

## **Tribal Self-Rule Law and Common Property Resources in Scheduled Areas of India - A New Paradigm Shift or another Ineffective Sop?<sup>1</sup>**

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Village-level democracy became a real prospect for India in 1992 with the 73<sup>rd</sup> amendment to the Constitution, which mandated that resources, responsibility and decision-making be devolved from central government to the lowest unit of the governance, the *Gram Sabha* or the Village Assembly. A three-tier structure of local self-government was envisaged under this amendment. The nationwide euphoria that greeted this about-turn in bureaucracy was seen again with the extension of the 73<sup>rd</sup> amendment to the *Scheduled Areas*<sup>3</sup>, [through Provisions of Panchayats (Extension to Scheduled Areas) Act, 1996] [hereinafter PESA or Central PESA or the Tribal Self Rule Law as it is variously called). Scheduled Areas are those, which are under the Fifth Schedule of the Constitution of India where the tribal populations are predominant. It is also imperative to understand here that the founding fathers of the Constitution of India had envisaged a special scheme of administration in the scheduled areas where general laws would not be applicable unless the Governor deemed it fit to enforce such laws. It was thought that these areas are inhabited with people who have resided on the basis of their own customary practices and traditional beliefs and culture and thus general laws of the land would be inappropriate with their customary laws and ethos. However, a decade later, there is a growing feeling that while the burden of ‘management’ of natural resources, has been devolved, ‘control’ over resources and land is still in the hands of the

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<sup>3</sup> Scheduled Areas are those, which are under the Fifth Schedule of the Constitution of India where the tribal populations are predominant.

state. This paper delves in some detail into the manner in which the States' have subverted the mandate of the Central Legislation through carefully using the wordings in law to make the implementation vague and ineffective especially in the context of 'community resources' in scheduled areas. The scheduled areas, which are notified by the President of India as the Tribal dominated areas, exists in nine states of India<sup>4</sup>.

### ***The Coming of PESA (Tribal Self Rule Law)***

A brief introduction of how the central law on PESA came into being and the consequent state mandate would be instructive here. The 73rd amendment to the Constitution and the subsequent enactment of Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA) aimed to operationalise decentralization in India, through the transfer of power to the *Gram Sabha* or the village assembly . The PESA attempted to vest legislative powers in *Gram Sabha*, specifically in matters relating to development planning, management of natural resources and adjudication of disputes in accordance with prevalent traditions and customs. This significant legislation was expected to have far reaching consequences in the social, economic and cultural life of tribal people in Scheduled Areas. All the scheduled states were given one year to amend their respective Panchayat Acts to conform to the letter and spirit of PESA. Accordingly, most states have introduced some form of conformity amendments, which reflect their intent to conform to the spirit of PESA.

At a first glance the state conformity legislations and amendments seem to have generally reflected most of the provisions of the PESA, although a closer look establishes that almost all powers have been made subject to rules/ further orders "as may be prescribed by the State Governments ". The control over prospecting of minor minerals, planning and management of water bodies, control and management of minor forest produce, prevention alienation of land are all subject to rules in force or as may be prescribed by the State. The fact that the enabling rules are not in place even more than eight years after

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<sup>4</sup> There are eight scheduled states namely Andhra Pradesh, Bihar (now divided into Jharkhand and Bihar) Gujarat, Himachal Pradesh, Madhya Pradesh (now divided into Chattisgarh and M.P) Maharashtra, Orissa

the adoption of the central law on PESA suggests reluctance by the State Governments to operationalise the mandate of PESA.

There are four points that need particular emphasis here. *First* there are critical omissions of some of the fundamental principles without which the spirit of PESA can never be realized. *Secondly*, the state legislations, perhaps by design, twist certain words from the Central PESA that has resulted in powers being taken away from the *Gram Sabha* - the collectivity of all village adults where the need for empowerment is most critical for making local self-governance a reality in the Country especially in relation to managing common pool resources. *Thirdly*, even where it affirmed some provisions of the law in principle, their applicability was made subject to framing of rules/ orders or “as may be prescribed.” As stated earlier, such enabling rules are not yet in place in most cases. *Finally*, few rules and *prescriptions* began to surface in early 2000 primarily through revocable official circulars but which again have been totally inoperative because of the ambiguity and lack of clarity of these provisions. Thus it is not surprising that even these are waiting to be taken to the ground. The operative provisions being not in place, a promising radical law has been reduced largely to a paper law.

The above is exemplified in numerous ways especially in the context of community resources. The *Panchayats* (Institutions of Local Self-Government) at the appropriate level and/or the *Gram Sabha* have been endowed specifically with powers for management of local resources. For instance the *Gram Sabha* or Panchayat at appropriate level shall be consulted before making acquisition of land in scheduled area for development projects as well as before resettlement or rehabilitation of persons affected by such projects in Scheduled Areas. The use of the word ‘consultation’ under PESA instead of ‘consent’ significantly waters down the power vested with the Panchayat. Besides *Gram Sabha* and Panchayats have powers to prevent alienation of land in the Scheduled Area and to take appropriate action to restore any alienated land of Scheduled Tribe<sup>5</sup>. In this regard there needs to be a clear understanding of the nature and extent of

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and Rajasthan

<sup>5</sup> Scheduled Tribes are those tribes that have been notified by the President of India under the Constitution.

powers that needs to be vested with the *Gram Sabha* and the various tiers of the Panchayats. The law is vague and ambiguous as will be demonstrated later in state specific examples. Further the ownership of forest based resources have also been granted though is a tendency to limit the local area of the *Gram Sabha* for the purposes of owning minor forest produce<sup>6</sup>.

A central concern of the present paper is to highlight the conflicts arising out of the powers vested with the *Gram Sabhas* under PESA and the provisions contained in the various 'subject matter' State laws Under the PESA, the *Gram Sabha* or the Panchayats at the appropriate level has been vested with the mandatory powers to regulate on subjects such as minor forest produce, alienation of land, management of minor water bodies and control over local plans and their resources. On all these subjects there exist specific State legislation, which might impact the operation of the state variants of the PESA. Again when it comes to amending all the subject matter laws to give effect to PESA, the States response is varied.

### ***The State Response to Tribal Self Rule***

There are also some glaring omissions in the State legislations when they are assessed for their conformity with the PESA. Some fundamental principles on which the PESA is premised such as state legislations on Panchayats shall be in consonance with customary laws, and among other things traditional management practices of community resources; the competence of *Gram Sabha* in safeguarding and preserving traditions and customs of the people and the community resources have been omitted from omitted from the conformity Acts for example in Rajasthan.

Let us now see some specific resources that have been impacted by the law on tribal self rule and the subsequent state legislations which include; management of minor water

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<sup>6</sup> Minor forest produce are ordinarily understood to mean those forest produce brought from forest and other than timber. They also exclude those forest produce that are under the purview of state monopoly.

bodies, forest land especially relating to ownership of minor forest produce and tribal land alienation and restoration.

### ***Minor water bodies***

As per the Central PESA the power to plan and manage 'minor water bodies' exclusively vested with the Panchayat at Appropriate level (PAL) which in other words means that the Central law gives a discretion to the states to assign to any tier of the local self government such power in the best interest of the community. However, the first obstacle is on the definition itself. No legal definition of minor water bodies exists in the statute books. The states too have ignored it, whether by design or default is unclear. The Gujarat State in the Western India has given such power to the *Gram Panchayat* (Village Council). The State of Himachal Pradesh in the north has assigned it to Village Council (*Gram Panchayat*) OR at Block Committee Level i.e. *Panchayat Samiti* OR District Council (*Zila Parishad*) level "as may be specified". The State of Rajasthan in the North West too uses the word "as may be prescribed" by the State. No such prescriptions are in place even after eight years. The Maharashtra Government completely ignores it. This ambiguous power devolution becomes further critical as there are a number of externally aided projects on water sheds and water users which are participatory based approaches and the state amendments completely ignores these developments in their enactments. The Participatory Irrigation Management laws enacted in states such as Rajasthan and Mahaharashtra for instance where Water Users Associations have been created, Water Shed Committees that have been created instates such as Madhya Pradesh and Andhra Pradesh in the South has no linkage with the Local self Government units and more so in scheduled areas or tribal dominated areas.

### ***Land Resources***

Two critical land issues emerge in the context of the law on tribal self rule and the manner in which state conformity legislations on PESA has been enacted. One on land acquisition and the other on land alienation and restoration of illegally alienated lands.

Note that land belonging to a scheduled tribe can be transferred to a non-tribal under the various Land Revenue Codes of the states and more so in tribal areas (read scheduled areas).

### ***Land Acquisition***

As regards land acquisition the power has been vested with the *Gram Sabha* or Panchayat at appropriate level (PAL) by the Central PESA. It mandates that there should be consultation before land Acquisition for development projects and before resettling or rehabilitating persons affected by such projects. The state of Gujarat for example has granted this power to higher level of Panchayat at the Block level (*Taluka Level*). The state of Himachal Pradesh mandates that the ***Gram Sabha*** shall be consulted before making the acquisition of land in the Scheduled Areas for development of projects and before re-settling or rehabilitating persons 'evicted' by such projects in the scheduled areas. Note the use of the word 'evicted' which limits the scope of this provision to evicted person only. The state of Madhya Pradesh in Central India states the *Gram Sabha* or the Panchayats at the appropriate level shall be consulted thus not deciding any particular tier but keeping it vague. At the same time the *Gram Sabha* in Scheduled Areas is also required to manage natural resources including land, water, forests within the area of the village in accordance with provisions of the Constitution and other relevant laws for the time being in force. Clearly there is an overlap and misdirection in terms of assignment of power to a specific level and simultaneous allocation of power on a very general basis. These are bound to give conflicting signals at the field level. In Maharashtra the power to consult before land acquisition has been granted to every *Panchayat* i.e at *Gram Panchayat*; *Panchayat Samiti* and *Zila Parishad* level (all tiers of local self government) —Provided that, every *Panchayat* shall consult the *Gram Sabha* before conveying its views to the Land Acquisition Authority concerned. Note here that there is a provision of 'conveying views' and without any clarity on what happens if such conveyed views are not taken into account. In Rajasthan the *Gram Sabha* or the Panchayati Raj Institution at such level, 'as may be prescribed' by the State Government,

shall be consulted. Again there is total ambiguity in the manner in which the powers have been assigned.

### ***Land Alienation***

The powers of prevention of land alienation and restoration of illegally alienated land under the Central PESA has been vested both to the *Gram Sabha* and the Panchayat at appropriate level. One of the crucial reason why a necessary mandate to the *Gram Sabha* and any tier of local self government has been envisaged is the significance the Central Government attaches to certain subjects that are critical to the lives of the tribals. Land alienation is one such critical aspect among others in the context of common property resources. Different states have responded differently. While the Gujarat Government has only involved the District *Panchayat*. The Maharashtra Government has mandated that it shall be competent for every *Gram Sabha* in the Scheduled Areas to make recommendations through *Panchayat* having regard to the provisions of any law for the time being in force pertaining to transfer or alienation of land of the persons belonging to the scheduled tribes, be competent to make suitable recommendations to the Collector. Here again the precedence has been given to the already existing laws in the state rather than the spirit of the new law on PESA. The state of Rajasthan has not yet decided whether the powers would be assigned to Gam Sabha or the Panchayat at any appropriate level and again even if they decide “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 *would* be in accordance with laws in force in the State”. This seems to be somewhat as nebulous as the state Maharashtra as discussed earlier. The state of Madhya Pradesh has decided not to introduce this provision at all, the reasons best known to them.

### ***Minor Forest Produce***

Forest and forest based resources are yet another subject critical to the lives of the tribals. PESA recognizes this and thus responds most radically by granting ownership of minor forest produce to the *Gram Sabha* along with *Panchayat* at appropriate level. Again two

critical legal issues emerge here. One the definition of minor forest produce and second the jurisdiction where such ownership rights would be exercised. Before these critical issues are discussed it would be instructive to assess the state's responses.

The Gujarat Act has vested in the *Village Panchayat* minor forest produce found (*except found in the areas of National Parks or Sanctuaries*) in such area of a forest as is situate in the jurisdiction of that village. This essentially means that while the ownership rights have been granted but the area on which such resources exist is exempt. The Himachal Pradesh Act provides that the '*Gram Panchayat* or as the case may be *Gram Sabha*' shall have the ownership of minor forest produce within the local area of the *Gram Sabha*. Again which tier has been granted the ownership is not clear and what constitutes local area is ambiguous. The Maharashtra Act, empowers the *Gram Sabha* in the Scheduled Areas to issue direction to the *Panchayat* with regard to the exploitation and regulation of trading of minor forest produce, subject to provisions of the Maharashtra Transfer of Ownership of Minor Forest Produce in the Scheduled Areas, and the Maharashtra Minor Forest Produce (Regulation of Trade) (Amendment) Act, 1997. However, it does not transfer ownership. While the state of Madhya Pradesh Act has not transferred the power of ownership of minor forest produce under the State PESA at all the Rajasthan has made the local self-government units subservient to the executive initiated committees such as Joint Forest Management Committees and Eco development Committees. As is obvious there is total reluctance from the state governments to give effect to this otherwise radical provision. It is well known that forest based resources are one of the most significant resource for tribal people in India and the reluctance by the States suggests that by excluding forest rich areas such as sanctuaries or by restricting the area to the local jurisdiction of the village or by making the *Panchayat* bodies subservient to the executive initiated committees such as Joint Forest Management Committees the states intention is to exclude the most important resource on which tribal life depends. What is most surprising that one of the most rich biodiversity and forested states of Madhya Pradesh in central India has completely ignored this provision.



***Concluding Remarks:***

The various conformity legislations of the various tribal states in India supposedly giving effect to the most radical legislation in Indian legal history have proved that the spirit of a social welfare legislation can be totally marred by carefully selecting words and phrases in law that kills the soul while maintaining the body of a legislation. The law on tribal self rule which recognized for the first time the competence of a village assembly to manage its community resources, which recognized for the first time that a village where one resides is not always a homogeneous , population based entity but a social cohesive unit with its own self identity where people who have been ordinarily and traditionally residing for centuries with a common belief system and cultural traits apart from the manner in which they manage their natural resources. Despite such laudable objectives the states having scheduled areas have proved that it is too difficult to relinquish power in a bureaucratic power structure. Slight twist of words, maintaining ambiguity in legislative frame, and brazen omissions of fundamental principles on which a social , empowering legislation is based can override the basic intent of any well meaning law due to states' whim. But perhaps it is too late for states to undermine the significance of communities living close to natural resources on which they depend. It is only a matter of time when the nation- state would come about in their approach to realise that for any effective governance including managing our common pool resources they have to integrate communities closest to natural resources by a near total paradigm shift in their approach and not merely by some some ineffective sop in the garb of any social welfare legislation.