HISTORICAL ECOLOGY OF LAND SURVEY AND SETTLEMENT IN TRIBAL AREAS AND CHALLENGES OF DEVELOPMENT (WITH PARTICULAR REFERENCE TO CENTRAL TRIBAL BELT OF INDIA) *

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RECAPITULATION AND CONCLUSION

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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 z*amindar* 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 nullius* and 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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