

Implementation And Working Of PESA : Issues And Challenges

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I. Introduction

India, the country's unique feature is the diverse culture among its people. In particular it is one of the nations with hundreds of ethnic groups and tribal communities. These communities play a vital role in upholding the country's cultural heritage and occupying a major part of Indian history. In the process of understanding the historical aspects of such tribal groups, the Government of India has made various Constitutional provisions and other welfare programmes for their upliftment. The 73rd Constitutional amendment Act, 1992 enshrines the provision of local self-governance by the creation of Panchayati Raj Institutions (PRIs). This framework was applicable throughout the country except the ten states mentioned under Part IX of the Constitution of India. These ten states are namely Andhra Pradesh, Telengana, Himachal Pradesh, Chhattisgarh, Gujarat, Madhya Pradesh, Jharkhand, Maharashtra, Odisha and Rajasthan². Thus, the Government of India enacted the Panchayat (Extension to the Scheduled Areas) Act in the year 1996 to cover the local governance in the above mentioned Scheduled areas or Scheduled States with respect to the tribal communities. From then, the Government of India has been trying to amend certain legislations which are in conflict with this Act. The State Governments of certain states have also been trying to submit their opinion on the fact that the Act is not in lines with their state's subject laws. Therefore, the need of the hour is to implement this Act by analyzing the provisions and the conflicting issues.

II. The Panchayati Raj

Ever since the father of our nation established the vision of self-governance, it has been acting as a backbone of the Indian Villages with regard to administration and management of their

affairs. The Panchayati Raj was also recognized as a 'Directive Principle of State Policy' under Art. 40, Part IV of the Constitution of India³. The ultimate goal of this Constitutional Provision was to create and promote autonomy in the local communities. Moreover, self-development of an individual in the society in his everyday life was a key focus of this provision. Mahatma Gandhi said that there should be five persons constituting a Panchayat, who shall be elected by the adults in the village, possessing a minimum qualification as prescribed. This would be conducted annually, and the Panchayat will have plenary powers in terms of executive, legislature and judiciary⁴.

For the purpose of enacting separate laws with respect to tribal communities and tribal areas, the 5th and 6th Schedule of the Constitution has been put in place. These provisions in the Constitution help the tribal community people to uphold their traditions, which in turn would help them to grow with regard to their own customs and values and not to allow any external forced system, which the tribal communities are, may experience. The First Prime Minister of India, Jawaharlal Nehru had also formulated certain principles, under the Panchsheel program, which ought to be looked into for the purposes of development of the tribal communities in India⁵. It principles concluded that the tribal communities should always move ahead in accordance to their traditional spirit and values along with the preserving their rights over forests and other land use. The Government must also form trained working teams from among the tribal community themselves. Nehru also said that the outcomes of these measures should not be assessed in terms of statistics of money spent or other expenses but rather should be in terms of the quality of human character, outcomes and developments therewith.

The 73rd Constitutional Amendment Act

1992 brought in the concept of Panchayati Raj Institutions, thus giving them a constitutional status⁶. The Act provides for strengthening the grass root levels of democratic India, eventually achieving a politically strong rural administration. The elected representatives were given all concerned powers to initiate and provide and formulate basic social, economic and political needs to the people, thus gearing up a better democratic value based society. It was very important for the representatives to know the needs of that particular community, on the first hand. This principle was intended to subsequently eradicate poverty and hence improving the economic standards of the people as well as the country as a whole.

The Fifth Schedule of the Indian Constitution defines "Scheduled Areas" to be such areas as the President, by order, may declare to be Scheduled Areas after consultation with the Governor of that state and in consultation with the State Government. The Schedule also insists for establishment of Tribal Advisory Councils (TAC) in every state having scheduled areas. With the direction and assent of the President, the TACs can also be established in areas where Scheduled Tribe Communities live. The basic role of these TACs is to advice the State Governments on issues pertaining development and welfare of Tribes. The said Panchayats (Extension to Scheduled Areas) Act of 1996, also known as PESA, extends to all Scheduled Areas in the country and also contains provisions for the interests of STs⁷.

III. Background of the Act

The Constitution of India enshrines its Fifth and Sixth Schedule as Scheduled Areas and Tribal Areas respectively, as mentioned. Scheduled Areas in India are predominantly inhabited by the tribal population who have been managing their natural resources and governing their social, economic and political life in their habitat through a proper system of ancient

customs and practices⁸. As about 8.6% of India's population constitutes of the tribal community, they have their own customs, traditions, practices and culture⁹. As most of them live in the forest areas, they solely enjoy the rights over flora and fauna. Therefore, it is important to safeguard their socio-economic and cultural rights. The Government of India felt that there is a need to introduce provisions beyond the ambit of the 73rd Constitutional Amendment Act as the system of Panchayati Raj was going off track. Therefore to achieve the objective of welfare of tribes, the Government of India formed a committee under the chairmanship of Dilip Singh Bhuria in the year 1994 and was called the 'Bhuria Committee' that conducted deep studies on various issues relating to tribal welfare. On the recommendations of the committee, the Parliament enacted the PESA Act in the year 1996, exercising its power under Article 243M of the Constitution. The Act came into effect on 24th December 1996 ensuring to uphold the rights of the tribal communities on matters relating to their natural resources.

IV. Analysis, Implementation and Working of the Act:

The PESA Act gives itself the status of being a very powerful Act as it covers a wide range of provisions relating to the tribal communities. Inclusion of Gram Sabha and its direct and indirect powers over their jurisdictions over the rights and interests of the tribes is also one of the peculiar features of this Act. Section 4 and Section 5 of the Act should likewise be focused in an urgent and careful way. The preamble of Section 4 of PESA Act forbids the State Government to make any law under that Part which is conflicting with any of the elements set down in the Central Act. Section 5 emphasizes that any provision of law which is conflicting with the provisions of PESA can just keep on being in compel until corrected or revoked by the state. Otherwise, it will consequently terminate in one year from the date on which

this Central Act became effective. This time has officially terminated on 23-12-1997. In this way, all provisions in the laws of the concerned states and the center that are not in consonance with the fundamental elements laid down in Section 4 of PESA are declared to be invalid and void.¹⁰ Under this Act, the powers and functions of the Gram Sabhas and Panchayats can be categorized into three namely, mandatory consultations, mandatory recommendations and mandatory executive functions & responsibilities. Though these absolute powers are vested under this Act, certain provisions are being taken advantage and misinterpretation due to the ambiguity in it.

The Ministry of Rural Development looks into the implementation and working of the PESA Act. According to the Planning Commission Working Group¹¹, “All States have enacted requisite compliance legislations by amending the respective Panchayati Raj Acts. Certain gaps continue to exist. Most States are also yet to amend the subject laws and rules, such as those relating to money lending, forest, mining and excise to harmonise with PESA. Though the provisions in such laws are legally invalid after December 12, 1997, they continue to be followed by departments and their functionaries for want of clear instructions and guidelines. Powers statutorily devolved upon the Gram Sabha and Panchayats are not matched by the concomitant transfer of funds and functionaries resulting in the non-exercise of such powers. States have, over the years, been repeatedly urged to expedite this process, but progress has been slow and often, only symbolic, with no real intention to operationalise the provisions in spirit”.

Therefore, the Panchayat Acts of various states including the newly formed states of Jharkhand and Telengana does not clearly mention the rules and provisions thus leading to a scope of ambiguity. The subject laws of the local Acts relating to land, forest produce, mining etc. have to be looked into and reframed. For example,

certain clauses of Section 4 of PESA are in conflict with the local Acts of the states. In spite of the fact that the provisions of such laws are in conflict with the provisions of PESA, and they have become invalid and void after December 23, 1997, they are being taken by offices and their functionaries as a result of the ignorance of government authorities at appropriate levels of administration. Apart from that, transfer of funds and functionaries to the lower level government has not occurred in the wake of vesting statutory powers to the Gram Sabha and Panchayats. Therefore, by fact, it is evident that the state Acts does not go in lines with PESA. Though the central Government has been consistently requesting to gear up the implementation of the Act, it is not seen to have happened.

The following, enshrines the details of the compliance of important subject laws of the Fifth Schedule state with PESA.¹²

Andhra Pradesh's State subject laws do not comply with PESA including Land acquisition, forest produce, excise, mines and minerals, agricultural produce and markets and moneylenders. Similarly, in the state of Chhattisgarh, the subject laws relating to agricultural produce, forest produce and money lenders do not comply with PESA. The subject laws Gujarat, Himachal Pradesh, Jharkhand, Maharashtra and Madhya Pradesh relating to Forest produce do not comply with PESA's provisions. Except Madhya Pradesh, none of the State's subject laws on Agriculture Produce and Market comply with PESA. Similarly, the subject laws of Gujarat, Jharkhand, Orissa, Maharashtra and Rajasthan on Land acquisition are in conflict with the provisions of PESA. In the same way, many of the state subject laws are not in parlance with PESA.

V. Steps taken by the Central Government

The Central government has taken various steps in implementing PESA in the said states. It

has appointed various committees and working groups to take necessary steps in the working of the Act and also to achieve the desired goal. Moreover, even the then existed Planning Commission was given powers to study on the implementation of PESA and report them.

A Draft Model Rules for PESA were prepared by the MoPR and circulated to all the states mentioned under the Fifth Schedule to boost the process of implementation of the central Act.¹³The Ministry of Panchayati Raj (MoPR) introduced a scheme called the Rajiv Gandhi Panchayat Sashaktikaran Abhiyan (RGPSA) in order to strengthen the Gram Sabhas that are mentioned under the PESA areas. The State Institute of Rural Development helps in the coordination of the programmes of providing funds to orient Gram Sabha, creating NGOs etc. on issues relating to PESA. The Indian Law Institute was appointed to analyze and study on certain Central Acts and if they are in compliance with the PESA. The report of their suggestions and amendments were circulated to respective Ministries of the Union Government for consideration.¹⁴The MoPR has also completed a study on the compliance of the State Panchayati Laws with PESA. The Report suggested certain amendments in the state subject laws with respect to PESA. The report also suggested amendments in PESA Act itself.¹⁵Field visits were made in the states mentioned under PESA. Moreover meetings were held with the state government officials in regard to the Panchayati Raj, environment, forest and mining and other PESA provisions to recommend amendments under relevant provisions. The meetings focused on aspects of implementation in the said areas. Committees were also formed alongside to envisage on the administration.

A committee on Harmonization of Central laws with PESA was formed under the chairmanship of the secretary of legal affairs on the recommendation of the Second Administrative Reforms Commission. This committee undertook

follow up actions on the issues relating the harmonization of central laws with PESA. To look into the issues of Minimum Support Price (MSP), value addition and marketing of MSP in states mentioned under the Fifth Schedule, a committee on Minor Forest Produce (MFP) was formed which was headed by T.Haque. The recommendations of the Haque committee were to taken into consideration by the Ministry of Tribal Affairs and also the Environment and forests. The then existed Planning Commission also had a follow up on the operationalization of the recommendations.¹⁶Moreover, detailed comments on central bills and laws such as Land Acquisition, Rehabilitation and Resettlement (LARR) Bill, 2011, Mines and Minerals (Development and Regulation) Bill, 2011 and Indian Forest Act, 1927 were sent to the ministries concerned.

VI. Analysis of the Issues and way forwards

The Government of India, as mentioned earlier conducted various studies and surveys in regard to the implementation of PESA. These surveys have proved and concluded that the tribal communities depend on the state and trust them as the authority that can fulfill their interest and safeguard their rights. But, we see that there is no proper interest by the officials and authorities at appropriate levels to exercise their functions and powers as laid down in PESA. Eventually the state governments fail in their duty to protect, respect and safeguard the rights, cultural identity and interests of the tribal communities respectively. The issue can be broadly classified into two, legal and political. Legal issues are nothing but the conflict of certain provisions of PESA with the provisions of the State Panchayati Raj Laws and also their respective subject laws that were discussed earlier. The political issues are the ignorance and carelessness of the government authorities at appropriate levels of state administration. Therefore, a strict and a well-organized solution must be taken by the

state governments to administer the reach and working of PESA from all aspects.

Though the state governments of the said states under the Fifth Schedule have amended their State Panchayati Raj Acts, it is not in compliance with the Central Act in true spirit. Many of the state's subject laws conflict with PESA. Therefore, the central government must take necessary steps as a 'need of the hour' to implement PESA in all the said ten states in a more proactive and studious manner. It is also the duty of the Ministry of Panchayati Raj to insist the states to analyze the provisions of their state Acts which are in conflict with PESA, and prepare guidelines which includes suggestions from different agencies relating to tribal affairs in that state. The Ministry of Tribal Affairs must also be involved in this. The authorities must take into consideration the customs, culture and tradition of the tribal communities while preparing these guidelines.

A high power committee enjoying control and advisory powers, may be formed by the Ministry of Tribal Affairs to have a check on the implementation of PESA in the ten states. A committee may also be formed in all ten states, respectively, to supervise and examine if the central Act is being implemented in that particular state. This committee shall submit the report of the working of the Act and also its impact on the state to the Governor of that state who may then hand over the report to the committee in the center. These reports must be uploaded on the website, making it available for the public. The central government should insist the state governments to take immediate and necessary steps to amend their state Acts in lines with the central Act. This must be done without any further delay, as this is the first step of implementation. Taking into consideration the gender equality, tribal women must be given one-third opportunity in the Gram Sabhas, Tribal agencies and councils.

VII. Conclusion

India, being the homeland for a various tribal communities, legislation like PESA plays a very vibrant and powerful role in protecting and safeguarding the rights and interests of the tribes. Moreover, the state is duty bound in the protection of rights of the tribes, as they form a minority part of the society. It is evident that the authorities and officials of the state government, have not taken proper initiatives nor have they had any concern towards the interests of the tribal communities. Though the central government has taken certain steps in the implementation of the Act, the irresponsible and casual behavior of the state continues to be in existence. The central government must take strong, strict and stringent actions to implement the Act, it must also rectify the loopholes present in the Act as well. The state governments have to sincerely abide by the guidelines of the central government not only in the working and implementation of the Act in their respective states, but also in the amendment of the state laws that are in conflict with PESA, as mentioned earlier. The state governments must ensure that their political and administrative machineries are efficient enough and have the capacity to have a check on the working and implementation of the Act in the state. As many tribal protection agencies, organizations and NGOs are fighting for the rights of the tribal communities over their lifestyle, resources, etc., it is necessary for the government which the tribal communities trust and depend on, to ensure that PESA reaches the need in the right way, more importantly, without any delay, as this aspect of the society is a 'need of the hour'.

(Endnotes)

- 1 Niranjan E V, 4th year, B.A.LL.B (Hons.), School of Law, CHRIST (Deemed to be University), Bangalore.
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- 3 Constitution of India, 1950.
- 4 <http://www.academia.edu/28141902/Gandhis_Concept_of_Gram_Swaraj_Special_Reference_to

- Panchayati_Raj>(accessed on 13-01-18)
- 5 *Id.*
 - 6 Constitution of India, 1950.
 - 7 Panchayats (Extension to Scheduled Areas) Act, 1996.
 - 8 Government of India, Background of PESA,1996, available at <http://pesadarpan.gov.in/en>
 - 9 <http://www.isca.in/IJSS/Archive/v4/i12/9.ISCA-IRJSS-2015-238.pdf> (accessed on 25-01-2018)
 - 10 <http://www.isca.in/IJSS/Archive/v4/i12/9.ISCA-IRJSS-2015-238.pdf> (accessed on 25-01-2018)
 - 11 <http://www.in.undp.org/content/dam/india/docs/UNDP-Policy-Brief-on-PESA.pdf>, accessed on (25-01-2018)
 - 12 Ministry of Panchayati Raj, *Annual Report*, Government of India, 2011, p.86, 2011, available at http://www.panchayat.gov.in/documents/401/84079/Annual_report_English.pdf (accessed on 27-01-18)
 - 13 Ministry of Panchayati Raj, *Annual Report*, Government of India, 2011, p. 37,38,39, 2011, available at http://www.panchayat.gov.in/documents/401/84079/Annual_report_English.pdf (accessed on 27-01-18)
 - 14 *Id.*
 - 15 *Id.*
 - 16 *Id.*