

“Tribes and Tribal Law”

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Abstract

The tribes, as considered and understood by common man, are the descendants of the first people to have walked on the Earth. They have this unique relationship with the nature, which no civilized society, in today's date does. The idea of 'development' and 'growth' has gotten so much into the minds of human, that he has forgotten to protect what needs protection, and in this thirst has started destroying everything which comes his way. He does this, by making skewed and broken laws which, on the face of it, looks like it is for the development of the society, but an in-depth study of these laws gives one a clear understanding of what is missing in the real world. Through this review article, I try to give an idea as to what being an adivasi, an indigenous person means and what dangers the tribal communities are facing and have been facing due to lack of good legislations.

Keywords : indigenous, adivasi, tribals, Fifth Schedule, PESA

Introduction

One of man's 'guilty pleasure' since time immemorial would be to label things as good or bad, decent or indecent, right or wrong, educated or illiterate. The concept of labeling is often then used as an excuse for putting things in order, and when he does do so successfully, he declares himself as the most superior being and his word becomes the law of the land. Any other creature which then disrupts his order of things, and doesn't abide by the law created by the man is labeled as benighted. And this is where man has drawn a line between civilized and Adivasi. Understanding the concept of Adivasi has conceptual as well as empirical problems. To begin with, the most primitive mark of differentiation was those who were part of the civilization and those who were not. This is why the usage of the term 'Adivasi' seems to have some legitimacy even in the sense of marginalization. The term has been given to the group by the outside world, that is the civilized society, and it has been so strongly forced onto them that as an effect these people now identify themselves as 'Adivasis' as marking themselves socially different and now it is being used as a tool for the articulation of empowerment.

About 104 million people are belonging to the 'Scheduled Tribes' in India generally considered as the 'Adivasis'. The term Adivasi is a combination of two words derived from the Hindi language: 'Adi' meaning earliest of times or from the beginning and 'Vasi' meaning inhabitant or resident, making them the first settlers. The term was coined in the 1930s by the social worker and activist Amritlal Vithaldas Thakkar or fondly known as Thakkar Bapa, as a consequence of

political movement to put together a sense of belonging. Although the terms scheduled tribes and Adivasis are not coterminous, they are very much used similarly. The term scheduled tribes is an administrative term used for administering people who are largely considered backward due to their lack of formal education and desire to refrain from being part of the ‘civilized’ society. However, the term does not do justice to all the people who identify themselves as ‘Adivasis’. From the 5,653 diverse communities in India, 635 are believed to be ‘tribes’ or ‘Adivasis’. For rational purposes, the United Nations and other agencies consider the Scheduled Tribes as ‘indigenous people’.

Tribes as ‘Indigenous’ People

The term indigenous although of recent coinage mainly used at international platforms has been in use in India for a long time now. Social workers and political activists in India, use the Indian version of the term ‘indigenous’, which is ‘Adivasi’. Organizations that come together to identify themselves as Adivasis claim that they are ‘indigenous’ to India (Xaxa, 1999). The presumption is then that these present-day Adivasis are the descendants of the original inhabitants of a particular territory, who have been culturally, politically, and economically been marginalized. (de Maaker and Schleiter, 2010). Bates had of course some reservations with the term ‘indigenous’. He rather believed that the term indigenous is the product of Orientalism¹. Ghurye used the expression ‘so-called aborigines’ rather than using terms such as ‘indigenous’. The term indigenous is mainly used as a mark of differentiation, to mark out people based on their religion, culture, history, livelihood practices, features, languages, social groups, and so on. Ghurye, writes, “When the history of internal movements of peoples is not known, it is utterly unscientific to regard some tribe or the other as the original owner of the soil. It is possible to contend that even if the tribes are not aborigines of the exact area they now occupy, they are autochthonous of India, and to that extent, they may be called the aborigines.” We find no uneasiness on part of academicians, and scholars, political activists, and social workers in using the term ‘indigenous’ the repetitive usage of the term has lead the people to identify themselves as ‘indigenous’ and now it is being used to represent themselves politically and socially. The term was not debated until recently due to the internalization of rights and privileges associated with the term that it has started being critically analyzed and challenged in the Indian context for what it holds and truly means. There are three concepts on which the notion of being indigenous is set. First, these are the people who are the descendants of early settlers, the original inhabitants

¹ There are two reasons why the term indigenous is a product of Orientalism. First, being the use of terms of very modern notions such as property and contract, titles, deeds and characterization of the society set up by the socio-economic surveys of the mid 19th century. Through their repetitive use of instruments, and the tempering of ‘rights to conquest’ and ‘rights of occupation’ in the legal framework established in India by the British, that gives birth to the term ‘original inhabitants’. Second, the idea of ‘equality’ merged with ‘possession’ and ‘ownership’ introduced the notion of political relationship between the rulers and the ruled, not in terms of status and inherited influence, but in terms of equality and natural right, *Lost Innocents and the Loss of Innocence: Interpreting Adivasi Movements in South Asia – Crispin Bates*.

of a particular territory². Second, due to colonization of that particular territory, they have become marginalized by the outside world and the colonizers. Third, they are distinct from civilized society concerning their cultural institution, way of life, languages, social groups, and so on. Thus, indigenous people are invariably seen as people who are victims of marginalization by the outside world, and hence are easily identifiable.

The Concept of Adivasi

The term Adivasi represents those social groups of the society, which the political activists and social workers believed to be the descendants of the original inhabitants of the Indo-Aryan group of South-Asia, and hence considered as alien interlopers by Adivasi activists. Historically speaking, the Aryans arrived in the Indian subcontinent around the 2nd millennium, and settled in the plains of River Ganga, inhabiting almost all of the northern territory. It was the Aryans who are, supposedly, believed to originate Hinduism, and according to the Brahmanic views, the Adivasis from the lowest category of people, hence terming them as ‘untouchables’ or ‘Harijans’.

It is believed that the so-called Adivasis were originally Hindus, and became Adivasis probably because of their economic circumstances, or that they figured that it would be propitious for them to identify themselves as Adivasis. As a consequence of the reservation policies in India, the percentage of people who identified themselves as Adivasis or Scheduled Tribes increased from 5.3% in 1951 to 7.3% in 1971, as opposed to the circumstances back then which represented a time which depicted growth in all areas of Indian social, economic and political life. This increase in the percentage of Adivasis is not just dependant on the political and administrative policies, but also on the regular bureaucratic practices of the government officers who shape these notions of ‘tribality’. Because the so-called Adivasis were originally Hindu, and though many call them animists, a lot of the Adivasis worship Hindu Gods and Goddesses. A classic example would be of Goddess Danteshwari, worshiped in the area which was then known as Bastar, and is now, a part of Chhattisgarh. Similarly, the incarnation of Lord Vishnu as Jagannath at Puri, and Goddess Kali, are, supposedly Tribal Gods and are still worshipped by many tribal groups³.

Hence, not only does being the original inhabitant determine that a tribe is indigenous to a territory or not, the influence of religion, society, culture also plays an important role in determining the identity of a particular group. It could also be said that how the history is told by

² Another view point which relates to this idea is that although it is believed that indigenous are the first people and early settlers, and that’s the basis for their right to claim land, there are however communities which although are older than the tribes, but still not considered as indigenous. They are not considered indigenous because they do not constitute the marginalized groups – *Tribes As Indigenous People of India- Virginius Xaxa*

³ *Lost Innocents and the Loss of Innocence: Interpreting Adivasi Movements in South Asia – Crispin Bates*

the people who were witnesses to it, heard by the curious minds, and then passed around by social groups whose sole purpose was to tell stories and carry on the legacies and traditions of their ancestors affect the way a particular community identifies and is represented in the society. Hence, this makes it difficult to 'label' such groups as either 'indigenous' and/or 'Adivasis', but in labeling them as belonging to any one term, we either end up exploiting them by forcing upon them the ways of civilized society so much that they perish completely or end up losing their identity and traditions.

Tribal Laws

As is evident that there are stark differences in how tribals represent themselves, there are regional and cultural variations amongst these groups and how they interact with other tribal groups. India's major tribal belt ranges from northeastern states bordering China and Burma to central and southern highlands. These areas are homes to almost 80% of the tribal communities in the region. Despite all the differences amongst the tribal communities, they share similar traits such as alienation from mainstream society, geographical isolation, and self-contained than nontribal groups. These differences are always problematic when it comes to interacting with the groups and giving them the opportunities to represent themselves politically and socially. The widely accepted solution would then be to bridge the differences between homogenization of the tribals and their seemingly autarchic identity and delineate the shapes of national policies that would allow them to sustain their way of life without risking their development. India, one of the largest democracies of the world, with a long history of acknowledging, nurturing, and glorifying cultural diversity, has struggled to maintain this balance. It has struggled to recognize the rights of tribal groups not just in terms of decentralized administration, but also their rights to not just demand but also fight for justice in their cultural laws, use and exploit their lands, in their territories as they like fit. The Indian laws, which are mostly a product of the laws created by the British, formed laws for the tribal groups based on two assumptions. First, if the tribes had capabilities to administer and govern their communities, and second if the tribal regions had an adequate population. And hence, based on these two criteria, the Indian Constitution has provided laws for the administration for the scheduled tribes. The tribal groups and communities are officially identified and enumerated in the Constitution of India under Article 342 and re-classified as the 'Scheduled Tribes'. The Fifth and Sixth Schedules provides for the administrative arrangements where the tribes are numerically dominant. The Fifth Schedule provides for the provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996 for further legal and administrative reinforcement.

The Sixth Schedule gives special provisions to the areas which were not identified until the Government of India Act, 1935. State and Parliament legislatures such as the Leh Autonomous Hill Development Council, Kargil Autonomous Hill Development Council, Darjeeling Gorkha Hill Council have also been empowered to create tribal autonomous regions out of the ambit of

the 5th and the 6th Schedules. The recommendation of the Bhuria Committee (1991) paved way for the enactment and implementation of the Panchayats (Extension to Scheduled Areas) Act, 1996. The provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA), 2006 and the Panchayats (Extension to Scheduled Areas) Act (PESA), 1996 which are enacted to deal with the historical injustices faced by the tribal groups of the nation has improved the legal position and the status of the ethnic groups. Although its implementation is a slow process, the policies and practices have changed the circumstances in the law.

The Fifth and Sixth Schedules of the Constitution

The term ‘schedule areas’ refers to the tribal regions to which either the fifth schedule or the sixth schedule is applied. The mechanisms of these schedules are very different from one another. The Fifth Schedule gives full power to the executive authorities to manage the affairs of the areas. The governor of the state has complete authority to make all necessary regulations to maintain peace and governance of the state. Hence, the Governor is the sole legislature for the management of the scheduled areas. Any form of growth or changes in the functioning of the offices of the government happens via the Governor.

On the other hand, the sixth schedule gives full autonomy to the local panchayats of the scheduled areas. The councils of particular tribes have the power to make and refer to laws and regulations which are required for the governance of the scheduled areas. These independent councils also have the authority to function judiciously. These councils are so financially independent that they do not have to rely on the state governments for their smooth functioning and hence do not labor under them. The Supreme Court’s ruling in *Pu Myllai Hlychho* illustrated that even though the Sixth Schedule is not a self-contained code the courts must nonetheless remit to the legislative, administrative, and judicial independence that the Schedule grants District and Regional Councils.

The Panchayat (Extension to the Scheduled Areas) Act, 1996

Even though PESA, is considered as legislation revolutionizing the tribal representation in the Fifth Schedule, it has mostly robbed the tribals of their economy and culture, and not much has changed since the colonial rule. Neither PESA nor the Fifth Schedule has successfully managed to protect and provide rights of the tribal communities as it had intended to do when it was codifying the laws in the Parliament. Tribal local governments are still ignored and any actual benefit of the scheduled areas still lies in the corrupt hands of the government. Moreover, as under List 53 of the Seventh Schedule, the Government still has access and power to take away any piece of land for purposes of development of the nation. In fact, tribal communities have now completely lost control over forest lands and its resources to both the settlers and the State.

Jharkhand the state with the majority tribal population is one of the worst victims of corruption by the bureaucratic offices. The state government's mining operations and hydroelectric power projects have exploited the state's resources and have snatched the natural habitats of the tribal groups and communities and have thus turned them as outsiders on their territory. The Kamatapur district of Bengal has cited cases of neglect, gross violence, exploitation, and discrimination from not only the settlers but also the official government officers to such an extent that they now have demanded their separate state. Tribes in Orissa have demanded a prohibition on the mining of bauxite, one of the richest regions in India. Similarly, tribes in Kerala have started banding against the government's local bodies and started fighting for their land and their exclusive rights to it.

A detailed and thorough study and understanding of the Fifth Schedule and PESA will show that although the intention was to uplift the tribal communities, it in no way does justice to its intended meaning. These two provisions are replete with structural flaws and ideologies. It not only hinders the active involvement of the tribes, but also hinders them from claiming rights to their land, and hence, pushing them back more. A clear example of the structural flaw in PESA would be that it only gives the tribes legal right to their land, and not fundamental right. It is faulty in the sense that, first, fundamental rights have more weightage as opposed to legal rights, because it then becomes the responsibility of the tribes to prove that the land taken away from them by the State was not consulted properly and acquired without consent. And keeping in mind the supposed lack of formal education within the tribal groups, it becomes a burden for the groups. Second, the state can anytime acquire the land because of the authority it holds. Furthermore, the Apex Court has held that the Government is the "best judge" while determining the fact that whether or not public purpose has been served by acquisition. Moreover, PESA does not give clear guidelines as to the level of consultation, modes, and manner of consultation, of the tribal people before acquiring land, giving administrators a chance to avoid these situations as much as they can.

Conclusion

The tribals communities, be it indigenous or Adivasi, are not only the most varied groups of people to walk on earth, but they have also played important roles in maintaining not just the biodiversity, but also the first spoken languages, cultures, and traditions. They have played major roles in almost every aspect of the lives that we are living in. The first freedom struggle movement was started by the tribals in an attempt to save their lands from getting colonized by the British. We may make laws and regulations to administer them in such a way that it does not hinder their growth and protects their culture, but we have to understand probably with a more empathic approach that the tribals are humans, irrespective of their way of life, and they do deserve their way of life as much as we do. In no way should their lifestyle be a curse to them, instead it should be celebrated at every chance that we can get. There is a need to improve the

legislation available to them, and it can only be done when we start exploiting them and their resources.

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