries is being overwhelmingly realised due to their potential for providing large-scale employment mostly in rural areas.
2. Forest-based industries are now finding it extremely difficult to meet their requirement of raw material. The situations are likely to become critical in the next decade. Immediate action is called for increasing the resource-base.

In conformity with the said objectives, the major areas of thrust in forestry development should be the following:

1. Improving the environment by protecting the forests and undertaking massive afforestation programmes in the degraded areas by involving tribals as partners in management and profits.
2. Meeting the requirements of the village and tribal communities as well as those of defence, communications and industry.
3. Undertaking a massive programme of social forestry, farm forestry and village fuel-wood plantation which can yield fuel, fodder, fruit and fertilizer of the soil (through fixation of nitrogen).
4. Providing gainful employment to the weaker sections of the society through harvesting of timber and bamboo and scientific development of MFP.

5. Popularising agro-forestry, silvi-pastoral, etc., mixed systems.
6. Affording strict protection to wildlife and other gene pools which are facing the danger of extinction.

TRIBALS AND FORESTS

The tribal communities in India largely occupy forested regions where for a long period in their history they have lived in isolation but in harmony with nature. They have had symbiotic relationship with the forest which continues undisturbed in the interior areas even now.

The forests not only provide them food, material to build houses, fuel for cooking, light and warmth, fodder for their cattle, but also satisfy the deep-rooted sentiments. Their folk-lore revolves around forest. Tribal life is connected one way or the other with forests, right from birth to death.

The benefits accruing to tribals from forests are various and derived in a variety of ways. The tribals are so accustomed to these benefits that they have become a part of their daily routine. In areas where forests exist, not only the able-bodied worker but also the old and infirm as well as children bring something, however modest it may be, to the household, whereby they have the satisfaction of having contributed their mite. This ensures an inbuilt system of social security in these areas.

Fuel-wood in the context of tribal people is not merely used for cooking, but also for warmth and lighting purposes. The people, by and large, do not have any warm clothes to protect them from the winter cold and the only method by which they keep themselves warm is by being near fire. In fact, the material existence of the people depends on forest to such an extent that they cannot be visualised in the absence of the forests. It appears that tribals and forests are ecologically and economically inseparable. They have co-existed since time immemorial and will continue to co-exist in a mutually reinforcing relationship in future also.

Tribals have always been sentimentally attached to the forests and considered them to be nature's gift. Their folklore is full of references to the forests. There are several rites and rituals where some forest produce is used some way or another. The local people are conversant with the medicinal plants occurring in these areas.

RECOMMENDATIONS OF COMMISSIONS, COMMITTEES AND WORKING GROUPS

In their 1961 Report, the Scheduled Areas and Scheduled Tribes Commission (Dhebar Commission 1961) recommended the following measures to be adopted for linking of forest and tribal development programmes:

(i) A basic change in forest policy to enable tribal community to have control of forest resources.

(ii) In forest villages, assurance of security of land tenure. These villages should be made self-sufficient with the basic amenities of life such as wells, schools, dispensaries, etc.

(iii) Vesting of management of land revenue from village forests in the village panchayats.

(iv) Full collection and local processing of MFP. Development Corporations should be created for MFP collection.

(v) Exploitation of major forest produce by engaging Forest Labourers Co-operative Societies.

The Committee on Tribal Economy in Forest Areas (Hari Singh Committee 1967) recommended the following measures for the economic upliftment of tribals:

(i) Elimination of intermediaries in forests should be given priority and co-operative movement in forestry sector be mobilised.

(ii) Forest-based industries should be established locally to provide regular employment to tribals.

(iii) National Tribal Development Co-operative Corporation may be established to look after co-operative programmes in the tribal areas.

The National Commission on Agriculture (1976) bestowed their attention on the inter-relationship of forest economy and tribal economy and urged rationality in forest operations and better utilisation of forest produce. Some of the important recommendations are:

(i) Fair price shops should be opened for assured supply of essential commodities at reasonable rates to tribals, including opening of Nistar Bhandars (depots) for supply of domestic forest produce requirement of tribals.

(ii) Tribals should be allotted homestead land, where programmes of afforestation, pasture and grassland development, introduction of horticulture crops, etc., are taken up.

(iii) Tribals should be trained for absorption in all skilled forestry jobs and in forest-based industries.

(iv) For tackling shifting cultivation, multi-disciplinary approach should be adopted and institutional arrangements for maintenance of shifting cultivators should be ensured.

The Conference of State Ministers of Forest and Tribal Welfare on the "Role of Forest in Tribal Economy (1978)" recommended that forestry development, instead of being planned in isolation, should become an integral part of a comprehensive plan for development of the area in which the needs of local economy should get high priority and should, consequently, influence the choice of species for each area. The Conference accepted the need for associating tribals in a big plantation programme giving individual rights on the tree and their usufruct. The Conference underlined the need for establishment of a strong co-operative base by Tribal Development Department in conjunction with the Forest Department. All social and economic development programmes should be expanded to these villages on the same lines as for the residents of other villages, and action should be taken to convert these villages into revenue villages.

The Working Group on Tribal Development during the Sixth Plan (1980-85) urged that increasing the vegetal cover to the extent of covering one-third of the country's area is a colossal programme and Forest Department in States alone cannot achieve it. To tackle the problem, people's participation should be mobilised by involving a "tree army" of Forest Development Corporations, educational institutions, voluntary organisations, communities, panchayats and private individuals.

Further, a comprehensive plan for all those Integrated Tribal Development projects which have sizeable forest area may be prepared in which tribal development and forestry development could become two co-equal goals. In the forest-rich regions, forestry-based programmes may be assigned the central position, agriculture having a secondary and supplementary role. Tribals may be involved in plantation programmes by providing them right on trees and usufruct. Other important recommendations are:

(i) Item-wise survey of MFP, maximum collection and processing through co-operatives, and research and development programmes should be put through, to aid tribal development.

(ii) In plantation programmes, there should be a mixture of species which yield fuel, fodder, small timber, fruit, MFP and other items of economic importance and for daily use.

(iii) Tribals living in forest villages should be given heritable and inalienable rights over the land which they cultivate. These villages should be provided with all facilities.

(iv) Human resource should be developed through training and extension for conversion of natural resource endowment into ready economic assets.

(v) Training and orientation of functionaries should be paid special attention.

(vi) Institutional finance should be attracted for forestry schemes.

(vii) Measures for regulating shifting cultivation should be carried out within the existing social framework in the best interest of the individual families, the community and the ecology.

RESUME OF STATES' SCENE

The State Governments have taken a number of steps in pursuance of the recommendations made from time to time, particularly after the tribal sub-plans became operative. A brief resume of the action taken item-wise is given hereunder:

The Conference on the "Role of Forest in the Tribal Economy" recommended that forest villages be abolished and the States should take immediate steps to convert them into revenue villages. It was envisaged that this would enable tribals living in the forest villages acquire inalienable rights over the land and obtain benefits of the development plans hitherto denied to them. Andhra Pradesh, Maharashtra, Rajasthan, Uttar Pradesh and Orissa State Governments have converted all forest villages into revenue villages. Forest villages were established with the primary obligation to provide labour even on payment of wage, a condition for residents in the forest villages, held ultra-vires of the Constitution by the Kerala High Court.

Forest Labour Co-operative Societies

Tribal communities provide bulk of the manpower for forestry operations. Employment of forest labourers is generally through contractors. The contractors recruit labour in groups and bring them from outside. However, forest labour is casual and largely seasonal. The relationship of forest labour and employment agencies is, to a large extent, exploitative, the advantage of which is taken by the middlemen or the contractor. The arrangement may also get reflected in lower working expenses of the forest department. To ensure reasonable wage to the forest labourers and to provide them long-range employment, it has been suggested that the working of forests should be organised through co-operatives of forest labour. It has also been said that to save the tribals from exploitation, in case formation of tribal co-operatives is not immediately practicable, the contractor agency may be substituted by departmental agency in the first stage to be later replaced by forest labour co-operative societies.

Minor Forest Produce (MFP)

According to the National Commission on Agriculture, MFP has the potential to bring about an economic revolution for tribals in the country. In fact, before independence the value of MFP items used to be so low that the State Forest Department did not regard them as an important source of revenue. The tribal continued collection and sale of MFP for his sustenance till it gained commercial importance and attracted the attention of the State Governments as a source of revenue.

A large number of MFP items have acquired commercial value due to national and international demand.

In order to have adequate and sustained supply of MFP to villages, small and medium-scale industries and, at the same time, to ensure remunerative rates to the tribals for collection, trade of a few MFP items in some of the states was nationalised. Through suitable legislation, some states acquired monopoly rights to procure nationalised items. They also fixed collection charges of MFP. Notwithstanding such steps, the economic situation of tribals hardly improved more than marginally. Even after nationalisation, the states have adopted advance purchase system for fixing rates. Since under the law the states alone can procure the nationalised commodities, purchase should be done directly by the Forest Department from tribals. In practice, however, procurement by agents appointed by the Department

is more common than direct purchase by the Department. The agents purchase produce formally on behalf of the department, but the collection is channelled to the final purchaser in reality. The state becomes entitled to the difference between the agreed sale price and the collection charges. Thus, the primary objective of removing the middlemen and passing on the maximum benefit to the primary collector is defeated. The system also suffers from the defects of non-collection of material from the more interior areas, over-exploitation of accessible areas, low payment for collection to tribals and declaration of quantities less than actually collected. As a third system, in some states, collection of some of the items of MFP, whether nationalised or not, is being undertaken through co-operative of tribals (LAMPS - Large Sized Multipurpose Societies, etc.) on a monopoly basis or otherwise. In this way, three different practices are in vogue for collection of MFP, viz., through contractors and industrialists, departmental agency and through co-operatives.

Social Forestry

Having regard to the low percentage of afforested area in the country and the big gap between demand and supply of forest produce, it is essential to mount a massive effort at afforestation and involve the maximum number of people therein.

A large fraction of our population is today being forced to eke out subsistence by cultivating marginal land, overgrazing depleted pastures, cutting wood from dwindling forests and destroying the base of our national resource in many other ways. To save the forests, it is necessary to provide an economically viable scheme to such population for diverting them from their existing activity. In the tribal areas, the sub-marginal land, being used for raising agricultural crops can more profitably be put under forestry crops which incidentally help in restoring the ecological balance. This has now been made possible by the availability of choice of suitable technology and production pattern, so that a piece of land about 1.5 hectares or so, can make a family more or less economically independent. The choice can be as wide-ranging as the capital-intensive coffee plantation at one end, through plantations of fruit-bearing trees, plantation of fodder trees linked with animal husbandry programme, host-trees for tussar, fast-growing plantations linked with forest industries and fuel-wood plantation, at the other. The traditional programmes of forest plantation are too costly and, therefore, need to be suitably modified for raising social forestry plantation involving local people in the venture as partners.

A large programme of coffee plantation has been taken up in Andhra Pradesh with financial support from Agricultural Refinance and Development Corporation (ARDC). Each individual tribal is assigned a piece of land for plantation and he has the right on the crop and the usufruct, but does not have the right of alienation of land. The project is said to be working well.

The Gujarat Forest Department has started social security, afforestation schemes for tribal families. In the absence of sustained employment, landless tribals indulge in illicit felling or migrate to far-off places every year in search of manual work resulting in dislocation of economic and social life for them. The forest department has developed a scheme as per which an assured monthly income is to be provided by permanently engaging a tribal family on forest plantation work earmarking plots of certain size, say of 2.5 hectare. Plantation of suitable forest species is raised in this land by the family under the supervision and guidance of the forest department. The required materials, viz., polyethylene bags, seeds, etc., are supplied by the Forest Department. The family is responsible for all operations for successful raising of the plantation, i.e., digging of pits, soil conservation measures, planting, weeding, fencing and protection of the planted crops. For the labour put in, each family is paid a monthly remuneration of Rs. 250/- for a period of 15 years. The family is also given small-size timber, bamboo, etc., for constructing a hut near the plantation site and is allowed to cut grasses and collect MFP free of charge. At the end of the rotation period of 15 years, the family is to be given 20% share in the profit derived from the sale of the material making him partner in the profits. The measure is aimed at helping the family to stabilise and, in the process, ensure protection of the new plantation and existing forest, resulting in production of scarce fuel-wood and small timber. The scheme is expected to improve the socio-economic condition of landless tribals.

The State of Rajasthan also, has started a new scheme of social security through forest plantation, on the Gujarat pattern. The scheme is likely to cover 9,000 hectares of such land by extending benefits to 300 tribal families every year.

Forest-Based Industry

At present, forest industries are mostly located outside the tribal areas. Hence, primary forest produce has no direct link with the organised market. The processing of forest produce outside

the tribal area adversely affects the tribal economy inasmuch as value addition on forest produce is siphoned off by the trader and industrialist, and no gainful employment is generated locally for the tribals.

The forest-based industries in general, and paper industries in particular, have been obtaining supplies of raw materials from the forest sector by paying unremunerative prices to the State Forest Department. As a consequence, very little investment has been made in production of raw material and regeneration of forest. Additional planned investment in the forest sector for the creation of man-made forest is essential for continued supply of raw material for the existing as well as new forest-based industries. Future expansion of pulp and paper industries will depend upon generation of additional forest resources by raising plantations of fast-growing species suitable for pulping.

Training of Personnel

To achieve integration of forest and tribal development, forestry programmes require suitable modification for which re-orientation of foresters is necessary. Foresters might acquire a good knowledge of the forests and the area, but may not develop appropriate perception and sensitivity to tribal needs and aspirations, with the result that they unwittingly develop programmes which are not in harmony with tribal ethos, culture and way of life. Tribal Development should be introduced as a subject in all the forest colleges and schools.

Rights and Concessions of Tribals

The right of tribals to collect forest produce has been accepted as a policy by a number of states, though in varying form and extent:

(i) In Madhya Pradesh, nistar concessions and facilities have been granted which cover most of the basic needs of the tribals. They are permitted to remove firewood by headloads, fruits, leaves, bark, roots, thatching grass, medicinal herbs, fencing material free of charge, and collect and remove dry and dead firewood by carts at concessional rates. Small-size timber and bamboo required for construction and agricultural implements are provided through nistar depots at concessional rates. Grazing of cows, bullocks and buffaloes is allowed free of charge.

(ii) In the hill area of Uttar Pradesh, 10 cft. of marketable

timber like pine, kail, sisoo or 30 cft. of non-marketable miscellaneous timber is given as grant to a family every year. For every fifth house, one oak tree is given every year free. Silviculturable available trees of miscellaneous species can be removed without paying any price. Dry trees and stumps can be removed for bonafide use. Free grazing is allowed in the forest situated within a radius of 8 kilometres, for specified number of cattle, beyond which a concessional grazing fee is charged.

(iii) Other states are gradually recognising the rights and concessions of tribals on different forest produce.

RESUME OF THE NATIONAL SCENE

From time immemorial, the tribal people have enjoyed the freedom to use the fauna and flora of the forest. This has given rise to the belief that the forest belongs to them, a conviction that even today remains rooted in their mind.

Forest Policy

Forest resources gradually came under systematic management of the state from about the middle of the nineteenth century. The state was concerned not only with maintenance of forest resources but also preservation of the environment. The following extract contains the gist of the first forest policy of 1894:

"The sole object with which State forests are administered is the public benefit. In some cases the public to be benefited are the whole body of tax-payers; in others, the people of the tract within which the forest is situated; but in almost all cases the constitution and preservation of a forest involve, in greater or lesser degree, the regulation of rights and the restriction of privileges of users in the forest areas which may have previously been enjoyed by the inhabitants of its immediate neighbourhood. These regulations and restrictions are justified only when the advantage to be gained by the public is great; and the cardinal principle to be observed is that the rights and privileges of individuals must be limited, otherwise than for their own benefit, only in such degree as is absolutely necessary to secure that advantage."

The national scene remained nearly static during the early part of the twentieth century. However, the pressure of population was gradually increasing and by the mid-twentieth century, the increase was more than 40%. The two World Wars affected

the economy in many important ways and drew heavily on the valuable forest resource-base for meeting defence requirements. After Independence, the national leadership decided to make a determined effort for fast economic development necessitating a second look at the forest policy.

The forest policy was revised in 1952. It laid down the following basic principles for proper management of the forests of the country to derive from them the maximum benefits, direct or indirect:

(a) Forests are valuable not only in the physical field such as prevention of soil erosion and conservation of moisture, but also in the economic field such as development of agriculture, industry and communications.

(b) For purposes of management, forests should be classified according to the primary functions, a role a particular forest has to fulfil.

(c) Uncontrolled and excessive grazing is incompatible with proper growth of trees and fodder grasses and must be regulated.

(d) It is necessary to evolve a system of balanced and complementary land-use under which each type of land should be allotted to that form of use under which it will produce the most and deteriorate the least.

Soon after Independence, with the abolition of princely states and zamindars, action was taken to take over the private forest as government property, resulting in a period of uncertainty causing substantial damage to the standing forest crop. Considerable effort had to be made before the new area was put under systematic administration and control by adopting a uniform forest policy. Even now there are major gaps in forest land statistics in many states.

The National Commission on Agriculture recommended revision of the 1952 forest policy by incorporating significant shifts and stresses in the forest policy arising out of the recommendations of the Central Board of Forestry. The Estimates Committee (1968-69) of the Fourth Lok Sabha in its 76th Report also recommended that the national forest policy should be reappraised so as to make the new policy more purposeful, realistic, effective and operative for the development of forests and forestry in the country.

A new policy resolution is on the anvil.

The NCA has given thought to the principles which should govern revision of forest legislation, and recommended the following to be adopted:

(a) There should be uniformity in forest law so that incompatibility in forest laws among the states is removed and there is no multiplicity of legally sanctioned authorities concerned with forestry matters.

(b) It should be possible to tackle specific problems in different parts of the country through subsidiary rules and regulations.

(c) A developmental approach should be followed.

(d) There should be stringent preventive and punitive provisions, so that when a resource is allocated for development in a certain direction, it is not wasted.

We agree that there should be an Indian Forest Act enacted by the Parliament applicable throughout the country for the sake of uniformity. It should be possible to frame the Act in such a manner that states are free to make subsidiary rules and regulations under the Act to meet contingencies of local situations.

The nistar rights of tribals on forest produce should be duly recognised and there should be provision for creating 'nistar forests'.

There should be provision in the Act to eliminate the contractor agency from forest working. Forest villagers should be provided tenurial rights on land which they cultivate.

Shifting Cultivation

It is reported that there are about 233 blocks spread over 62 districts in 16 states as the affected area under shifting cultivation to a higher or lesser degree, involving nearly 12% of the tribal population of the country. For settling the shifting cultivators so far, only piece-meal attempts have been made but a comprehensive approach in study, research and application has yet to emerge.

The need for integrated approach involving multi-disciplinary teams as per different models for each separate region has been accepted at the national level. Two pilot projects - one in the Nishi area of Arunachal Pradesh, and another in the Juang area of Orissa, are under preparation. It is intended to regulate shifting cultivation within the existing social framework in the

best interest of the individual, family, community and ecology.

SUMMING UP

Background

Forests occupy a central position in the tribal economy. As per FAO Reports, one-third of the world's most deprived (800 million) people live in this country needing immediate help. Forests cater to the basic needs of these people by providing food, fodder, fuel for domestic purposes, timber for construction of dwelling units and agricultural implements, and other saleable products. They also generate rural employment.

With more than 15% of the world's population, India's forest area of 74.74 million hectares (22.7% of total land area of the country) containing less than 1% of the productive forests yielding per capita forest of 0.109 hectares, has made it a forest-poor country. Low yield from India's forests (only 10% out of 22.7% forested area is well stocked) and steadily-increasing needs of the people and industries, have resulted in high prices and acute shortage of forest commodities.

The rural population, including tribals, shares the hardship of severe firewood, timber and fodder scarcity, land degradation, soil erosion and flood damage. The state-managed and private forests (notified reserve, protected village and others) have been getting depleted under pressure of heavy demand for wood and forest products in the rural areas. Further, the depletion of forests has been instrumental in destruction of the rich fauna and flora which sustained the tribal population, exposing hill-sides to land-slides and erosion, washing away the fertile top soil making agriculture lands unproductive, leading to silting of dams and reservoirs and driving wildlife to the point of extinction. There is immediate need to restore an optional vegetal cover so that the eco-system strikes the balance again and yields the resources so direly needed.

Forest Policy

The official statement of 1894 on forest policy mentioned that regulations and restrictions were justified only when the advantage to be gained by the public is great. But forestry practices during the pre-Independence period were concerned mainly with the supply of raw materials, for industries and defence installations in the colonial set-up and hardly anything was done to ensure continuous supply from the forests of the basic

needs of the population. Thus, historically, forestry activities became occupied with meeting the raw material requirements of wood-based industries emerging over a period of time. After Independence, rapid industrialisation made the forest authorities more concerned with financial rate of return, net revenue and such other indices of productivity-efficiency and, in the process, forestry got mainly linked with consumption of the urban society comprising a small fraction of the total population.

After Independence, it was considered necessary to revise the forest policy. It was felt that revolutionary changes which had taken place during the interval in the physical, economic and political fields called for re-orientation of the old policy. The value of forests was recognised not only in industry and communications, and in the later day in agriculture, but also in the physical field for conservation of moisture and prevention of erosion.

The policy of 1952 accepted as its primary goal the need for evolving a system of balanced and complementary land-use under which each type of land is allotted to that form of use under which it would produce the most and deteriorate the least. The policy also took into consideration other goals, i.e., checking denudation, establishing tree-lands, provision of nistar facilities, defence and industrial uses and maximum revenue consistent with the primary goals. The tribal communities were granted certain concessions like collection of MFP, grazing of cattle, etc.

Developments during the three decades following the enunciation of the policy call for a review. Increase in population has given rise to demands for a variety of forest products on the one hand and pressure on land on the other hand, resulting in substantial loss of forest lands. The economic and social benefits accruing to the community from forests and forest-based industries have come to be better understood.

In their Report (1961), the Dhebar Commission recommended that the policy of 1952 should be reconsidered and that, subject to safeguards, tribals should be allowed forest lands for cultivation, their needs should be met from out-lying areas in the reserve forests and their requirements for grazing and shifting cultivation should be conceded. They were also of the view that the forest department should be deemed to be charged, as a branch of the Government, with the responsibility of participating in the betterment of the tribals side by side with the development of

the forest. Enlarging, they desired that a time-schedule should be prepared by the forest department in consultation with agriculture, industries and development departments in each region with the intention of providing work to tribals all the year round. Such work should include services of the forest department like protection, conservation, exploitation, etc. It should include work on land utilisation schemes, collection of forest produce, exploitation and processing of major and minor forest produce.

The National Commission on Agriculture referred to the inter-relationship of forest economy with rural and tribal economy. In their view, the two should not work in isolation, and the relationship between them should be considered in terms of employment, rights of user and involvement of the local people. Forestry needs strengthening by rationality in operations, larger investments and use of new technology so that it can yield a higher surplus to be shared locally, regionally and nationally as against rapid disappearance of trees and vegetation.

The Underlying Considerations

By and large, forestry operations have been regarded as revenue-earners for the state and private sectors. Tribal economy has figured little among the parameters of a forest policy and, at best, the tribals continue to be wage-earners. Benefits should flow to tribal people by imaginative forestry programmes and conservation and re-organisation of their traditional skills. In other words, the individual tribal, the local tribal community, and national interest, should be regarded as the three corners of a triangular forest policy.

It is conceded that the general subject of forests transcends the limited scope of tribals and forestry. However, it is as well to recognise that while tribal life is profoundly affected by whatever happens to the forest, forest development cannot make much headway without involvement of tribals. While, in a broad sense, forest policy and forest system should be directed towards managing a renewable endowment of vast potential for subserving national, regional as well as local development goals, the intimate complementarity of forest development and tribal development should gain wide recognition in policy and action. Further, instead of relying on policing of forests, the responsibility of their preservation should be cast on the people. The recognition should be subsumed in the understanding "tribals

for forests and forests for tribals". In short, there needs to be a deliberate, conscious shift in the orientation and approach of the forester towards a public perspective policy.

There is lot to be said for the view that the forests should be managed primarily by the forest-dwellers and backed by technical guidance of the Forest Department. In this context, we cannot help referring to our experience in the North-East where we found a number of villages maintaining their own communal-owned forests. Some of them are well managed. The tribals and the local villagers should be considered as potential allies in the battle for re-afforestation. With it must come a profound re-organisation of the forest department. Its role should be akin to that of the agricultural extension services.

Macro-scale plans tend to blur the perspective of micro-level requirements. It is felt that little attention has so far been paid to grass-root planning. Detailed micro projections in respect of technology to be adopted, areas to be covered, species to be included, time-frame of long-range and short-range objectives should be made and fitted into the state's overall context of afforestation programmes.

In concrete terms, we recommend that:

(a) For the existing 10% forested area of the country - measures for protection, conservation and regulated working should be stringent.

(b) Restocking of the existing 13% degraded forest area should be quickened.

(c) Afforestation of 10% of the country's wasteland scattered as well as in strips along-side roads, railway-lines, canals and river-banks, should be put under forestry with public participation.

The Agencies

The effort involved for (b) and (c) above would be colossal and the State Forest Departments by themselves may not be in a position to mount it, let alone achieve it. Further, the additional areas to make up to the one-third might be comprised for degraded, marginal and sub-marginal lands lying away from the existing operational and habitational areas.

The task may be divided among –

(i) The State Forest Departments - who should look after the reserve forests.

(ii) The village community or panchayats or individuals - charged with the responsibility of forestry in and around revenue villages.

(iii) A "tree army" - to be raised for undertaking silviculture operations in the more distant, degraded, marginal and sub-marginal lands.

The incongruity of the British forest policy followed in India was recognised by the National Commission who made suitable recommendations. In consideration of tribal revolts against the encroachment and destruction of forests by the agents of colonial rule, a special system of forestry-management was introduced in the submontane region of Uttar Pradesh through the Kumaon Forest Panchayat Act, 1924. There have been popular movements like "Chipko" movement in Uttarakhand (U.P.), protestsagainst mass cutting of trees in Singhbhum district (Bihar) and elsewhere in Maharashtra. A climate of participation needs to be created keeping these movements in view. A national forest policy should recognise the positive role of the people in maintaining their forest and environment in unambiguous terms and not merely in its implication.

We are quite convinced that community involvement is the only long-range solution to the question of afforestation, preservation, production and management of lands outside the reserve forest area, particularly in and around human settlements. A framework for obtaining their interest-identification with a view to community involvement and production orientation should be evolved.

The organisational instrument for community, social and farm forestry is important. In the north-east, the village and district councils have traditionally managed their forests. It is possible that the organisations of tribal communities might in the past, have managed the surrounding forests. It may be worthwhile to revitalise these organisations and vest management of protected and village forests in them for commercial, social and farm forestry purposes. However, the "tree-army" concept would need to be worked out in more details and should at any rate, be a common child of the official and non-official agencies, the exact arrangement emerging differently in different regions. Farm forestry could be promoted individually.

Forestry and Tribal Development Programmes

In this context, we would like to make some specific suggestions. In regions having a substantial area under forest, development of forests instead of being planned in isolation, should form an integral part of the comprehensive plan of integrated tribal development. The needs of the local economy should get the highest priority in forestry programmes and should influence the choice of species to be planted in the area.

For shifting cultivation as such, no satisfactory answer has yet been found from the agricultural, silvicultural, sociological and other points of view. There is need for undertaking intensive surveys, studies, experiments, pilot projects, etc., in the field to understand it in all its variations, ramifications, implications and aspects, to evolve substitutes, remedies, etc.

From a macro point of view, it has been suggested that very broadly the approach should incorporate forestry on hill-tops, horticulture in the intermediate slopes, and terrace-cultivation in the foot-hills. Afforestation through agro-silvicultural method might meet the psychological urge of tribals to practice shifting cultivation. Shifting cultivation may be provided full-time occupation in relating plantation of crops, development of live-stock, etc. A ten-year perspective plan may be prepared for settlement of shifting cultivation as per this three-tier agro-silviculture pattern. However, each contextual micro-situation needs to be studied to formulate a comprehensive programme of settlement of shifting cultivation in that situation. Thus, a variety of project reports should be formulated responding to each situation encountered, by interdisciplinary teams touching on all facets of tribal life.

Forest Villages

It appears to us that the institution of forest villages needs to be abolished. The forest villages may be converted into normal revenue-villages, enabling tribals living therein to acquire inalienable rights to land and obtain benefits of development plans. Maharashtra has already done this and the villagers have been granted land on permanent basis and inalienable tenure. The states of Madhya Pradesh, Orissa, Bihar, Uttar Pradesh, etc., might follow suit.

Social Forestry

Basically, social forestry is designed to meet the benefits and

primary needs of the tribal and rural population as opposed to the needs of industries and the urban elite. The desiderata are:

(a) A mixed production system including fruit, fodder, grass, fuel-wood, fibre, small timber, etc.

(b) Involvement of the beneficiaries right from the planning stage.

(c) Minimal government control.

(d) Financial contribution by local bodies, voluntary contributions and government subsidies.

(e) Use of communal and government lands.

Social forestry envisages creation of wood-lots on government, communal and private marginal, sub-marginal wastelands as per a pre-determined land-use pattern, afforestation of degraded forests, block plantation along road-sides, canal-banks and railways. Thus, it is a complete production system.

In social forestry, the initiative ought to come from the tribal people and other forest-dwellers. Identification of the areas, species to be planted, institutional arrangement for protection and marketing should be done by them. In other words, for its success, the programmes should bear the hall-mark of tribal involvement. The programme would need to be given much higher priority than hitherto, since conceived as geared to tribal needs it will help relieve the pressure on forests.

One of the reasons for tardy progress of social forestry and allied programmes could be that they are being implemented without taking into consideration the corporate rights of tribal communities over lands in many areas. Democratisation of forest management is an essential, overdue step.

There is hardly any inflow of institutional finance for social forestry. By and large, financial institutions, including commercial banks and co-operatives, do not appear to have evolved norms and procedures for extending term-loans for forestry on community lands. We understand that the Agricultural Refinance and Development Corporation has under its contemplation some social forestry schemes in Gujarat. In our view, this is an area where mutual co-operation will be to the benefit of both the parties, and, hence should be fully explored.

The co-operative sector too has remained rather aloof when it should have whole-heartedly participated in this essentially

community-co-operative venture. We urge that it should emerge out of inhibitions, if any.

Forest-based Industries

It seems that forest-based activities occupy a comparatively minor position in the manufacturing activities in India.

Most of the forest-based industries are situated far away from the source of raw material, involving long haulage. Prima-facie, there is no direct linkage between raw material production and industrial activity. Raw material production has occurred at such places where the industry could not come up and some industries have expanded their production capacity without reference to location of raw material. Non-use of raw material due to the absence of industrial demand and non-supply of raw material due to distant location have led to generation of low employment potential in both sectors. This calls for the closest co-ordination between raw material production and forest-based industries.

We make the following recommendations partly based on those of the Group which was appointed by Government of India to go into the matter:

(a) As far as possible, a forest-based industry should be a joint venture of the three parties, i.e., the concerned corporation, the entrepreneur and the tribal producer and collector of raw material.

(b) Tribals should be encouraged in the context of comprehensive land-use planning to grow in the marginal farm and wasteland, raw materials for the forest-based industry, e.g., bamboo, Sabai for paper and pulp. Certain industries are already doing that, as in Bengal. Incentives may be given to tribals for the purpose.

(c) The industry should assure take-over of the raw materials grown by the tribals as per a schedule, the concerned extension agent should work for adherence of the schedule by the tribals.

(d) The industry-linked plantations (pine in Bastar) should not be located close to tribal habitation in order not to cause interference in Nistar rights of tribals. Location of the plantation should preferably be determined by the local officers after discussion with the concerned local tribals.

(e) The corporate body should take up strong extension

activities to motivate tribals to raise industrial raw materials on their farms as well as on available community lands.

(f) Support activities such as establishment of fuel-wood, small timber and bamboo depots, grain-banks, etc., should be undertaken to enable the basic needs of tribals being met at their door-steps.

To our knowledge, financial institutions have not taken kindly to plantations as a resource or even raw material asset for industry. We feel that the time has now come for public lending bodies to play a positive role in providing a fillip to the plantation-industry nexus and for forestry and industry to make use of public finance.

Minor Forest Produce

MinorForest Produce (MFP) is deemed to include all items of forest produce except timber. The Dhebar Commission (1961), Hari Singh Committee (1967), the National Commission on Agriculture (1976), and several others have laid stress on development of MFP for the benefit of tribals. In fact, the National Commission on Agriculture held that MFP possesses the potential of an economic revolution among tribals.

During drought and adverse climatic conditions, tribals depend mainly on MFP for their sustenance. Further, a study conducted in 1978 by Administrative Staff College of India, Hyderabad, showed that between 10% to 55% of the income budget of a tribal family in the major tribal concentration states of Madhya Pradesh, Orissa, Bihar and Andhra Pradesh was obtained through sale of MFP, the rest being derived from agriculture. MFP items are an important source of sustenance and cash income for the tribes and other people living in and around forests. Apart therefrom, they are important raw material for small, village and cottage industries and contribute to national economy through import substitution and export.

Keeping in view the position of MFP in the food and income budgets of a tribal family, the right of collection by tribals of MFP without restrictions, wherever this is lacking, should be ensured. This should be followed by organised collection and marketing of MFP.

Out of more than 21,000 botanical species reported from forest areas, so far less than 3,000 species have been identified yielding MFP of some commercial importance. With dependence of a large segment of the tribal population on MFP, there is need for

research and development of the forest items by various bodies like the Indian Council of Scientific and Industrial Research, the Forest Research Institute (FRI), the State Forest Institutes, etc.

Since the bulk of the MFP remains uncollected due to lack of infrastructural facilities in the interior areas, plans for development of roads, godowns, amenities of labour and trade channels, should be adopted aiming at full exploitation of MFP. As recommended by the National Commission on Agriculture, item-wise survey should be undertaken for a full resource inventory for each state, may be by the newly constituted Forest Survey of India. Project reports, amenable to economic appraisal, for organising collection, procurement transport, storage, grading, local processing and marketing, should be prepared. Tremendous employment potential can be generated and definite impact on tribal economy can be made through a special drive launched for maximising collection of MFP by formulating item-wise location-specific projects.

The most crucial problem is marketing of MFP. The tribal at the lowest end receives a pitifully low recompense for the produce he collects, while the consumer has to pay an inflated price, the middle-man appropriating the large difference.

A definite procurement strategy for MFP is called for. We would like to cite the recommendations of the workshop on marketing of MFP held on 25-27 May, 1979 at Hyderabad that competitive procurement and marketing by cooperative bodies and other agencies might lead to a better price for the tribals, while keeping the co-operative bodies in trim shape. However, this should occur at the primary level to enable the price impact to be felt by the tribals.

We understand that about 2,500 Large Sized Multipurpose Societies (LAMPS) have been set-up in tribal areas of various Sates of the country with the three-fold objective of:

(a) Procurement at remunerative rates from tribals and other population of their surplus farm and forest produce.

(b) Sale at controlled or reasonable rates to them of their consumer necessities.

(c) Extension to them of production and consumption credit.

Unscientific and indiscriminate exploitation of MFP has been making serous inroads into our resource base. Various species have been "bled" for gums, resins and medicines, in various parts

of the country. Bamboo and Khair forests are facing the danger of extinction over major areas. Elimination of the avaricious contractors is likely to bring in relief. Further, in order to prevent "death-tapping" and instil quality consciousness, the tribals must be trained to collect in the correct way only specific quantities without injuring the resource base.

We find enough attention is not being paid to storage and preservation of MFP with the result that quality deterioration takes place. Improved storage techniques should be employed, using scientific methods and personnel with the requisite technical experience. The storage practices of tribals should be studied for mutual benefit and improvement. Facilities for storage in a state need to be created at primary, intermediate and apex stages.

A large part of MFP is exported from tribal areas in original, raw form. Processing is essential for value-addition and can be done at three stages:

> "First-stage processing at the household level, as in respect of hill-broom grading, tamarind deseeding and defibring, Adda-leaf, Kendu (Tendu) leaf, Pipal Modi, stick-lac to seed-lac, extraction of non-edible oils. Processing at the primary society level example being tamarind concentrate, oil-extraction (power Ghani), lac, tussar reeling and spinning, bees-wax. Processing at the apex-level, examples being solvent extraction of Sal, extraction of other edible and non-edible oil, shellac, Sabai-grass, etc".

We feel that regeneration of MFP has attracted only a token effort so far. It is of critical significance for tribal economy. Plantation of MFP should be taken up on an individual or community basis in individual or communal land by associating tribals in management and protection under the technical guidance and supervision of the forest department; while in Government land it could be taken up on the basis of right of usufruct in favour of tribals. Further, the states' five year and annual working plans should include a distinct and significant finance and implementational component for regeneration of MFP species.

The question of realistion of royalty of MFP by the forest departments from individuals, co-operatives or corporations engaged in the MFP collection should be reviewed in the interest of a suitable price to be made available to the tribal based on the market value of the community. We would urge exemption of MFP from royalty particularly in respect of these items which fall

in the co-operative sphere. But, even if royalty is to be retained, there is evidently a case for its rationalisation.

FOREST LABOURERS' CO-OPERATIVE SOCIETIES (FLCSs)

FLCSs have a significant role to play in generating employment, countering exploitation, promoting participation of tribals in management of their affairs and creating leadership among them.

A national seminar on economic development of Scheduled Tribes held by the Tata Institute of Social Sciences, Bombay in 1979, came to the conclusion that while the FLCSs have partly succeeded in eradicating exploitation by forest contractors and in preparing tribals to participate in and manage the affairs of the societies, they have not been successful in creating additional employment. The full benefit of the societies can be obtained if they assure the tribal forest labourers work all the year round in the pursuits like collection of MFP, plantation work, nursery work, fire protection work, etc. We support the recommendation.

Biosphere Reserves

During our visit to Nagaland, we were pleasantly surprised to find dense virgin forests being maintained for generations by the tribal population of Angami and Zeliang areas around Khonoma and Jalube villages. It might be desirable to enter into a dialogue with the villagers for obtaining their concurrence to declare vulnerable parts of the range as a biosphere reserve. There are many more areas in the country which are still virgin or rain forests, e.g., in the Andaman and Nicobar Islands, Karnataka and Kerala. We would recommend that they should be declared as biosphere reserve for germ-plasm, gene pool and other purposes, and strict observance of their identity as such.

The concept of biosphere reserves has been viewed as an approach for maintaining the integrity in time and space of a complex biological system. It has been urged that the diversity and integrity of biotic communities of plants and animals within natural systems should be conserved for the present and future use, and genetic diversity of species on which continuing evolution depends should be promoted. Such reserves would provide vistas of future evolutionary growth, opening up vast areas of ecological and environmental research. These reserves would need to be demarcated clearly for enabling natural processes to operate without the risk of human interference. Even if the

biospheres are located in the national parks/sanctuaries, they will be of exceptional value. We understand that the MAB (Man and Biosphere) Committee has completed reports in respect of two - the Nilgiri and the Namdapha biosphere reserves; and that work of preparation of documents of four biosphere reserves, viz., Nandadevi, Valley of Flowers (Uttarakhand), North Andaman Islands and Mandapam Marine reserves, has been taken up and would be completed soon.

Hence, we recommend speedy establishment of biosphere reserves for which expeditious administrative, legislative and scientific action needs to be taken by the Government of India and the State Governments.

We have come across reports of ouster of tribal families from the sites of national parks, sanctuaries, etc., without providing for an alternative source of their livelihood. These also indicate disregard of tribal interests in preference to those of sanctuaries in the maintenance of the latter. The situation needs to be rectified and the criticism that the needs of the animals have, in such cases, triumphed over that of man should not be allowed to hold validity. Now that the question of establishment of biosphere reserves is in view, the interest of tribal families would need to be borne in mind.

Management System

The crux of the problem of forest management lies in the need for integration of tribal and forest economics. The present atmosphere of confrontation between tribals and foresters should be transformed into one of co-operation and partnership.

If the interface of forestry with development has to undergo metamorphosis in the conditions of today and tomorrow, and further if the conservation-orientation has to yield ground to development orientation, community forestry may have to be accorded a fairly high position in the newly emerging pattern. This necessitates forestry activities to be carried out by many, often local institutions, rather than by a single forest department. In brief, meta-management system would have to be applied rather than super-management.

The course of the management in the progress from narrow departmental production forestry to the broad-based community forestry can be made smoother through public participation.

HISTORICAL ECOLOGY OF LAND SURVEY AND SETTLEMENT IN TRIBAL AREAS AND CHALLENGES OF DEVELOPMENT

(WITH PARTICULAR REFERENCE TO CENTRAL TRIBAL BELT OF INDIA) *

* Council for Social Development

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Anthropology Department of the concerned Universities,

and Tribal Cell, Government of India

RECAPITULATION AND CONCLUSION

(EXCERPT FROM ABOVE-CITED CSD JOURNAL)

The present study was taken up in the central tribal belt of India to examine:

1. The concept of property among the tribal communities in different stages of development.
2. The forms in which and the extent to which common property resources prevailed among different tribal communities in the early 1950s.
3. Extent to which survey and settlement operations and preparation of record of rights have been carried out, and what problems were faced in carrying out these operations.
4. In what manner the access of different socio-economic categories and other sectors of tribal population to the common property resources have been affected by these operations.

5. Nature and extent of accumulation of capital as well as transfer of capital as related to the existence of common property resources and to the after-effect of survey and settlement operations in the areas where such resources exist.
6. What changes have been brought about in the land use pattern in the aftermath of the survey and settlement operations and to what extent the same can be related to these operations.
7. What types of demographic changes and changes in the occupation pattern of original inhabitants (male and female separately) of the concerned communities are taking place in the wake of survey and settlement operations.
8. To what extent and in what manner the content, strategy and progress of development activities have been influenced by the presence of common property resources among the tribal communities (one important dimension of the study in this context is to find out the extent to which the development activities are harmonic or disharmonic to the people's knowledge, beliefs and practices centering the common property resources).
9. To what extent and in what manner the implementation of the development activities have affected the form and extent of common property resources of the tribal communities in diverse social ecological contexts.

The field investigations have been carried out in selected tribal areas of Bihar, Orissa and Madhya Pradesh. But, for the interpretation of the field data it has been necessary to keep in view the note of caution struck by Tylor,[1] the father of modern anthropology, more than a century ago. "It is always unsafe to detach a custom from its hold on past events, treating it as an isolated fact to be simply disposed of by some plausible explanation". In the words of Bidney,[2] "This represents also the basic thesis of Maine[3] and may be characterized as ethno-historical functionalism. It is an approach which combines a keen appreciation of the necessity of ethno-historical perspective in evaluating the function and the significance of contemporary customs and institutions together with an understanding of the functional inter-relations of cultural traits in both time and place". It is in line with this intellectual heritage, though not necessarily with all the dimensions of it, that the field data have been

examined in the context of local and wider historical processes as well as in a comparative framework, which again has not been confined to India alone.

Some of the theoretical postulates, premises and generalised observations which have informed the study would first be briefly indicated here.

1. Groups and organizations differ in the extent to which they exercise control through expressly formulated rules (law), through less definitely formulated but definitely patterned expectations of behaviour which are reinforced by sentiment and supporting moral doctrines (mores) and through routinized, often habitual but less strongly effective, expectations (folkways).[4]

2. While Maine's dictum that progressive societies have moved from status to contract is to be kept in view, due attention is also to be given on Durkheim's[5] observation about the existence of a body of rules which have not been the object of any agreement among the contracting parties themselves but are socially 'given'. He is careful to point out that the legal rules stand by no means alone, but are supplemented by a vast body of customary rules, trade conventions and the like which are, in effect, equally obligatory with the law, although not enforceable in the courts. Commenting on Durkheim's empirical insight in this matter, Parsons[6] emphasises the fact that the vast complex of action in the pursuit of individual interests takes place within the framework of a body of rules independent of the immediate interests of the contracting parties to promote mutual advantage and peaceful cooperation.

3. Based on Jenks,[7] Hidayatulla[8] observes "Property as defined in dictionaries means the right specially the exclusive right, to possession, use or disposal of anything. It is the act of 'appropriating' or making 'proper' to oneself some part of the resources of the universe. This line of thinking can be traced back to Locke,[9] who looked upon property as an inalienable 'natural' right of the citizen.

4. According to Austin[10] "property taken in its strict sense denotes a right, indefinite in point of use, unrestricted in point of disposition and unlimited in point of duration over a determinate thing". But the Christian idea of property in medieval times, as presented by Whittaker seems to be very

much different. St. Thomas Aquinas did not justify private property in any absolute sense, rather private property was limited by the condition that those who possessed it would "communicate it to others in their need". Aquinas quotes Ambrose (340-397, Bishop of Milan) who said, "Let no man call his own that which is common". According to Ganguli[11] this was also Ruskin's standpoint as well as Gandhi's.

It is obvious that legal positivism, reflected in the statement of Austin about property, is only one way to look upon property and ownership. From an anarchist perspective, Kropotkin spoke about 'social capital'.[12] Again, according to Herbert Read, human groups have always spontaneously associated themselves in groups for mutual aid and to satisfy their needs, and so can be relied upon voluntarily to organize a social economy which will ensure the satisfaction of their needs.[13] There is a growing realisation that apart from philosophical and ideological points of view, from the perspective of sociology of law also the approach whose heritage has been derived from Locke is not wholly tenable. "In its political and sociological – and indeed, in its popular – sense 'property' is clearly not confined to ownership in 'things' (Sachan). It comprises not only the reality and personality - or, more precisely, immovable and movable objects – but also patents, copyrights, shares, claims". There cannot be, technically speaking, an ownership of mortgages or copyrights. "The economic significance of intangible property rights such as patents, copyrights, shares or options has revealed the dogmatic aridity of the civilian definition of property; even more important is the increasing realization that in modern industrial and commercial society, property is not an exclusive relation of dominance, exercised by one person, physical or corporate, over the thing or even a number of 'quasi-things', but that it is rather a collective description for a complex of powers, functions, expectations, liabilities, which may be apportioned between different parties to a legal transaction". For instance, "the evolution of trust concept, has attuned the common-law mind to the division of property between different parties, each endowed with certain parts of the property right". "The trustee and to a certain extent, the settler, has the power to dispose; the beneficiary has the power to enjoy. On the other hand, the predominance of land law in the formative era of common

law, and its impregnation with a feudal concept, under which only various degrees of estates are held, while the residue – and theoretically the only right of property – is vested in the crown, has resulted in the establishment of various 'estates' in land rather than full ownership. While some contemporary jurists regard the survival of the theoretical ownership by the crown of all land as a mere fiction to be disregarded, and therefore describe the fee simple as full ownership, others strongly criticize such a conception as unhistorical and contrary to the spirit of English law". Here it is to be noted that in the American Restatement of the Law of Property of 1936, 'estate' has been defined as 'ownership measured in terms of duration'.[14]

5. The analytical appraisal of the feudal root of the development of Anglo-American common law concepts is of particular importance for India. In the words of Lloyd[15] "In India there is an ancient civilization based on the traditional standards of Hindu culture". "Over and above, and in profound contrast to this, there is the pattern of western law first introduced by the rulers of British India, and now enshrined in a written constitution which expounds, in language inherited from Locke, the doctrine of Individual Liberty. This represents, though probably as yet much more superficially, another kind of living law in Indian society. It is obvious therefore that the positive law of India must represent a kind of ferment between these two historically and culturally opposed social forces. In a society with a relatively homogenous cultural tradition it may be possible for judges to assert that they are not concerned with the policy of the law, but merely to state what the law is and apply it, for here the ideological factors remain concealed and merely implicit for most part. But in the context of present day India, it is hardly possible for the judiciary, even if trained in the most rigorous standards of legal positivism, to adopt this detached attitude without, by their very decisions, making it all too apparent how empty a formula this is". In his statement, Lloyd has also referred to the ideology of Hindu law. But in this matter he has not specifically referred to the land question. It would therefore be useful to draw upon sources which have gone into the question in greater detail. Besides, it would also be necessary to consider the land control system that evolved during the Mughal rule. Here several other aspects of the social meaning of property as brought out by Lloyd, and

some of the issues arising out of his observation, will be briefly discussed.

6. "In modern times the huge development of the public law aspect of property has confined within very narrow limits the potential freedoms of the property owner", because "ownership may be virtually completely divested of the elements of enjoyment and control and still remain ownership, and further, because there is no such thing in law as an unlimited right, for the law inevitably imposes restraints on the use or disposal of property". "To give but one instance, the extent to which a land owner is limited as regards his mode of use, control the present or future disposition of the land, by a heavy overlay of town-planning and building regulations and possible powers of compulsory acquisition of the land by various authorities, sufficiently emphasizes that ownership is not so much a general liberty of a man to do what he likes with his own, but is much more in the nature of some kind of residual right which remains after all other relevant rights and restraints have been duly discounted".[16]

   While in the context of modern trends in industrial society, legal sociology is recognising the limitation of the stereotypes relating to property that prevail in the legal systems in the West and is discovering that, after all, right to property is only a residual right, it would be interesting to examine in the light of the data already furnished in the various chapters of the present monograph [refer: Council for Social Development (CSD - New Delhi)-1982. Circulated among State Tribal Research Institutes, Anthropology Department of the concerned universities, and Tribal Cell, GOI], whether in the primitive and post-primitive tribal societies, in their own context, individual right to landed property is not generally perceived as a residual right. In case it is so, it will also be necessary to examine, whether it will not be treated as cultural imposition, if by applying anachronistic legal concepts, imbibed by the ruling elite from the colonial predecessors, record of rights in respect of land resources are prepared today or if already prepared, are allowed to continue, without bringing about historic correction.

7. In the matter of historic correction, a conceptual differentiation provided by Lloyd about the nature of right

in property, is also of particular relevance "ownership is not a single category of legal 'right' but is a complex bundle of rights whose precise character will vary from legal system to legal system. Broadly speaking, this bundle of rights divides into two categories or aspects, one concerned with what may be termed the 'root of title' and other 'beneficial' ownership. Of the two, the first may be said to be the more fundamental. The notion here is that a certain right, which has a specific (but not necessarily a material) subject-matter, and which is capable of being treated as a pecuniary interest or of pecuniary value, and is further capable of being exercised against the public as a whole, may be regarded as owned by the person who can lay claim to the ultimate core of title to that 'thing' or subject-matter. If every possible right of this kind were subject to a system of registration then the original owner could be regarded as the first named person on the register, and the present owner as the person who now stands on the register as having acquired title from or through that person by some lawful means of acquisition". "As however no legal system could possibly in practice work a universal register of this kind – the idea of possession plays such an important role in property law, for legal systems tend to regard possession as good evidence of lawful title".

"The notion of beneficial ownership, on the other hand, is tied up with the various ways in which an owner may exercise certain legal powers or 'liberties' in relation to its subject-matter. These include a wide range of activities such as using or disposing of the property, or excluding others from its use, or even of destroying the physical thing itself. Such powers, central though they may be to the popular conception of ownership, can normally be separated from the root to the thing, so that the legal owner may be virtually divested of any beneficial interest whatever. This is the situation of a trustee who holds property on trust for some beneficiary with an absolute equitable interest therein, as it is equally of a landowner who grants 999 years building lease to a lessee at a 'pepper corn' ground rent. It is indeed rather a distinctive feature of common-law systems to facilitate the splitting up of the beneficial aspect of legal ownership in this way and this has conferred much flexibility, though inevitably also much complexity".[17]

8. Apart from depth-enquiry about the meaning of 'ownership' and shades of ownership in diverse socio-cultural systems, the task of historic correction would also require one to take note of the distortions brought by colonial rule. Some of the leading economic historians of the Third World Countries have addressed themselves to it. While discussing the ways in which the intervention of state apparatus operated in colonial times, Bagchi[18] observed, "In many colonial countries, perhaps the most important enactment was to render land a commodity for purchase and sale. From the 19th century onwards, the state took measures to create a more or less free labour and land market. It abolished slavery and declared (in Latin America) communal land to be partitionable and convertible into personal property. At the same time, to retain control over labour, it often brought in new laws of vagrancy which compelled poor people or particular ethnic groups to work for others". A specific example of distortion brought in by colonial intervention has been provided by Kludge of Ghana. "The main legal authority, on the basis of which the British courts had exercised jurisdiction in the Gold Coast (Ghana), was the Court's Ordinance of 1876. That statute recognised the applicability of the customary law, especially in the specified areas like land law, marriage, chieftaincy and succession." Then there was added the repugnancy clause, a proviso which became a common feature in all British dependencies that the rule of customary law may only be enforced if found by a state court to be "not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any ordinance for the time being in force". "The repugnancy clause subjects the customary law to state law in several respects, such that interaction between the two is based on subjugation of the former to the latter". "The more troubling aspect of the repugnancy clause was that it permitted the rejection of a rule of customary law because it was repugnant to natural justice, equity and good conscience". "Since the notions of natural justice and equity or fairness were the foreign, English norms - the customary law was deemed to succumb to the superior authority of state law". "In the Ghanaian case of Ashiemoa v. Bani – the learned judge concluded that on the evidence it was not proved that under customary law, land on the periphery of a township in Kpando in the

Volta Region would lose its exclusive private character if the township extended beyond the limits, so that local natives could build on such land without a grant from the owner. The locally well-known rule of customary law did not divest the land-owner of his title but only created an encumbrance in favour of the entire community, to ensure a roof over the head of all who would need a building plot. This must by all criteria of social justice be a fair rule, which regarded land as property for the common good, although it constituted a derogation from the exclusivity of capitalist conceptions of property ownership". What is, however, most significant is that the learned judge held that "even if the customary law had been proved to his satisfaction, he would reject it as repugnant to natural justice, equity and good conscience". According to Kludge, this was "because the rule of customary law urged upon him would not be totally conformable to capitalist notions of exclusive property right". Kludge informs that the attainment of political independence has given a greater impetus to the eventual acceptance of the customary law as a body of law enforceable alongside the common law and other forms of state law.[19]

9. One hurdle faced by the newly independent countries, including India, is the domination of some of the notions and ideas, without critical look into the content of the same. One such notion, which is frequently entertained without analysis of its content, is that of communal ownership. Various connotations of the term as found on the ground have already been discussed in Chapter I [refer: CSD, New Delhi: 1982]. At the conceptual level, Marx had found three forms of communal ownership of land to be associated with three civilization areas. While it is not necessary to go along with Marx about the historical association of the three forms with distinct civilizations, it is useful to take note of these three forms so that in social planning for the future, one does not unawarely stumble into one of them, without realising that the label carries a different meaning from what one might have in mind. In the words of Marx, "The property mediated by its existence in a community, may appear as communal property, which gives the individual only possession and no private property in soil, or else it may appear in the dual form of state and private property which co-exist side by side, but in such a way as to make the former the pre-condition of the latter so

that only the citizen is and must be a private proprietor, while on the other hand his property qua citizen also has a separate existence. Lastly, communal property may appear merely as a supplement to private property, which in this case forms the basis; in this case the community has no existence except in the assembly of its members and in their association for common purposes". Marx identified the second and the third forms with the ancient Roman and German forms of communal property, and the first form with the Asiatic village community.[20]

In point of fact, all the three forms exist in India. But while the first and the second forms partake of different shades of gemeinschaft relationship, the third form represents an out and out gesellschaft relationship. Reinforcement of the first form is reinforcement of the community; of the second form is a dimension of transition towards community renewal; of the third form is an attempt to make instrumental use of the memory of community for diverse purposes in a free-floating manner. The three forms are not variations of the same category of socio-political experience; these symptomatise three types of socio-political formations.

10. Awareness of the social meaning of diverse structures and of the problems of introducing historic correctives, mainly to the colonial and penumbra-colonial distortions, places the responsibility on the analyst of the scene, to examine the role of law in a changing society. In the International Encyclopedia of Social Sciences, Selznick[21] has observed that "failure to take account of the historical and cultural forces impinging upon the law not only distorts reality but gives the legal order an excessive dignity, insulates it from criticism and offers society inadequate leverage for change". As against this, there is the instrumental value of law, advanced by social philosophers like Bentham or Jhering in the 19th century or by such outstanding figure in jurisprudence as Roscoe Pound. It "invites close study of what law is and does in fact. The chief significance of instrumentalism is that it encourages the incorporation of social knowledge into law. For if laws are instruments, they must be open to interpretation and revision in the light of changing circumstances. Moreover, law is seen as having more than one function, not only is it a vehicle for maintaining public order and settling disputes, but it

also facilitates voluntary transactions and arrangements, confers political legitimacy, promotes education and civic participation and helps to define social aspirations". Complementary to instrumentalism is also legal pluralism. It "refers to the view that law is 'located in society' – that is beyond the official agencies of the Government. Ehrilien held that law is endemic in custom and social organization; it is in the actual regularity of group life that we find the living law."

It is obvious that in a multi-ethnic nation society like India, striving to build up the edifice of a participatory democracy, legal system sustained by mere coercive apparatus, (as envisaged by Max Weber at the level of abstraction for legal system as such) will not be viable. Hardly any alternative to legal pluralism will work here. It is in the context of the appreciation of the fact that the legitimacy of the legal system in the long run derives from the society, and not from the legal system itself. Some of the tenets of the legal system developed in the past, in Hindu social philosophy which have relevance for property questions, will be briefly indicated here.

Manusmriti is the first regular law book in Hindu system. The legal system introduced by Manu was further elaborated by Yajnavalkya, Brhaspati, Narada and Katyayana. All these law givers declare the king to be the guardian of law, rather than the fountain of law. Custom has been recognized as an important component of law. Even those customs which do not have full approval of smritis are nevertheless, accorded recognition by them.[22] While Gautama considers that long possession alone cannot be a mode of ownership, Yajnavalkya points out the importance of possession. He provides that title without any possession has no strength, though title is stronger than possession in case possession is not inherited; law-givers differ a great deal about the length of time which makes the possession legitimate.

Gautama Dharmasutra provides that if an owner silently watches and raises no protest when his property has been enjoyed by a stronger person for ten years, he loses his ownership over the property if the owner is not a minor or an idiot. The same source makes an exception to this general rule. It states that the ownership does not cease, if the property is used by Srotriyas or learned Brahmans, ascetics and royal officials. Similarly animals, land and females are not lost to the owner by another man's

possession. According to Yajnavalkya, wealth will be lost in ten years, whereas the loss of land will be in twenty years by adverse enjoyment.

When a property has been enjoyed by agnates and cognates of the owner or his own people, the ownership of the thing would not result from mere possession, according to Brhaspati and Katyayana. Brhaspati further adds that wealth possessed by a son-in-law, a learned Brahmana, the king or his minister does not become legitimate property for them even after the lapse of a very long period. Brhaspati, Narad and Katyayana had to respond to the needs of a growing commercial society and overseas trade. They provide that possession without a title becomes an independent proof of ownership, when it is enjoyed for three generations. Undisturbed possession extended over three generations may be an independent means of proof of ownership; without actual proof of title, it becomes legitimate possession. The possession is decisive in that case. Brhaspati allocates a period of thirty years for each generation. Thus, the total period of time will be ninety years or more. Katyayana cuts down this period to sixty years. Mitaksara ordains that while the property would not get lost to the owner, he would be deprived of the produce.[23]

Summing up the growth of legal system in Indian society, Indra Deva and Shrirama observed "one important device of legitimizing deviation from Vedic precepts and practices was that of declaring them to be 'Kali Varjya'. This means that because of the degenerate Kali age people had become unfit for following the old vedic norms".[24] This is a case of giving the dog a bad name but agreeing to his right of freedom. In real life it is not the bad term which matters; what matters most is the right of freedom of action in conformity with the norms determined by one's own social ecology.

Three broad categories of land systems, in terms of which the local systems articulated with the state framework, have been historically traced by Frykenberg. "It is necessary for readers to have some acquaintance with the three basic general categories of landholding which evolved during the history of the Indian Empire, forms of which devolved from Mughal times (but which seem primordial) and which are still current (even persistent, despite reforms). These forms of landholding were called 'settlements'. They came from the Persian 'Jamabandi'; literally meaning a 'collecting' or 'gather-roll'. They were the administrative

and bureaucratic terms applied to the 'agreements' or 'contracts' which were made between landholders and Government, whether made each year or made 'permanently' (and meant to be immutable).

The three categories were:

(1) the *Zamindari settlement,*

(2) the *Gramwari (or Mahalwari)* settlement, and

(3) the *Ryotwari* settlement.

The first, which began in Bengal in 1793 – sometimes known as the Bengal settlement, or more commonly as the Permanent Settlement – and later spread to other parts of India, generally pertained to large holdings (or 'estates'). A zamindar was not the 'owner' of these lands-cum-people as such. Indeed, the common law notion of property ownership was and is an alien concept, altogether inappropriate when applied to India and to zamindari land holding. A zamindar's 'tenure' was, therefore a form of political and socio-economic authority or control; moreover his 'tenants' and 'sub-tenants' and sub-subtenants', all held the similar kinds of power and privilege, each based upon a similar kind of 'settlement' or 'agreement'." "When seen in such terms, therefore within ranges of sizes and conditions of tenure of great variety, the zamindari form of land tenure was enormously complex. Yet, for purposes of general communications, the term is usually applied to the holding of the largest 'landed estates' (including in early days, even powers over police and armed retinues)".

"The second level of landholding pertained mainly to the revenue or 'rent' village as a corporate entity. While zamindars themselves could and did 'settle' with villages in this way, the term generally applied to a direct contract (or settlement) between each village community and officers of the Government". "Whether these demands came in the form of a 'ransom' paid sporadically to marauder bands (e.g., dacoits or pindaris); of 'tribute' paid annually to a predatory prince; of 'rent' paid to rackrenting 'rentier' or 'lease-holder', or of regular revenue or taxes paid to officer of the Raj (under circumstances or conditions of variable integrity or corruptivity), an ancient and strong village community did what it could to preserve if not to enhance the holdings of the village lands. Meeting in their panchayat (literally a 'council of five' but commonly any family, caste or village conclave), leaders

were often remarkably astute in playing off outside forces and in retaining the integrity of their joint holdings. Many names have been used to designate such tenures – such as 'joint-rent', 'joint-lease', brother-hood' or 'house-holding' or 'tract (mahal) holding' and 'village-folk (grama-wari)'. All in all, this form is best thought of as the village settlement (or 'joint-village') settlement".

"The third level was the lowest or smallest. It was the ryotwari settlement. Reaching past the corporate defenses of village power and tradition, it implied or was intended to deal with each 'raiyat' or 'cultivator' as an individual. At least at the beginning, in the initial stages of British administration, the ryot was one of the leading villagers." "Sir Thomas Munro, the great champion of this settlement, saw the 'ryot' and the 'raya' (rayatu and rayalu in Telugu) as being essentially the same person. Those who saw to the cultivation of the village lands were natural lords whose power and prestige brought deference from all other communities." "However the policy of direct contact between the Government and each village lord contained two profoundly important ramifications. First, it implied or (later) recognized the Raj (State) was penultimate holder of all lands, cultivated or uncultivated". "Secondly, if the state was the ultimate controller, whether as ultimate 'holder' or ultimate 'owner' of agrarian relationships, then an enormous administrative structure with a vast bureaucratic agency was required".[25]

This rapid review of the concepts of property, social meaning of private and common property with reference to the diverse political economies and social visions about the overall pattern of future of society; of the role of law and source of legitimacy of law and of the growth of legal system centering land in India, through the ages, will help to see the empirical data in perspective.

Recapitulating the empirical materials presented in the different chapters [refer: CSD, New Delhi: 1982], the following aspects are highlighted.

Concept of Property

1. In all the areas where field investigations have been conducted, hiatus between the perception of the state and the people about the nature of right of the different categories of population (the commoners, the chief, the state) has been found to exist. This confirms the observation made by Baden Powell in this regard even in the last century, which has been referred to earlier. Persistence

of this hiatus suggests the co-existence of two levels of law - the command law of the state and the living law of the people. While this indicates that Gandhiji's dream of Village Swaraj has remained unfulfilled, for the purpose of the present study what is of immediate interest is, to what extent the rights as perceived by the people and the rights actually enjoyed by them for generations, have been taken into consideration in the survey and settlements, the Rules framed under the Acts and the executive instructions issued from time to time for carrying on the field operations.

2. The most important gap is in the matter of conceptualisation of property itself. In most of the communities covered by the study, along with exclusive rights of households over specific areas, there are shared rights over areas along with other members of the community. The community for this purpose is, however, defined by the people differently according to historico-ecological contexts.

3. While the area to the resources of which the members of a specific community have right of access, is considered by the members of the community and their neighbours as belonging to that community (both in the sense of right of use and right of control), according to the Government the same area is res nulliusand belongs to the state. If the members of the community are making use of the resources of the area for generations, it is viewed by the Government, to be by the grace of the state and the state has the right of denying the access to the resources and changing the land use pattern without making alternative arrangement for the members of the community.

Form and Extent of Communal Resources

4. It has been found that the extent of dependence on the communal resources, for obtaining the supplementary food items, fuel-wood and other necessities of life is quite substantial. As pointed out by Mahapatra, when the population are displaced from their communal resources during implementation of massive irrigation projects like Indravati project, without receiving any compensation for the same, their economy suffers a great set back.

5. The communal resources exist in various forms. One is in the form of grazing land, water-way, road-side, canal or river-side land and so on, which are common facilities

available to the members of the village community. For such common facility resources as well as for resources like community forest, village wasteland, the access to and/or use of which is guided by some regulatory or allocation function of a recognised organ of the village community, the term 'common property resources' is used by some quarters. In the present study also, the same term has been frequently used. But analytically, these belong to two different categories. Unless allocative or regulatory function of an endogenous organ of the community is involved, the resources available for use by the members of the community should be categorised as 'common facility resources' but not 'communal property'. Common facilities are enjoyed by the persons belonging to a village as citizens of the state; share of communal property are enjoyed by the same persons as members of the community.

6. The endogenous organs of the community regulating the communal land resources have been found to exist in diverse forms. More frequently, there is a headman, who tends to hold the office by succession from father. But as at Sutilong, personal competence among the eligible persons by birth is also a factor.

7. While the headman enjoys certain prerogatives in respect of the management and control of communal land and also in having a special share for himself with reference to his office, he is looked upon by the community as their spokesman to the outside world, but not as the sole owner of the community land. Among the Mundas particularly, a tendency has been observed both among the officials as well as among sections of tribals themselves to treat the headmen (Mundas) as holders of community lands (as owners in their own right rather than as managing-owners on behalf of the community). As a result, feudalisation of communal lands, not only in respect of external relations, but also in respect of the terms and conditions of the utilisation of the resources internally is taking place. In the context of the tendency of the state to deny wherever possible, or at least curtail in other areas, the scope of functioning of the communal rights, a sublimated neo-feudal trend is noticeable. As the state does not recognise the corporate existence of the community as owner of property, the members of the community have no alternative but to rally behind the

headman as the holder of the community land. Having done so, they move along one of the two directions. One direction is to acquiesce to the usurpation of the community right by the headman and enjoy whatever residual right or facility he allows the other members to partake of; the other is to politically mobilise themselves internally and force the headman to retain minimal prerogative and share the common right with other members of the community. The first form, which may be described as sublimated neo-feudalism, does not challenge the claim of the headman of sole right of controlling communal property, insofar as the state is concerned. Thus, it is a back-stride of history, as a protective device against the danger of losing all rights. This confirms the observation of Frykenberg about the astuteness of village elders in playing off outside forces and in retaining the integrity of their joint holding.

8. While neo-feudalisation or sublimated neo-fuedalisation of communal land is taking place in recent decades, articulation with feudal entities had been taking place since the later part of the Mughal rule and early colonial rule. It has been discussed in some detail in Chapter 2 [refer: CSD, New Delhi: 1982], how the rights of receiving tribute in discharge of protective functions against external threats were converted into rent during this period. But even then the rent in cash and kind was ordinarily demanded from the community as a whole and not from individual landholders. In some areas of more intensive contact in Chhota Nagpur, disintegration of corporate functioning of village community had taken place, but by and large corporate character of village community in interaction with the external feudal overlords continued in other areas. But in one matter, the Mundas of even intensive contact in Chhota Nagpur enjoyed corporate right to a greater extent than the tribal communities in many other areas. Till 1947, the Mundas enjoyed Khorkar right or right of clearing village wasteland with the consent of the headman in Mundari Khuntkatti areas. Since 1948, through an amendment of Chhota Nagpur Tenancy Act, this right of allocation vests with the Deputy Commissioner, though it seems that in practice the earlier system continued until recently.

   In Kolhan, the right to clear up village wasteland was enjoyed by the members of the village community, but the

village and inter-village headmen exercised the right of allocation under the control and guidance of the revenue officials. In Santhal Pargana, on the other hand, even now the village headman enjoys the right of allocation.

In the tribal areas of Orissa, the right of the villagers of converting village wastelands into cultivable land continues, but even in the beginning of this century, the headmen were brought under control of the revenue officials. This subjugation of the village headmen to the political and administrative control of the functionaries of the state or of the feudal overlords was not, however, without compensation so far as they were concerned. This enabled them to partially free themselves of the control of the community. They could assume some of the feudal rights themselves.

9. So far as the village communities are concerned, apart from nascent feudal tendencies as indicated, the effect of assumption of proprietary rights by the state under formal law, or by the feudal overlords under formal law, or manipulation of formal law, was not continuously felt. There were sporadic outbursts of rebellion and protest actions and then there were periods of accommodative confrontation. But the nascent feudal tendencies internal to the communities paved the way for intensive intervention of the state in the post-independence period. For instance, in Koraput district, the post of mustajars, who from being revenue collectors, displayed feudal pretensions, was abolished. But along with abolition of their post, the corporate character of the village as revenue paying entity was also abolished. Earlier, through the mustajars, the households made payment for the village land as a whole, including the wasteland. After the abolition of the post, they were required to pay revenue only for the land, recognised by the state to belong to individual households. The wasteland under formal law became state land. But except for small areas which were taken over by the state for various 'public purposes', the remaining land continued to be controlled by the concerned communities.

   Unacquainted with the intricacies of formal legal system, whose basic tenets have been derived from the West, the people fail to comprehend, how land which they have been enjoying, managing and controlling for generations could

have ceased to be theirs. Similarly, while there cannot be any question about the propriety of the abolition of forced labour, which prevailed in most of the tribal areas in the central belt of the country, it should not be ignored, that forced labour was frequently exacted from the village community as a whole. In many areas, exaction of forced labour was considered to be payment of rent in service for the entire village land. Historically speaking, this was an imposition during the early colonial period. Hence, one would expect that with abolition of forced labour, the right of the community, unfettered by the feudal distortions under colonial aegis, would be restored. But along with abolition of forced labour, the right of the village community over the village land, also ceased to have even symbolic recognition outside the community system. Thus, an apparently humanitarian act turned out to be a step which because of its incomplete and a historic approach made a large number of tribals legally landless. In point of fact, however, many of these tribals still continue to have access to the same lands; to which they have had access for generations under the 'living laws' of the communities.

10. It is obvious that land reforms in the tribal areas would require the colonial distortions to be removed first. This will require knowledge about the understanding of the meaning of ethno-history of specific tribal communities in their respective ecological settings. It is not that the state does not draw upon ethno-history when it suits it. It has been mentioned how in the early 1940s, Ramdhyani drew upon ethno-history of the Mundas of Gangpur state to reject their claim for recognition of Khuntkatti land tenure system in their area. But ethno-history cannot be used in such a selective manner against the interest of the people. The work requires to be done in a comprehensive manner so that land reforms in the tribal areas can be rooted in the historically determined needs and aspirations of the people subsumed within the national frameworks. If as indicated in the Introduction chapter [refer: CSD, New Delhi: 1982], most countries of the world, including some of the advanced industrial countries, have not approached the matter in an objective manner, this is no justification why India, which has imbibed the humanism (in contrast of humanitarianism) of Gandhi and Nehru through its long drawn freedom struggle, should fail in it.

11. If land reform in tribal areas is based on ethno-history of the concerned communities, some of the postulates of Indian legal system should be drawn upon. There is to be a more flexible approach to the concepts of property and ownership, in the light of the comparative material presented. Besides limits to adverse possession, particularly in case of such adverse possession lying with the state, should be laid down in a flexible manner as suggested by Brhaspati.

12. A point is often made that recognition of corporate right of tribal communities would perpetuate shifting cultivation. It is not proposed to examine here whether all techniques of shifting cultivation are always equally harmful or whether some techniques of monoculture commercial forestry are not more harmful for the environment. What is more important is that the right to practice shifting cultivation should not be equated with the right to enjoy the land under shifting cultivation. If shifting cultivation is conclusively proved to be always and in all forms harmful, the state has every right to ban it or regulate its practice. Based on Selznick, it has already been indicated that in the contemporary world, right to property is a residual right. But it should first be a residual right for the monopolists; not for the weak. Abolition of shifting cultivation cannot mean forfeiture of the ownership right of the social unit (family, clan, village community) owning the land.

13. In fact, all-out tirade against shifting cultivation appears to be an alibi for extension of techno-bureaucratic control over land and related resources. It is frequently argued that the shifting cultivators cannot be considered to be in continuous possession of the land and hence they cannot be treated as ryots under various tenancy Acts. The field investigations in Orissa show that the shifting cultivators enjoy some prerogatives to return to the same plot of land in the jhum cycle. This has been confirmed by recent official publications, in Orissa and Madhya Pradesh. If ignoring these publications a particular stand is taken, it is not only a case of bureaucratic rigidity. It has a deeper import which requires a closer look.

14. It is frequently argued that economic development requires individual motivation, initiative and enterprises and hence corporate entities cannot be recognised by the

state. Underlying this formulation is the premise that 'every agent is actuated only by self-interest'. Edgeworth is one of the economic historians who had first asserted this in 1881. But as pointed out by Sen,[26] he himself was aware that this so-called first principle of economics could not explain all empirical realities. Apart from the basic question about the nature of human nature, about which Gandhi, Kropotkin and many other social philosophers held a different view, it is to be noted that the state does not eschew all types of corporate entities. The Orissa Land Reforms Act, 1970, not only accords recognition, but also gives exemption in the enforcement of ceiling, in favour of lands held by a privileged raiyat, industrial or commercial undertakings and plantations. Under Section 37A of the Act, privileged raiyat means cooperative society, Lord Jagannath of Puri and his temple, any trust or other institution recognised under provisions of this Act. 'Plantation' means any land used principally for cultivation of coffee, cocoa or tea and includes land used for any purpose ancillary to the cultivation of plantation crops or for the preservation of the same for their marketing. In fact, all modern land legislations include similar provisions. Here the state deals with corporate entities, not only of the type formed under formal laws of the state, in the interest of economic development, but even of traditional type like Lord Jagannath of Puri as a mark of respect for the susceptibilities of a particular culture group. One may not, therefore, be entirely unjustified to think that there is an ethno-cultural bias in not recognising the community institutions of the tribals as land holding corporate entities, not to speak of, as privileged raiyats.

Survey and Settlement Operations

15. Strictly speaking, the survey and settlement operations do not create any right. Ideally, during the survey different types of rights prevailing on the ground are recorded and then settled according to the policy decisions of the Government. For operational purpose, however, the prevailing rights and the related activities on the ground are recorded according to conceptual framework provided by the Government about what rights are to be recorded and how to identify these rights. Besides, the scope and coverage of the record of rights are defined by the Act itself, or by the Rules framed under the Act, providing the legal

basis for the operation.

16. A comparative study of the scope and coverage of the Record of Rights under Chhota Nagpur Tenancy Act, Santhal Pargana Tenancy Act, Bihar Tenancy Act and Orissa Survey and Settlement Act gives an interesting insight. This has been discussed in Chapter 3 [refer: CSD, New Delhi: 1982]; but is partly reproduced here. In case of Santhal Pargana, the focus is on community's own arrangement of management of resources and in the context of the same, on the terms and conditions on which the individuals and other entities of the community enjoy various rights in respect of the resources. In case of Chhota Nagpur, the focus is on tenants, tenure holders and landlords and their mutual relations as defined by the state with recognition of communal rights as ancillary to the tenancy rights. In case of Bihar as a whole and Orissa, the focus is entirely on tenants, tenure holders and landlords and their mutual relations faintly informed by the ethos of peasant proprietorship. Thus, the Santhal Parganas Settlement Regulation on the one hand, and section on the preparation of record of rights in the Bihar Tenancy Act, 1885 as well as the Orissa Survey and Settlement Act, 1958 on the other, stand at two polar ends; the section on the preparation of record of rights in Chhota Nagpur Tenancy Act as amended in 1947, holds an intermediate position in between the two.

17. The results of the Survey and Settlement Operations conducted in Santhal Pargana could not be studied in the field. The survey and settlement operations under Chhota Nagpur Tenancy Act have caused considerable controversies which have been discussed in Chapter 3 [refer: CSD, New Delhi: 1982]. Broadly, it can be stated that the provisions of the Act have freezed the privileges of the Khuntkatti headman and protected him from the internal democratisation process of the community. In some places at least it has enabled the headman to assume feudal pretensions and the system has turned into a caricature of community system of enjoyment and management of resources. But at the same time, the provisions of the Act by upholding the principle of communal right, has given a sense of self-confidence to the Khuntkattidar households and kept alive the hope of getting fair share out of the residual common property in the village. They resent feudal assumption of the headman,

but also they resent interference with the system for fear of losing even the residual rights that they enjoy or have potential claim to enjoy. In some places there are signs of democratic assertion. But planning agencies do not have any positive policy in respect of such democratic assertions; first because planning has come to be equated with only the calculus of economic outlay; secondly because, the rigidity of thought that goes with legal positivism inhibits sensitive response to the emerging life-ways; and thirdly because, the lack of imaginative monitoring of the social processes going on within the penumbra of the system, has generated either romantic imageries or wholly negative stereotypes about the system.

The field investigations in Orissa show that the survey and settlement operations conducted under the provisions of the Survey and Settlement Act have not been able to give a realistic picture of the pattern of access to and enjoyment of land resources by the tribal communities in their respective habitats where they are living for generations.

18. Apart from the legal apparatus providing the framework for identification of rights, a technical factor and an administrative decision also have been found to have affected the entries in the record of rights in Orissa. In Koraput district, survey and settlement operation was done for the first time during 1938-64. During the earlier phase of the survey, the chain survey method was adopted; but later the plain-table method was adopted. Plain-table method is much cheaper for the operative agency; but by this method land beyond 10 per cent slope cannot be accurately measured. Hence, a very reduced size of the holding is recorded. Thus, what is cheap for the operative agency, is a costly loss for the tribal land-holder. The Settlement Officer himself had expressed his dissatisfaction with this method in his published report. The report also made a mention of an instruction issued by the Board of Revenue which required that shifting cultivation upto 10 per cent slope could be recognised and beyond that should be treated as encroachment. Even upto 10 per cent slope, record of shifting cultivators was not to be prepared "as the intention was not to give any permanent right".[27]

19. Survey and settlement data in respect of two villages in Koraput district have been furnished earlier. Das Patnaik[28]

has studied the problem more intensively in the same area.

In the year 1961, land survey and settlement operations took place in the Niyamgiri hills for the first time. Total area surveyed in the village was 2647.32 acres, out of which only 15.32 acres was fit to be declared as cultivable dry land and rent was charged for the same from 16 raiyats of the village. One acre of land was recorded under grazing, and 6.62 acres under house site. Only 54 cents of land was earmarked as common land used as graveyard. The remaining 2625.53 acres were recorded as uncultivable wasteland. "To a Dongria Kondh, Dongar land is considered as endowed with divine powers". "It is believed that each individual swidden of a Dongar plot is haunted by ancestor spirits (Dumba) who help in the bumper growth of the crops". "Hence the right over such swidden can never be confiscated or changed". But Das Patnaik reports that persons of other villages were allotted land at Kurli during the survey and settlement operation.

20. A comparison of the land system of the tribals as recorded by the Tribal Research Institutes of Bihar, Orissa and Madhya Pradesh, and the record of rights prepared during the survey and settlement operations or assumed by various development agencies, shows considerable difference in their findings. These differences, in fact, reflect different approaches to the understanding of the systems of rights. The researchers examine the system in those terms on which the tribals assert their claims and discharge their obligations insofar as their compatriots and neighbours are concerned; the administrative agencies in their turn are more prone to examine the relations, in terms of the postulates of the formal legal and administrative systems. There is no reason to think that both are not by and large correct in terms of their respective frames of reference.

21. The State Governments of Bihar, Orissa and Madhya Pradesh have Tribal Research Institutes of their own. There is a point of view that these Institutes should be associated with the enquiries related to the preparation of the record of rights. This is certainly a much needed step. But this will require a radical departure from the legal philosophy that has struck deep root during the colonial period. As noted by Indra Deva and Shrirama, according to Indian tradition, King (state) is the custodian of law and not the maker of

law. As envisaged by Ehrlich, it is the 'living law' of the people that should legitimise the legal system. Gandhi's dream of gram swaraj as a 'co-operative commonwealth' requires the conscientisation of the nation about a legal philosophy on these lines. Unless a consensus emerges out through nationwide debate and discussion, mere structural arrangement will not serve much purpose. It may either result in operational stalemate or in intellectual hijacking.

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Professor B.K. Roy Burman was a Senior Visiting Fellow at the Centre for the Study of Developing Societies, New Delhi. He had served in various capacities with the office of the Commissioner for Scheduled Castes and Tribes and the Registrar General of India. He was a Professor at the JNU and Viswa Bharati University, and Director and Senior Professor at the Council for Social Development, Delhi. He had advised several governments on tribal and social issues, served on various commissions and authored numerous learned studies and reports.

Prof Roy Burman was President of the Indian Social Science Congress and Chairman of the Futurology Commission of the International Union of Anthropological and Ethnological Sciences. He was for some years the Chief Editor of the Indian Anthropologist.

He was associated with the commissions for OBCs, SCs and STs—namely, Dhebar Commission and Kalelkar Commission; and was the Chairman of the Technical Committee of the Mandal Commission.

He was instrumental in setting up the social studies unit of Census Operations, thus paving the way for generation of vast amount of data with regard to the social status of the population of India through the census operations. He was one of the first recipients of the Nehru Fellowship instituted by the Government of India for the promotion of research in different areas of governance. He was selected by the American Biographical Institute to be a recipient of its Albert Einstein Award of Excellence for 2011, for demonstrating effectiveness and distinction in his field.

He set up the Institute for People's Action in Awangkhul village in Manipur for action research on self-management and sustainable development and introduced ideas of a more harmonious system of management for the North-East. He helped in setting up the JNU Centre at Imphal.

Over and above his contributions to the body of knowledge of political anthropology, his life was exemplary. He always engaged in experiments to bring governance regimes, theory and philosophy to enrich discussions and debates, and improve the living conditions of the people on the margins. He was also seen as an important resource person in social movements as well as for the establishment.

Professor B.K. Roy Burman passed away at the age of 89 years on June 26, 2012.

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