

## Tribal Rights in Kerala an Evaluation

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### ABSTRACT

Tribal rights especially the land rights of tribal – debated area- Land is the basis of social, economic, cultural, religious identity of Scheduled Tribes- various forest legislations marginalized tribes- land alienation found to be the most important problem among tribal in Kerala- enactments in 1975 and 1999 were enacted to meet the problem of land rights- in the implementation level they failed miserably- the new hope has come from the central government with the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – this may in near future realize the basic rights of tribal.

### INTRODUCTION

Tribe is defined as a collection of families bearing a common name, speaking a common dialect<sup>i</sup>, occupying or professing to occupy a common territory<sup>ii</sup> and is usually endogamous<sup>iii</sup> through originality. According to another definition a tribe is that human group whose members have common interest<sup>iv</sup>, territory, language, social law and economic occupation<sup>v</sup>. the constitution of India defines Scheduled Tribe<sup>vi</sup> as “ such tribes or tribal communities or parts or groups within such tribes or tribal communities as are deemed under Art.342 to be scheduled tribes for the purpose of this constitution. Apart from this tribes are possessing protection awareness, having distinct political organization who are interested in the welfare of tribal and oriented towards its protection, have common culture, kinship is given due importance and uphold egalitarian value structure. Thus these characteristics makes tribal distinct from plainsman.

In India scheduled tribes constitute 8.2% of the total population as per the 2001 census. They occupy 15% of the countries area which are located in various geo climatic conditions. According to the 2011 census the total scheduled tribal population of the country is 5,24,09,823. That is the population of the scheduled tribes has shown an increase from 8.2% in 2001 to 8.6% in 2011.

The states of North East have very large tribal population. While significant tribal population are also residing in central states of Madhya Pradesh, Chhattisgarh, Jharkhand and Orissa. The lowest population of the tribal in the state population is found in the states of Kerala and Tamil Nadu and North Eastern States Uttarakhand, Uttar Pradesh, New Delhi and Bihar.

Land remains as the basis of social, economic, cultural, religious identity of Scheduled Tribes. Their lives are closely interlinked with the forest for food, fuel, medicine, fodder and livelihood. According to the forest survey of India, 2011 the total forest cover in the country is 692,027 km, which comprises of 21.05% of total geographical area of the country. Almost 60% of the forest cover is found in tribal areas. However through the legislation enacted in the name of protection and upgradation of forest cover classified forests as reserved forest<sup>vii</sup> and protected forest<sup>viii</sup> as well as wild life sanctuaries<sup>ix</sup> and National Parks. This resulted in marginalization of tribal communities from their original abode. Now they are considered as encroachers in their homeland. Much of the forest lands in above mentioned North- Eastern states are divested for mining purpose resulting in environmental degradation, loss of livelihood and displacement of tribal communities. Dams have been another source of displacement for tribes.

There are several tribal populated and tribal dominant areas across the country which are not scheduled areas<sup>x</sup> and therefore are not covered by the protection<sup>xi</sup> under the fifth schedule of the constitution which provides for provisions as to the administration and control of scheduled areas. These include tribal living in West Bengal, Bihar, UP, Uttarakhand, Goa, Tamil Nadu, Karnataka and Kerala. A large population of tribal in these southern areas belongs to the Nilgiri Hills Region, covering three states of Kerala, Karnataka, Tamil Nadu. A survey by the British in 1847 revealed that 78% people in Nilgiri region were tribal who were involved in traditional jobs. These areas were never scheduled. Tribal in these region face serious problem of landlessness, land alienation, mal nutrition, bonded labor, restriction for national parks and sanctuaries as well as displacement due to hydroelectric projects<sup>xiii</sup>.

Among the tribal in Kerala land alienation<sup>xiii</sup> is identified as the serious problem. The innocence, illiteracy and introvert attitude of the tribal people are exploited by the plainsman. The tribal are exploited by land lords, money launders, forest contractors and revenue officers. Their original lands reached the hands of non -tribal through various illicit ways such as narcotics, liquor, paying paltry sums of money at exorbitant rate of interest and sometimes deceptive and aggressive means such as use of force and threat also were used by them.

### **Problems of Tribes in Kerala**

Scheduled tribes in Kerala are ethnic minority. They constitute only 1.1% of the total population. The highest concentration of scheduled tribes in Kerala is found in Wayanad District (37.36%) followed by Idukki (14%) and Palakkad (10.8%). Tribal in Kerala are not only geographically concentrated but are overwhelmingly rural<sup>xiv</sup>. Extreme levels of poverty, deprivation, vulnerability, marginalization, exchange between tribal communities and other influence by middlemen, low level of access to entitlements, practically no participation in developmental matters, no autonomy in decision making, low level of literacy, poor access to medical and health care facilities, quick deterioration of additional knowledge system and cultural attainments, rapid alienation of land, involvement of tribal in criminal activities like illicit distillation, cultivation of ganga plants, stealing of forest wealth ,high level of exploitation of tribal woman by outsiders, weak delivery system of public services, implementation of *ad hoc* and stereo typed development programs in the absence of open planning, very weak monitoring system etc. are problems faced by the tribal in Kerala.

## **Land and Tribal in Kerala**

Alienation of land is a serious problem faced by the scheduled tribes<sup>xv</sup>. A large population of ST are the collectors of forest produce, hunter gathers, shifting cultivators, pastoral and nomadic herds ie. Most of them depend on agriculture and allied activities. They depend on traditional ways for their livelihood. Hence land is the only tangible asset of the tribal community. Their emotional bonding with land is also an important factor attached to it.

Studies revealed that the extend of land which has been under traditional occupation of scheduled tribes steadily on the decrease due to alienation, lease, mortgage and due to unauthorized occupation of tribal lands by non -tribal. Most of the lands are grabbed from them by means of trivial sums of money offered to them. Understanding the gravity of the problem, legislation was felt necessary. Though the evaluation committee of Kerala Legislative assembly had recommended the legislation to curb this menace various Governments which came one after the other slept over the report and none of them was bold enough to restore the lands alienated from the poor tribes.

### **Legislation on Tribal Land**

The state of Kerala enacted the Kerala Scheduled Tribes (Restriction on Transfer of land and Restoration of Alienated lands) Act, 1975, with the object of providing restriction on transfer of land members of scheduled tribes in the state of Kerala and for Restoration of lands alienated by such members and for matters connected therewith. This Act received the assent of the President of India and was included in the 9<sup>th</sup> schedule as item 150 by the 40<sup>th</sup> constitutional amendment Act. However only on 24<sup>th</sup> January 1986 a notification was issued bringing the said act in force with retrospective effect from 1<sup>st</sup> January 1982.

The Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restriction of Alienated Land) Rules, 1986 were framed for the effective implementation of the Act of 1975. The 1975 Act was enacted by the state of Kerala terms of Entry 6 of List III of the seventh schedule the constitution of the India.

The interpretation clause defines important terms relating to land. The terms specified there in. Immovable property<sup>xvi</sup> under the Act is defined to include standing crops and trees but does not include growing grass. Scheduled tribes<sup>xvii</sup> has been defined to mean any of the scheduled tribes relating to the states as specified in the constitution scheduled tribes order 1950.

The word transfer<sup>xviii</sup> is defined as ‘transfer in relation to immovable property means an act by which immovable property is conveyed to any of the documentary or oral transaction whether by way of mortgage with or without possession lease, sale, gift or exchange or in any other manner not being a testamentary dispossession and includes a charge, vilapanayam<sup>xix</sup>, unduruthi<sup>xx</sup>, usufruct relating to immovable property mortgage pledge hypothecation of crops or standing trees of payment of consideration or otherwise voluntary surrender and abandonment’.

A non obstante clause in the Act imposes restriction on the transfer of property after the commencement of the Act<sup>xxi</sup>. Any transfer effected the by the member of the scheduled tribe of immovable property possessed, enjoyed or owned by him to a person other than the member of the scheduled tribe without the previous consent in writing of the competent

authority would be invalid. The competent authority is the district collector of the district in which the land is situated or any other officer appointed by the government to be the competent authority for the purpose of this Act for an area in which land is situated. The Act invalidated certain transfers<sup>xxii</sup> made by tribal to persons other than tribal after the first January 1960 and before the commencement of this Act.

Under section 6<sup>xxiii</sup> of the Act members of the scheduled tribe became able to regain possession of properties transferred and which stood invalid by operation of section 4 and section 5 of the Act. It provided for application to be made by the tribal for restriction of alienated lands to the revenue divisional officer within the time prescribed therefor. The RDO was to make enquiries and after being satisfied with the application as to direct restoration of possession to the applicant.

Section 11 of the Act provides for liability to pay amount which is equal to the aggregate of the actual amount of the consideration received by such member at the time of transfer and the amount determined by a competent authority for its improvements if any, after the transfer and before the restoration to the person from possession or enjoyment as the case may be was restored in accordance with the rules made under this Act. No amount is payable if the transfer is made after the commencement of the Act of 1975. Section 12 provides for advancement of loan by the government for the payment of the amount on such terms and conditions as has been laid down under subsections(2) and (3). The Act also prescribed offences and provided for penalties etc. Section 22 of the Act covers rule making power for successful implementation of the Act.

### **Implementation the 1975 Act**

Despite the 1975 Act having been brought into force and rules having been formed for effective implementation by the state and the revenue officers took no steps for its effective implementation. The Act and the Rules prescribed several stages for its contents to be in practice. The procedure laid down consists of filing applications for restoration, calling for objections, determination of the issues and filing of appeals. Once that stage is reached, liability of the applicant to pay compensation to the land holder under section 9 of the Act.

The Act contemplated raising a loan from the Government by the members of the ST subject to the conditions laid down in the rules. The procedure for grant of loan and subsequent payment of compensation to the owner of the land was a precondition for actual implementation of the 1975 Act. Thus when loans are raised and amount of compensation paid to the transferees, the vested right of getting back possession of the land get accrued and not prior to it.

The Government on realization that the 1975 Act would really serve the purpose ameliorating the problems of scheduled tribes, but may lead to law and order situation in various parts of the state repealed the Act. A new Act was passed, ie. The Kerala Restriction on Transfers by and Restoration of Lands to Scheduled Tribes Act, 1999.

### **The 1999 Act**

The 1999 Act was published in Kerala Gazette extraordinary on 20<sup>th</sup> April 1999. It was given retrospective effect from 24<sup>th</sup> January 1986. The term land<sup>xxiv</sup> is defined as any agricultural land. Certain transfers such as any transfer of land possessed, enjoyed or owned by a member of a ST to a person other than a member of ST effected on or after the 1<sup>st</sup> day

of January, 1960, and before the commencement of this Act shall be deemed to be invalid. The proviso adduced to this section makes it clear that if the extent of land transferred is less than two hectares such transfers are not invalid. Section 5(2) also validates the transfer if the transferred property is used for agriculture purpose, provided the extent of land is up to two hectares. Power is vested on the RDO to demarcate the land in the prescribed manner.

In order to remedy the social problems which will be created by the ousting of plainsman section 6 of the Act provided for allotment of land from Government? It says that the criteria specified under the earlier legislation has been complied by tribal but has not obtained the restoration of possession the transferee ie. the member of the ST is entitled to restoration of possession of equal extent of land which has been alienated from him. This land is provided to him by Government. This section is coupled with a proviso that the eligibility for restoration of rights is less than 40 Ares, the government shall provide him the rest of the land required to make it to the total extent of 40 Ares. The following sections<sup>xxv</sup> deals with the amount of compensation. This amount will be equal to the actual amount of consideration paid by such member at the time of transfer of land. But such an amount cannot be paid if the transfer is affected after the commencement of the Act. The amount fixed by the competent authority is final and no court can entertain the question of adequacy of amount.

Section 10 provides for assignment of land. This provides that government shall assign land to the landless families of the scheduled tribes in state an extent not exceeding 40 ares of land in the district in which they reside within a period of two years from the date of publication of this Act. This Act also provides for the Scheduled Tribe rehabilitation and welfare fund. The provision of grant under the Act is need not be repaid. This Act provides for the provision of basic amenity of 40 ares of land even though the Scheduled Tribe has transferred a less extent of land.

In exercise of the powers conferred by section 7 of the Kerala Land Assignment Act, 1960 the government has enacted rules for the assignment of government lands to scheduled tribes and it is called The Kerala Assignment of Government Land to Scheduled Tribe Rules, 2001. This assignment is made for the purpose of house sites, personal cultivation, and beneficial enjoyment. The assigning authority is the Tahsildar or any other officer empowered by government for this purpose. The extent of land to be assigned is determined by the government from time to time taking into account availability of land in a particular area, nature of land, number of members in the community and other similar factors. Even though there are various provisions which provides for the basic land and related rights of scheduled Tribes in reality they are facing much difficulty to enforce the same. Various agitations such as Chengara, Muthanga, Aralamfarm etc. are some examples of the same.

### **The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006**

In 2006 Central Government has taken a bold step in enacting a new piece of legislation recognizing the historical injustice done to the Scheduled Tribes. They are always referred as forest dwellers but their rights were rarely recognized by the authorities and in the absence of real ownership of the land, the already marginalized local dwellers suffered.

The reason for this latter phenomenon is India's forest laws. India's forests are governed by two main laws, the Indian Forest Act, 1927 and the Wild Life (Protection) Act, 1972. The

former empowers the government to declare any area to be a reserved forest, protected forest or village forest. The latter allows any area to be constituted as a "protected area", namely a national park, wildlife sanctuary, tiger reserve or community conservation area. The claims of people who resided this area was settled by the Forest Settlement Officer. But in most of the cases due to absence of evidence their rights were negated and for centuries they were suffering. Thus the Parliament enacted The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Under this Act many rights have been granted to them. These can be categorised to title rights<sup>xxvi</sup>, use rights<sup>xxvii</sup>, management rights<sup>xxviii</sup> and relief and development rights<sup>xxix</sup>.

Most important among the various rights mentioned under the section is land rights. This is given to them under individual or common occupation for habitation or self-cultivation<sup>xxx</sup>. But this Act also is not implemented in Kerala and most of the claims under the Act is still pending. The amendment Rules, 2012 bring more clarity to provisions relating to recognition of forest dwellers' rights to conserve and manage community forest resources and give more powers to Gram Sabha to ensure sustainable management.

Under these rules the District Level Committee shall ensure that all Particularly Vulnerable Tribal Groups receive habitat rights, in consultation with their concerned traditional institutions and their claims for habitat rights are filed before the concerned Gram Sabhas, wherever necessary by recognizing floating nature of their Gram Sabhas. The District Level Committee shall facilitate the filling of claims by pastoralist, transhumant and nomadic communities as described in clause (d) of sub-section (1) of section 3 before the concerned Gram Sabha.

The rules also provides for the post claim support to holders of forest rights. It includes to ensure all government schemes such as land improvement, land productivity, basic amenities and other livelihood measures relevant to upliftment of forest dwelling Scheduled Tribes and other Traditional Forest Dwellers whose rights have been recognized and vested under the Forest Rights Act are provided.

### **Conclusion**

Various legislations enacted for the protection, conservation and upliftment of the tribal community remains in dark without proper implementation. They are a marginalised section of the society who even after the 71<sup>st</sup> independence anniversary of Indian republic remains out stream in the sayings of the main stream society. The only way possible is the strict implementation of the legislation. It is almost true that due to lack of political will, their rights have been disregarded strategically. Lack of initiative from concerned state government is quite evident. Central government has shown enthusiasm to take appropriate action to eliminate the loopholes in the central legislation. This must be 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 and protect the rights of the tribal.

### **End Notes**

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<sup>i</sup> Common language makes the unity of tribes deeper

<sup>ii</sup> Tribal people live within a definite topography. It is a common place for all the members of a particular tribe occupying that region. This remains the base of their identity.

<sup>iii</sup> Generally tribal's do not marry outside their group. But due to the effects of changes inter tribe marriages happens rarely.

<sup>iv</sup> Unity of interest is another important feature of the tribal populations.

<sup>v</sup> Cambridge Advanced Learner's Dictionary and Thesaurus, Cambridge University Press

<sup>vi</sup> The Constitution of India, Art. 366(25).

<sup>vii</sup> The Indian Forest Act, 1927, s. 3. Also see ss.4-27

<sup>viii</sup> *Ibid*, ss.29-33

<sup>ix</sup> Wildlife (Protection ) Act, 1972, ss.18-34

<sup>x</sup> *Supra note 6*

<sup>xi</sup> Article 244 of the Constitution of India read with two Schedules – the Fifth and Sixth Schedules – to the Constitution of India provide special arrangements for areas inhabited by Scheduled Tribes. A large number of areas predominantly inhabited by Adivasis had been declared to be Excluded/Partially Excluded Areas during the British period. These areas came under the purview of the Scheduled Districts Act of 1874 and the Government of India (Excluded and Partially Excluded Areas) Order 1936. Following Independence, these areas were brought under the Fifth and Sixth Schedules respectively, and referred to as Scheduled Areas. Some other predominantly Adivasi areas were declared to be Scheduled Areas by the President subsequently.

<sup>xii</sup> *Narmada Bachao Andolan V. Union of India and others*, AIR 2000 S.C. 3751.

<sup>xiii</sup> The land alienation is mainly due to the immigration of plainsmen into tribal areas. This process occurred in two phases. Beginning phase was during the 18<sup>th</sup> and 19<sup>th</sup> century. This was under the local rulers during that time. The reasons were merely political. The second one was during the 1940's. This was the invasion of plainsmen from the erstwhile Travancore- Cochin Region. This inflow was witnessed by Malabar region.

<sup>xiv</sup> Evaluation Committee Report, Kerala Legislative Assembly, 1961. They have expressed the concern over the social malady faced by tribes in Kerala and recommended a special legislation with protective shield and preventive sword to protect and safeguard their rights.

<sup>xv</sup> Hereinafter referred to as ST.

<sup>xvi</sup> The Kerala Scheduled Tribes(Restriction on Transfer of land and Restoration of Alienated lands) Act, 1975, s. 2 (b)

<sup>xvii</sup> *Id.* at s. 2(e)

<sup>xviii</sup> *Id.* at s. 2(g)

<sup>xix</sup> Vilapanayam means hypothecation of crops on payment of consideration or otherwise.

<sup>xx</sup> Unduruthi means an assignment of the right to collect the usufructs available or anticipated to be available to any land during specified term for a specified price.

<sup>xxi</sup> *Supra n.* 16 at s.4

<sup>xxii</sup> *Id.* at s.5. It reads as notwithstanding anything to the contrary contained in other law for the time being in force or in any contract or custom usage or in any judgement decree or order of the court ,any transfer of immovable property, possessed or enjoyed or owned by a member of the scheduled tribe to a person other than the member of the scheduled tribe effected on or after 1<sup>st</sup> January 1960 mad before the commencement of this Act shall be deemed invalid.

<sup>xxiii</sup> Section 6 reads as under:

Reconveyance of property: (1) where by reasons of a transfer of immovable property which is invalidated u/s4 and 5 by a member of SC and ST has ceased to be in possession or enjoyment thereof, he shall be entitled to the restoration of possession or enjoyment as the case may be of such property.

(2) Any person entitled to be restored to the possession or enjoyment of any immovable property under subsection (1) or any other person on behalf of him may make an application either orally or in writing to the RDO within a period of one year from the date of commencement of this Act or of such further period as may be specified by Government by notification in the Gazette.

(a ) for restoration of possession or enjoyment as the case may be of such property if such transfer had been made before the commencement of this Act.

(b) for restoration of possession or enjoyment as the case may be of such property and for prosecution of the person who has procured such transfer if such transfer was made on or after the date of commencement of this Act.

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3) On receipt of application under subsection (2 ) RDO shall make or cause to be made necessary enquiries in respect of such application and if he is satisfied that the applicant or the person on whose behalf the application has been made is entitled to restoration of possession or enjoyment of such property, mentioned in the application, he shall by order direct the person in possession or enjoyment of such property to deliver possession thereof to the applicant or to the person on whose behalf the application has been made as the case may be to allow him to enjoy such property within a period of 30 days from the date of service of the order and also specify the amount payable under section 11 of the Act.

<sup>xxiv</sup> The Kerala Restriction on Transfers by and Restoration of Lands to Scheduled Tribes Act, 1999, s. 2(b).

<sup>xxv</sup> Section 8 of the Act

<sup>xxvi</sup> Title rights - i.e. ownership - to land that is being farmed by tribals or forest dwellers as on 13 December 2005, subject to a maximum of 4 hectares; ownership is only for land that is actually being cultivated by the concerned family as on that date, meaning that no new lands are granted

<sup>xxvii</sup> Use rights - to minor forest produce (also including ownership), to grazing areas, to pastoralist routes, etc

<sup>xxviii</sup> Forest management rights - to protect forests and wildlife

<sup>xxix</sup> Relief and development rights - to rehabilitation in case of illegal eviction or forced displacement;<sup>[15]</sup> and to basic amenities, subject to restrictions for forest protection

<sup>xxx</sup> S. 3(1)(a) of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

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