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Ambiguities, Incongruities, Inadequacies in Scheduled Tribes and Other Technical forest dwellers (Recognition offorest Rights) Act 2006

A CASE FOR CONSTRUCTIVE ENGAGEMENT

B.K. ROY BURMAN

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 received assent of the President on December 29, 2006 but came into force only on December 31, 2007. In the meantime the draft Rules of the Act were published on July 19, 2007; but it was only after strident agitation by political parties and activists calumniating in massive mobilisation of tribal peoples from different parts of the country that a much diluted set of rules was finalised and published on January 1, 2008.

When the draft Rules of June 19, 2007 are compared with the finalised Rules of January 1, 2008, many ambiguities and inadequacies come into sharp focus.)

The finalised Rules of January 1, 2008 seem to reflect a half-hearted approach to the matter. There was considerable opposition from the corporate lobby and its conscious and unconscious network, as well as from a section of ill-informed, though perhaps well-meaning, environmentalists. A canard was spread to the effect that vesting substantial ownership rights with the tribal and traditional forest dwellers will lead to large scale destruction of forest leading to an ecological catastrophe.

The antagonists, aided by the apathy and indifference of the media in general and also the active involvement of a powerful section of the same, wanted the people to forget the lessons of history. They even tried to make the people ignore the currently available facts. As we firmly believe that had there been greater awareness of the historical facts and of the current interplay of various forces and factors, not only the Rules in the final form, but even many facets of the Act itself would have been different, a brief notice will first be taken of the facts history and of the current situation.

HISTORICALLY, it is a fact that in the second part of the

Prof Roy Burman is on the Faculty of the Centre for the Developing Societies, New Delhi and is the Chairman, Forum for Cultural Democracy, New Delhi.

19th century when in the interest of stabilising the colonial regime large scale deforestations were taking place, there were revolts of the forest dwellers in different parts of the country.

During the First World War, when forests faced fast depletion for manufacturing war equipment, the satyagraha launched by the forest dwellers of Kumaon, with Govind Ballabh Pant (who later became the Home Minister of the Government of India), became a part of the heritage of the country's freedom struggle.

In independent India, several struggles of the forest dwellers to protect the forest have been documented. In the early 1970s, there was the Jangal Katao Andolan (movement to fell down forests as a symbolic protest) when the government tried to replace *sal* trees of the Saranda forest of Jharkhand by teak which, though more cash earning, was also more vulnerable to the ravages of nature. The World Bank plan of replacement of *sal* in Bastar had to be substantially modified in the late 1970s because of the opposition by the adivasis. During the same period the Forest Department in Manipur was forced to modify their plan of plantation of pine on a large scale when researchers pointed out that pine being a dominant species caused disappearance of the ecologically more efficient broad-leaf species and soil protecting undergrowths. The Gauhati High Court's Law Research Institute recorded in the early 1980s that in some parts of Arunachal, the Environment Protection Committees, set up by local tribal peoples at the village level, were restricting the extraction of timber from their forests by contractors for supplying the plywood industries and for other purposes.

The Chipko movement of the women of Garhwal against the mindless felling of trees by contractors in the early 1970s is world famous. But little is known of an earlier heroic deed of the women and men of a small community, the Toto, living on the border of West Bengal and Bhutan. In 1958 without prior consultation, the Agriculture Department of the West Bengal Government decided to get clear-felled a sacred grove of the Toto, so that an agricul-

tural demonstration farm could be raised on the land. But the entire population of the tiny tribe surrounded the grove and told the contractor's men that they would have to cut down every Toto man and woman before they could touch a single tree. While through the intervention of a researcher a catastrophe was averted, later an attempt was made to make a scapegoat of him with an allegation of obstruction to government work.

There are innumerable such unrecorded struggles all over the country. While the Chipko was fortunate to attract media attention globally, most of these struggles have been treated as unseeable by the media even locally.

Even today the media do not give enough attention to significant indicators. Since 1987, the Forest Survey of India (FSI)—an ancillary of the Ministry of Environment and Forest, Government of India—is bringing out the State of Forest Report (SFR). The latest report available to the public is that for the year 2003.

As information provided in respect of Arunachal Pradesh in the SFR of 2003 is significant, it will be subjected to a quick examination. To present the case in perspective comparative data for the country as a whole would also be presented along with those for Arunachal Pradesh.

In 2003 India recorded a forest area of 7,74,746 square kilometres. It was 23.57 per cent of the total geographical area of the country (SFR, p. 6), but the actual forest cover was 6,78,333 square kilometres which was 20.64 per cent of the geographical area of India (p. 13) and 87.56 per cent of the recorded forest area of the country. The remaining 12.44 per cent area, though recorded as forest, actually did not have forest cover.

In Arunachal the SFR 2003 gave a very different picture. While in India as a whole reserved and protected forests contributed 81.94 per cent of the total declared forest, in Arunachal these two categories of forests constituted only 38.25 per cent of the recorded forests. At the national level, the remaining 17.60 per cent of the recorded forests were recorded as unclassified forests; in Arunachal 67.75 per cent of the forests were unclassified forests, mostly under community ownership and management regime. Had the view propagated by the corporate lobby and its friends that bereft of strict control and management by the state machinery forests would, over a length of time, degenerate into virtual non-existence, been true, the bulk of the forest in India should have been dense forest, including a substantial quantum of very dense forest; on the other hand in Arunachal

the bulk of the forest would have been open forest, or legally delineated forest land without tree cover. But actually the reverse is true. Although in India as a whole recorded forest was 7,74,746 square kilometres, actual forest cover was 6,78,333 square kilometre whereas in Arunachal as against a recorded forest area of 51,540 square kilometres actual forest cover was 68,019 square kilometre that is, 16,479 square kilometres (31.97 per cent) more than the recorded forest area. More interesting is the fact that dense forest in Arunachal, including very dense forest (53,511 square kilometres), was 1971 square kilometres more than the recorded forest of all types. On the other hand, as already noted in the country as a whole, at least 12.49 per cent of recorded forest ceased to have forest cover, though they were under the overall control and management of the state machinery.

It is important to note that the Arunachal case is not an example of relative merit or demerit of state control and management versus private control and management. If anything, the foregoing data provide empirical base for examining the relative merit of state control and management versus community control and management. In fact the Forest and Tribal Committee, Government of India (1982) had observed that wherever communities were managing forests the forests were in a better condition than those managed by the Government Department. Had the media highlighted the Arunachal experience and had there been more nuanced research and communication on the various parameters of the phenomena mentioned here, perhaps not only the rules operating the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Right) Act 2006, but the Act itself would have been substantially different. The Act and the Rules would have been less ambiguous and inadequate.

THE most important ambiguity relates to the population precisely covered by the Act and the Rules.

In the Act 'Forest Dwelling' Scheduled Tribes "means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forest or forest lands for bona fide livelihood needs, and includes the Scheduled Tribe pastoralist Communities/'

'Other traditional forest dwellers' means any member or community who "has for at least three generations prior to December 13, 2005, primarily resided in and who depends on the forest or forest

land for bona fide livelihood needs". 'Forest land' means "land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, sanctuaries and national parks",

The draft Rules published on June 19, 2007 clarified that 'primarily reside in and depend on the forests or forest lands' in Section 2(c) and Section 2 (o) of the Act means "those claimants who are dependent on such forest or forest land for bona fide livelihood needs but who need *not exclusively and necessarily reside* on such forest or forest land". (Emphasis is by the author.) The clarification given in the draft Rules of June 19, 2007 is absent in the Rules finally adopted on January 1, 2008. In the absence of such clarification it may be argued that those who do not primarily reside in forest land do not come within the purview of this Act. However, one can argue back by drawing upon the very wide definition of 'forest land' in the Act itself. Even then one wishes that ambiguity was not created by non-inclusion in the finally adopted Rules the clarification that was given in the draft Rules published on June 19, 2007.

Section 3.1 (g) of the Act contains an apparently very progressive provision, but in certain situations it may be otherwise. It provides for recognition of the Forest Dwellers' "rights for conversion of pattas or leases or grants issued by any local authority or any State Government on forest lands to titles". As a statement of general principle the provision is commendable. But in some ex-Princely States, the feudal rulers had issued pattas in favour of tribal chiefs, vesting them with the right of possession of vast tracts of tribal lands. At least in one State, namely, Manipur, even after independence, it has not been possible to extinguish this incongruity, because continuation of the same was a part of the merger agreement. Similar incongruities may exist in some other parts of the country as well. It seems that in some parts of Jharkhand, faced with people's response to the government bid to assume the right of superior landlord over khunkatti land (land owned by lineage), the government tried to win over the support of khunkattidars by investing neo-feudal rights on them. In some areas the government has succeeded, but not in all areas.

This Section of the Act should not be applied in a mechanical manner. It should be applied contextually by going into historical depth.

The Act has a laudable positive content in that it recognises community as a legal person eligible to

claim forest right; but Section 4 (6) of the Act, by treating the community in the same manner as in the case of an individual or a family and by stipulating that recognition of right shall in no case exceed an area of four hectares, seems to have mutilated its positive intent. In North-East India in particular, and in many other parts of the country, community access, control and management of forest tracts go much beyond four hectares. It is highly incongruous to stipulate that this recognition of forest rights of communities would be four hectares only. Here it is to be noted that in several countries, New Zealand for instance, based on community rights of land, large enterprises carrying on international trade have been created. In India an initiative was taken to examine the possibility. But it suffered a setback when the bureaucracy-politician nexus tried to hijack the agenda to serve their own interest. However, the matter requires serious rethinking and a fresh approach.

Section 5 of the Act provides that the holders of any forest right, Gram Sabha and village level institutions, in areas where there are holders of any forest right under this Act, are empowered to (a) protect the wild life, forest and biodiversity; (b) ensure that adjoining catchment area, water sources and other ecological sensitive areas are adequately protected; (c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage; (d) ensure that the decision taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affect the wild animals, forest and biodiversity are complied with.

Though in the body of the Act the word 'empowered' to enforce the foregoing conditions has been used, the descriptive caption in the margin speaks of "duties of holders of forest rights". While it seems that use of the word 'empowered' is an euphemism, without quibbling on the words, it is to be examined what instruments of power have been made available to the holders of forest rights, to be able to ensure that the conditions indicated in this Section have been actually enforced or what assistance has been provided so that the forest right holders can discharge their duty.

RULE 24 of the Rules published on June 19, 2007 had provided that

(i) the village level institutions or Gram Sabha may per-

form the duties falling under Section 5 of the Act, on behalf of holders of any forest right, and they shall be empowered to (a) prepare a plan for the protection and management of community forest resources; (b) prepare and adopt norms including institutional arrangements for the protection and regulation of access to and sustainable use of the community forest resources; (c) prepare norms for community wild life management; (d) evolve procedures to protect, conserve, regenerate or manage the resources while protecting the interests in forest rights of vulnerable groups and women; (e) evolve methods for monitoring and implementing such norms,

(ii) the Gram Sabha may (a) request the assistance of the Forest Department or other local authorities for implementing its norms and such authorities *shall* provide the requisite assistance; (b) take corrective action as may be necessary, where there is violation of norms created by it in exercise of this right or direct the concerned authorities to proceed in accordance with law; (c) guide the functioning of the Joint Forest Management Committee, Eco-development Committee, Watershed Committee, Biodiversity Management Committee or any other such committees or institutions concerned with the management of forest resources. In sub rule (3) of Rule 24, the draft Rules further provided that in case there was a conflict between a decision of a Gram Sabha and a user group in regard to exercise of rights under clause (1) of sub section (1) of Section 3 of the Act, the decision of the Gram Sabha would prevail, while ensuring that forest rights of vulnerable groups and women were not put to any disadvantage.

The draft Rules thus vested substantive legal and administrative instruments with grass-root level bodies to ensure that the tasks entrusted with the forest rights holders were implemented. But the Rules finally framed do not contain any of these provisions. Rule 4(e) of the finally adopted Rules lays down that the Gram Sabha shall constitute a committee, for the protection of wild life, forest and biodiversity, from amongst its members in order to carry out the provision of Section 5 of the Act.

The message that the foregoing provision would convey can hardly be called inspiring. The committees are not like wizards that simply by expressing their wishes through resolutions can make things happen. One may draw attention to sub rule (3) of Rule 4 and claim that the Gram Sabha shall be provided with the necessary assistance by the authorities in the state. But it is too general and unspecific a provision to be of much help, particularly when the antagonistic forces are too powerful and too deeply entrenched.

The absurdity of the arrangement would become

obvious from the fact that though the Supreme Court has placed several restrictions on extraction of timber, according to the High Powered Committee set up by the Court to monitor the implementation of the same, even in North-East India, where the forests are considered to be in a better condition than in many other parts of the country, the nexus of contractors, bureaucrats, politicians is causing havoc. (Referred to by Karlsson, 2004, p. 10-11 who further mentions that timber trade, causing most of the destruction of forest, is a capitalist undertaking, where community as such has little or no role.) More insight is available from the Report of the Forest Survey of India 2003. It highlights the phenomenon of loss of forest on a large scale in one area being made up by afforestation of an equal, if not more, area in another area. Praveen Bhargava, a member of the National Board for Wild Life, has described this phenomenon as "Greening India but losing forests". (*The Hindu*, November 2, 2007) This is the chain-effect of enforcement of compulsory levies on mining, power and other development projects that gobble up the national forest and intrude into wild life habitats. A sum of Rs 5000 crores thus collected is now lying in a corpus fund. The Ministry of Environment and Forests (MEF) is for the moment custodian of the corpus. As Bhargava describes, unfortunately, this has often led to a situation in which the pristine natural forest is destroyed, say, for a mining project, and on the nearby grassland, which should have been left alone, exotic species are planted; the net result is the destruction of two natural habitats.

One may admit that the present arrangement is utterly inadequate to meet the type of challenge indicated; at the same time one may ask with skepticism whether arming the Gram Sabhas or panchayat bodies with more legal and administrative power will be adequate to meet the challenge of the situation.

This is certainly a legitimate question. As far as can be seen, simply by vesting the panchayati bodies with more administrative and legal power is very unlikely to make much dent on the situation. But the Act in itself conveys a strong message going beyond command law or straitjacket administrative arrangement.

IN the preambular statement which forms part of the Act itself, mention has been made of the historical injustice done to the forest dwelling Scheduled

Tribes and other traditional forest dwellers. This is a very strong political message. Its operational implication is that simply by holding on to the legal and administrative instruments provided in the Act and the Rules as in their final form, will not make significant changes in the situation, unless there is a continued constructive engagement through political mobilisation. To start with, operationalising the entire set of draft Rules, as published on June 19, 2007, should provide the framework for simultaneous political mobilisation and constructive engagement. At the same time the incongruity of the Act, particularly in its approach to community rights, should be brought to public consciousness.

While in the matter of eco-conservation by Gram Sabhas on behalf of the forest right holders, the Rules in the final form are inadequate, in the matter of recognition of community forest right holders, the Act itself is not explicit enough and thus inadequate.

In traditional shifting cultivation areas culturable lands and forest land fuse with one another. In fact shifting cultivation is possible only through early regeneration of the forests which are subjected to slash and burn. Apart from shifting cultivation land, some types of lands under horticulture, wild fruits, edible roots, tubers and natural growth of leafy vegetables, also fuse with forest. In many States such culturable forest lands are under the administrative control of the Land Revenue Department but the management prerogative, by tradition, primarily belongs to communities; individual rights are embedded in the same as secondary rights. The Land Revenue Departments of most States, while recognising some forms of common use rights on such culturable forest lands, do not recognise the ownership rights of communities. As a result during Land Survey and Settlement operations ordinarily lands under visible occupation of individu-

als or institutions and corporate bodies are recorded in their favour, but lands under multiple common uses are recorded as state lands, though the traditional use may or may not be interfered with. In protest in several States, for instance, in parts of Chattisgarh, after an initial start, the operation had to be discontinued due to people's resistance. But the state takes advantage of the ambiguity of the situation and as and when it finds it necessary, nibbles away tracts of land without paying compensation. This form of historical injustice has affected the rights of Scheduled Tribes and traditional forest dwellers several times more than that done by all the other forms of historical injustices put together. The Government of India Committee Report on Land Holding System of Tribes (1985) has made a mention of this type of denial of historical rights. It has also drawn attention to another fact. In Orissa, where only 45 per cent of the forest is under control of the Forest Department, the remaining 55 per cent is under the control of the Land Revenue Department. During the last revisional land survey and settlement operation in the State, the Board of Revenue has issued an instruction that all lands beyond 10 degree slope should be shown as state land. As a result the Committee found that hardly one per cent of land under occupation of the tribal communities for centuries, was recorded in their favour. It is not a matter of surprise that the most militant forms of political extremism have come up today in such areas. In Parliament, the Government of India justified this transgression of people's right on the plea of need for environmental protection. By proffering this plea the government meant that left to themselves the people would cause damage to the environment. As already mentioned, the Forest Survey data in respect of Arunachal as well as the report of the Government of India Committee on Forest and Tribals show that such insinuation was totally uncalled for. What is important is that no political party in Parliament had raised its voice against this injustice and unconstitutional and illegal Act. It is to be noticed that while the present Forest Act is silent on this matter, no political party or no activist group has taken up the issue. It seems that the agenda of opposition is confined to the cognitive orbit set by the present Act itself. It is hoped that at least some people will break the cordon of inadequacy and pick up all the relevant issues. •

[Modified version of a talk delivered at the National Convention on Forest Rights recently organised by the National Forum for Forest People and Forest Workers (NFFPFW) and Delhi Solidarity Forum]