

# Is the Pathalgadi Movement in Tribal Areas Anti-constitutional?

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The Pathalgadi movement has stemmed from the unabated alienation of land from tribal people, and is a democratic assertion for the realisation of their rights in light of the government's failure to implement the same.

A movement known as the Pathalgadi movement has been brewing for quite some time in the tribal areas in the heart of India. Yet, it had not caught the attention of the people at large and the national media, until the alleged kidnap and gang rape of five non-governmental organisation (NGO) workers by some youths in the Khunti district of Jharkhand. The movement, though not confined to them, is more notable in the states of Jharkhand, Chhattisgarh and Odisha. The state administration and regional media have dubbed the movement as anti-national and Maoist-driven. Cases of sedition have been filed against people sympathetic to, and those associated with the movement, as well as villagers supporting the movement. A large number of people have been arrested. Some are on bail while others are still languishing in jails. The Pathalgadis, on the other hand, claim it to be constitutional. The claim, in my view, is true and tenable, though they have been over-enthusiastic in their interpretation of some provisions. The problem with the special provisions provided for tribes in the Constitution and laws enacted for their safeguard is that the very people and institutions—politicians, administrators and the judiciary—that are to administer them, have generally little knowledge and understanding of the special provisions and laws themselves. These are special provisions and laws, and cannot be subservient to the laws, rules and regulations applicable to the general population.

## Pathalgadi as Tribal Tradition

The term Pathalgadi has been drawn from a tribal custom of placing a stone at the tomb of a dead person, especially among tribes belonging to the Austro-Asiatic linguistic family such as the Mundas, Khasis, etc. Sasandiri was the

original term the Mundas used to describe this practice. However, after the enactment of the Provisions of the Panchayats (Extension to Scheduled Areas) Act (PESA) in 1996, former Indian Administrative Services (IAS) officer B D Sharma and former Indian Police Service (IPS) officer Bandi Oraon initiated the practice of placing stone slabs inscribed with provisions of the act. This was done with a view to raise awareness of the provisions among the villagers. It is worth noting here that the 73rd (Panchayati Raj) and 74th (Nagarpalika) constitutional amendment acts of 1992 were excluded from their extension to the Fifth and Sixth Scheduled Areas. Parliament was to extend provisions for Scheduled Areas by enacting separate laws, which it did through the PESA in 1996. The act extended the provisions of the Panchayat Act to the Scheduled Areas.

## Social Moorings

What is happening today in the tribal areas in the heart of India, reminds one of the early phase of the British rule in these areas. The British brought tribes under the same rule and administration as others, once the territories they inhabited were incorporated into British India. There was an imposition of laws, rules, regulation and administration that were alien to the tribes. The new land and revenue settlements resulting in the introduction of private property in land along with written documents in support of it, was one such instance that played havoc in tribal areas. This was the beginning of the alienation of tribal land to non-tribes. The improvement of the means of communication to tribal areas only accelerated these processes as the regions were now not only opened to the movement of traders, merchants and moneylenders, but also to the land-hungry non-tribal peasants from the plains in its vicinity. This accelerated the alienation of the tribal land leading to general restlessness among tribes, culminating in a series of revolts and rebellions at a regular interval all through the late 18th and 19th centuries. Often, these revolts are treated as wars of independence of the

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tribes against the British. It is worth noting that these wars were as much against the people of the plains as against the British. Both were equal partners in the oppression and exploitation of the tribes. The recurrent revolts did pose a threat to the British rule and administration. As a measure to contain such recurrences in the future, the British therefore toyed with the idea of certain safeguards. These came in the form of non-regulation tracts where general laws and regulation were not applicable unless felt otherwise. Later, such areas came to be referred to as excluded and partially excluded areas, which provided some space for traditional systems of self-governance.

Much of the problems the tribals have been facing today have their roots in this colonial legacy, which became even more entrenched in post-independence India. What is being witnessed today in tribal areas is a repeat of what their forefathers had been through about 200 years ago. Alienation of land from the tribes to non-tribes has continued unabated despite the constitutional provision of bringing much of the areas that the tribes inhabit into the Scheduled Areas, either under the provision of the Fifth or Sixth Schedule of the Constitution. This problem has been compounded by the extent of displacement that the tribes in the region, especially the Fifth Scheduled Areas, have been witness to following the state development projects as a part of the nation-building process. With the opening up of the Indian economy to the wider world through the processes of liberalisation and globalisation since the early 1990s, there has been an unprecedented entry of the private companies, including multinational corporations (MNCs), for resource extraction and profit. The state governments have been very proactive in facilitating and aiding this process. As there are laws restricting alienation of land from tribes to non-tribes, states began acquiring lands and making it available at the disposal of private companies at a price higher than what it paid to tribes as compensation.

Such passing of tribal land by the state to private companies in the Fifth Scheduled Areas, as per the historic Samata

judgment of the Supreme Court in 1997, is legally and constitutionally untenable. Hence, the state governments have been toying with the idea of tampering with the legal and constitutional safeguards meant for the tribes. This has been most evident in Jharkhand. There had been attempts to bring in amendments to the Chhotanagpur Land Tenancy Act, 1908 and the Santhal Pargana Tenancy Act, 1949. The former was enacted in the aftermath of the tumultuous Birsa Munda movement. The bill failed to receive the assent of the Governor due to massive protests by the tribals. As a strategy to break the unity of the tribes, the Jharkhand Freedom of Religion Bill was introduced and passed in 2017. A few months later, an ordinance was passed introducing the amendment to the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement (Jharkhand Amendment) Bill, 2017. The ordinance has been awaiting assent of the Governor and President. All these moves are pointers to the persistent attempts by the government to

counter the provisions of protection and safeguard enshrined in the Constitution and laws.

### Legitimate Assertion

Given such repeated moves by the states for the acquisition of tribal lands, the tribes are pushed to defend themselves. Earlier, they had been resisting such projects through protest, rallies and other democratic means on a continuing basis. Of late, however, they have been trying to defend themselves from such assault by asserting their constitutional and legal rights emanating from the Fifth Schedule of the Constitution. In the Fifth Schedule, the governors, to begin with, are vested with special powers to safeguard and protect the interests of the tribal population. They are expected to examine laws enacted by Parliament and the state legislature to ascertain if they are in keeping with safeguarding of tribal interests, and accordingly have the power to restrain their application in Scheduled Areas or suggest their application along with suitable amendments.

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They are responsible for the maintenance of law and good governance in tribal areas. In all these they are expected to take the advice of the Tribes Advisory Council. They are also expected to submit annual reports to the President of India on the tribal situation of the state. Paradoxically, however, the governors have shied away from this constitutional responsibility. Due to this, much harm has already been done and is still being done, but the governors seem to be oblivious of their responsibility. Under the Sixth Schedule too, the Governor is a custodian of tribal interest though there is a provision of self-governance in the form of autonomous district councils. The autonomous council has legislative, executive and judicial power over certain subjects. What the Fifth Scheduled Areas of mainland India did not have is self-governance. Hence, there was a campaign and movement for self-governance which was led by Bharat Jan Andolan, an umbrella organisation of NGOs, activists, academics and grass-roots tribal community organisations. The slogan of the movement was “hamara gaon hamara raj” (our village, our rule). The movement culminated in the enactment of the PESA in 1996.

In short, the Fifth Schedule of the Constitution provides for administration and control of Scheduled Areas and Scheduled Tribes (STs) and gives power to the Governor to make regulations for peace and good governance of the Scheduled Areas. Deriving force from these enabling provisions in the Constitution aimed at ensuring social, economic and political equity, several specific legislations have further been enacted by the central and state governments for the welfare of the STs, the PESA being one of them. Essentially, the Fifth Schedule is a historic guarantee to the STs over the land they live on.

However, the acronym PESA for Provisions of Panchayat (Extension to Scheduled Areas) Act is somewhat misleading. It is important to note that it is not an extension of panchayati raj as it is generally viewed, but an extension of the provisions of the panchayat to Scheduled Areas. The provisions provided in the PESA are substantially different in letter

and spirit from the Panchayat Raj constitutional amendment act of 1992. The latter was exempted from its application in the Fifth and Sixth Scheduled Areas. The PESA provides for self-governance through traditional *gram sabhas* for people living in the Fifth Scheduled Areas. In fact, the PESA mandates that notwithstanding anything contained under Part IX of the Constitution, the legislatures of the states shall not make any law under that part which is inconsistent with any of the features of the PESA. The key features are:

- (i) A state legislation on the panchayat that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources. Every gram sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution.
- (ii) All relevant subject laws and rules, central and state are to harmonise with the aims and objectives of the PESA. Some of the key acts that need consideration in this context are those regarding land acquisition, mines and minerals, forests, forest conservation, excise, etc.
- (iii) 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-governance, the state legislature is to ensure that the panchayats and the gram sabha are endowed with power and authority to enforce or regulate the ownership of minor forest produce, power to prevent alienation of land and to restore alienated land, the power to manage village markets, exercise control over moneylending, excise, etc.

Given such powers to tribes under the PESA, it is extremely problematic to treat the Pathalgadi movement as anti-national and book people associated with the movement under charges of sedition. In fact, the people are merely asserting the rights provided to them by law and the Constitution. If they have gone somewhat overboard with regard to the interpretation of some of the provisions, the state governments are almost totally ignorant of special rights provided to tribes in the Constitution and law enacted by the state. If governments fail to implement the rights given to the people, it is only imperative that people engage in democratic assertion for the realisation of their rights. Indeed, history is witness to the fact that the implementation of laws has been effective only where there are grass-roots organisations to ensure the effective realisation of rights.

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