

PESA: A MERE MIRAGE OF INDEPENDENT LOCAL SELF-GOVERNANCE

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ABSTRACT

The Panchayat (Extension to the Scheduled Areas) Act, 1996 also known as PESA was enacted with an aim to extend the mandates of local self-governance that was implemented through the 73rd amendment in 1992 in the form of Panchayati Raj Institutions (PRIs). PESA was enacted keeping in mind the ethnicity of the people living in Scheduled Areas and, therefore, empowered the Gram-Sabhas for local self-governance among the tribal communities. The paper tries to study the present scenario of PESA after two decades of its implementation and how the Central Act is being adopted by the states in true letter and spirit. The paper employs descriptive and analytical methods to reach at generalisations. Secondary sources such as Acts, books and other materials those are available with the Ministry of Panchayat Raj (MOPR), Government of India are used in the study. The paper tries to portray that PESA, which could have been otherwise a powerful instrument in the hands of the community living in the Scheduled Areas stands as a caged tiger with no actual power defeating the whole purpose of its enactment. The paper suggests a way forward on how to overcome this present deadlock, thereby, helping in achieving the actual objective of this Act.

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1. Introduction

India, a land of diversity, has achieved milestones in every aspect and has emerged as one of the most powerful nations of the globe. Being an epitome of diversity, it constitutes all kinds of population be it urban, rural or other communities living in Scheduled Areas. According to the 2011 census, tribal community comprises 8.6% of the total population which is around 104 million people.¹ Although India has grown rapidly in political, economic and social aspects yet it has always paid less attention towards the interests of the tribal communities. It is not that the government is not taking appropriate steps but it is rather that their rights are being eroded slowly because of the lacunae in the implementation of the laws which are in turn exploiting the indigenous rights of the community.

India is abode to a large number of tribal people who are also known as adivasis. Tribes or adivasis are groups of indigenous people who are dependent on their land for their livelihood, who are largely self-sufficient and not integrated into the mainstream society because of their distinct culture. The tribes are groups of heterogeneous set of people who have their own ethnicity and are also considered the aboriginal population of India.² Before the advent of the British rule, the tribal communities enjoyed all rights over the land in which they inhabited but this was taken away from them by The Indian Forest Act, 1927 enacted under the British regime. After independence, the State Government undertook control of the forest lands and gave the tribal communities right to limited access. Later, the central government took over the control over forests from the state government and tried to preserve the rights of the forest dwellers. The Forest Conservation Act, 1980 widened the definition of forests and the Supreme Court of India also passed a judgement³ where it was stated that forests cannot be conserved only by the employees alone but the forest dwellers should be a part of such conservation. The forests should not only be a part of revenue earning but also serve as livelihood to the forest dwellers. In India, there are three groups of tribes who can be classified as the hill-tribe group, semi-nomadic plain group and the nomadic group. These group are settled in various parts of the country, it includes forest belts stretching from the

¹ <www.censusindia.gov.in>Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, Government of India, Accessed on 21-12-17.

² Govinda Chandra Rath, Tribal Development in India : The contemporary debate from landlessness to ownership, Sage publication,2005.

³ National Thermal Power Co. Ltd. vs. Commissioner of Income Tax (SC) (1998)229 ITR 383.

foot-hills of the Himalayas, parts of Himachal Pradesh, Uttar Pradesh in the West, Meghalaya, Tripura, Mizoram, Manipur, Rajasthan and traces of it can also be seen in Tamil Nadu, Kerala and also in Union Territories such as Lakshadweep and the Andaman & Nicobar islands.

The Panchayat (Extension to Scheduled Areas) Act 1996⁴ was enacted to bring in a stronger local self-governance system through the Gram Sabhas in the tribal areas as mentioned in the Fifth and Sixth Schedule Areas of the Constitution. The 73rd Amendment passed in 1992 laid down a stronger and independent three-tier Panchayat system but the Act was not extended to the Scheduled Areas as it was exempted under Article 243M of the Constitution. The exemption of tribal communities was made keeping in mind their distinct culture. The Constituent Assembly made constant efforts for providing them with a separate system of governance. But there are reasons for which the government machinery fails to bring in proper and adequate facilities for the backward communities which have resulted in issues such as economic backwardness, land alienation, cultural, social and educational backwardness, etc. Therefore, PESA was enacted on 24th December 1996 to extend tribal self-rule in the areas mentioned in the Fifth and Sixth Scheduled Areas by the Gram Sabhas.

2. A Perspective

Part IX of the Constitution of India was inserted vide the 73rd Amendment, 1992 that came in force on 24th April, 1993. Part IX converted Panchayats into independent institutions of local self-governance. Article 243M and Article 244 of the Constitution exempt Schedule Areas and tribes from the application of Part IX of Constitution but on similar lines in Article 243M(1), special powers have been bestowed to the Parliament to legislate any law which shall extend to the Scheduled Areas and tribal areas.

The Scheduled Areas are largely dominated by the tribal communities who have their own distinct customs and practices. They can also be termed as custodians of our natural

⁴ The Gazette of India, The Provision of Panchayat (Extension to Scheduled Areas) Act, 1996; Act 40, 24 December 1996 (1996)

resources as they spend their life in those habitats. The distinct characteristic of these people urged the government to bring in special laws which shall bring them to the mainstream Panchayat system but in sync with their own culture and distinctiveness. Keeping the special needs in mind, the Government of India had set up a committee under the leadership of Duleep Singh Bhuria, whose suggestions were accepted on the matter. PESA recommended the independent working of Gram Sabhas in making decisions relating to the tribal community. The Act not only focused on the present issues of land acquisition, forest rights, etc., but also paved the way for future law-making in relation with tribes.⁵

3. Constitutional Provisions

The Constitution of India is the supreme law which lays down the fundamental structure, principles, procedures, policies, etc., governing the society and its people. Article 14 of the Constitution lays down the principle of equality where it mentions that every person shall be equal before law and there shall be equal protection of the laws within the territory of India and no discrimination on the grounds of religion, race, sex or place of birth shall prevail. The tribes being a part of India should be subjected to such privileges and protection. The constitutional provisions regarding the Scheduled Tribes can be classified into two types, viz., to protective and developmental under Article 19(5) and 15(4) respectively. The Constitution vest powers in the hands of state government for making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and PESA is an example of such a special provision. All these provisions become futile if there is no proper mechanism for implementation. The problem then arises that how to protect the rights of these tribal communities without their ethnicity being lost. This issue can be answered through the 73rd Amendment in 1992 which prioritised on making the local self-governance stronger through the three tier Panchayat system. The Amendment especially exempted the Schedule Tribes and areas mentioned in the Fifth Schedule from its ambit, therefore, the requirement of a new Act especially governing these people came into existence in the form of PESA.

⁵ Gaurav Redhal and Upasana Daity, Rights of Tribals In India With Respect To Access To Justice, IJSARD, Vol 2 Issue 1.

The Fifth and Sixth Schedule with reference to Article 244 in the Indian Constitution ensure historic guarantee to the tribal community in India and these provisions are the backbone to their legal framework. To preserve their ethnicity, the makers acknowledged the need for special legislation to administer areas dominated by the tribes. The special legislation also aimed at protecting the tribes from external vulnerability, filling up the gaps and bringing them into the mainstream, to preserve their land by regulating stricter rules of land acquisition.

4. Analysis of the PESA Act

Grassroots democracy has been made possible under the 73rd Amendment, 1992, which breaks the hierarchy of delegated powers from the central government to state government and promotes a bottom-up approach. The bottom-up approach curbs the power of the central government and passes it to the lowest unit of democracy which is the Gram Sabhas or the village assemblies. PESA being the most powerful Act enacted to protect the rights of the tribes extended this Panchayat system in the nine states mentioned under Schedule Five and some states under the Sixth Schedule consisting of North-Eastern states, where autonomous councils are absent.

PESA vests enormous powers in the hands of the Governor, who is appointed as the sole protector of PESA and if required he/she can also take action to amend any laws that are inconsistent with PESA. The Gram Sabhas also play an important role in PESA and is all pervasive in the Scheduled Areas. They have been given extensive powers to deal with any issues that involve the Scheduled Tribes. Section 4 of the Act is very critical since it states that no state can pass any Act that is inconsistent with the central Act, PESA 1996. Section 5 implements the Act in actuality as it prescribes a time limit for amending the other laws, which are inconsistent with the said Act which is one year from the date of passing of the said Act which expired on 23-12-1997. Therefore, any provision that is not in consistency with PESA is considered null and void.⁶

⁶ Biswas Sudipta, Implementation of PESA: Issues, Challenges and way Forwards, IRJSS, Vol. 4(12), 49-54, December (2015).

Under PESA Act, the Gram Sabhas have been bestowed with absolute powers and the state legislature has been given an advisory role to ensure proper functioning of the Panchayats and Gram Sabhas. This system of delegation of powers represents the principle of subsidiarity, which can be explained in a manner where Panchayats at higher levels should not try to curtail the powers of the lower levels and there shall be independence throughout. There are many powers and functions that are given to the Gram Sabhas.⁷ These are as follows:

- (i) Protection of traditional belief, culture of the tribal communities;
- (ii) Resolution of the local disputes;
- (iii) Prevention of land alienation;
- (iv) Management and protection of the common properties based on their traditions;
- (v) Management of village markets;
- (vi) Rights to control production, distillation and prohibition of liquor;
- (vii) exercise of control over money-lending;
- (viii) any other rights involving the Scheduled Tribes.

The Act suggests that the Governor and the Tribes Advisory Council should follow harmonious construction of laws and should work towards the welfare and should give importance to tribal self-governance. Though PESA is considered to be one of the most powerful Acts being the backbone of tribal legislation, there are many issues and limitations plaguing the effective implementation of the provisions of the Act.

5. PESA a Mere Mirage of Local Self-Governance

PESA was enacted to make the Scheduled Areas in the Fifth Schedule self-sufficient by empowering the Gram Sabhas as centres par excellence. The main object was to decentralise the power of the central and state governments and vest it in the hands of the local governments for independent and self-sufficient governance. But PESA failed to

⁷ Section 4, Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996.

achieve its objectives in true letter and spirit making the Act a mere puppet in the hands of the bureaucrats and the political clergy.

When we study the Act we may confront many areas with loopholes which create deadlocks preventing an effective implementation. There are lot of ambiguities in definition, for example, the definition of ‘Village’ or a ‘Gram Sabha Unit’ is not very clear creating a question of limit of jurisdiction. There is also ambiguity with the term ‘Minor Forest Produce’ which is not defined clearly. The law was brought in by the Ministry of Rural Development where it has mentioned its role but the two other ministries such as the Ministry of Tribal Affairs and the Ministry of Panchayati Raj which actually should interact for implementation is absent. The whole structure has been differentiated in three views; one is of the central government; one is of the state government and one of the local governments which have now come to a deadlock. Table.1 depicts the actual scenario of the implementation of the Central Act in different states.

Table 1: State Government laws in Compliance with PESA

States	Land Acquisition	Excise	Forest Produce	Mines and Minerals	Agri produce market	Money lending
Andhra Pradesh	N	N	N	N	N	N
Madhya Pradesh	Y	Y	N	Y	Y	N
Chhattisgarh	Y	Y	N	Y	Y	Y
Maharashtra	N	N	Y	N	N	N
Gujarat	N	Y	N	Y	Y	Y
Odisha	N	Y	Y	Y	N	Y
Himachal Pradesh	Y	Y	Y	Y	N	N
Rajasthan	N	N	N	Y	N	Y
Jharkhand	N	N	Y	N	N	N
Telengana	N	N	N	N	N	N

(Source: MOPR, Government of India; Accessed on 20/10/2017)

‘Y’ denotes the provision is PESA compliant. ‘N’ denotes the provision is yet not PESA compliant.

The above chart depicts how many states have fully complied with the provisions of PESA by amending their own state laws in accordance with the Central Act. There are states that represent better compliance rates such as the states of Himachal Pradesh, Odisha and Madhya Pradesh and on the other hand there are states such as Jharkhand, Telegana, Andhra Pradesh and Rajasthan which are not at all complying with the provisions of PESA. The main purpose of the Act gets defeated if there is no proper compliance made by the State Government for the welfare of the Scheduled Area as mentioned in the Fifth Schedule. The below-mentioned table speaks about Districts under each states that have complied with PESA.

Table 2: Notified Fifth Schedule Areas

States	PESA District (Both Partly and Fully covered)	PESA District (Fully covered)	PESA District (Partly Coverd)
Andhra Pradesh	5	0	5
Madhya Pradesh	20	5	15
Chhattisgarh	19	13	6
Maharashtra	12	0	12
Gujarat	11	4	7
Odisha	13	6	7
Himachal Pradesh	3	2	1
Rajasthan	5	2	3
Jharkhand	16	13	3
Telengana	4	0	4

(Source: MOPR, Government of India; Accessed on 20/10/2017)

The chart above depicts similar information as the first where PESA has not even been implemented in some of the districts of the mentioned nine states. In places it is partially implemented but there is no state till now which has been able to implement the Act fully. This shows the gap between enactment and implementation of the Act.

6. The Way Forward

The non-implementation of PESA in true letter and spirit not only indicates flaws in the enactment of the law but also highlights the political scenario of a country which is not able to appropriately implement welfare laws. The Act brings out the differences of working between central, state and local governments and shows that there are no serious efforts made to implement the law at the ground level. The present position of tribal communities depict that they are trying to be a part of the mainstream society but have not been able to do so due to lack of adequate protection of their social, cultural, political and economic rights which in turn results in backwardness, non-participation and non-acceptance among the general public.

There are difficulties in the implementation of PESA such as legal difficulties, political difficulties, gaps and inconsistencies, clashes between PESA and other existing laws, customary practice and lack of political will, which can't be overlooked. The inference from the above charts that may be drawn is that even after 20 years of implementation of PESA, the centre and the states are still in dilemma whether or not to adopt the provisions in actuality. The failure and non-implementation at all levels is defeating the objectives of the Act.

The whole situation can be dealt when all the three levels come together and work towards the betterment of the community. The central government should force the state governments to adopt PESA in true letter and spirit by giving them time limits within which there should be mandatory compliance. The states should form high-power Committees which shall advice and also monitor the activities at the Gram Sabha level. The Gram Sabhas should be more active and there must be a reporting to the Committee in the form of Annual Reports. The principles of accountability and transparency should be followed at all levels. Active participation of the tribal people, especially women, in the Gram Sabhas should be promoted. Some of the Acts such as the Land Acquisition Act, Forest Act, etc., should be amended so as to bestow powers to the Gram Sabhas to regulate their own affairs.

7. Conclusion

PESA, which can be a powerful tool in the hands of the tribal community, is presently working as a mere mirage of independent local self-governance. The implementation of PESA should be considered immediately in its true letter and spirit. The central government and the state governments should come together to retrieve the local Gram Sabhas, and bring them back to mainstream governance. Tribal Communities are a predominant part of our society; tribal people's contribution in the preservation of natural resources and in the maintenance of folk culture and tradition is immense. Hence, protection of their rights and quality of their living should be of utmost importance. The government should promote active participation of tribes, especially tribal women; and focus on issues such as capacity building, transparency and accountability of the community. Assistance may be taken from NGOs and Civil Society Organisations for creating awareness campaigns so that more and more tribal people come forward for protection of their own rights.