

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 5

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Beyond PESA: Navigating the Nuances

PRAKHYA BOIRAGI¹

ABSTRACT

...तुमनहें इया जीव जंतु री काय? , चाळ पानुं से काय? , तुमां होपने वादलाम पोंगे बोणावूलु हाय, तुमुहूँ तोरती नाटकाले नाहा रिये, पावुहं खोटो ता नेंय मनाने, तुमनहें "चंद्रमेन" आखूं ता, आखरीप तुमुहूँ चीडे ता नाहा पेन, उडुलु होपने हेअतेहे, तुमुहूँ लेखलें जे हाय...

~ पाव थोवलु जोमीन

Translation:- What have you got to do with these insects, these trees and vegetation? You dream of building a house in the sky.

You are no longer the dear son of Mother Earth. I hope you are not offended, brother, if I call you the 'Moon Man'

No, you are no bird but you dream of flying high, alright. And why not, with such education!...

~ Excerpt from *Land to Rest our Feet* by Jitendra Vasava

The Panchayat (Extension to Schedule Area) Act, 1996 (PESA) was designed to implement the constitutional requirement of self-government in Adivasi regions. It aimed to empower the gram sabha (village council) to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary dispute resolution practices. The goal of strengthening local institutions for sustainable self-government was a long held aspiration, originally championed by Mahatma Gandhi for post-independence India. The realisation of this dream came 45 years later with the 73rd Constitutional Amendment Act 1993, which provided a structural framework for the traditional self-governing institutions, ensuring their effectiveness. This amendment aimed for democratic decentralization, where decision making is downwardly countable through statutory bodies, notably the Panchayat Raj system in India.

PESA was an extension of the principles of Part IX of the Constitution and the 5th Schedule and it intended to stablish a more robust form of decentralisation. It mandated the evolution of certain political, administrative and fiscal powers to local governments elected by Adivasi communities in their jurisdiction . It's objective was to engage Adivasi communities in limited self-governance and empower them to protect their customs and manage community resources. However, the ostensible radical approach of the government where it sought to achieve a bottom up form of governance, ended up vesting eminent domain to

¹ Author is a student at Jindal Global Law School, India.

the state, thereby heading towards centralisation and standardisation in the guise of participatory democracy.

Keywords: *PESA, adivasis, land rights, justice, marginalisation.*

I. INTRODUCTION

PESA has opened doors to political participation in rural India for one of the most marginalized and proletarianized communities in India². Article 243 of the Constitution, which deals with Panchayats, was expanded through the Parliaments enactment to PESA in 1996. This legislation aimed to empower the Gram Sabha extensively in various sectors, focusing on the welfare and upliftment of tribal communities in peninsular India. It sought to grant significant authority to the grassroots level of democracy, endowing Gram Sabha's or Panchayats with broad ranging powers. Following the implementation of this act, states were suggested to amend their respective Panchayat Acts to extend the PESAs provisions to Schedule Areas, with due consideration to the letter and the spirit of the PESA³.

After three decades of the act's implementation, it can be argued that the PESA has not succeeded in accomplishing its goals of promoting self-governance and democratic decentralization. It missed the opportunity to fundamentally shift the balance of powers in Scheduled Areas by granting Adivasi communities control over their resources, which was a critical aspect of empowerment. The reluctance of the state to delegate authority as intended ultimately resulted in the erosion of the sanctity of the village panchayats. The implementation of the PESA has revealed its inherent contradictions, its overlapping nature with other laws, violation of the law by the state itself and the ambiguous legal status of the act⁴.

Since gaining independence, the prevailing attitude towards tribal communities has been rooted in the belief that, due to their perceived backwardness, they should not be entrusted with significant decision-making powers, as it is assumed they may struggle with complex legislation and administration. This approach has essentially treated them as an internal colony⁵, and it is evident in the ongoing underdevelopment of the tribal regions and continued exploitation of their natural resources. PESA, in essence, expedited this process. Following its implementation, Adivasi communities often find themselves culturally deprived and economically exploited,

² Nandini Sundar, *The Schedule Tribes and Their India* (2016, Oxford University Press)

³ Yatindra Singh Sisodia and Tapas K Dalapati, *Decentralised Governance and Implementation of PESA in Tribal Areas*, pg 332-347, in V Srinivasa Rao, *Adivasi Rights and Exclusion*

⁴ Nandini Sundar. "Laws, Policies and Practices in Jharkhand." *Economic and Political Weekly* 40, no. 41 (2005): 4459–62.

⁵ Nandini Sundar, *The Schedule Tribes and Their India* (2016, Oxford University Press)

much like during the colonial era⁶.

It is well evident that the benefits of tangible development projects rarely reach Adivasis, as these projects often controlled by outsiders and dominated by non-tribal interests. State initiatives that involve non-tribal landowners and government officials have been held responsible for the displacement of the Adivasis from their ancestral lands. The responsibility of the underdevelopment of tribal communities can be attributed to the Indian state's failure to challenge the power of the non-tribal ruling oligarchy and its exploitation of resources extracted from Adivasi homelands – which outweighs the funds employed by the Central and State Governments for tribal welfare and development⁷.

The gradual evisceration of Adivasi land rights is a process which is facilitated by the PESA⁸. According to clause 4(i) of the PESA, it is mandatory to consult with the Gram Sabha or Panchayats at the appropriate level before acquiring land for development projects in Scheduled Areas and before resettling or rehabilitating individuals affected by such projects in these areas. The planning and execution of projects in Scheduled Areas must be centrally coordinated at the state level. This clause indirectly permits land acquisition in Scheduled Areas and grants states the authority to determine the process of obtaining 'prior informed consent'⁹. In the case of *Daulat Singh Surana v First Land Acquisition Collector*¹⁰, the Supreme court asserted that the government is the "best judge" in determining whether public purpose is served by the acquisition of a particular land. Consequently, a significant question arises: which segment of the public do these acts serve, and whose interests do they genuinely advance?

The issue of land rights enacted by PESA has become a source of discord between the judicial and executive branches of the state¹¹. This divide is evident in the case of *Samatha v State of Andhra Pradesh*¹², where the state government of Andhra Pradesh contended that they had the authority to grant mining leases in Schedule Areas without seeking consent from Adivasi gram sabhas. Their primary argument was that the state's mining policies and laws superseded Adivasi autonomy guaranteed in the Fifth Schedule. The Supreme Court ruled in favour of the Adivasis, emphasizing that the 5th schedule enjoined governors to make regulations preventing

⁶ Apoorv Kurup, *Tribal Law in India : How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better* [2008] 7 Indigenous Law Journal

⁷ Nandini Sundar, *The Schedule Tribes and Their India* (2016, Oxford University Press)

⁸ Apoorv Kurup, *Tribal Law in India : How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better* [2008] 7 Indigenous Law Journal

⁹ Kamal Nayan . "Enhancing PESA: The Unfinished Agenda." *Economic and Political Weekly* 50, no. 8 (2015)

¹⁰ [2006] 11 SCALE 482.

¹¹ Apoorv Kurup, *Tribal Law in India : How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better* [2008] 7 Indigenous Law Journal

¹² id

the purchase and exploitation of tribal land for mining activities by an entity that was not state owned or a tribal enterprise. Interestingly, this case encouraged several other states to express similar opinions regarding their competency to exploit natural resources in Scheduled Areas by private, non-tribal enterprises¹³.

Laws governing natural resources has often been criticized for their ambiguity, allowing those with influence to exploit it by enforcing their own interpretation. Adivasi's right to utilize forest resources are determined on the classification of forests into one of the three categories: - reserved, protected or village forests. Even though PESA gives tribal communities rights over minor forest produce, these rights are essentially ineffective unless state authorities designate forests near Adivasi areas as village forests instead of reserve forests. This situation effectively maintains the control previously established by colonial-era regulations such as the forest act and reinforces the authority of the forest department¹⁴.

PESA's clause 4(j) stipulates that local communities in should have the right to oversee minor water bodies, a term which hasn't been clearly defined in statute¹⁵. The challenge here is that minor water bodies are classified based on their acreage rather than their territorial jurisdiction and traditional use patterns of tribal communities¹⁶. Some states delegate management roles without considering the actual requirements of the communities or fail to introduce appropriate legislation. In contrast, Madhya Pradesh has put in place detailed guidelines on utilization of minor water bodies in Scheduled Areas and Maharashtra has given management responsibilities to its local government, ensuring that the specific needs of the schedule areas are addressed.

This highlights the juxtaposition of intent versus the execution of PESA. The ground realities depict a narrative of challenges and complexities and the need to address these issues to ensure that Adivasi empowerment is a genuine, tangible reality.

II. PESA PROBE: DISSECTING DISCREPANCIES

So far, it's evident that local governments under PESA have largely been non-functional, with most authority still held by state administration. Scholars point out that tribes governed by the 5th schedule find it challenging to navigate the newly imposed regulations. By pushing the system of local self-government prescribed by non-tribal communities, traditional system of

¹³ id

¹⁴ Section 28 of the Indian Forest Act, 1927 references village forests. While this provision was overlooked during the colonial period, the neglect persisted post-Independence. There appears to be a deliberate effort to maintain the forest bureaucracy's control by contrasting village forests with community forest rights, which are now overseen by the gram sabha.

¹⁵ Apoorv Kurup, *Tribal Law in India : How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better* [2008] 7 *Indigenous Law Journal*

¹⁶ Id

governance which were practiced by the Adivasis were suddenly abolished by the Parliament. This shift forced the Adivasis to grapple with foreign legal concepts. The introduction of this new legislation lacked thorough evaluation of its compatibility with existing laws, resulting in the centralization and standardization of laws¹⁷. Moreover, the Adivasis who attempt to defend their own system of customary practices against the foreign imposed laws often find themselves under the state's radar in the name of Maoist rebellion.

In 2005, there was a commotion in Jharkhand over the Panchayat elections. Adivasi groups, such as Jharkhand Pradesh Parha Raja, Manjhi Parganait Manki Munda opposed having elections in scheduled areas, and their dissent was labelled as Maoist uprising in the state¹⁸. These groups believed that their traditional customary headmen- the Manki mundas, would serve them better in comparison to a hierarchical three tier elected system. Historically, the Adivasis of Jharkhand like the Ho community had their distinct governance structure, referred to as the Manki Munda and parha-parganait system. This system was egalitarian and democratic, resolving conflicts through community discussions and aiming for consensus based resolutions.¹⁹ However, the onset of the British rule, this system was revamped to fit their governance style and agenda. Post-independence, this indigenous system faced a new challenge with the introduction of the Panchayat Raj governance model.

The abrupt shift from traditional institutions to elected representatives and Panchayats, as encouraged by radical thrust of laws like the PESA, has resulted in a very low tribal participation and underutilization of these institutions²⁰. As previously noted, the native communities of Jharkhand prefer the traditional Manki Munda system and consistently grapple with the non-native governance model imposed upon them. For a robust local governance mechanism, it's vital to move beyond viewing indigenous populations as antiquated and acknowledge their right to pursue justice within their own traditional frameworks. It is important to take into account customary laws, post-colonial legislation and the changing economic and political context in which such laws operate so that its implementation is effective, thereby ensuring democratic decentralisation.

¹⁷ Nandini Sundar . “‘Custom’ and ‘Democracy’ in Jharkhand.” Economic and Political Weekly 40, no. 41 (2005): 4430–34.

¹⁸ Jaideep Deogharia / TNN / Nov 26 2010, ‘Maoists Urge Villagers to Keep Away from Polls: Ranchi News - Times of India’ (The Times of India)

¹⁹ Ashok Kumar Sen, Manki- Munda System of West Singhbhum: Historical Overview of Village Governance and Development, in Varsha Bhagat and Sujit Kumar, *India's Scheduled Areas: Untangling Governance, Law and Institutions*, London and New York: Routledge, 2020.

²⁰ Apoorv Kurup, *Tribal Law in India : How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better* [2008] 7 Indigenous Law Journal

III. THE PATHALGADI MOVEMENT: - ADIVASIS RECLAIMING JUSTICE

The Pathalgadi movement, which commenced in March 2017 in Khunti district was a response to the state government's endeavors to provide corporate entities easier access to mineral-rich Adivasi territories, compromising the traditional land right of the Adivasis and undermining the statutory powers of the village council/ gram sabha. The term Pathalgadi translates to "carving a stone" and the stones erected in this movement symbolized territorial markers inscribed with references to constitutional rights ensuring tribal autonomy. The movement escalated when police actions against the Pradhan (village headmen) led villagers to bar entry of the outsiders²¹. Individual leaders played a pivotal role in the movement, familiarised the Adivasis with the legal-constitutional aspects of their struggle and modalities of resistance²². The core of the movement revolved around re-establishing the legal safeguards of Adivasi customary rights and the preservation of their unique cultural identity.

The movement originated in Khunti district of Jharkhand and eventually permeated in neighboring districts of the states. The pathals bore inscriptions referencing the 5th Schedule of the Constitution and PESA, asserting their right to local self-governance through independent gram sabhas. This posed a direct challenge to the state government's authority and overarching centralizing narrative of the central government. These pathals symbolize the inalienable relationship that the Adivasis share with their land, a bond that the government seems to ignore when proposing amendments to the CNTA in 2016, aiming to repurpose tribal land for industrial objectives. The movement thus brought to the fore a critical debate on the coexistence and intersection of traditional and constitutional self-governance systems in the region²³.

The inscriptions on the pathals, referencing authoritative constitutional interpretations, proclaimed that conducting elections for the Parliament, state legislatures, panchayats and municipal corporations within scheduled areas were illegal. It stated that the Government of India have any ownership over land in scheduled areas. The pathals further asserted that the Adivasis could not be governed under Hindu laws as they weren't Hindus. As original inhabitants of India, their land was non transferrable to the non- Adivasis, and the mineral resources of their land was exclusively theirs.

Referred to as "constitutional messianism²⁴" the Pathalgadi movement contested the

²¹ Anupama Roy and Ujjwal Kumar Singh, *Pathalgadi Movement, Self-Governance, and the Question of 'Weak Statehood'*, Springer Link, pp 117-137

²² id

²³ id

²⁴ id

government's interpretation of laws. This movement is a demonstration of the dual nature of the law: performing a simultaneous role of marker of hegemony and means of resistance²⁵. The judiciary's or administration's understanding of the Constitution do not align with the non-judicial reality and the Adivasis engagement with the Constitution. The movement hasn't sparked a fresh wave of Adivasi identity entered around traditional practices, but it also challenges established governance ideas and promotes meaningful empowerment of gram sabha as alternative agency of village governance²⁶.

IV. RECOMMENDATIONS AND CONCLUSION

Thousands of Adivasis today are engaged in mass struggles against displacement by large steel plants, and mines from the Narmada to the Barak valleys and many of them are part of small mass organizations like the Kashtakari Sanghatana in Maharashtra. Adivasis lead multifaceted lives from those involving in anti-displacement struggles who staked their lives for the state to domestic workers from Jharkhand, Chhattisgarh, and Orissa who long to come back to their homes, even as they and their families are dependent on the remittances from metropolitan centers. Most of the laws passed in favor of the Adivasis to redress 'historic injustices' takes concerted people's struggles to get these acts legislated and it usually depends on the political will of the regime in power. These are rarely made available as justiciable rights, despite their constitutional and judicial empowerment. Even with constitutional backing and legal endorsements, these rights are seldom upheld in practice. Hence, to enhance their living conditions, it's imperative to provide Adivasis with a platform to voice their concerns.

To fortify local governance, it is important to constitutional and statutory changes that affirm tribal autonomy in the 5th Schedule areas²⁷. Drawing inspiration from the 6th Schedule, the 5th Schedule could be reformed to let Adivasis manage their affairs in accordance with their shared traditions and customs. However, the government should also give recommendations to the Adivasis to evolve their customary laws in accordance with the changing political and economic context²⁸. Additionally, legislative autonomy should be guaranteed to the local governments by introducing a fourth list, as recommended by Apoorv Kurup. PESA, other laws such as the CNTA, SPTA and Schedule Tribes (Recognition of Forest Rights) Bill should be incorporated

²⁵ Nandini Sundar. "Laws, Policies and Practices in Jharkhand." *Economic and Political Weekly* 40, no. 41 (2005): 4459–62.

²⁶ Ajanta Singh. *Many faces of the Pathalgadi movement in Jharkhand*. *Economic and Political Weekly*. 2001

²⁷ Apoorv Kurup, *Tribal Law in India : How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better* [2008] 7 *Indigenous Law Journal*

²⁸ Debate is required within the communities regarding women's rights to land and other resources, including political power. Outside encroachment is often an excuse for further entrenchment of patriarchal attitudes within the communities. Customary law among Adivasis do not permit ownership of land of daughters or widows.

in this framework.

Another pathway to autonomy for Adivasis could be the establishment of their own state. While resource capture by the tribal elites is a possibility, having their own state will give them a sense of identity and access, couples with initiatives like schooling in Adivasi languages²⁹. Their population being dispersed across render them not strong enough to influence state policy.

PESA exemplifies law that remains disempowered, largely due to refusal of the ruling elite to go by the spirit of the legislation. It is a reflection as the prevailing view of the Adivasis as groups of people who need to be reformed. Autochthony is the only sphere that government practices recognize, thereby constraining the choices of the STs. There is an underlying cultural imperialism that is exerted towards them which the people need to be aware of in order of them to interact with the wider society as equals and not inferiors.

²⁹ Nandini Sundar, *The Schedule Tribes and Their India* (2016, Oxford University Press)