

# TRIBALS AND PANCHAYATS WITH REFERENCE TO THE PESA ACT, 1996: A CRITICAL ANALYSIS

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**Abstract:** Tribals are known to be the real sons of the soil or inhabitants of the country. The existing situation of tribals in India remains far more than worse in India though measures have been taken to curb the indifference faced by them and ease their plight, which is safeguarded by the constitution of India as well as a new act introduced by the parliament in 1996 namely Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA Act) but the real question which remains is what is the actual situation which still exists even after the enactment of such laws and the lacunae which needs to be fixed for proper enforcement of the law and safeguard their rights.

**Keywords:** Tribal, Fifth and Sixth Schedule Areas, PESA Act, 1996, Indian Constitution.

The tribal people are the original inhabitants of the country known as the “sons of the soil”. India has the second largest tribal population in the world next to Africa. Different terms are used such as “Adivasis” or “indigenous people” to refer to the tribals. ‘Scheduled tribe’ is an administrative term used for the purpose of “administering” certain specific constitutional privileges, protection and benefits for tribal people. Tribes in India have a significant degree of cultural and ethnic diversity. They differ in their socio-economic levels and behavioural patterns. Moreover, Tribal situation in India poses particular problems of development, not encountered in other areas.

Development in such areas is a very complicated task and needs more careful attention than has been paid to it so far. Mostly, such tribal communities live in rural and wild area. So, Local self-government in rural areas i.e. Panchayati Raj Institutions (PRIs) play an important role in the tribal development. Panchayat is a nomenclature associated with rural life in India from time immemorial. However, since 1992 following the 73<sup>rd</sup> constitutional amendment, Panchayats have acquired a new meaning as ‘institutions of local self-government’ with the specific task to prepare and implement ‘plans for economic development and social justice’<sup>2</sup>. This Amendment was undertaken to ensure Panchayati Raj system with certain revolutionary and progressive measures.<sup>3</sup>

But excluding the operation of part IX of the Indian Constitution the ‘Fifth Schedule Areas’, the Parliament had withdrawn the legislative power of the State legislatures and the special powers conferred on the governors to make regulations for the scheduled areas on the Panchayati Raj setup as constitutional immunity was against

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<sup>2</sup> Oommen, ‘Deepening Decentralised Governance in Rural India’ (Dec. 2004)

<sup>3</sup> Samal Avinash, ‘Institutional Reforms for Decentralized Governance and the Politics of Control and Management of Local Natural Resources: A Study in the Scheduled Areas of India’ (2007)

overarching laws. Taking into consideration the special conditions that exist in the scheduled areas, the parliament reserved to itself the power to make a separate legislation with necessary modifications for the scheduled areas.

In the last decade, government of India became more aware about tribal development and especially tribal participation in local governance and their social & economic development and to extend the provisions of the constitution relating to the Panchayats to the Scheduled Areas a special legislation called Panchayat (Extension to Scheduled Areas) Act,1996 (PESA Act) was enacted by the Parliament.<sup>4</sup> The PESA Act,1996 endeavours to enhance tribal representation in local governance and further increased the even to uplift them socio-economically. But in reality, PESA has almost been forgotten and has not become part of mainstream political or policy discourse. Many state governments have passed laws not fully in conformity with the central law. The implementation of the law has been severely damaged by a reluctant attitude of most state governments to make laws and rules that conform to the law. Weak political will has paved way to bureaucracy in interpretations of the law.

**CONCEPT OF TRIBE:** The Indian Constitution has not defined the word ‘tribe’, it only mentions about identifying a group of communities as Scheduled Tribes (STs). The President of India, through public notification can specify any tribe as Scheduled Tribe, further; a tribe can also be included in the list of Scheduled Tribes.<sup>5</sup> It can be said that the government uses the traditional notion of a tribe as being forest dwellers or those who are socially and economically backward.

Tribe can be defined as a “collection of families bearing a common name, speaking a common dialect, occupying or professing to occupy a common territory and is not usually endogamous though originally it might have been so”<sup>6</sup>. D.N. Majumdar defines tribe as “a tribe is a collection of families or group of families bearing a common name, members of which occupy the same territory, speak the same language and observe certain taboos regarding marriage, profession or occupation and have developed a well-assessed system of reciprocity and mutuality of obligations”.

Any pre-literate local group may be termed as tribe, whose members reside in a common area, speak a common language and have common culture.<sup>7</sup> Tribe is a simple type of social group whose members speak a common dialect and work together at the time of war.<sup>8</sup> According to Prof. R.N. Mukherjee ‘A tribe is that human group, whose members have common interest, territory, language, social law and economic occupation.’ Therefore, tribes can be characterized group of families having a name who speak common language or dialect, reside in

<sup>4</sup> Pal Mahi, ‘Panchayats in Fifth Schedule Areas’ (May,2000) Economic and Political Weekly

<sup>5</sup> Article 342 of The Constitution of India,1950

<sup>6</sup> The Imperial Gazetteer of India, 1911

<sup>7</sup> Gillin and Gillin, ‘An Introduction to Cultural Sociology’ (1948)

<sup>8</sup> Dr. W.H.R River, ‘History and Ethnology’ (1922)

a common territory, observe taboos related to marriage, have a common occupation, have well developed system of reciprocal exchange and have a common culture.

Scheduled Tribes are referred to in Article 366(25) of the Constitution of India as those tribal communities or parts of or groups within such tribes or tribal communities, who are scheduled in accordance with Article 342 of the Constitution. The essential characteristics, first laid down by the Lokur Committee<sup>9</sup>, for a community to be identified as Scheduled Tribes are: (i) indications of primitive traits (ii) distinctive culture (iii) shyness of contact with the community at large (iv) geographical isolation and (v) backwardness.<sup>10</sup>

**STATUS OF TRIBALS IN INDIA:** India has the largest concentration of tribal people anywhere in the world except perhaps in Africa. The main concentration of tribal people is in the central tribal belt in the middle part of the India and in the north-eastern States. The two-third of the ST population is concentrated only in the seven States of the country, viz. Madhya Pradesh, Maharashtra, Orissa, Gujarat, Rajasthan, Jharkhand and Chhattisgarh. There is no ST population in 3 States (Delhi NCR, Punjab and Haryana) and 2 UTs (Puducherry and Chandigarh), as no Scheduled Tribe is notified.<sup>11</sup>

There are over 705 Scheduled Tribes notified under Article 342 of the Constitution of India, spread over different states and Union Territories of the Country.<sup>12</sup> As per the 2011 census report conducted by Ministry of Tribal Affairs there is relatively an increase in population of the Scheduled Tribes from 6.9% in 1961 to 8.6% in 2011. Also, the population has grown both in urban as well as rural areas, where in urban the increment from 1961 to 2011 is 1.0% to 2.8%; in rural areas, it from 7.9% to 11.3% which is relatively higher than that of the growth in the urban areas.<sup>13</sup>

The tribal population of the country, as per 2011 census, is 10.43 crore, constituting 8.6% of the total population. 89.97% of them live in rural areas and 10.03% in urban areas. Broadly the STs inhabit two distinct geographical area – the Central India and the North- Eastern Area. More than half of the Scheduled Tribe population is concentrated in Central India, i.e., Madhya Pradesh (14.69%), Chhattisgarh (7.5%), Jharkhand (8.29%), Andhra Pradesh (5.7%), Maharashtra (10.08%), Orissa (9.2%), Gujarat (8.55%) and Rajasthan (8.86%). The other distinct area is the North East (Assam, Nagaland, Mizoram, Manipur, Meghalaya, Tripura, Sikkim and Arunachal Pradesh).<sup>14</sup>

<sup>9</sup> 1965.

<sup>10</sup> sums the definitions contained in 1931 census, 1<sup>st</sup> Backward Classes Committee (1955), The Joint Committee of Parliament on the Scheduled Castes and Scheduled Tribes Amendment Bill (1967) and Chanda Committee (1969).

<sup>11</sup> ST Statistical Profile – at a glance, Ministry of Tribal affairs, <https://tribal.nic.in/Statistics.aspx>, last visited on 18.01.2020.

<sup>12</sup> Statistical profile of STs 2013.

<sup>13</sup> ST in India as Revealed in Census 2011, Ministry of Tribal affairs, [https://tribal.nic.in/ST/3-STinindiaascensus2011\\_compressed.pdf](https://tribal.nic.in/ST/3-STinindiaascensus2011_compressed.pdf), last visited on 21.01.2020.

<sup>14</sup> Scheduled Tribes in India, Census 2011 by Registrar General of India, May 2013.

## SAFEGUARDS FOR TRIBALS IN THE CONSTITUTION:

Article 244, Administration of Scheduled Areas and Tribal Areas. Article 339, Control of the Union over the Administration of Scheduled Areas and the welfare of Scheduled Tribes. Article 243 M. Part not to apply to certain areas. (4)(b) Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.”<sup>15</sup>

### TRIBAL SELF – RULE (PESA ACT,1996)

**Historical Background:** Scheduled Areas in India are predominantly inhabited by the tribal population who have been managing their natural resources and governing social, economic and political life in their habitat through a well-knit system of ancient customs and practices. In the era of this unprecedented social change, the imperative need was felt to usher the tribals in the mainstream of development efforts without disturbing or destroying their cultural identity and socio-economic milieu to meet this challenge.<sup>16</sup>

To achieve this objective, the Government of India constituted a Committee under the chairmanship of Shri Dilip Singh Bhuria in 1994, popularly called “*Bhuria Committee*” to examine various dimensions of self-rule for tribals, the constitutional requirements and to make recommendations for extending the provisions of Part IX of the Constitution to the Scheduled Areas.

And it was on the basis of report of *Bhuria Committee* submitted in 1995, the Parliament enacted the Provisions of the Panchayats (Extension to the Scheduled Areas) (PESA) Act, 1996 for its applicability to Fifth Schedule Areas as per article 243M of the Constitution.

### NECESSITY:

As discussed above, after the recommendations which were in a sense the reasons listed out as to why there was an urgent need for tribal self-rule in the heavily populated tribals areas indicated majorly in nine states. “The major recommendations or the need for a Tribal Self-Rule (The PESA Act,1996) were as follows:

- Gram Sabha at the hamlet/village level does not exercise traditional functions such as management of land, forest, water and air.
- States do not consider reorganisation of the boundaries based on ethnic, demographic and geographic considerations.
- Tribal aspirations can be satisfied if tribal regions are conferred sub-state status. Grant of autonomous district council status for districts in central Indian tribal tracts will be in the nature of sub-federalism.
- The basic lacunae were in the Land Acquisition Act.
- The schemes were not pre-eminently related to participative democracy, particularly at the grassroots and district levels.

<sup>15</sup> Ibid.

<sup>16</sup> Background of PESA,1996, <http://pesadarpan.gov.in> , last visited on 10.02.2020.

- The consent of the local village community was not obligatory. The rehabilitation package was not operated with the consent of the local village community. Viable and acceptable package of livelihood was not offered as a means of rehabilitation to the affected families.
- The lower functionaries of departments/government servants posted in the autonomous districts were not under the control of the district councils.
- The tribal community should be regarded as in command of the economic resources. The districts and other councils did not have any appropriate laws for regulation of land and other resources for industries.”<sup>17</sup>

## VARIOUS COMMITTEE REPORTS FOR BETTER EFFICACY:

Even after the enactment of PESA Act, 1996 there was constituted many sub-committees to review the work under PESA, 1996 and recommendations were made for better efficacy of the act. The Committees and the important recommendations by the committees are discussed hereunder:

**I. Mungekar Committee:** The Standing Committee on Inter-sectorial issues relating to Tribal Development was constituted by the Prime Minister’s Office on October 30, 2004 with Dr. Bhalchandra Mungekar, Member, Planning Commission, as its Chairman.<sup>18</sup>

**The First report** was submitted by the Committee on October 27, 2005 on *Inter-Sectoral Issues relating to Tribal Development*. Based on which the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (No. 2 of 2007) was enacted.

**The Second report** was submitted on April 16, 2007 relating to *Displacement, Resettlement and Rehabilitation of Scheduled Tribes*. The recommendations were taken into consideration while notifying the new National Rehabilitation and Resettlement Policy, 2007 on October 31, 2007.

**The Third report** was submitted in February, 2009 relating to *Standards of Administration and Governance in Scheduled Areas*. The recommendations of which were included in 12<sup>th</sup> year plan.

## II. Sub-committees:

- **B D Sharma Sub-committee:** It was constituted in July 2006 on ‘Model Guidelines to vest Gram Sabhas with Powers as envisaged in PESA’. The Sub-committee recommended that Rules for PESA may be framed by all the PESA States. The Draft Model Rules for PESA were prepared and sent to all PESA States in May 2010 for framing their own State specific PESA Rules. Out of the ten PESA States, Maharashtra, Rajasthan, Andhra Pradesh, Telangana and Himachal Pradesh have framed their PESA Rules.
- **Raghav Chandra Sub-committee:** This committee ‘Land Alienation, Displacement, Rehabilitation and Resettlement’ was constituted on July 14, 2006. The Committee submitted its report on November

<sup>17</sup> Recommendation of Bhuria Committee, 1994

<sup>18</sup> Reports of Committees, <http://pesadarpan.gov.in>, last visited on 15.10.2018



29, 2006 and recommended modifications in PESA Act,1996 as under Sections 4 (i), Section 4 (k), Section 4 (l) and Section 4 (m) (iii).

- The other sub-committees i.e. A.K. Sharma Sub-committee (2007), Haq Committee (2011) and Committee on Harmonization of Other Central Laws with Provisions of PESA Act, 1996 were constituted based on the suggestion of Administrative Reform Committee respectively, although there has been major change based on the recommendations of these committees.<sup>19</sup>

### THE PARADIGM SHIFT:

Some specific resources were said to have been impacted by the law on tribal self-rule and the subsequent state legislations which include management of minor water bodies, forest land especially relating to ownership of minor forest produce and tribal land alienation and restoration. It is hereunder discussed under following heads:

- **Minor water bodies:** As per the Central PESA the power to plan and manage ‘minor water bodies’ exclusively vested with the Panchayat at appropriate level which in other words means that the Central law gives a discretion to the states to assign to any tier of the local self-government such power in the best interest of the community. However, the first obstacle is in the definition itself. No legal definition of minor water bodies exists in the statutes. The states too have ignored it, whether by design or default is unclear. The state of Gujarat has given such power to the Gram Panchayat (Village Council). This ambiguous power devolution becomes further critical as there are a number of externally aided projects on water sheds and water users which are participatory based approaches and the state amendments completely ignores these developments in their enactments.<sup>20</sup>
- **Land Resources:** Two critical land issues emerge in the context of the law on tribal self-rule and the manner in which state legislations on PESA has been enacted. The first on land acquisition and the other on land alienation and restoration of illegally alienated lands. The land belonging to a scheduled tribe can be transferred to a non- tribal under the various Land Revenue Code of the states and more so in tribal areas.
- **Land Alienation:** The powers of prevention of land alienation and restoration of illegally alienated land under the Central PESA has been vested both to the Gram Sabha and the Panchayat at appropriate level. Land alienation is one such critical point among others in the context of common property resources. Different states have responded differently. While the Gujarat Government has only involved the District Panchayat.<sup>21</sup> The Orissa Government has mandated that it shall be competent for every Gram Sabha in the Scheduled Areas to make recommendations through Panchayat having regard to the provisions of

<sup>19</sup> Reports and Publications, <http://pesadarpan.gov.in> , last visited on 15.10.2018

<sup>20</sup> S.T. Shrisath, ‘Reinventing Tribal Local Governance through Administrative Reforms in India: With Reference to Fifth Schedule Area’, Apr. 2014

<sup>21</sup>Rights of Scheduled Tribes of India, Louis Prakash;2008

any law for the time being in force pertaining to transfer or alienation of land of the persons belonging to the scheduled tribes, be competent to make suitable recommendations to the Collector.<sup>22</sup> Here again the precedence has been given to the already existing laws in the state rather than the spirit of the new law on PESA.<sup>23</sup>

- **Land Acquisition:** As regards the land acquisition the power has been vested with the Gram Sabha or Panchayat at appropriate level by the Central PESA. It mandates that there should be consultation before land Acquisition for development projects and before resettling or rehabilitating persons affected by such projects. The state of Gujarat for example has granted this power to higher level of Panchayat at the Block level.<sup>24</sup> At the same time the Gram Sabha in Scheduled Areas is also required to manage natural resources including land, water, forests within the area of the village in accordance with provisions of the Constitution and other relevant laws for the time being in force. Clearly there is an overlap and misdirection in terms of assignment of power to a specific level and simultaneous allocation of power on a very general basis.
- **Minor Forest Produce:** Two critical legal issues emerge here. One the definition of minor forest produces and second the jurisdiction where such ownership rights would be exercised. The Gujarat Act has vested in the Village Panchayat minor forest produce found in such area of a forest as is situate in the jurisdiction of that village. This essentially means that while the ownership rights have been granted but the area on which such resources exist is exempt.

Also, according to available information, no exercise has been initiated by the government to examine the relevance of different Central laws to Schedule V Areas and to harmonize them with the aims and objectives of the PESA. The land Acquisition Act (1894), Mines and Mineral (Development and Regulation) Act (1957 & 1980), and The Indian Registration Act are among the laws, which warrant particular attention in this context. Besides, the National Policy on Resettlement and Rehabilitation of Project Affected persons (2007), National Water Policy (2002), National Minerals Policy (2008), and National Forest Policy (2004) would require detailed examination from the viewpoint of ensuring compliance to the provisions of PESA.

### **CURRENT SCENARIO IN THE STATES (FIFTH SCHEDULE AREAS):**

All nine states having Scheduled Areas amended their existing Panchayat Acts to comply with the provisions of PESA. But still certain critical gaps exist. There are certain provisions in the State Panchayat Acts which are not defined clearly by making subsequent Rules – leaving the scope of ambiguity.

<sup>22</sup> PESA implementation – some essential prerequisites and suggestions for the State of Orrisa, Enviro Legal Defence Firm, March 2011

<sup>23</sup> Beauty Gogai, Panchayati Raj and Tribal Development in India, IJARSSH, Volume 1, July-December 2013

<sup>24</sup> PESA implementation – some essential prerequisites and suggestions for the State of Gujarat, Enviro Legal Defence Firm, March 2011

In addition to that, there are certain subject laws and rules regarding money lending, forest and minor forest produce, mining and excise, which need to be reframed. Though the provisions in such laws which are in conflict with the provisions of PESA have become null and void after December 23, 1997, they continue to be followed by departments and their functionaries because of the simple ignorance of the governments.

Certain major gaps between the central legislation and provisioning at the State level are:

- Existing state laws regarding money lending, forest, excise etc., continue without any change
- Transfer of ownership of minor forest produce and planning and management of minor water bodies to Gram Panchayats and Gram Sabhas have taken place incompletely
- Adequate actions have not been taken on preventing alienation of tribal lands recognized in PESA
- As is the case with Panchayati Raj in general, devolution of functions the Gram Sabha and the Panchayat have not been followed by subsequent devolution of fund and functionaries.

Consequently, de facto compliance with PESA remains incomplete and being carried out with interest. Over the years, requests have been made to states repeatedly to gear up the process of implementation of PESA and the matter has been discussed in the meeting of Ministry of Panchayati Raj (MoPR) and Performance Review Committees, but too little avail as revealed by several evaluations commissioned before 2004 by the Ministry of Rural Development.<sup>25</sup>

#### State subject laws not in compliance with PESA

States	Land Acquisition	Excise	Forest Produce	Mines and Minerals	Village Market	Money Lending
Andhra Pradesh	No	No	No	No	No	No
Chattisgarh	Yes	Yes	No	Yes	Yes	Yes
Gujarat	No	Yes	No	Yes	Yes	Yes
Himachal Pradesh	Yes	Yes	Yes	Yes	No	No
Jharkhand	No	No		No	No	No
Orrisa	Yes	Yes	Yes	Yes	No	Yes
Maharashtra	No	No	No	No	No	No
Madhya Pradesh	Yes	Yes	No	Yes	Yes	No
Rajasthan	No	No	No	Yes	No	Yes

Source: Ministry of Panchayati Raj (MoPR), Government of India; as updated on 24.04.2018<sup>26</sup>

<sup>25</sup> Ministry of Panchayati Raj, Government of India, B.N. Yugandhar Committee Report (2003)

<sup>26</sup> Compilation of State wise ELDF (Enviro legal Defence Firm) Report, March 2011



## CONCLUSION:

The PESA Act,1996 is a most powerful legislation which can play an instrumental role in recognizing the rights of the tribal population in Scheduled areas over natural resources thus transforming their quality of life. It is almost true that due to lack of political will, their rights have been disregarded.

Though central government has taken several measures to implement the Act on paper, lack of initiative from concerned state government is quite evident. Central government should take appropriate action to eliminate the loopholes in the central legislation immediately; followed by a strong direction from political government to abide by the constitutional mandate. State government should follow the guideline issued by the central government to incorporate changes in the state Acts proposed by state level study reports, take appropriate measures to amend state laws which are in conflict with the provisions of PESA, take initiatives to enhance the capacity of government machinery and stakeholders who play vital role in actual implementation of the Act at the ground level.

Civil Society Organizations who have been fighting proactively for the issue has to play strategic role in building awareness among the stakeholders at each level and organizing the politically divided tribal communities. So, a strategy with taking several aspects into consideration to address the issue from different aspect is the need of the hour.

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