REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE HURISDICTION

CIVIL APPEAL NOS. 484-491 OF 2006

UNION OF INDIA, etc. ….APPELLANT

Versus

RAKE SH KUMAR AND ORS.,etc ….RESPONDENTS

WITH

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 21123 OF 2005)

Civil Appeal Nos. __ of 2010 (Arising out of SLP (C) No. 21124-25 OF 2005)

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 21129 OF 2005)

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 21131 OF 2005)

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 23887 OF 2005)

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 2535 OF 2006)

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 3274 OF 2006)

Civil Appeal No. __ of 2010 (Arising out of SLP (C) No. 6325 OF 2008)

JUDGMENT

K.G. BALAKRISHNAN, CJI

1. Leave granted.

2. For a considerable period during the British Rule, special laws were made applicable to certain 'backward areas' in India that were predominantly occupied by tribal people. These backward regions covered an area of more than 1,20,000 square miles. However, the characteristics of these areas and their populations varied widely. By Act XIV of 1874, Santhal Parganas and Chutia Nagpur Division (now known as Chhotanagpur Division) were created and in these 'Scheduled districts', tribal communities were accorded a certain degree of autonomy to regulate their affairs on the basis of their own conventions and traditions. Many of these communities chose their leaders through an informal consensus among other customary methods for selection. When the Constitution was enacted, these areas were designated as 'Scheduled Areas'. Article 244 of the Constitution explicitly states that the provisions of the Fifth Schedule shall apply in respect of the administration and control of the Scheduled Areas in any State other than the States of Assam, Meghalaya, Tripura and Mizoram. The provisions of the Sixth Schedule guide the administration of tribal areas in those states.

3. Paragraph (4) of the Fifth Schedule states that there shall be in each State having a "Schedule Area", a 'Tribes Advisory Council' consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the

Legislative Assembly of the State. It was the duty of the 'Tribes Advisory Council' to advise on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State. Paragraph (5) of the Fifth Schedule states that the Governor of the State may by public notification direct that any particular Act of Parliament or the Legislature of the State shall not apply to a Scheduled Area or would apply subject to such exceptions and modifications as he may specify. The Governor of the State may also make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. The Governor of the State has also been given the power to repeal or amend any existing Act of Parliament or of the Legislature of the State which is for the time being applicable to the area in question.

4. Hence, it is evident that the framers' intent behind including the Fifth Schedule was that of a separate administrative scheme for Scheduled Areas in order to address the special needs of tribal communities. During the debates on the floor of the Constituent Assembly, some members had criticized such differential treatment for Scheduled Tribes. In response to such criticisms, Shri K.M. Munshi had said that 'Adivasis' or tribes were many in number belonging to different "ethnic, religious and social groups" and he explained the object of the Drafting Committee's proposals in the following words:

> "We want that the Scheduled Tribes in the whole country should be protected from the destructive impact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time we want them 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 little 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."

5. In exercise of the powers conferred by paragraph 6(i) of the Fifth Schedule to the Constitution of India, the President of India made an Order known as The Scheduled Area (Part A States) Order, 1950. With respect to the then combined State of Bihar, this Order was applied to Ranchi district, Singhbhum district (excluding Dalbhum sub-division) and Santhal Pargana district. The following table shows the chronology of the governmental measures which have identified Scheduled Areas in the territories that lie in the present-day State of Jharkhand:

1874	Scheduled Districts Act, 1874 (Act XIV of 1874) passed during the colonial period	Declared the Santhal Parganas and the Chutia Nagpur Division (now known as 'Chhotanagpur Division') as 'scheduled districts' in the erstwhile province of Bengal. These areas now come within the territory of the State of Jharkhand.
1950	After independence, The President of India had made an order known as The Scheduled Area (Part A States) Order, 1950 in exercise of the powers conferred by Paragraph 6(ii) of the Fifth Schedule to the Constitution of India.	In pursuance of this Order, Ranchi district, Singhbhum district (excluding Dalbhum sub-division), Santhal Pargana district (excluding Godda and Deoghar sub-divisions) and Latehar sub-division of Palamau district were declared to be Scheduled areas.

1977	The 1950 Order was rescinded and replaced by the Scheduled Areas (States of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977	By the said Order, Ranchi district, Singhbhum district, Latehar sub-division and Bhandaria block of Garhwa sub-division in Palamau district, Dumka; Pakur; Rajmahal and Jamatra sub-divisions and Sundarpahari and Boarijor blocks of Godda sub-divisions in Santhal Pargana district were shown as scheduled areas of the then combined State of Bihar, all of which now fall within the territory of Jharkhand.
2003	Subsequent to the formation of the States of Jharkhand and Chhattisgarh, The Scheduled Areas (States of Chhattisgarh, Jharkhand and Madhya Pradesh) Order, 2003 was passed to replace the 1977 order	Under the 2003 order, the following areas in the State of Jharkhand have been declared as Scheduled Areas: 1. Burhmu, Mandar, Chanho, Bero, Lapung, Namkom, Kanke, Ormanjhi, Angara, Silli, Sonahatu, Tamar, Bundu, Arki, Khunti, Murhu, Karra, Torpa and Raniya blocks in Ranchi District. 2. Kisko, Kuru, Lohardaga, Bhadra and Senha blocks in Lohardaga district 3. Bishanpur, Ghaghra, Chainpur, Dumri, Raidih, Gumla, Sisai, Kagdara, Basiya and Palkot blocks in Gumla District 4. Simdega, Kolebira, Bano, Jaldega, Thethetangar, Kurdeng and Bolba blocks within Simdega District. 5. Barwadih, Manika, Balumath, Chandwa, Latehar, Garu and Mahuadaran blocks within Latehar District 6. Bhandariya block within Garhwa District 7. Bandgaon, Chakradharpur, Sonuwa, Goyalkera, Mahoharpur, Noamundi, Jagannathpur, Manghgaon, Kumardungi, Manjhari, Tatnagar, Jhinkpani, Tonto, Khutpani and Chaibasa blocks within the West Singhbum District 8. Govindpur (Rajnagar), Adityapur

		(Ghamariya), Seraikela, Kharsaan, Kuchai, Chandil, Ichagarh and Nimdih blocks within Seraikella Kharsawan District 9. Golmuri-Jugslia, Patmada, Potka, Dumariya, Musabani, Ghatsila, Dhalbhumgarh, Chakuliya and Bahragora blocks within East Singhbhum District 10. Sariyahat, Jarmundi, Jama, Ramagarh, Gopikandar, Kathikund, Dumka, Sikripara, Raneshwar and Masaliya blocks within Dumka District. 11. Kundhit, Nala, Jamtara and Narayanpur blocks within Jamtara District 12. Sahebganj, Boriyo, Taljhari, Rajmahal, Barharwa, Pathna and Barhet blocks within Sahebganj District. 13. Littipara, Amrapara, Hiranpur, Pakur, Maheshpur and Pakuriya blocks within Pakur District 14. Borijore and Sundarpahari blocks within Godda District.
2007	Subsequent to the impugned judgment of the Jharkhand High Court, the Government of Jharkhand passed the Scheduled Areas (State of Jharkhand) Order, 2007 and the same is presently in force.	

Hence, Tribes Advisory Councils had been constituted for these Scheduled areas since the Panchayati Raj System had not been extended to them.

6. By way of the Constitution (Seventy-Third Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243B of Part IX of the Constitution mandated that there shall be Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part. Article 243-C provides that the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats. Detailed provisions were made under Article 243-D enabling the reservation of seats for Scheduled Castes, Scheduled Tribes, women and other backward classes. Article 243-M stated that nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

7. Two years after the 73rd Amendment Act, the Union Government had appointed a Committee of Members of Parliament (MPs) and experts under the Chairmanship of Sh. Dilip Singh Bhuria to undertake a detailed study and make recommendations about whether the Panchayati raj system should be extended to the Schedules Areas, as contemplated by Article 243-M(4)(b) of the Constitution. The Committee submitted its report on 17.1.1995 and favoured democratic decentralization in scheduled areas. It will be instructive to refer to the following observations in the Bhuria Committee Report (at Para. 10):-

> "Tribal life and economy, in the not too distant past, bore a harmonious relationship with nature and its

endowment. It was an example of sustainable development. But with the influx of outside population, it suffered grievous blows. The colonial system was established on the basis of expropriation of the natural and economic resources of tribal and other areas in the country. Although, theoretically, there has been difference in the approach after the departure of the colonial masters from Tribal areas, in practice, the principles enunciated in Article 39 and other Directive Principles of State Policy have to be followed more rigorously. On account of their simplicity arid ignorance, over the decades the tribals have been dispossessed of their natural and economic resources like land, forest, water, air, etc.. The dispossession has not been confined to that through private parties. For the purpose of promotion of general economic development projects, the State also has been depriving them of the basis means of livelihood. These processes have been operative since a long time causing human misery and socio-economic damage. No reliable picture is yet available, for instance, we are not seized on the total quantum of land alienated from the tribals both on private and State account nor the number of families, clans or Tribes involved. This has compelled some to perceive development as an agent of destruction. But since planned development has been an article of faith with us, it has to be ensured that implementation of the policies and programmes drawn up in tribal interest are implemented in tribal interest. Since, by and large, the politico-bureaucratic apparatus has failed in its endeavor, powers should be developed on the people so that they can formulate programmed which suit them and implement them for their own benefits."

It was further observed, at Para. 30:

"The group was further of the view that notwithstanding the fact that the areas under consideration i.e. Scheduled Areas are expected to have majority of tribal population, it is necessary to stipulate that the Panchayats therein will have a

> majority of Scheduled Tribes members. The reason is that the Scheduled Areas were notified as such on account of majority of Scheduled Tribe population, contiguity etc. In course of time, on account of influx of non-ST population, in a few Scheduled Areas, the status of the ST population might have been reduced to a minority. That should not be regarded as having altered the overall character of the Scheduled Areas. The chairmen and vice-chairmen should belong to the Scheduled Tribes. One-third of the seats should be reserved for women."
>
> (Emphasis supplied)

8. Evidently, the Committee made three specific recommendations, namely, (a) Panchayats in scheduled areas must have a majority of scheduled tribes members, (b) Chairmen and Vice-Chairmen should belong to scheduled tribes, and (c) one-third of the seats should be reserved for women. The Committee felt that certain provisions in Part IX which pertained to Panchayati Raj Institutions (PRIs) were wholesome and should be incorporated in the law to be passed by the Parliament under Article 243-M(4)(b) with due regard for the unique characteristics of tribal societies residing in the Scheduled Areas. It was considered especially important to protect the interests of many tribal societies which have their own customary laws, traditional practices and community ethos. The Committee was also of the view that since the Scheduled Areas and Tribal Areas are expected to have a majority of tribal population, the Panchayats at different tiers should have a majority of members who belong to the Scheduled Tribes (Hereinafter

'STs'). Furthermore, it was suggested that both the chairman and vice-chairman should belong to this category as well. The Committee also made recommendations in respect of the various functions to be discharged by the Gram Sabhas in Tribal areas. They pertained to safeguards for the rights of the tribal communities in matters relating to land, water, forest and minor forest produce; enforcement of customary rights such as grazing, fuel, fodder, minor forest produce, building materials; mobilization for community welfare programmes and organising voluntary labour for community works; promotion of solidarity and harmony among all sections of people; consideration of the report on the audit of accounts of the Gram Panchayat; women and child development; identification of the beneficiaries for poverty alleviation and other programmes and host of other welfare measures such as drinking water supply, sanitation, conservancy and drainage; public health measures; village roads and streets; small tanks; maintenance of public properties and community assets. The Committee gave detailed suggestions with regard to the powers, functions and procedures of the Panchayati Raj Institutions.

9. Based on these recommendations, The Panchayats (Extension to the Scheduled Areas) Act, 1996 [hereinafter 'PESA'] was passed by the Parliament in 1996. The statement of Objects and Reasons of the PESA Act reads as follows:

> "There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayat Raj Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Schedule Areas with certain modifications providing that, among other things, the State Legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources; …. The offices of the Chairpersons in the Panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every Panchayat for the Scheduled Tribes shall not be less than one-third of the total number of seats."

10. The provision of the PESA Act which merits consideration in the present case is Section 4 which reads as follows:-

> 4. Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:--
>
> (a) a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;
>
> (b) a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs;
>
> (c) every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level;
>
> (d) every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people,

their cultural identity, community resources and the customary mode of dispute resolution;

(e) every Gram Sabha shall –

(i) approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level;

(ii) be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes;

(f) every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilization of funds by that Panchayat for the plans, programmes and projects referred to in clause (e);

(g) the reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution;

Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats:

Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes;

(h) the State Government may nominate persons belonging to such Schedule Tribes as have no representation in the Panchayat at the intermediate level or the Panchayat at the district level:

Provided that such nomination shall not exceed one-tenth of the total members to be elected in that Panchayat;

(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled

Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level;

(j) planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;

(k) the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas:

(l) the prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction;

(m) while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with –

(i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant;

(ii) the ownership of minor forest produce;

(iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;

(iv) the power to manage village markets by whatever name called;

(v) the power to exercise control over money lending to the Scheduled Tribes;

(vi) the power to exercise control over institutions and functionaries in all social sectors;

(vii) the power to control over local plans and resources for such plans including tribal sub-plans;

(n) the State legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions or self-government shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha;

(o) the State Legislature shall endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district levels in the Scheduled Areas.

[emphasis supplied]

11. To give effect to the provisions of PESA Act, the State Legislature of Jharkhand had passed the Jharkhand Panchayat Raj Act, 2001 [Hereinafter 'JPRA'] which included the following provisions:-

Section 17(B). Reservation of seats in Gram Panchayat. –

(B) For the members of the Gram Panchayat (in Scheduled Area). –

(1) In scheduled areas, in every Gram Panchayat, reservation of seats in favour of Scheduled Castes and Scheduled Tribes shall be made, proportionate to their respective population in that Gram Panchayat:

Provided that the seats reserved for Scheduled Tribes shall not be less than half of the total number.

(2) In the scheduled areas, in Gram Panchayat, seats shall be reserved in such number in favour of persons of backward class, proportionate to their population, which, if combined with the

seats reserved for Scheduled Castes and Scheduled tribes, if any, shall not exceed more than Eighty per cent of total seats of that Gram Panchayat.

Section 21(B) – Reservation of Posts of Mukhia and Up-Mukhia in Gram Panchayat (In Scheduled area) –

Post of Mukhia and Up-Mukhia of the Gram Panchayats in the scheduled areas shall be reserved for the scheduled tribes;

Provided also that the Gram Panchayats, in the scheduled areas, wherein there is no population of scheduled tribes, shall be duly excluded from allotment of reserved posts of Mukhia and Up-Mukhia of scheduled tribes.

Section 36(B)- Reservation of seats of Panchayat Samiti (in Schedule Area) –

(1) In scheduled areas, in every Panchayat Samiti, reservation of seats in favour of Scheduled Castes and Scheduled Tribes shall be made, proportionate to their respective population in that Panchayat Samiti:

Provided that the seats reserved for Scheduled Tribes shall not be less than half of the total number.

(2) In the scheduled areas, in Panchayat Samiti, seats shall be reserved in such number in favour of persons of backward class, proportionate to their population, which, if combined with the seats reserved for Scheduled Castes and Scheduled tribes, if any, shall not exceed more than Eighty per cent of total seats of that Panchayat Samiti.

…

Section 40(B) – Reservation of Posts of Pramukh and Up-Pramukh in Panchayat Samiti (In the scheduled area) –

Posts of Pramukh and Up-Pramukh in Panchayat Samitis in the scheduled areas shall be reserved for the members belonging to the scheduled tribes.

Section 51(B). Reservation of seats of Zila Parishad (in Scheduled Area) –

(1) In scheduled areas, in every Zila Parishad, reservation of seats in favour of Scheduled Castes and Scheduled Tribes shall be made, proportionate to their respective population in that Zila Parishad:

Provided that the seats reserved for Scheduled Tribes shall not be less than half of the total number.

(2) In the scheduled areas, in Zila Parishad, seats shall be reserved in such number in favour of persons of backward class, proportionate to their population, which, if combined with the seats reserved for Scheduled Castes and Scheduled tribes, if any, shall not exceed more than Eighty per cent of total seats of that Zila Parishad.

Section 55(B) – Reservation for Posts of Adhyaksha and Upadhakshya in Zila Parishad (In scheduled area) –

The post of Adhyaksha and Zila Parishads in scheduled areas shall be reserved for the members of the scheduled tribes.

12. In the High Court of Jharkhand, several writ petitions were filed to challenge the constitutional validity of the PESA Act, 1996 and certain other provisions of the Jharkhand Panchayati Raj Act, 2001. With regard to the PESA, the main challenge was directed against the second proviso to Section 4(g) whereby all the seats of Chairpersons of Panchayats at all three tiers in Scheduled Areas are to be reserved in favour of Scheduled Tribes. The petitioners before the High Court had contended that since every eligible individual has a right to vote and the right to contest elections for the seats and Chairperson positions in panchayats, the cent per cent reservation of Chairperson positions in favour of STs would

curtail the rights of candidates other than those belonging to the ST category.

13. It was also argued that the cent per cent reservation of Chairperson positions was excessive and hence violative of Article 14 of the Constitution. Some of the petitioners had urged that the office of a Chairperson should be treated as a solitary post and hence reservation of such office was not permissible. In support of this contention, they had relied on an earlier Judgment of the Patna High Court in the case of ***Janardhan Paswan*** v. ***State of Bihar***, AIR 1988 Pat 75. This case was distinguished by the High Court keeping in mind that it was decided before the commencement of the Seventy-Third Amendment and that Article 243-D in Part IX of the Constitution had contemplated the said reservation policy. However, the High Court held that the second proviso to Section 4(g) of the PESA Act, 1996 reserving all the seats of Chairpersons of Panchayats in favour of Scheduled Tribes was unconstitutional. The relevant portion of the High Court Judgment reads as follows:-

> "..So far as 2nd proviso to clause (g) of Section 4 of PESA Act, 1996 is concerned, by such provision of the seats of Chairpersons of Panchayats at all levels in the scheduled areas have been reserved for the Scheduled Tribes. In view of the aforesaid proviso to clause (g) of Section 4 of PESA Act, 1996, the State Government while enacted Jharkhand Panchayat Raj Act, 2001 in regard to the scheduled areas, all seats of Chairpersons of Panchayats at all levels have been reserved for Scheduled Tribes vide Section 21 (B),

> Section 40(B) and Section 55 (B) of the Act, 2001. It has already been held that cent-percent reservation of the offices and seats of Chairpersons cannot be made, being excessive, unreasonable and against the principles of equality i.e. violative of Article 14 of the Constitution of India. By the aforesaid provisions cent-percent reservation of seats of Chairpersons of Panchayats at all levels in scheduled areas having been made, they cannot be upheld, being unconstitutional. Accordingly, the 2nd proviso to clause (g) of Section 4 of PESA Act, 1996, Section 21 (B), Section 40 (B) and Section 55 (B) of Jharkhand Panchayat Raj Act, 2001 so far cent percent reservation of seats of Chairpersons of Panchayats at all levels in favour of Scheduled Tribes is concerned, are hereby declared unconstitutional and ultra-vires."

The above-mentioned finding of the High Court has been challenged before this Court by the Union of India (appellant).

14. In the course of the proceedings before this Court, we heard Mr. Gopal Subramanium, Additional Solicitor General [now Solicitor General of India] and Mr. M.P. Raju, on behalf of the appellant. Mr. P.S. Mishra, Mr. M.N. Krishnamani, Sr. Adv., Mr. R. Venkataraman, Mr. Nagender Rai and Mr. Delip Jerath, learned counsels made oral submissions on behalf of the respondents.

15. It should be kept in mind that apart from relying on the earlier decision, the High Court did not state any specific reason for striking down the second proviso to Section 4(g) of the PESA Act, 1996 as well as Sections 21 (B), 40 (B) and 55 (B) of the JPRA Act, 2001 by holding these

provisions to be unconstitutional. The only reason given by the High Court was that cent per cent reservation of the offices of Chairpersons is excessive, unreasonable and against the principles of equality. It may also be noted that the Bhuria Committee Report had recommended that the Chairman and Vice-Chairman of Panchayats should belong to Scheduled Tribes. This recommendation was accepted by the Union Government and the PESA Act, 1996 was enacted to give effect to the same. The Parliament has conferred such special reservation on account of the pivotal role of the Chairperson in a Panchayat. It must have been felt that if the Chairperson positions are occupied by non-tribal persons in Scheduled Areas, there is no guarantee that such persons will account for the special interests of the Scheduled Tribes.

16. While enacting the Fifth Schedule, the Constituent Assembly was of the view that the subjection to normal laws would have exposed the tribal communities to two dangers in particular. Both arose out of the fact that they were primitive people, simple, unsophisticated and frequently improvident. Firstly, there was a risk of their agricultural land being usurped by the more civilized section of the population. This would threaten their livelihood and sustenance since the occupation of the tribals was for the most part agricultural. Secondly they were more likely to be victimized by the 'wiles of the moneylender'. The primary aim of the government policy then was to protect the tribal communities from these

two dangers and to preserve their customs. This objective was pursued by incorporating special provisions that were to be made applicable to these backward areas. The main contention made by the counsels for the respondents is that it is not justifiable to reserve all Chairperson positions in Panchayats located in Scheduled Areas in favour of persons belonging to the ST category. At this juncture, we must clarify that Sections 21(B), 40(B) and 55(B) of the JPRA have since been amended to confine reservation to the office of Mukhiya (at Gram Panchayat level), Pramukh (at Panchayat Samithi level) and Adhyaksh (at Zila Parishad level).

17. The counsel for the respondent had contended that the constitutional intention behind Article 243-D is not that of 100 per cent reservation but only proportionate reservation and it speaks of rotation of the reserved seats. However, we must emphasize that Article 243-M(4)(b) permits 'exceptions and modifications' in the application of Part IX to Scheduled Areas. The respondents have also argued that the maximum reservation which is legally permissible is only up to 50 per cent and reliance was placed on the decisions of this Court in ***Indra Sawhney*** v. ***Union of India***, (1992) Suppl. (3) SCC 217 and ***M.R. Balaji*** *v.* ***State of Mysore***, (1963) 1 SCC 439. However, it should be kept in mind that both of these decisions were given in respect of reservation measures enabled by Article 16 (4) of the Constitution.

18. At the outset, we are of the view that the principles of reservation which are applicable for public employment and for admission to educational institutions cannot be readily applied in respect of a reservation policy made by the legislature to protect the interests of the Scheduled Tribes by assuring them of majority reservation as well as the occupancy of Chairperson positions in Panchayats located in Scheduled Areas. This policy broadly corresponds with the past practice wherein the Scheduled Areas were administered as per the provisions of the Fifth Schedule to the Constitution and the same was expected to adhere to the advice of the Tribes Advisory Councils, which were predominantly controlled by Scheduled Tribes. By extending the Panchayati Raj system to these areas, Scheduled Tribes should not be put in a relatively disadvantageous position. In the Panchayati Raj system contemplated by Part IX, the Scheduled Tribes should have an effective say in the administration. That is why the Bhuria Committee recommended that all Chairperson positions should be reserved in favour of Scheduled Tribes.

19. The Counsel for the respondents also contended that the exclusive reservation in favour of Scheduled Tribes unfairly limits the scope of political participation for others and since all the offices of Chairpersons are reserved, there is no scope for rotation of seats as contemplated by the third proviso to Article 243-D(4) of the Constitution. It was also

pointed out that in some of the Districts notified as Scheduled Areas, the Scheduled Tribes are not in a majority. First of all, it is to be remembered that the impugned reservation policy is applicable only to Scheduled Areas which were hitherto covered by the Fifth Schedule to the Constitution. We must make it abundantly clear that this pattern of reservation has been designed only for Scheduled Areas which merit such exceptional treatment. In the present case, it should be noted that the Scheduled Areas under consideration are restricted only to certain Districts in the State of Jharkhand. In some Districts where STs are not predominantly in occupation, only certain blocks have been notified as Scheduled Areas by themselves. On account of migration of non-tribal people in some areas, there may be a relatively lesser proportion of tribal population but historically these areas were occupied almost exclusively by Tribal people.

20. In the course of the proceedings, our attention was also drawn to a Constitution Bench decision reported as ***R.C Poudyal*** v. ***Union of India*** (1994) Supp. 1 SCC 324, wherein the majority had upheld the reservation of some seats in the favour of the Bhutia and Lepcha communities in the Sikkim Legislative Assembly. In that case the majority had held that even though legislative seats could not be ordinarily reserved on the basis of ethnic and religious identity, an exception could be made in this case on account of the particular historical factors that led to the integration of Sikkim with the Union of

India. The judgment in that case does not directly aid the case of either side in the present litigation. However, the opinions delivered in that case did touch on the importance of the 'one-man, one-vote' principle that should be followed in liberal democracies. While this principle entails that there should be parity between the weightage given to the votes cast by individuals, the same cannot be enforced to an absolute standard. This is because territorial constituencies are of varying sizes with regard to the number of voters residing in them. This means that there is bound to be some disparity in the weightage accorded to the votes cast by individuals across different constituencies. This problem exists in all electoral formats where representatives are chosen from territorial constituencies. Needless to say the principle of 'one-man, one-vote' cannot be applied in an absolute sense in the context of Panchayat elections in Scheduled Areas. However, it is the responsibility of the executive to identify territorial constituencies which have a certain degree of parity in their population levels. It is of course important to re-draw these constituencies from time to time, in keeping with the demographic shifts in the concerned area.

21. Concerns were also raised that in some instances the notified Scheduled Areas include certain blocks in particular districts but do not include the remaining blocks of the same districts. This is not a serious hurdle because it is quite clear that the exceptional treatment for

Scheduled Tribes will be confined to the blocks that have been notified as Scheduled Areas. This means that in the Districts where only some of the blocks have been notified as Scheduled Areas, the impugned provisions of the JPRA will be applicable at the level of Panchayat Samitis within the notified area but not at the level of the Zilla Parishad for the whole district.

22. A comparable reservation policy contained in the Madhya Pradesh Panchayati Raj Act was challenged in ***Ashok Kumar Tripathi*** v. ***Union of India*** , 2000 (2) MPHT 193 and the High Court upheld the provision. The High Court of Madhya Pradesh held that:

> "45. So far as the high percentage of reservation exceeding 50% for members and 100% reservation for Chairpersons in Scheduled Areas is concerned, it is supportable even on the touch stone of Article 14 of the Constitution. It is a protective discrimination permissible on a reasonable classification of different sections of the society into more oppressed-backwards and the forwards. The peculiar situation of the inhabitants of the Scheduled Areas whose conditions have to be improved to educate them in the local Government, a step towards an effort to achieve their assimilation in the normal stream of democratic life at par with the advanced and the forward sections of the society justifies such classification. In the Scheduled Areas in reality if an aboriginal has to contest an election against a member of the forward section of the society, the contest would be totally unequal as of a weak and ignorant against wealthy and powerful. In a contest of this nature the weak and ignorant hardly can get a chance to become a member and in any case it would be impossible for him to reach to the helm of the institution as Chairperson. If he by chance becomes a Chairperson in the Panchayat consisting of elected members from advanced sections of the society and the members are in majority, it

> would be well nigh impossible for the Chairperson of the reserved category to effectively function and to save his elected status. The necessity, therefore, is that the Chairperson should be from the reserved category so that he is in a position to effectively function without inhibition and threat of no confidence motion against him to remove him from his office. …"

23. In light of these observations, it is our considered opinion that the High Court of Jharkhand had erred in striking down Sections 21(B), 40(B) and 55(B) of the Jharkhand Panchayat Raj Act which give effect to the second proviso of Section 4(g) of the Panchayats (Extension to Scheduled Areas) Act, 1996. We hold that in Panchayats located in Scheduled Areas, the exclusive representation of Scheduled Tribes in the Chairperson positions of the same bodies is constitutionally permissible. This is so because Article 243-M(4)(b) expressly empowers Parliament to provide for 'exceptions and modifications' in the application of Part IX to Scheduled Areas. The provisos to Section 4(g) of the PESA contemplate certain exceptions to the norm of 'proportionate representation' and the same exceptional treatment was incorporated in the impugned provisions of the JPRA.

24. The next point that arises for consideration is whether it is constitutionally permissible to provide reservations in favour of Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC) that together amount to eighty percent of the seats in the

Panchayati Raj Institutions located in Scheduled Areas of the State of Jharkhand? The High Court had struck down Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the JPRA as unconstitutional by virtue of reasoning that reservations to the extent of 80% of the seats in panchayats were excessive, arbitrary and disproportionate, thereby violating Article 14 of the Constitution. The Counsels for the respondent had referred to the observations of this Court in ***M.R. Balaji*** v. ***State of Mysore***, AIR 1963 SC 649 and ***Indra Sawhney*** v. ***Union of India*** (1992) Supp 3 SCC 217 which had prescribed an upper ceiling of 50% for reservation of posts in public employment. Reference was also made to a decision of the Patna High Court in the case of ***Krishna Kumar Mishra*** v. ***State of Bihar***, AIR 1996 Pat. 112, wherein a similar view had been adopted.

25. Sections 17(B)(1), 36(B)(1) and 51(B)(1) of the JPRA are in conformity with the first proviso to Section 4(g) of the PESA Act as 50% of the seats in Panchayats located in scheduled areas are reserved in favour of ST candidates. The High Court has not struck down these provisions. These provisions contemplate that in Gram Panchayats, Panchayat Samitis and Zila Parishads located in Scheduled Areas, the reservation of seats for the Scheduled Castes and Scheduled Tribes shall be made on the basis of the proportion of their respective population, provided that reservation for the scheduled tribes shall not be less than half of the total number of seats. In addition to this, Sections 17(B)(2), 36(B)(2) and

51(B)(2) of the JPRA provide that in Gram Panchayats, Panchayat Samitis and Zila Parishads located in Scheduled Areas, seats are to be reserved in favour of persons belonging to backward classes in proportion to their population, so that the aggregate reservations shall not exceed 80% of the total number of seats available. By the impugned judgment, Section 17(B)(2), 36(B)(2) and 51(B)(2) have been held to be unconstitutional mainly on the ground that they permit 'excessive reservation' which violates Article 14 of the Constitution. This finding of the High Court has also been contested before us.

26. Before adverting to the contentions advanced by the appellants' counsel, it is useful to refer to the pattern of reservations set out in Part IX of the Constitution. Article 243-D is reproduced below:-

> "Article 243-D. Reservation of Seats. - (1) Seats shall be reserved for –
>
> (*a*) The Scheduled Castes; and
>
> (*b*) The Scheduled Tribes,
>
> in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.
>
> (2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of office of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens."

27. It may be noted that under Article 243-D there is a clear mandate for the State Legislature to reserve seats for SCs and STs in every panchayat and the number of seats so reserved shall bear, as nearly as may be, the

same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the SCs or of the STs in that Panchayat area bears to the total population of the area under consideration. Article 243-D(6) further states that nothing in this Part shall prevent a State Legislature from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens. There was no contention on behalf of the petitioners before the High Court that the members of backward class were not entitled to get reservation in the scheduled area. With respect to scheduled castes, the State was bound to provide reservation to them even in the Scheduled Areas. As already noticed, under the PESA 50% of the seats in Gram Panchayats, Panchayat Samitis and Zila Parishads should be reserved in favour of schedule tribes and the ceiling is fixed to the extent that this reservation put together shall not exceed 80% of the total seats. The contention of the respondents is that this policy will lead to reverse discrimination against persons who are not eligible for such reservation benefits. It may be noticed that this reservation policy is exclusively applicable to scheduled areas which had hitherto been the subject of a separate administrative scheme under the Fifth Schedule of the Constitution.

28. It is a well-accepted premise in our legal system that ideas such as 'substantive equality' and 'distributive justice' are at the heart of our

understanding of the guarantee of 'equal protection before the law'. The State can treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres. The question is whether 'reasonable classification' has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with a legitimate governmental objective. When examining the validity of affirmative action measures, the enquiry should be governed by the standard of proportionality rather than the standard of 'strict scrutiny'. Of course, these affirmative action measures should be periodically reviewed and various measures are modified or adapted from time to time in keeping with the changing social and economic conditions. Reservation of seats in Panchayats is one such affirmative action measure enabled by Part IX of the Constitution.

29. The Statement of Objects and Reasons appended to the Constitution (Seventy Second Amendment) Bill, 1991 which was enacted as the Constitution (Seventy Third Amendment) Act, 1992 reads as follows :-

> "Though the Panchayat Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supercessions, insufficient representation of weaker sections like Schedule Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

(2) Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayat Raj Institutions to impart certainty, continuity and strength to them.

(3) Accordingly, it is proposed to add a new Part relating to Panchayats in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of Chairpersons of Panchayats at such levels; reservations of seats for the Scheduled Castes and Schedule Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supercession of any Panchayat; disqualifications for membership of Panchayats; devolution by the State Legislature of powers and responsibilities upon the Panchayats with respect to the preparation of plans for economic developments and social justice and for the implementation of development schemes; sound finance of the Panchayats by securing authorization from State Legislature for grants-in-aid to the Panchayats from the Consolidated Fund of the State, as also assignments to, or appropriation by, the Panchayats of the revenues of designated taxes, duties, tolls and fees; setting up of a Finance Commission within one year of the proposed amendment and thereafter every 5 years to review the financial position of Panchayats; auditing of accounts of the Panchayats; powers of State Legislatures to make provisions with respect to elections to Panchayats under the superintendence, direction and control of the chief electoral officer of the State; application of the provisions of the said Part to Union territories; excluding certain State and areas from the application of the provisions of the said Part; continuance of existing laws and Panchayats until one year

from the commencement of the proposed amendment and barring interference by courts in electoral matters relating to Panchayats;

(4) The Bill seeks to achieve the aforesaid objectives."

30. Article 243D of the Constitution, as stated earlier, clearly identifies the intended beneficiaries in the form of persons belonging to scheduled castes, scheduled tribes, women and other backward class of citizens. While introducing the 73rd Amendment Act, the Statement of Objects and Reasons clearly contemplated democratic decentralization to pursue the legitimate governmental objective of ensuring that the traditionally marginalized groups should progressively gain a foothold in local self government. It is in this background that 'reasonable classification' is to be viewed.

31. 50% of reservation in favour of the STs in Panchayats at all the three tiers is clearly an example of 'compensatory discrimination' especially in view of the fact that the scheduled areas under consideration were completely under a separate administrative scheme as per the Fifth Schedule to the Constitution. In fact, 50% of reservation in favour of the scheduled tribes by itself was not challenged before the High Court. Therefore, the question that now remains is whether reservation should be made in favour of the scheduled castes and backward class for the purpose of scheduled areas. The Constitutional mandate is that the

scheduled castes should be given reservation at all the three tiers of Panchayats, with regard to the principle of proportionate representation.

32. The Division Bench of the High Court has relied on the precedents relating to Article 15(4) and Article 16(4) by drawing an analogy with the limits placed on reservations in higher education and public employment. We must emphasize that Article 243-D is a distinct and independent constitutional basis for reservation in Panchayat Raj Institutions. This reservation cannot be readily compared to the affirmative action measures enabled by Articles 15(4) and 16(4) of the Constitution. Especially on the unviability of the analogy between Article 16(4) and Article 243-D, we are in agreement with a decision of the Bombay High Court, reported as ***Vinayakrao Gangaramji Deshmukh*** v. ***P.C. Agrawal & Ors***., AIR 1999 Bom 142. That case involved a fact-situation where the chairperson position in a Panchayat was reserved in favour of a Scheduled Caste Woman. In the course of upholding this reservation, it was held:

> "… Now, after the seventy-third and seventy-fourth Constitutional amendments, the constitution of local has been granted a constitutional protection and Article 243D mandates that a seat be reserved for the Scheduled Caste and Scheduled Tribe in every Panchayat and Sub-article (4) of the said Article 243D also directs that the offices of the Chairpersons in the panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide. Therefore, the reservation in the local bodies like the Village Panchayat is not governed by Article 16(4), which speaks about the reservation in

the public employment, but a separate constitutional power which directs the reservation in such local bodies. ..."

33. For the sake of argument, even if an analogy between Article 243-D and Article 16(4) was viable, a close reading of the *Indra Sawhney* decision will reveal that even though an upper limit of 50% was prescribed for reservations in public employment, the said decision did recognise the need for exceptional treatment in some circumstances. This is evident from the following words (at Paras. 809, 810):

> "809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.
>
> 810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being put of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

34. We believe that the case of Panchayats in Scheduled Areas is a fit case that warrants exceptional treatment with regard to reservations. The rationale behind imposing an upper ceiling of 50% in reservations for higher education and public employment cannot be readily extended to the domain of political representation at the Panchayat-level in Scheduled Areas. With respect to education and employment, parity is

maintained between the total number of reserved and unreserved seats in order to maintain a pragmatic balance between the affirmative action measures and considerations of merit. Under Article 15(4) and 16(4) the reservation of seats in favour of socially and educationally backward classes (SEBC) is ordinarily done on the basis of proportionate representation and an upper ceiling of 50% allows for considerable flexibility in distributing the benefits of higher education and public employment among a wide range of intended beneficiaries such as the Scheduled Castes (SC), Scheduled Tribes (ST), Women and Other Backward Classes (OBC). However, the same approach of providing proportionate representation is likely to be less effective in the context of reservations for panchayats in scheduled areas. One reason for this is the inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political participation on the other hand. While access to higher education and public employment increases the likelihood of gradual socio-economic empowerment of the individual beneficiaries, involvement in local-self government is intended as a more immediate measure of protection for the individual as well as the community that he/she belongs to. Especially in the context of Scheduled Areas, there is a compelling need to safeguard the interests of tribal communities with immediate effect by giving them an effective voice in local self-government. The Bhuria Committee Report had clearly outlined the problems faced by Scheduled

Tribes and urged the importance of democratic decentralisation which would empower them to protect their own interests.

35. By reserving at least half of the seats in panchayats located in Scheduled Areas in favour of STs, the legislature has adopted a standard of compensatory discrimination which goes beyond the ordinary standards of 'adequate representation' and 'proportionate representation'. The standard of 'adequate representation' comes into play when it is found that a particular community is under-represented in a certain domain and a specific threshold is provided in order to ensure that the beneficiary group comes to be adequately represented with the passage of time. For instance in Part IX of the Constitution, the reservation in favour of women which amounts to one-third of all the seats in Panchayats is an embodiment of the 'adequate representation' standard.

36. However, in instances where the Constitution does not specify the quantum of reservations, the idea of 'proportionate representation' is the rule of thumb. As mentioned earlier, proportionate representation has been the controlling idea behind reservations in the context of education and employment which have a basis in Article 15(4) and 16(4) respectively. Even in the context of Panchayati Raj Institutions, Article 243-M(1) and Article 243-M(6) explicitly refer to 'proportionate

representation' as the controlling idea behind reservations in favour of SCs, STs and Backward Classes respectively. With respect to the panchayats located in Scheduled Areas, the flexibility provided by Article 243-M(4)(b) has led to the enactment of the PESA which specifies 'proportional representation' as the norm for reservations in favour of the intended beneficiaries, but makes a departure from this standard in order to protect the interests of Scheduled Tribes in particular.

37. There is of course a rational basis for departing from the norms of 'adequate representation' as well as 'proportionate representation' in the present case. This was necessary because it was found that even in the areas where Scheduled Tribes are in a relative majority, they are under-represented in the government machinery and hence vulnerable to exploitation. Even in areas where persons belonging to Scheduled Tribes held public positions, it is a distinct possibility that the non-tribal population will come to dominate the affairs. The relatively weaker position of the Scheduled Tribes is also manifested through problems such as land-grabbing by non-tribals, displacement on account of private as well as governmental developmental activities and the destruction of environmental resources. In order to tackle such social realities, the legislature thought it fit to depart from the norm of 'proportional representation'. In this sense, it is not our job to second-guess such policy-choices. A similar position was also adopted by the

Madhya Pradesh High Court in ***Ashok Kumar Tripathi*** v. ***Union of India***, 2000 (2) MPHT 193,where Dharmadhikari, J. made the following observations (extracted from Para. 36, 37):

> "… To safeguard interests of Scheduled Tribes living in remote or hilly areas or forests with primitive culture of their own, the Constitution envisages formation of Scheduled Areas for them, and application of laws to them with 'exceptions and modifications', so that they are able to preserve their culture and occupation and are not exposed to exploitation by forward classes of Urban Population. The protective discrimination in favour of such deprived section of the Society can go to the extent of complete exclusion, if the circumstances so justify, of advanced classes in Local Self Governance of Scheduled areas. The main object and purpose behind such reservations based on population, even in excess of 50% is with a view that the exclusive participation of deprived and oppressed sections of the Society in Local Self-Government bodies in their areas is ensured because in open competition with the advanced sections of the Society they can never have any share to participate in Self-Governance. A close and careful examination of the provisions of the Central and State Act, in the light of Constitutional provisions, shows that principle of proportionate representation based on the population of the reserved categories has been adhered to but only departure has been made from it in giving them larger share of self-governance by reserving seats for them as member and in the Scheduled Areas a monopoly of seats of Chairpersons has been created for them so that they conserve their culture and way of living. … For taking a decision on the policy of reservation as to whether it is reasonable or unreasonable, the Court has to examine the overall Scheme of the Constitution as envisaged in Part IX and IX A and the corresponding Central and State Legislation brought to implement it. The aim and object of the reservation policy contained in Part IX and IX A is that the Backward and oppressed sections of the Society have to be encouraged in the democratic process by giving them a share of governance which hither-to was denied to them since the times of British India and after independence. The other object at the same time is to protect them from urban influences so that they may be able to conserve their culture and way of life and are not exposed to exploitation by the advanced or socially and economically powerful sections of the society.

> At the Bar it was argued that such excess policy of reservation is bound to create bad blood between the two classes and would be a serious deterrent to bring such oppressed classes into the mainstream of democratic life. There are arguments for and against this. In the matters of policy the best judges are the Legislators who are closer to the society and represent them. They have a study of the society and have advantage of reports based on sociological surveys made by experts. They better understand the needs of the society and the various sections forming it. It is not for this Court to enter into this forbidden arena and lay down a policy of reservation. The argument advanced on behalf of the petitioners only shows that the attitude of the members of the advanced sections of the society towards castes and tribes continues to be more of competition than compassion. The reservation in various walks of life made in their favour for the last 50 years of the independence has not been successful in improving their socio-economic condition and have not made them effective participant in the democratic process. The necessity is still felt by the legislators in making special provisions for them in the Constitution and the laws to ensure their effective participation at least in the local self Government institutions as a first step to give them due share of governance in the Assemblies of the States and the Parliament. The argument that the policy of reservation would segregate them rather than assimilate them with the common stream is one for the legislator to consider on the basis of existing social situation. In the matters of policy, wisdom of legislature cannot be questioned or the policy laid down cannot be upset by the Court which is ill equipped to deal with the subject."

38. Even though there are cogent reasons for the exceptional treatment accorded to Scheduled Tribes, there are some other concerns that merit consideration. One such concern is with the very identification of Scheduled Areas in the first place. It is a common refrain that the efficacy as well as legitimacy of affirmative action measures can be questioned if they are not targeted properly. In the present case, it was pointed out that the identification of Scheduled Areas is done on the

basis of census data and the same is collected after intervals of 10 years. It was urged that the identification of Scheduled Areas may not be accurate if it was based on outdated data. Even though we were shown data describing the distribution of the population belonging to the Scheduled Tribes category in the various districts of Jharkhand (As per the 2001 census), it will suffice to say that the identification of Scheduled Areas is an executive function and we do not possess the expertise needed to scrutinize the empirical basis of the same. The data submitted before us indicates that while the Scheduled Tribes are indeed in a majority in some Scheduled Areas, the same is not true for some other Scheduled Areas. This disparity is understandable keeping in mind that there has been a considerable influx of non-tribal population in some of the Scheduled Areas. In this regard, we must re-emphasize the Bhuria Committee's recommendation that persons belonging to the Scheduled Tribes should occupy at least half of the seats in Panchayats located in Scheduled Areas, irrespective of whether the ST population was in a relative minority in the concerned area. This recommendation is in line with the larger objective of safeguarding the interests of Scheduled Tribes.

39. The other significant criticism of aggregate reservation amounting to 80% of the seats in Panchayats located in Scheduled Areas is that it amounts to an unreasonable limitation on the rights of political

participation of persons belonging to the general category. The rights of political participation broadly include the right of a citizen to vote for a candidate of his/her choice and right of citizens to contest elections for a public office. In the present case, it was urged that reservations amounting to 80% of the seats in Scheduled area panchayats will have the effect of limiting the choices available to voters and effectively discourage persons belonging to the general category from contesting these elections. While the exercise of electoral franchise is an essential component of a liberal democracy, it is a well-settled principle in Indian law that such rights do not have the status of fundamental rights and are instead legal rights which are controlled through legislative means (See ***N.P. Ponnuswami's*** *case,* AIR 1952 SC 64*).* For instance, the Constitution empowers the Election Commission of India to prepare electoral rolls for the purpose of identifying the eligible voters in elections for the Lok Sabha and the Vidhan Sabhas. Furthermore, the Representation of People Act, 1951 gives effect to the Constitutional guidance on the eligibility of persons to contest these elections. This includes grounds that render persons ineligible from contesting elections such as that of a person not being a citizen of India, a person being of unsound mind, insolvency and the holding of an 'office of profit' under the executive among others. It will suffice to say that there is no inherent right to contest elections since there are explicit legislative controls over the same.

40. In the context of reservations in Panchayats, it can be reasoned that the limitation placed on the choices available to voters is an incidental consequence of the reservation policy. In this case, the compelling state interest in safeguarding the interests of weaker sections by ensuring their representation in local self-government clearly outweighs the competing interest in not curtailing the choices available to voters. It must also be reiterated here that the 50% reservations in favour of STs as contemplated by the first proviso to Section 4(g) of the PESA were not struck down in the impugned judgment. Even though it was argued before this Court that this provision makes a departure from the norm of 'proportionate representation' contemplated by Art. 243-D(1), we have already explained how Art. 243-M(4)(b) permits 'exceptions and modifications' in the application of Part IX to Scheduled Areas. Sections 17(B)(1), 36(B)(1) and 51(B)(1) of the JPRA merely give effect to the exceptional treatment that is mandated by the PESA.

41. However, in addition to the 50% reservations in favour of Scheduled Tribes, the State of Jharkhand is also under an obligation to account for the interests of Scheduled Castes and Other Backward Classes. The same has been contemplated in Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the JPRA which incorporate the standard of 'proportionate representation' for Scheduled Castes and Backward Classes in such a manner that the total reservations do not exceed 80%. This does not

mean that reservations will reach the 80% ceiling in all the Scheduled Areas. Since the allocation of seats in favour of Scheduled Castes and Backward Classes has to follow the principle of proportionality, the extent of total reservations is likely to vary across the different territorial constituencies identified for the purpose of elections to the panchayats. Depending on the demographic profile of a particular constituency, it is possible that the total reservations could well fall short of the 80% upper ceiling. However, in Scheduled Areas where the extent of the population belonging to the Scheduled Castes and Backward Classes exceeds 30% of the total population, the upper ceiling of 80% will become operative.

42. Irrespective of such permutations, the legislative intent behind the impugned provisions of the JPRA is primarily that of safeguarding the interests of persons belonging to the Scheduled Tribes category. In light of the preceding discussion, it is our considered view that total reservations exceeding 50% of the seats in Panchayats located in Scheduled Areas are permissible on account of the exceptional treatment mandated under Article 243-M(4)(b). Therefore, we agree with the appellants and overturn the ruling of the High Court of Jharkhand on this limited point.

43. Dr. M.P. Raju, learned counsel appearing for one of the Respondents, contended that Jharkhand Panchayat Reservation Act should not have been extended to the 'Scheduled Area' as the Scheduled

Tribes were enjoying more powers under the Fifth Schedule to the Constitution. The learned Counsel contended that if those provisions are held to be unconstitutional as held by the High Court, it would be better to revert to the system of Tribes Advisory Councils under the Fifth Schedule. We do not find much force in the contention and it is only to be rejected.

44. In the result, the appeals filed by the Union of India are allowed and the proviso to Section 4(g) of PESA Act and Sections 21(B), 40(B) and 55(B) of Jharkhand Panchayat Reservation Act, 2001 are held to be constitutionally valid. We also hold that Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the Jharkhand Panchayat Reservation Act, 2001 are constitutionally valid provisions.

45. The other appeals are also disposed of accordingly and the State Election Commission of the State of Jharkhand is directed to conduct elections for the Panchayati Raj Institutions (PRIs) as early as possible.

.....CJI
(K.G. BALAKRISHNAN)

.....J.
(P. SATHASIVAM)

.....J.
(J.M. PANCHAL)

New Delhi
January 12, 2010.