
‘SARKARCHYA PAYRYA CHAD JOS NOKO’
Experiences and lessons of seeking justice in the courts on behalf of
tribal communities and individuals in general and regarding mass
displacement in particular

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At the very outset, I would like to state that I will not limit myself to issues of displacement. Even though the agenda states that I shall be presenting on the subject of “Seeking Legal Redress against Mass Displacement”, I have actually been asked to speak on the experiences and lessons of seeking justice in the courts on behalf of tribal communities and individuals in general, and regarding mass displacement in particular. In fact, I will try and cover a gamut of issues regarding tribals’ experiences with the judicial system, both at the higher and lower levels. Tribal issues tend to get stereotyped as mass displacement issues, which while definitely one of the more important issues for tribal people, is not the only issue affecting their lives.

It is also necessary to clarify that mass displacement takes place in two ways. Displacement is usually understood as being the consequence of mega and minor projects such as highways or dams. However, displacement of tribals also takes place on a continuous basis through forced migration, both temporary and permanent, as a result, and in the context of, poverty. Forced permanent migration is visible in the influx into cities. Temporary displacement takes place on a seasonal basis, whereby thousands of tribals, sometimes entire families, migrate to work on construction sites, brick kilns, as lorry *hamals* (porters) and so on, for periods as long as eight months in a year. They often live in open spaces, with no facilities, and with no protection on the work site. I will be referring to both types of displacement in the discussion that follows.

Lack of Faith in the Judicial System

Nothing captures the tribal mindset regarding mistrust of the judicial system more succinctly than the chant of the “*suyarin*” or midwife who performs the “*zoli*” ceremony, which initiates a newborn into the Warli tribe. She gives a message to the newborn, which goes like this:

*Gaajal vijlaval tyala bihajos noko, Vaata ghaata bihajos noko, Wagha nadgashi
bihajos noko,
Daarashi koni aala hirva nahin tar sheejel tari dijis,
Ais vaharel dhav ghin paljos, bas vaharel dhav ghin ijis,
Sarkarchya Payrya chad jos noko.*

(Don't be afraid of the thunder and lightning, Don't be afraid of the mountain path, Don't be afraid of the tiger and the bear;
If any one comes to your doorstep, if you have nothing uncooked then at least give him a meal;
When your mother calls out, run away, when your father calls, come running at once; **Do not enter the portals of the Government.**)

Yes, the tribal does not believe that the State – the Courts – can give him justice. While this lack of faith has historical roots, the positions taken by the Courts in recent years, especially with respect to mass displacement, have only further strengthened this belief.

There are various figures regarding the extent of displacement in the country. Walter Fernandes pegs it at 300 lakhs of people, while another study put the figure at 164 lakhs, of whom only 25% could be resettled or given any compensation.¹ The total number of displaced persons, according to Paranjpe and Fernandes, is 213 lakhs, while the World Commission on Dams estimates the figure to be a gigantic 560 lakhs, of whom a total of 47% are tribals.² In addition, large dams have submerged 50 lakh hectares of forests. Despite these mind-boggling figures regarding the extent of decimation of tribal communities, the Courts have consistently held that these Projects serve a public purpose, and are necessary for the “welfare of the nation”. Tribals raise the question - “Who is the ‘public’? Who decides the ‘public purpose’? Whose nation?” When these questions are consistently answered by the Courts to the detriment of the tribal, is it logical to expect the tribal to have ‘faith in the judicial system’?

Tribals believe that even if they access the Courts they will not get justice. This is especially so with respect to the issue of displacement. The fact of acquisition is often taken as a “given”, and therefore the focus of litigation boils down to getting better compensation and rehabilitation. It must be remembered that in many cases the projects in question come up in flagrant violation of the law. For example, in Makhada taluka of Thane district, three minor dams came up within a radius of 10 kilometres of each other. Construction on all three dams began without following any of the provisions of the Land Acquisition Act 1894. We happened to intervene regarding the construction of one particular dam (the Wagh Prakalp). As a fair portion of construction had already been completed, we thought it prudent to pray only for compensation and for strict adherence by the authorities to the provisions of the Land Acquisition Act and the Rehabilitation Act 1986. Interestingly, when we stated before the Court that we were not challenging the public purpose of the project, the judge looked upon our case more favourably.

However, while the Court ordered strict adherence to all the provisions of the Land Acquisition Act, it failed to take any action to penalize the officers who had committed blatant illegalities or to award compensation to the tribals for the damages suffered prior to legal acquisition. If the Court had passed such orders, it would have gone a long way

¹ See Sanjay Sangvai in Politics of Displacement and the State in the Age of Globalisation , Unpublished work

² See *ibid*

to prevent such blatant illegalities in the future and thus indirectly protect the interests of other unsuspecting tribals.

The point that is being made is that while in a number of instances people do approach the Courts, there are many more cases in which they do not do so. In Thane district, where we work, tribals have not approached the Courts in innumerable cases of mass displacement including, to name but a few, those in Dapchari Dairy, Surya Prakalp, Tulyachapada Dam, Khoch Dam, and the Ahmedabad-Mumbai Highway. While financial constraints are a factor limiting their access, activists are deterred from approaching the Courts by experiences such as in the Narmada case. *The fact that the Courts have till date rarely, if at all, halted mass displacement, limits people's vision of what expectations they can have of the Court.* The perspective of the people is limited by what the Court has done till date. Courts at their best have acted only as a benevolent part of the State, not independent of it, in responding to the basic issues raised by the tribals.

In a case regarding tribal migrant salt pans, we had approached the Bombay High Court in a PIL regarding working conditions and payment of outstanding wages. The High Court ordered the Labour Department to conduct a survey of the conditions. The Report corroborated the points that we had made in our petition. The High Court then ordered the Integrated Tribal Development Project Officer to verify the claims regarding non-payment of wages. The Report was completed and submitted to the Court. But by then the Board had changed and the new judge dismissed the case on grounds that the lower court should have been approached; this was two years after filing the petition! This type of experience severely diminishes people's faith in and the possibility for their seeking to access the judicial system.

The Frame of Colonial Laws that Deny Access

The issues that impinge on tribal life – in particular regarding land and forests -- are framed and thus circumscribed by the terms of colonial laws, such as the Land Acquisition Act 1894 and the Indian Forest Act 1927. Tribals are unable to stake their claim over forests, grasslands and other community resources that are physically submerged because of the concept of eminent domain. Despite the enactment of specific legislation (PESA, see below), the tribal's rights over common property resources are not recognised. The law of the land often does not cover the areas regarding which the victim seeks redress. For example, a tribal migrant labourer who has been denied his or her wages may find a police station fairly accessible to register a complaint, but is circumscribed by the fact that non-payment of wages is not a criminal offence. Registration of all migrant workers and their employers is not compulsory in the absence of an Intra-State Migrant Workers Act, and this seriously impedes obtaining redress for any complaint regarding unfair labour practices. **There are often no provisions in existing laws that recognize a tribal's right. Colonial laws did not recognize tribal rights – at best they offered concessions and privileges to them. As these colonial laws are still extant they effectively deny a tribal access to justice.**

Too Expensive to Access

Where legal services are not free, access to justice is first and foremost limited by the capacity to pay. Even where “sympathetic” lawyers may take up cases without fees, the entire process of typing, copying documents, serving notices, traveling to meet the lawyer, traveling to court, payment of petty bribes to clerks and so on makes the entire exercise much too expensive. This is particularly felt where an individual – not a community – is seeking redress.

But what about the system of legal aid that has been created for the poor? Very few know how to access it, especially at the higher levels of the judiciary. And accessing it is expensive in itself. Further, most lawyers consider it a burden – and sometimes, below their dignity -- to handle legal aid matters. These cases are forced upon juniors, who often do not handle the matters effectively. Judges should instruct senior lawyers to handle such matters.

Despite the noble intentions of those who conceived the Lok Nyayalayas, due to a corruption of concepts, in actual practice, especially at the Taluka level, *most Lok Nyayalayas are, to put it bluntly, a farce.* Matters that would ordinarily be compoundable in the open court under section 320 of the Code of Criminal Procedure (Cr.P.C.), are unnecessarily delayed and posted for the Lok Nyayalaya. The involved parties have to make an additional visit to the Court on the date of the Lok Nyayalaya to ensure that the “target” of the Lok Nyayalaya is reached. Very rarely have I witnessed a resolution of a conflict through deliberations and interventions of the appointed panel. Usually, difficult cases that are not resolvable are taken back before the Regular Board. As with legal aid matters, two out of the three panel judges are usually junior lawyers. There is little scope for the participation of the local or village community before the appointed panel. The panelists are not popularly responsive and “acceptable” panchas, but nominees of the state, who are supposed to act as mediators. The mediators, often operating from their own perspectives, provide guidance, at times even an ultimatum, and there is little scope for negotiation by the litigants. When one is talking about Lok Nyayalays in tribal areas, it is important to see who comprises the “Lok”. Paternalistic outsiders, elected “mainstream” tribal leaders, or the village community and its elders?

Non-Implementation of Orders Effectively Denying Justice

By and large we have had a fairly positive experience regarding implementation of Court orders. This is because the petitions that we file are backed by a strong grassroots organisation. In 1988, the State Reserve Police had been brought to Ambesari village to counter the villagers who were opposing the clear felling of trees in the forest. We obtained an order staying the felling of trees in the forest and the SRP was removed from the area within a couple of hours.

However, we have also had the experience of being unable to implement other orders that we have obtained from the Courts. In 1998, the Bombay High Court ordered the State government to regularise (according to the provisions of a 1969 Government Resolution)

approximately 14,000 acres of one-year leases being cultivated by tribals. Despite a time-frame for implementation being ordered by the Court, the order remains unimplemented. The same is the case in many compensation cases under the Motor Vehicles Act 1939. In one case, twelve labourers died while working on the fishing boats in the sea off the Gujarat coast. We filed a Writ Petition in the Gujarat High Court, where the owner admitted that they had died in an accident. Armed with that order, we filed for compensation at the Sessions Court in Thane. We received favourable orders after about ten years. As the boat owner had no insurance cover, the twelve widows of the deceased labourers have till date not received any compensation. We have filed an Appeal in the High Court. The matter is still pending.

Enabling Evidence Enhancing Access

The poor, especially tribals, are often handicapped by the lack of documentary evidence. Tribals have often been in possession of land, sometimes for generations, but their names have not been entered in the records. This is especially so in situations of non-recorded tenancies (on Varkas (As per section 2 of The Bombay Tenancy and Agricultural Lands Act, 1948, Varkas lands are defined to be “land which is used for the purpose of rab manure in connection with rice cultivation” and also includes any cultivation on sloping land as against rice cultivation on flat land called Kharif land) and in issues of cultivation on forest lands. In the Narmada case, since Land Settlement had never taken place, the villagers in thirty-three villages, despite residing therein for generations were nowhere shown in the records. The tribals of the Borivali National Park have suffered because they were unable to produce substantial documentary evidence of their historical existence. Sometimes the tribal may have misplaced the documentary evidence – lack of proper receptacles to store documents often results in loss of fine. Yes it is ! - Fines are levied on persons for offences committed, in this case on encroachers] and “dhara”(land tax) receipts through exposure to rain, sunlight and fire. *It is thus necessary to give due weightage – in fact more weightage – to oral and circumstantial evidence than documentary evidence if the poor, especially the tribal, is to effectively access justice.* To quote Dr. B.D. Sharma, former Commissioner, Scheduled Castes and Scheduled Tribes:

If the claims of the tribal people are to be determined on the basis of the record of the forest department, or, at best, record of other government departments, his claim may be as good as lost.³

We have had the good fortune that the Supreme Court “recognising the limitation of recorded evidence for a particular time, (the committee) ‘the committee’ is an insert into the quote and should not be deleted] sought to identify other sources of written and oral evidence in the present and pertaining to the specific period” in a Writ Petition regarding regularization of Forest Cultivations in which it accepted the Report of the Inquiry Committee appointed by it. ⁴ Further the Supreme Court also passed an order that

³ Dr. B.D. Sharma, Commissioner, Scheduled Castes and Scheduled Tribes, New Delhi, January 1990, in Resolution of Conflicts concerning Forest Lands – Adoption of a Frame by Government of India.

⁴ Pradip Prabhu and ors. Versus State of Maharashtra and ors in Writ Petition No. 1778 of 1986, Supreme Court of India, unreported.

“...even in cases where the claim is not supported by documents, ‘the committee may’ make an appropriate inquiry, receive evidence and then come to accept the claim.”⁵

The use of Court appointed Commissions and Inquiry Committees to verify the ground reality is useful in situations where a tribal may be handicapped by lack of documentary evidence. We have found this to be extremely useful in land matters in the lower courts where the bone of contention has been boundaries and the area under possession. At the Supreme Court level, in 1982, the Inquiry Committee verified the facts regarding the destruction of standing crops of tribals by the Forest Department and SRP. Again, in 1988, the Inquiry Committee appointed by the Supreme Court verified the claims regarding cultivation on Forest lands. Earlier, the Supreme Court had ordered an Inquiry by the District Judge into politically sponsored atrocities abetted by the police. Last year, the Bombay High Court ordered both the Labour Department to conduct a survey regarding the conditions of tribal migrant workers on Salt Pans, and the Project Officer of the Integrated Tribal Development Department to inquire into the claims of non-payment of earned wages.

Lack of Jurisdiction and Lack of Access

The structure of our judicial system is such that the scope of the lower courts’ powers decreases as one goes down the ladder. Although the lower courts are, to whatever extent, more accessible than the higher courts, in many cases victims are debarred from approaching the lower courts as they lack the necessary jurisdiction. *There is a need to devise a method by which the lower court does not refrain from entertaining a case on grounds of lack of jurisdiction, but instead is empowered to accept and hear an application, examine it on merits, verify the facts, examine its validity and then refer it to a higher court to examine the matter on merits on points of law.* A patient taken to a Primary Health Centre in rural Mokhada is not denied first-aid. On examination he is treated to the extent possible and is then given a Referral Slip for the J.J. Hospital in Mumbai.

Lack of Cultural Sensitivity Impeding Access

Perhaps what we need to discuss is not so much a case of ‘Unequal Access to Justice in the Context of Poverty’, but ‘Unequal Access to Justice in the Context of Different Cultural Systems’. Judges need to be sensitive to cultural differences and to correctly interpret the responses of tribal witnesses. As contradictions are kept to a minimum in tribal society, the word “no” is used very sparingly. When a tribal witness says “yes” in response to a question often what he or she really means is no more than that “Yes, I have heard your question.” Lawyers exploit the head shaking tribal who has never before been subjected to a barrage of questions in his or her life. The verbal response has a limited role in tribal society. The poignant silences tell you more of the reality. The reluctance to answer often is not indicative of “I do not know” but a plain straightforward “no”.

⁵ Order dated 28.10.1991 in Pradip Prabhu and ors. Versus State of Maharashtra and ors in Writ Petition No. 1778 of 1986, Supreme Court of India, unreported.

Judges need to be sensitive to such niceties and make suitable interventions wherever and whenever necessary.

Lack of Knowledge regarding PESA

Tribal society is based on the concepts of reconciliation and restoration of harmony. The traditional mode of dispute resolution involves a process of arriving at the truth and acceptance of one's guilt. A fine may be levied on the aggressor, but usually a fine is levied on both the aggressor and the victim for the resultant loss of harmony in the community. Once the dispute has been resolved -- which it must before the sunsets -- the disputing parties and the entire village community must sit and share a bottle of liquor together. The community attempts to resolve the matter in such a manner that all those concerned may be able to live amicably together again. Adversarial jurisprudence has no place in the traditional mode of dispensation of justice.

This has been recognized in the Panchayats Extension to the Scheduled Areas Act 1996 (PESA). Unfortunately, it seems that most judges are ignorant of its provisions. Section 4 (d) of PESA clearly states as follows:

...the Gram Sabha shall be competent to safeguard and preserve its traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution.

While no Rules have yet been framed in this regard, it would be well within the jurisdiction of a judge to refer any village dispute brought before him or her to the Gram Sabha and await its Report before proceeding with the case. This would permit the resolution of disputes in a manner that is transparent and participatory and thus has a greater possibility of truth being arrived at. In two cases filed under section 125 Cr.P.C.,⁶ we prayed before the Taluka Court that the matter be referred to the Gram Sabha. The Magistrate granted our prayer. The matter was resolved in the Gram Sabha and parties did not return to the Court.

The Role of the Police in Denying Justice

As justice dispensed by the criminal courts is circumscribed by the papers that are placed before them by the police, the role of the police cannot be overemphasized. In many cases, the callousness and deliberate errors of commission and omission by the police seal the fate of the complainant. It is common experience that the complainant/witnesses emphatically depose before the Court that they have made particular statements before the police, although no records of any such statements are to be found among the case papers. The witnesses are then found guilty of improving on the prosecution's story!

In a recent case, where the police was acting hand-in-glove with the complainant, the concerned police officers, in an attempt to establish a motive and a history of hostilities between the complainant and the accused, went so far as to fabricate a Non-cognizable

⁶ Section 125 CrPC concerns payment of Maintenance to Wives, Children and Parents.

offence by inserting an entry and adjusting the serial numbers in the Non-cognizable Register.

To give just one more example, poor tribal women who have filed applications for maintenance, continue to make monthly visits to the Courts, while their “deserting” husbands ignore summons and warrants, aided and abetted by the police.

Conclusion

In a situation where the public’s loss of faith in the judicial system seriously circumscribes the peoples’ access to it, there is a strong case for the Courts to take up matters *suo motu*. If Mohammad does not come to the Mountain, the Mountain must go to Mohammad. Since people are unable to properly access the Courts, it is necessary for the Courts to access the people. It is necessary that the Courts act independently of the Executive, and that they call upon it *suo motu* to answer them. Perhaps this will help restore faith in this august institution, and thereby create conditions for greater accessibility to the justice system by the poor and by tribals.