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THEIR INTERESTS. HAS THE LAW?**

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Where do Adivasis stand in Indian law?

Adivasis constitute 8.6 percent of Indians. The Constitution has always aimed to protect their interests. Has the law?



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Adivasis protesting against the government.

A fortnight ago I wrote a detailed explainer about the Land Acquisition Act and what we need to know about it. Today's piece follows up with an explainer about the rights of the communities most affected by land acquisition and land wars: the Adivasi communities. As we speak, Adivasi communities are protesting in Jamshedpur against the ordinance to amend the Land Acquisition Act in Jamshedpur and against police brutality in Chattisgarh, where coal mines have been [re-allotted](#).

The ambit of this piece extends only to the Adivasis in the Fifth Schedule areas and other tribal communities, but not those in the North-East (who are covered by the Sixth Schedule). The Fifth Schedule areas are found in the following 10 states: Jharkhand, Chattisgarh, Himachal Pradesh, Madhya Pradesh, Gujarat, Maharashtra, Odisha, Rajasthan, Andhra Pradesh, and now, Telangana. This covers about 8.6 percent of India's population (according to the 2011 Census). That's a population roughly equivalent to that of Bihar, India's third most populous state.

For a very long time now, the Constitution has aimed to protect the interests of Adivasis even as the law and administrative practice reduced them to an existence where they were at the sufferance of the state. In the forest, they were characterized as illegal encroachers, and they had no power to determine their own fate. While the law has changed dramatically, as the Forest Rights Act (2006) and the Provisions of Panchayat (Extension of Protection to

Scheduled Areas) Act (1996) show, in practice, the government is yet to acknowledge and act on this change.

When did Indian law first begin to speak of protecting Adivasi rights?

In 1950, when the Constitution of India was promulgated, provisions were introduced recognizing ‘Scheduled Tribes’ and providing for ‘scheduled areas’ – areas where Adivasi identity and Adivasi interests were to be protected. Among the chief concerns was the relationship between Adivasis and land. So, it was made the special responsibility of the state to prevent land alienation that would result in Adivasis losing control over land in scheduled areas to the non-Adivasi. If any land was to leave Adivasi hands and move to a non-Adivasi, it could happen only with the assent of the Collector (in most places) who would have to ensure that the land alienation was not prompted by distress, fraud, duress, and to assess what impact such land transfer would have in the scheduled area.

When did this protection first begin to erode?

In the early 1990s, this presumption of state protection was to take a severe beating when estimates of mass displacement due to projects that included dams, power companies and mining emerged suggesting that a shocking 40 percent of those displaced to make way for these projects were Adivasis. There was till then no law that recognized displacement; the Land Acquisition Act, 1894 (LAA) that was used in these projects only dealt with landowners and those with an ‘interest’ that may be compensated. There was no law prescribing rehabilitation. And, since the projects were in the public sector and so seen as government projects, and the government is not seen as a non-Adivasi, the law seemed weighted against the Adivasis.

In 1997, the Supreme Court had to spell out that private mining companies are indeed non-Adivasis to whom Adivasi lands cannot be transferred. This was in the well-known [Samatha case](#), where the court was categorical: "It has [...] been held that transfer of the Government land in favour of its instrumentalities, in the eye of law, is not a transfer but one of entrustment of its property for public purpose.... But a transfer of mining leases to non-tribal natural persons or company, corporation aggregate or partnership firm etc. is unconstitutional, void and inoperative."

A few years later, in 2001, when the workers of BALCO challenged the disinvestment of the company, another bench of the Supreme Court was to express “[strong reservations](#)” about the 1997 judgment. The government had already been making some [attempts to change](#) this constitutional principle, and the court’s disapproval of this limitation to state power was immediately followed up by the government with moves to [redraft the constitutional provisions](#) so that the transfer of Adivasi land to corporates could be facilitated; but these efforts did not go very far.

These were the years when the process of disinvestment had begun and the government was handing over its assets for a price to corporations which were, of course, non-Adivasi. Legal genius was deployed to find what may euphemistically be called ‘other means’ to do what had been declared constitutionally impermissible. A case in point to explain how this was done: in Odisha, Vedanta wanted to mine in Niyamgiri, a scheduled area in which the ‘particularly vulnerable tribal group’ (PVTG), the Dongria Kondhs, have their habitat. The Orissa Mining Corporation (OMC) stepped in to help out. The OMC took the Adivasi area on lease and gave it to Vedanta to mine, as a contractor. This legal subterfuge was to support the pretence that it was the state taking the land and not a non-Adivasi corporation. In this particular attempt, the OMC was to fail in its attempt to give Vedanta what it wanted, but that

was for reasons that they could not control. The Supreme Court's intervention and the Dongria Kondhs' refusal to allow the corporation to mine were two significant reasons. That the OMC approached the Supreme Court on behalf of Vedanta, contesting Adivasi concerns, speaks volumes about how far the state has moved away from its constitutional role in relation to Adivasis.

Does the law only speak of Adivasis in terms of state protection?

The Provisions of Panchayat (Extension of Protection to Scheduled Areas) Act (PESA), enacted in 1996, made a radical shift away from reliance on the state to safeguard Adivasi interest. When the Constitution was amended in 1993 to introduce the third tier of panchayats and municipalities, it was made clear that the provisions would not automatically apply in scheduled areas. Instead, the Parliament would have to make a law "to extend the provisions" relating to panchayats and to municipalities "subject to such exceptions and modifications" as the law would specify. The PESA 1996 accordingly accounted for "the customary law, social and religious practices, and traditional management practices of community resources." A "village", identified by "a community" would be left to manage "its affairs in accordance with traditions and customs". No less than one-half of the total number of seats were to be reserved for Scheduled Tribes. All posts of Chairpersons of Panchayats were to be reserved for Scheduled Tribes. Land acquisition in scheduled areas for development projects and before resettling or rehabilitating persons affected by such projects could be only after the gram sabha or the panchayat had been consulted. The ownership of minor forest produce was to be with the gram sabha and the panchayat. So, too, the "power to prevent alienation of land in the scheduled areas and to take appropriate actions to restore unlawfully alienated land of a scheduled tribe". And so on. These were to "function as institutions of self-government".

This was the earliest parliamentary acceptance of the autonomy of Adivasi communities. The state and project authorities would have to work with Adivasi communities, consult with them, and mandatorily seek their recommendations in a range of situations.

The law overturned the hierarchy of patronage and protection – the state and the project authorities would now have to convince Adivasi communities where, earlier, they could have had decisions imposed on them. There is no question that it caused disquiet and stubborn resistance among administrators. For years, most of the states with scheduled areas resisted making rules on much of what PESA provided. When they were made, the rules were not compliant with PESA. Projects have surged ahead regardless of what the Adivasis may have considered and decided. Giving life to the law was proving to be a superhuman task.

The PESA is about panchayat areas. There is still no companion law to the PESA to apply to municipalities. A Bill was introduced in the Rajya Sabha in 2001, the Municipalities (Extension to Scheduled Areas) Bill, but that is lying, forgotten and untended, in some parliamentary alcove. And the proliferation of nagar palikas in scheduled areas has carried on regardless, and without consulting the gram sabhas. The Adivasi resistance to including six villages and two and a half panchayats in Rourkela is a response to one such situation. And, once it becomes a municipality, it goes out of PESA, even as there is no law for municipalities in tribal areas. This is why the High-Level Committee on Socio-Economic, Health and Educational Status of Tribals of India had said: "Till Parliament makes a law that sets out the 'exceptions and modifications' while extending the law relating to municipalities to Scheduled Areas, or it makes a fresh legislation for municipalities in Scheduled Areas, any extension of municipalities or the establishing of new municipalities would be legally untenable."

How did the Forest Rights Act come into being?

In 2006 came the [Forest Rights Act](#) (FRA). Or, in full, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act. There are multiple tales of the genesis of this law. One of them goes like this: A [case](#) was taken to the Supreme Court by TN Godavarman Thirumulpad asking for a part of the Nilgiri hills to be protected from deforestation, which grew into what came to be known as the Forest Cases, or the Godavarman case. There was even a 'Forest Bench' every Friday afternoon. And the court set up a Centrally Empowered Committee with a wide mandate and on whom the court relied for expert opinion. All forests in the country were brought within the fold of this case, under the court's scrutiny and directions. On November 23, 2001, the court at the end of the hearing that day [passed an order](#) restraining the central government from regularizing encroachments in the country without the permission of the court. In a distortion of this order that cannot but be considered deliberate, the Inspector General of Forests issued a letter on May 3, 2002 to the Chief Secretaries of all states directing the state authorities to prepare a time-bound program for summary eviction of all the encroachments not eligible for regularization – by September 30, 2002. He was purportedly following up on the November 23, 2001 order of the Supreme Court, except that the court's order had asked for no such thing to be done. The result: large-scale evictions of Adivasi communities in state after state. In a March 2004 reply to a question in the Lok Sabha, it was revealed that 1,52,400 had been evicted from forestlands after May 2002.

This is certainly not the first time that Adivasi communities and other forest dwellers and forest dependent communities faced forced evictions. The scale of evictions and the arrogation of the non-existent authority provoked an outcry, which in the years that followed immediately became a call for the enactment of legal recognition of the relationship between forest dwellers, forest dependent communities and the forest.

The Forest Rights Act 1996 is a stunning law. Think about it. The law starts with acknowledging the “historic injustice” done to the forest dwelling scheduled tribes and other traditional forest dwellers “who are integral to the very survival and sustainability of the forest ecosystem.” It speaks of “recognition, restoration and vesting of forest rights”. After a century and some of being treated as ‘encroachers’, the law ‘recognizes’ their right to the forest. It recognizes a range of rights and relationship with the forest, both individual and communal. And, in Section 5, it empowers the forest communities to

- protect the wildlife forest and biodiversity
- protect the catchment area, water resources and other ecologically sensitive areas
- preserve their habitat and their cultural and natural heritage from “any form of destructive practices”
- “regulate access to community forest resources and stop any activity that adversely affects the wild animals, forest and biodiversity”.

A more graphic and categorical acknowledgement of what the Adivasi communities mean to the forest, how important it is to work with the Adivasis on being guardians of the forest, and how wronged they had been over the years by keeping them in a state of illegality could hardly have been conceived! Yet, the TSR Subramanian committee does not even mention the FRA in its '[Legal framework for protecting environment](#)'.

But don't the Indian Forest Act, 1927, and the Forest Conservation Act, 1980, take care of conservation issues?

Actually, no, not quite. The term 'reserved forest' has been misleading, suggesting that these were reserved to remain forests and, so, a move to preserve the forest as forest. The myth needs to be busted.

'Reserved forests' in the 1927 Act were reserved for the state to control and use. It was about identifying forests as a resource over which it could then assert exclusive rights. The 1927 law speaks again and again of the government's proprietary rights, forest produce to which the government is entitled, 'property' of government. The Act says what no person may do in the forest, and creates 'forest offences'; but it is silent about what the government may not do. In 1927, conservation, and environmental concerns, were not on the agenda. Forests, especially the trees in the forests, were a necessary resource for the development plans of a colonial state.

By 1980, environment and forest cover were squarely on the table. The threat of losing Silent Valley to development projects had just been averted. Yet, the remarkably short law (of five sections) did not itself circumscribe the reasons why a forest may be de-reserved and diverted. It merely shifted the power to decide about diversion of forestland for non-forest purposes from the state to the central government. And that is why, to end this tale like tragic tales so often tend to, the Indian Forest Act and the Forest Conservation Act are not about protection of forests but about who has the authority to decide the fate of forests. Which also explains why, even as there is talk about how disastrous it will be if we continue to lose forest cover, a Center for Science and Environment (CSE) [study](#) found that between 2007 and 2011, 8,734 projects were given permission to clear forests, and 1.98 lakh hectare of forest land was diverted to non-forest purposes, amounting to 24.3 percent of all forest land diverted for development projects since 1981. The study found that the pace of forest land diversion doubled in one single year – 2009 – and as much as 85,849 ha of forest was granted clearances, which was the highest in any one year since 1981.

Forests in which forest dwellers had been treated as illegal and as encroachers is 23 percent of Indian territory. That does not mean that 23 percent of the land is covered by tree cover and harbors fauna and flora which makes it a forest. It is only that this is the area over which the state has asserted sovereignty over the years. The FRA brings that era to a close. It is that dramatic.

So did the Forest Rights Act solve all our problems?

There is hardly anyone who gives up power or authority without a struggle. So, since 2008 when the FRA was brought into force, the settlement of forest rights has been tardy, reluctant, partial and often denied. Elephant corridors, tiger reserves, ecologically sensitive zones become excuses for evicting forest dwellers, even when the law says eviction will be the last resort, only when coexistence cannot happen. The 2013 law on land acquisition sidesteps the prohibition on Adivasi land being transferred to a non-Adivasi when it talks of acquisition for private companies or for public-private partnership projects. And the 2014 ordinance which amends the 2013 law by executive fiat even replaces 'private company' by 'private entity'!

It is no secret that the state and corporations view Adivasis, like they do forests, as hurdles in reaching the resources that they need for the growth project. Adivasis, forests and mineral resources, especially, are found in the same places. Far too many projects demand the price of the destruction of Adivasi life and the diversion of forests for non-forest purposes. In 2006, Kalinganagar was witness to [twelve Adivasis being shot down](#) by police bullets for protesting

the treatment given to them when their lands were taken away for a Tata project. In Chattisgarh today, the jails are overflowing with Adivasis who have been put away for what are called 'naxal offences'; locals see this as a way of putting down resistance to the corporatization of their land. In Singrauli district of Madhya Pradesh, coal blocks were allocated to two companies despite the Forest Advisory Committee not giving its go ahead, and the then Minister of Environment arguing vehemently against it. Inquiries revealed that the consent of the Adivasis had been manufactured through fraud. The High Court ordered a probe into the alleged fraud in 2014. The state reaction has been tragic – activists were arrested, the village of Amelia which was at the center of this controversy was attempted to be isolated, and, in January 2015, a Greenpeace activist who was to travel to the UK to address parliamentarians on the Mahan project was prevented from boarding her plane. The reason: because she was travelling to “[carry] out a campaign against the Government of India, in order to impact India's image abroad, and at a time when India is looking forward to foreign direct investment in India's infrastructure and manufacturing sector.” This, to the government of the day, is “anti-national”.

This is the current status.

Usha Ramanathan works on the jurisprudence of law and poverty. She was a member of the High Level Committee set up in August 2013 to report on the socio-economic status of tribal communities. The report was submitted to the government in May-June 2014 and can be found [here](#).