

TRIBAL COMMUNITIES AND THE LAW

This paper explains the relevant law subjects for the tribal communities.

This talk was delivered on 12th November 2013, while inaugurating the workshop on 'AN ALTERNATIVE LL.B. CURRICULUM RELEVANT TO TRIBAL STATES' organised by IBA-CLE chair National Law School of India Unniversity, Baglore and Menon Institute of Legal Advocacy Training Trivandum in association with Guru Ghasidas central University Law School at Bilaspur Chhattisgarh



Tribal women in the village market - picture courtesy Wikipedia

Professor Menon, ladies, and gentlemen,
Jai Johar, Namaste, and a very good evening to all of you.

Don't you think it is rather odd to inaugurate a workshop that had already begun three hours ago.

Well, I owe an explanation.

Today was a working day and I could not leave the court earlier; the other option was to decline the invitation.

I had met Professor Menon, a decade ago, in a workshop on the 'Role of Judicial Training Institutes' organised by the National Judicial Academy, Bhopal. Professor Menon was the Director of the same. I had heard a lot about him and his reputation, but had never met him. In a way, I was trying to judge him.

Professor Menon is a fine communicator and a good administrator; a person with clear understanding of law; he could sum up a session brilliantly; and better than the experts present: he turned out to be better than the reputation that he carries.

I, just could not decline his request to inaugurate the workshop. This is the reason for inaugurating the workshop at this time. However, there was another reason as well for coming here.

The brochure for the workshop indicates that the participants are among the Vice Chancellors, Deans of Law Schools, Senior Officials of Rural Development and Tribal Ministries and I could not deny myself meeting such an elite gathering.

Chhattisgarh is primarily a rural State and 80% of its population is residing in the rural areas. Scheduled Tribes and Scheduled Castes constitute more than 50% of its population. Scheduled Tribes population of the State is 10% population of Scheduled Tribes in our country; they are mostly forest dwellers and forty-four percent area of Chhattisgarh is covered by forest.

Chhattisgarh has natural resources and is a developing State. However, the incidence of poverty is high; more than double of the rest of the country though better than Orissa and Bihar.

And with these factors in background, where else, except Chhattisgarh, can a workshop—to make an assessment of legal needs of the rural communities in general and tribal communities in particular—be held; where else will it be better understood; the residents of which other State will benefit more than the residents of this State by such a workshop.

I am glad that it is being organised here and it gives me immense happiness to inaugurate the same.

During the next three days, you will deal with different aspects as indicated in the programme. It includes how legal aid is to be given; how the para-legal personnel are to be trained; and what kind of new courses should be included in the LLB curriculum. In this connection, I would like to make some

suggestions.

CHAPTER-X AND SCHEDULE FIVE AND SIX OF THE CONSTITUTION

Part X of the Constitution is entitled as 'The Scheduled and Tribal Areas.' It has two articles, namely 244 and 244A. Article 244 is titled as 'Administration of Scheduled Areas and Tribal Areas'. Sub-clause (2) of article 244 {244(2)} provides applicability of sixth schedule to the administration of the tribal areas in the States of Assam, Meghalaya, Mizoram and Tripura. Sub-clause (1) of article 244 {244 (1)} provides applicability of the fifth schedule to the administration and control of the scheduled areas and scheduled tribes in any other State.

The basic feature of the Part X as well as 5th and 6th Schedule of the Constitution is to remove these areas from the purview of the general law of the land and

- To make the Governor sole repository of legislative power (5th Schedule) and to act on the advice of the Tribal Advisory council; or
- To hand over the functioning of these areas to the autonomous districts and regions (6th Schedule) and to be governed by the provisions mentioned therein.

In the words of Shri KM Munshi, this was done as 'the Adivasis or tribes were many in number; they belong to different ethnic, religious, and social groups. ... The Drafting Committee wanted that the Scheduled Tribes in the whole country should be protected from destructive impact of races possessing a higher and aggressive culture and should be encouraged to develop their own autonomous life: at the same time...to take a larger part in the life of the country adopted. They should not be isolated communities or little republics to be perpetuated for ever...object is to maintain them as unconnected communities which might develop into different groups from the rest of the country and that these tribes should be absorbed in the national life of the country.'

However this dream has remained unfulfilled. In order to fulfil it not only understanding of Chapter X and Schedule five and six of the Constitution is required, but it is also necessary to have better understanding of laws in some other areas; they are briefly mentioned in the subsequent paragraphs.

OTHER AREAS OF LAW

(i) Customary law

After independence, Hindu Code Bill was introduced. It has four enactments:

- (i) Hindu Marriage Act, 1955;
- (ii) Hindu Adoptions & Maintenance Act, 1956;
- (iii) Hindu Minority & Guardianship Act, 1956;
- (iv) Hindu Succession Act, 1956.

These enactments are all pervading. Section 2 of these statutes provides their application. Broadly, they apply to all persons, who are domiciled in the territories to which these enactments extend—except Muslims, Christians, Parsis or Jews by religion.

However, sub-section (2) of section 2, excludes its application to the members of the Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government so directs. They are still governed by their customs.

Nevertheless, a customary law may not encourage undesirable social practices. The legislatures have enacted laws to discourage undesirable social practices. For example, Chhattisgarh State has enacted the Chhattisgarh Tonhi Atyachar (Niwaran) Act, 2005. It will be good idea to study their customary laws along with statutes enacted to discourage undesirable social practices.

(ii) PESA

Article 40 of the Constitution is entitled 'Organisation of village panchayats' and it is in Part IV of the Constitution, namely in the Chapter of 'Directive

Principles of State Policy'. It requires the State to organise village panchayats and endow them with powers and authority to enable them to function as units of self-government.

Part IX of the Constitution is entitled 'The Panchayats' and was added by the Constitution (Seventy-third Amendment) Act, 1992 to give effect to article 40 of the Constitution.

Article 243M is entitled 'Part not to apply to certain areas'. It excludes applicability of this part to the scheduled areas and tribal areas mentioned in article 244 of the Constitution. However, sub-clause (4) of Article 243M provides that the Parliament may, by law, extend the provisions of part IX to the scheduled areas and tribal areas with such exceptions and modifications as may be specified.

In pursuance of the power given by the Parliament under article 243M (4) of the Constitution, 'The Panchayats (Extension to the Scheduled Areas) Act, 1996' (PESA) has been enacted extending the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas with some exceptions and modifications as provided under section 4 of the PESA.

In pursuance of the PESA, the State may make a law for the scheduled areas. However, the State cannot make a law inconsistent with the features mentioned in section 4 of the PESA. Among others, section 4 envisages the following features:

- (i) The customary law, social and religious practices and traditional management practices of community resources;
- (ii) Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, community resources and the customary mode of dispute resolution;
- (iii) Before any plan, programme and project for social and economic development is taken up for implementation by the panchayat at the village

level it will require Gram Sabha approval;

(iv) Gram Sabha will also identify or select the persons as beneficiaries under the poverty alleviation and other programmes;

(v) Gram Sabhas or the Panchayats shall be consulted before making acquisition of land in the schedule areas for development projects and before resettling or rehabilitating persons affected by such project in the schedule areas;

(vi) Panchayats will be responsible for planning and management of minor water bodies in the scheduled areas;

(vii) The recommendations of the Gram Sabha or the panchayat will be mandatory before grant of prospecting licence or mining lease for minor minerals in the scheduled areas;

(viii) The Panchayats or the Gram Sabhas are specifically endowed with the ownership of minor forest produce and among others with the power to,

- Enforce prohibition or to regulate or restrict sale and consumption of any intoxicant;
- Prevent alienation of land and to take appropriate action to restore land unlawfully alienated;
- Manage village markets;
- Control over money lending to the scheduled tribes; and
- Control over institutions and functionaries in all social sectors, local plans and resources including tribal sub-plans.

It will be good idea to study the laws enacted in pursuance of PESA and see whether they comply with section 4 or not. It is important that section 4 of PESA as well as the laws consistent with it, are properly implemented.

(iii) Biological Diversity Act

The basic source of livelihood of ST is forest produce and it is equally important that not only biological diversity be conserved but the benefits arising from the same are equitably shared.

We were signatory to the Convention held by the United Nations Convention on Biological Diversity at Rio de Janeiro in 1992. In order to give effect to the said Convention the Biological Diversity Act, 2002 was enacted. It provides for conservation of Biological Diversity; sustainable use of its components; and equitable sharing of the benefits arising out of the use of biological resources and knowledge.

Its impact is yet to be felt in our country. Its enforcement in full extent will help the Adivasis.

(iv) Forest Rights Act

The forest dwelling Scheduled Tribes and other traditional forest dwellers are integral to the very survival and sustainability of the forest ecosystem. A great injustice has been done by not recognising their rights over their ancestral forest lands and their habitats either during the colonial period or in independent India. It was in order to undo the injustice that the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (No.2 of 2007) or simply Forest Right Acts was enacted.

The Forest Rights Act envisages,

- Recognising, recording, and vesting the forest rights and occupation in forest land with the forest dwelling Scheduled Tribes and other traditional forest dwellers;
- Providing a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land; and
- Strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers.

However, even after six years of its enforcement, nothing has changed. A report in the 15th November, 2013 issue of 'Down to Earth' magazine states that:

'lives of the forest dwellers have not changed much. Not one state has initiated concrete steps to officially register the title holders in the state land records. Without this they remain what they used to be—officially non-existent.'

Legal aid programmes should be undertaken to help them to claim their rights.

(v) Conflict with Environmentalists and Foresters

The forest dwellers are opposed by environmentalists and forest department officials. They think that forest dwellers are to be evicted as they are not only destroying the natural habitat of the animals and environment but are threat to wild life as well.

I don't wish to go into this debate or take up a side but this is also required to be harmonised; settled.

I wish this workshop all success and hope that its deliberations will not only evolve an alternative LL.B. Curriculum relevant to rural and tribal communities but it will also fulfil the dreams of our constitution framers.

Jai hind