



Government of India  
Ministry of Tribal Affairs



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# Land and Governance Under the Fifth Schedule



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## An Overview of the Law

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### PREFACE

The Scheduled Tribes live in contiguous areas unlike other communities. It is, therefore, much simpler to have an area approach for development activities as well as regulatory provisions to protect their interests.

In order to protect the interests of Scheduled Tribes Article 244 of the Constitution has made provision for 'Administration of Scheduled Areas and Tribal Areas'. On the issue of land and other social issues, provisions have been enshrined in the Fifth Schedule and the Sixth Schedule of the Constitution. The Fifth Schedule under Article 244(1) of Constitution defines "Scheduled Areas" as such areas as the President may by order declare to be Scheduled Areas. These areas can be altered by the President of India after consultation with the Governor of that State under Article 244(2).

The purpose of Scheduled Area is to preserve the tribal autonomy, their culture and economic empowerment, to ensure social, economic and political justice and preservation of peace and good governance. Towards this, Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA) was enacted and was hailed as a fundamental departure to local self-governance that would usher in participatory democracy and genuine empowerment of the people.

This book is an attempt to bring together the various legislative protections available to tribal communities pertaining to land and governance in the Schedule Areas and the role of different institutions to achieve the goals enshrined in the Constitution.

I am sure this book will serve as a ready reckoner for policy makers and administrators who are working on the issues concerning tribal development and empowerment.

I acknowledge the support of UNDP and especially, Ms Shomona Khanna for preparing this book and hope that this book will be widely circulated and used.

Ashok Pai



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### FOREWORD

The Constitution of India's framework for protecting and advancing the rights of tribal communities is amongst the most advanced in the world. The strong statutory framework is complimented by far reaching legislations including the Forests Rights Act and special provisions in Panchayati Raj laws.

Yet, realizing the rights and entitlements of forest dwelling communities in the truest sense as recent studies and evidence demonstrate, remains one of the country's biggest challenges. Empowering tribal communities requires a two pronged approach. The first is to strengthen constitutional and statutory protection in a holistic manner. Second, is to enable forest communities to understand their rights and legal provisions available to protect these fundamental rights.

This publication titled *Land and Governance in the Fifth Schedule* seeks to do just this. It outlines the legal framework of constitutional provisions and legislative safeguards which are applicable to the Fifth Schedule, and explores the potential for advancement through simple interpretative tools, accessible to all. Its an extremely relevant document which I hope will contribute to the realization of tribal rights over their resources and livelihoods.

I congratulate the Ministry of Tribal Affairs for leading the preparation of this important resource and commend the Ministry for its commitment to protecting and empowering tribal communities and in continuing to facilitate vital knowledge sharing which can inform all our efforts.

Jaco Cilliers  
Country Director

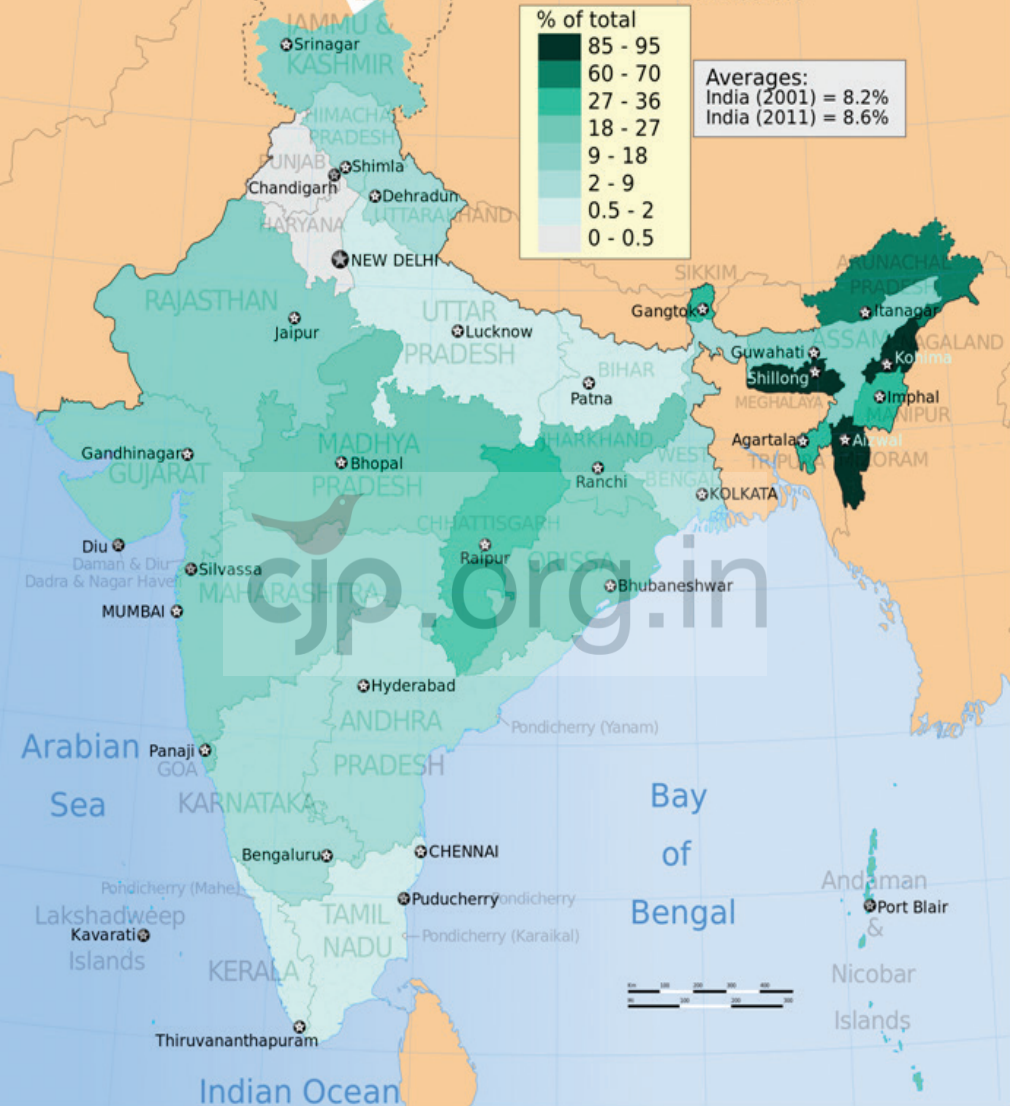
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## % Population Scheduled Tribes, Indian states 2011 Census



Source: Census of India 2011



# Introduction

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In Part I of the present compendium, we examine the Fifth Schedule of the Constitution and its various provisions. 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.

For the purpose of the present document, we will be looking closely at the law relating to Fifth Schedule areas only.

Article 244, contained in Part X of the Constitution entitled “The Scheduled and Tribal Areas”, provides as follows:

**“Article 244** (1) *The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Area and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram.”*

The purpose of Scheduled Areas, as also recognised in several judgments, is to preserve the tribal autonomy, their culture and economic empowerment, to ensure social, economic and political justice, and preservation of peace and good governance.<sup>1</sup> It is with this object in mind that the Constitution created the Fifth Schedule which has famously been called “A Constitution within a Constitution” by late Dr. B.D. Sharma, former Commissioner for Scheduled Castes and Scheduled Tribes.

The Panchsheel Doctrine,<sup>2</sup> a set of five fundamental principles devised by Sh. Jawaharlal Nehru, India’s first Prime Minister, enunciated tribal development as follows:

1. People should develop along the line of their own genius and we should avoid imposing anything on them. We should try to encourage in every way their own traditional arts and culture.
2. Tribal rights to land and forest should be respected.
3. We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will no doubt, be needed, especially in the beginning. But we should avoid introducing too many outsiders into tribal territory.
4. We should not over administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through, and not in rivalry to, their own social and cultural institutions.
5. We should judge results, not by statistics or the amount of money spent, but by the quality of human character that is evolved.

<sup>1</sup> *Samatha vs. State of Andhra Pradesh* (1997) 8 SCC 191.

<sup>2</sup> Verrier, Elwin, *A Philosophy of NEFA*, Shillong, 1959, p.62.

It is in this constitutional and policy approach that the Fifth Schedule is examined in the present compendium.

In Part II of the present compendium, the law relating to local self governance in Fifth Schedule areas, primarily through village panchayats, is examined. Panchayats as an institution of local self governance have been in existence in many parts of India since centuries. The Constitution of India gave the panchayats a constitutional status in 1993 with the 73<sup>rd</sup> Amendment to the Constitution. It introduced specific provisions for the setting up of Panchayats across the country in rural areas as a fourth rung of representative democracy.

In Part III we make a brief examination of how these constitutional and statutory protections translate into reality, by examining some of the key challenges to the rights of tribals over their homelands, resources and livelihoods, and whether the legal framework has provided the expected protections.



# Part I: The Fifth Schedule and its Provisions

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## ■■■■ | The Fifth Schedule in the Constitutional Design

The Preamble to the Constitution of India makes a commitment to 'Justice social, economic, and political'. The right to life under **Article 21**<sup>3</sup> of the Constitution has been interpreted in a catena of judgments to include the right to a life of dignity, which includes therefore a host of other rights which are necessary and important to ensure that this life is holistic and complete. Therefore the right to livelihood,<sup>4</sup> the right to shelter,<sup>5</sup> the right to a clean environment,<sup>6</sup> the right to water,<sup>7</sup> and numerous other rights which are of a socio-economic nature, have been held by judicial precedent to be

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<sup>3</sup> Article 21 of the Constitution of India states:

*"21. Protection of life and personal liberty:- No person shall be deprived of his life or personal liberty except according to procedure established by law."*

<sup>4</sup> *Olga Tellis vs. Bombay Municipal Corporation (1985) 3 SCC 545, Narendra Kumar vs. State of Haryana (1994) 4 SCC 460, State of Himachal Pradesh v. Raja Mahendra Pal (1999) 4 SCC 43.*

<sup>5</sup> *Shantistar Builders v. Narayan Khimlall Toame (1990) 1 SCC 520.*

<sup>6</sup> *N.D. Jayal v. Union of India (2004) 9 SCC 362, 382.*

<sup>7</sup> *B.L. Wadhwa vs. Union of India (1996) 2 SCC 594.*

part of the fundamental right under Article 21. At its core, the Constitution bears a commitment to the concept of equality of all citizens before the law, as stated at the outset in the Preamble itself when it commits to the vision of 'equality of status and opportunity' as a core part of the aspiration of a newly independent state. The fundamental right to equality has been held to be part of the 'basic structure' of the Constitution and therefore unalterable even by constitutional amendment.<sup>8</sup>

Not surprisingly, the Fundamental Rights Chapter of the Constitution (Part III) details the concept of equality at some length. **Article 14** recognises the right to equality before law and equal protection of the law and makes the same available to all persons, that is, citizens as well as non-citizens. The Constitutional provisions as well as numerous judicial precedents firmly establish that a mere 'formal' equality approach has been rejected. Instead, the Constitution clearly recognises that to be completely meaningful, a 'substantive' approach to equality has to be adopted, and therefore the historical discrimination of certain groups and classes must not only be abjured by the state, but concrete steps must be taken to reverse the present consequences of such historical discrimination. It is only with such a substantive or affirmative approach can equality in a real sense be achieved.

In keeping with this approach to Equality, the Constitution recognises the right against discrimination in **Article 15** which prohibits discrimination by the state of any citizen on grounds of religion, race, caste, sex, place of birth, or any of them. The Article insists on affirmative action, in the form of special provisions for 'socially and educationally backward classes of citizens or for Scheduled Tribes', as a part of this right.<sup>9</sup> **Article 16** (prohibition of discrimination in public employment includes reservations for 'backward

<sup>8</sup> The principle of basic structure has been articulated in *Keshavananda Bharati v. St of Kerala* (1973) 4 SCC 225, and reiterated in numerous judicial precedents thereafter. See also *Minerva Mills Ltd vs. UOI* (1980) 3 SCC 625.

<sup>9</sup> Article 15(4) of the Constitution states:

*"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."*

class of citizens' and reservations in promotions for Scheduled Tribes), and **Article 17** (prohibition of untouchability in any form) are instances of specific areas where the Constitution requires the state to take an affirmative and pro-active approach.<sup>10</sup>

Similarly, the "Directive Principles of State Policy" (Part IV of the Constitution) also contain several provisions which directly and indirectly impart the right to equality as understood in the Constitution. The Supreme Court in numerous judgments has held that these principles inform the right to life and dignity under Article 21. Key among these are two provisions which are understood to articulate the concept of 'distributive justice':

**Article 38** *places a duty on the state to "secure a social order in which justice, social, economic and political, shall inform all the institutions of the national life" and in particular to minimise inequalities in income and eliminate inequalities in status among individuals and amongst groups of people;*

**Article 39** *contains critical obligations on the state to direct its policy towards what has come to be known as 'distributive justice', with respect to adequate means of livelihood, ownership and control of material resources, minimisation of concentration of wealth in the economic system, and so on.*

In addition, **Article 46** contains an obligation on the state to promote the education and economic interests of weaker sections, in particular the Scheduled Tribes, and also to protect them from social injustice and all forms of exploitation.

This approach to equality, which recognises the need to correct historical wrongs in order to achieve substantive equality, in the present and the future, with a core commitment to distributive justice and the reduction of economic inequalities, has informed the entire constitutional dispensation with regard to marginalised peoples in general, and Scheduled Tribes in particular. Therefore, the constitutional provisions relating to Scheduled

<sup>10</sup> *Safai Karamchari Andolan & Ors. vs. Union of India & Ors.* (2014) 11 SCC 224.

Tribes under **Article 244** and the **Fifth Schedule** must always be placed within this larger constitutional perspective, before undertaking any textual analysis with regard to a specific fact situation or issue. When read together, these constitutional provisions create a distinct dispensation for tribal homelands which have been recognised as such through the process of scheduling of such areas, based on the recognition that tribal or indigenous peoples have historically suffered at the hands of people from the 'mainland', including the colonisers, and require special protections at a constitutional level to ensure that these historical wrongs are not repeated, and are reversed.

This aspect of the law relating to special constitutional protections to Scheduled Tribes and Scheduled Areas has also seen some important developments. A leading decision on the subject was passed by the Supreme Court in *Samatha vs. State of Andhra Pradesh*<sup>11</sup> (see Box 1 ahead). The Court was asked to rule on whether the grant of a mining lease, in a Scheduled Area to a non-tribal was in violation of laws preventing alienation of Adivasi lands. The specific context for the case was the Andhra Pradesh Scheduled Areas Land Transfer Regulation 1 of 1970, which explicitly prohibits any person in a Scheduled Area from transferring lands to anyone other than a Scheduled Tribe. The premise of the regulation is that all land in Scheduled Area is presumed to have been Adivasi land; hence, not only should no land now pass into the hands of non-Adivasis, but any land presently owned by non-tribal should, if being transferred, come back to the hands of Scheduled Tribes. The question before the Court was whether the grant of a mining lease on government land to a non-tribal violated this principle.

The Court did not rely purely on the specific clauses of the Regulation and instead held that the Constitution itself requires that land in Scheduled Areas should remain with the Adivasis to preserve their autonomy, culture and society. The Regulation, hence, should be interpreted 'expansively' in order to fulfill this mandate.

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<sup>11</sup> (1997) 8 SCC 191.

### Box 1: Samatha Judgment: Highlights

The highlights<sup>12</sup> of the Samata judgment are:

- a) Government lands, forest lands and tribal lands in the scheduled area cannot be leased out to non tribals or to private industries;
- b) This issue which started as non settlement of lands in reserve forest enclosures in Borra panchayat was addressed by the Court by directing the State government to immediately issue title deeds to tribals in occupation of these lands. The Court stated that government has no right to grant mining leases in these enclosure lands belonging to tribal people;
- c) Government cannot lease out lands in scheduled areas for mining operations to non tribals as it is in contravention of the Fifth Schedule of the constitution;
- d) Mining activity in scheduled area can be taken up only by Andhra Pradesh State Mineral Development Corporation or cooperative of tribals, and then only if they are in compliance with the *Forest Conservation Act, 1980* and the *Environment Protection Act, 1986*;
- e) The Court recognised the 73<sup>rd</sup> Constitution Amendment Act and the Andhra Pradesh Panchayati Raj (Extension to Scheduled Areas) Act by stating that the Gram Sabhas shall be competent to safeguard and preserve community resources and thereby reiterated the need to give the right of self governance to tribals;
- f) The court felt that, if necessary, the Chief Secretary of Andhra Pradesh should constitute a committee consisting of himself, Secretary (Industry), Secretary (Forest), Secretary (Social Welfare) to have the factual information collected, and consider whether it is feasible to permit the industry to carry on mining operations.

Contd...

<sup>12</sup> *Surviving A Minefield: An Adivasi Triumph*, Samata, Hyderabad, April, 2000.



If the committee so opines, the matter may be placed before a Cabinet Sub-Committee consisting of Minister for Industries, Forest and Tribal Welfare to examine the issue whether licences could be allowed to continue, or whether expedient to prohibit further mining operations;

- g) In case there are similar Acts in other States which do not totally prohibit grant of mining leases on the lands in scheduled areas, similar committee of Secretaries and State Cabinet Sub Committees should be constituted, and decision taken thereafter. Before granting leases, it would be obligatory for the State government to obtain concurrence of the Central government by constituting a sub-committee headed by the Prime Minister, and other union ministers;
- h) The Court also felt that it would be appropriate to constitute a conference of chief ministers and concerned union ministers to take a policy decision so as to bring about a suitable enactment for a consistent scheme, throughout the country in respect of tribal lands and exploitation of mineral wealth.
- i) The State government was, therefore, directed to stop all industries from mining operations in Scheduled Areas.

The court opined that since the Executive is enjoined to protect social, economic and educational interests of the tribals, when the state leases out lands in scheduled areas to non tribals or industries for exploitation of mineral resources, it transmits the above correlative constitutional duties and obligation to those who undertake to exploit the natural resources. The Court directed that at least 20% of the net profits should be set apart as a permanent fund, as part of industrial/business activity, for establishment and maintenance of water resources, schools, hospitals, sanitation, and transport facilities by laying roads, etc. This 20% allocation would not include the expenditure for reforestation and maintenance of the ecology.

In numerous cases where the constitutional validity of land legislations which prohibit/restrict the transfer of land by tribals in Scheduled Areas was challenged, the Courts have held that the Fifth Schedule has been designed, in furtherance of Article 15(4) and Article 46, to protect tribals from social injustice and exploitation. Therefore, these special legislations cannot be held to be unconstitutional on the ground of violation of other fundamental rights, such as Article 14 and 19(1)(g).<sup>13</sup> There is, therefore, a constitutional duty on the state to take positive and stern measures for the survival and preservation of the integrity and dignity of tribals.<sup>14</sup>

The substantive approach to equality has also informed numerous protective legislations enacted and implemented in the 60 years of India's independence, concerning a gamut of marginalised groups and people. In Part II of the present compendium, we will examine some of the State legislations on panchayati raj or local self-governance which have been amended to bring them in conformity with the Constitutional mandate and *The Panchayats (Extension to Scheduled Areas) Act 1996*. While the primary focus of this Central legislation is to make special provisions relating to the extension of the Panchayati raj system to Scheduled Areas, it also contains certain key provisions relating to the right to equality. Therefore, the statute mandates reservations for Scheduled Tribes at all levels in the Panchayats, and also provides for reservation of all posts of Chairperson of Panchayats at all levels in the Scheduled Areas for Scheduled Tribes.<sup>15</sup> This provision was the subject matter of a constitutional challenge in the Supreme Court of India, in a batch of petitions from the State of Jharkhand, on the ground that it violates the right to equality under Article 14. The Supreme Court rejected the challenge and upheld the constitutional validity of this provision, stating as follows:<sup>16</sup>

<sup>13</sup> *P. Rami Reddy vs. State of Andhra Pradesh* (1988) 3 SCC 433. Article 19(1)(g) of the Constitution states:

*"All citizens have the right to practise any profession, or to carry on any occupation, trade or business."*

<sup>14</sup> *Lingappa Pochanna Appelwar vs. State of Maharashtra* (1985) 1 SCC 479.

<sup>15</sup> The proviso to Section 4(g) of PESA states that the seat of Chairperson of Panchayats at all levels shall be reserved for the Scheduled Tribes.

<sup>16</sup> *Union of India etc. vs. Rakesh Kumar & Ors etc.* (2010) 4 SCC 50. Significantly, as a result of the pendency of this constitutional challenge, elections to Panchayati Raj institutions had not been held in Jharkhand since the formation of the State in 2000. As a result the Supreme Court in the above judgment also issued a direction to the State government and the State Election Commission to conduct elections to the Panchayati raj institutions as early as possible, which was done soon thereafter.

*‘...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.*

*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 the 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 policy choices....<sup>17</sup>*

The most recent legislation which illustrates this approach to equality is the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006* (hereafter ‘the Forest Rights Act’) which in its Preamble states:

*‘And whereas the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State Forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dweller who are integral to the fore very survival and sustainability of the forest ecosystem.’*

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<sup>17</sup> *Ibid* at para 34 and 37.

The constitutional scheme relating to Scheduled Areas and the statutory scheme under the Forest Rights Act was considered by the Supreme Court recently. In a detailed judgment passed by a three-judges bench in the *Niyamgiri case*,<sup>18</sup> the Court unambiguously upheld the provisions of the Forest Rights Act and various government circulars issued under it which require prior decision of the Gram Sabha before their traditional habitats in forest areas are diverted for non-forest purposes. The Court was of the view that:

*“Of late, we have realised that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.”<sup>19</sup>*

Not surprisingly, the issue of prior informed decision-making by the Gram Sabha has become a political hot potato, and is a subject of intense criticism by corporate interest groups which believe that consultation and consent of the tribal and forest dwelling peoples is a key obstruction to ‘development’. Never mind that such a development paradigm which enriches the few at the cost of the many, has itself been held up for scrutiny by the aforesaid judgment and the Constitution. It is within this constitutional framework that the Fifth Schedule is examined in the present document.

## ■ ■ ■ ■ | Brief outline of the Fifth Schedule provisions

It will be useful to briefly examine some of the key provisions of the Fifth Schedule, which comprises only seven paragraphs, before making a more detailed analysis (for full text of the Fifth Schedule, see **Appendix A.**)

<sup>18</sup> *Orissa Mining Corporation vs. Ministry of Environment and Forests* (2013) 6 SCC 476.

<sup>19</sup> *Ibid* at para 42.

**Paragraph 1** interprets the expression “State” for the purposes of this Schedule. **Paragraph 2**, while stating what Scheduled Areas are, further provides that subject to the provisions of the Schedule, executive power of the State extends to the Scheduled Areas located in such State. This provision makes it clear that the power of ‘administration and control’ of the state extends to these areas, removing doubts, if any, whether these areas are subject to the overarching authority of the state and its machinery. It has been held by the courts that the power of ‘administration and control’ referred to in this clause is wide enough to embrace exercise of governmental power of every description – executive, legislative and judicial.<sup>20</sup>

**Paragraph 3** requires the Governor of the State, who as we shall see below is vested with enormous legislative powers, to make a report annually, or when required to do so by the President of India, to the President regarding the administration of the Scheduled Area. It further provides that the Executive power of the Central government will extend to the giving of directions to the State government for the administration of these areas. This provision is significant, as it makes a sharp divergence from the non-Scheduled Areas where the executive power of the Centre extends only insofar as the subject matters which fall within its legislative domain under the Seventh Schedule.<sup>21</sup> In Scheduled Areas, however, the executive power of the Central government extends to **ALL** subject matters, even those which are within the domain of the State government.

**Paragraph 4** provides for the setting up of a Tribes Advisory Council (or ‘TAC’) to be set up in each State where there are Scheduled Areas, and also in those States with a significant tribal population, to give advice on matters relating to the welfare and advancement of the Scheduled Tribes in these States.

<sup>20</sup> *Amarendra Nath Dutta vs. State of Bihar* AIR 1983 Patna 151 @ para 18, 46.

<sup>21</sup> See Article 73(1)(a) of the Constitution, which states:

*“(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend to (a) all matters with respect to which Parliament has power to make laws...”*

Under **Paragraph 5** the Governor has been empowered to direct, by public notification, that any particular Act of Parliament or of the State Legislature shall not apply to the Scheduled Area of that state, or shall apply subject to exceptions and modifications. (For a recent example of such a regulation, see **Box 2**.) Paragraph 5 also empowers the Governor to make Regulations to restrict or prohibit transfer of land by or among members of Scheduled Tribes, regulate allotment of land, and also money-lending, subject to the assent of the President.

**Paragraph 6** defines the Scheduled Areas as may be declared, by the President, by Order, and provides that he may, by order, direct cesser of such area, increase or alter such area, and rescind any order made under this Paragraph.

**Paragraph 7** states that provisions in the Fifth Schedule may be amended, altered, or repealed by Parliament, and no such amendment will be construed to be an amendment to the Constitution under Article 368.

## ■ ■ ■ ■ | What are Scheduled Areas?

It is well known that “Scheduled Tribes” are those that are scheduled as such by a Presidential Order under Article 342 of the Constitution. It may be pointed out that the creation or cessation of Scheduled Areas, as provided in paragraph 6 of the fifth Schedule, is placed at an even higher level than the declaration of Scheduled Tribes and Scheduled Castes by Presidential Orders under Articles 341 and 342, where, subsequent to the initial notifications in 1950, the Constitution empowers the Parliament to make amendments from time to time.

With regard to Scheduled Areas, however, it is only the President of India, by way of a Presidential Order duly notified, who can make any alteration which will include, or exclude, any part of the territory of India from the Fifth Schedule.

The term “Scheduled Areas” are those that are scheduled as such by a Presidential Order under Paragraph 6 (1) of the Fifth Schedule, which states:

*“In this Constitution, the expression ‘Scheduled Areas’ means such areas as the President may by order declare to be Scheduled Areas.”*

This is an important fact to remember while addressing legal arguments and making legal submissions in a court environment, relating to marginalised and backward classes, including Scheduled Tribes. For instance, while arguing a case relating to non-compliance, with procedural safeguards, when declaring a municipality in a Scheduled Area, a judicial officer found himself unable to accept that “Scheduled Area” is a term which applies solely and only to areas declared as such under paragraph 6 above. He was of the view that a Scheduled Area could refer to an area declared as such under a Central or State level economic, taxation or land reform legislation, where demarcation of different classes of lands is often made under the Schedules of the concerned statute. It is important to remain alive to the reality of such possible conundrums, and ensure that while urging rights under the Fifth Schedule, the basic underlying principles and legal provisions relied upon are categorically stated.

Paragraph 6 provides the constitutional design for the creation of Scheduled Areas, making it very clear that any kind of alteration of boundaries of a Scheduled Area, whether it is increase, decrease, cessation, or declaration, is only permitted by an order of the President of India. The President is bound by the aid and advice of the Council of Ministers at the Centre. In certain situations, consultation with the Governor is necessary, but the provision is quite categorical that the location of this power is at the Centre, and then at the highest level.

### ■■■■ | **Criteria for declaring an area as a Scheduled Area**

The First Scheduled Areas and Scheduled Tribes Commission, also known as the Dhebar Commission (1960-61) laid down the following criteria for declaring any area as a ‘Scheduled Area’ under the Fifth Schedule:<sup>22</sup>

- Preponderance of tribal population, which should not be less than 50 percent;

<sup>22</sup> As cited in the Fiftieth Report of the Standing Committee on Urban and Rural Development (2003) (Thirteenth Lok Sabha).

- Compactness and reasonable size of the area;
- Underdeveloped nature of the area; and
- Marked disparity in the economic standard of the people, as compared to the neighboring areas.

More recently, a viable administrative entity such as a district, block or *taluk*, has been also identified as an important additional criteria.<sup>23</sup>

According to the Ministry of Tribal Affairs, '(t)hese criteria are not spelt out in the Constitution of India but have become well established. They embody the principles followed in declaring the 'Excluded' and 'Partially-Excluded Areas' under the Government of India Act, 1935, as well as those contained in Schedule 'B' of recommendations of the Excluded and Partially Excluded Areas Sub Committee of Constituent Assembly and those outlined by the Scheduled Areas and Scheduled Tribes Commission 1961.'<sup>24</sup>

It has been held by one of the High Courts that if any guidelines regarding the areas to be included in the Fifth Schedule can be deduced from the provisions of the Constitution, it is that the areas should have a substantial concentration of tribal population.<sup>25</sup> It is important to point out, however, that at present Scheduled Areas cover only 30% of the tribal population. No tribal habitations in the states of Kerala, Tamil Nadu, Karnataka, West Bengal, Uttar Pradesh and Jammu & Kashmir have been brought under the Fifth or Sixth Schedule. Recommendations of various Government-appointed Committees to include the remaining Tribal Sub-Plan (TSP) and Modified Area Development Approach (MADA) areas, as well as similar pockets, under the Scheduled Areas notification have been ignored till date.<sup>26</sup> Several States have continued

<sup>23</sup> Annual Report 2013-14, Ministry of Tribal Affairs, Government of India.

<sup>24</sup> *Special Report: Good Governance for Tribal Development and Administration*, National Commission for Scheduled Tribes May 2012.

<sup>25</sup> *Amarendra Nath Dutta vs. State of Bihar* AIR 1983 Patna 151. In this case the Presidential Order declaring Dhalbhum Sub Division as part of the Scheduled Areas in Bihar was challenged, and the challenge was rejected by the Patna High Court, stating that the exercise of power by the President is not ultra vires.

<sup>26</sup> See, for instance, the *Report of MPs and Experts to make recommendations on the salient features of the law for extending provisions of the Constitution (73rd) Amendment Act, 1992 to Scheduled Areas*, 1994 (Bhuria Committee Report).



to witness struggles spanning decades demanding the inclusion of tribal areas in the Fifth Schedule, prominent among these being the Muthanga struggle in Kerala, which continues till today.<sup>27</sup>

Allocation of resources for the administration of special schemes and budgets for Scheduled Areas is done through the Tribal Sub Plan (or 'TSP'). Started in the fifth Five Year Plan, the TSP was conceived to ensure coordinated expenditure of funds on projects for Scheduled Tribes in areas where they are the majority. At that time, it was found that certain areas besides Scheduled Areas also have preponderance of tribal population and these were also included in the TSP. At present, the Tribal Sub-Plan areas are coterminous with Scheduled Areas in the States of Bihar, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Odisha and Rajasthan. In the Eleventh Five Year Plan, Rs. 2,872.10 crore was provided as 'Special Central Assistance' to State/UT governments for expenditure on Tribal Sub Plan activities, and according to the Twelfth Plan document, about 15 lakh STs were assisted to cross above the poverty line during the previous plan period.<sup>28</sup>

## ■■■■ | Role of the Governor

In the constitutional design, just as the President is the head of the Executive at the Centre, the Governor is the head of state executive in a State government. He is appointed by the Central government, and under Article 163 of the Constitution, ordinarily the Governor is bound to exercise his/her powers with the 'aid and advice' of the Council of Ministers, i.e. the Cabinet of the elected State government.

However, while exercising powers under the Fifth Schedule, there is considerable debate as well as litigation on whether or not the powers conferred upon the Governor by the Fifth Schedule can be exercised without explicit sanction from the State government, and whether he is, in

<sup>27</sup> Bijoy CR, K Ravi Raman, *Muthanga: The Real Story- Adivasi Movement to Recover Land*, Economic and Political Weekly May 17<sup>th</sup>, 2003.

<sup>28</sup> Twelfth Five Year Plan, Volume III- Social Sectors, para 24.133, Planning Commission, Government of India.

fact, bound by the advice of the Central Government. It has been argued that the Governor, while exercising his powers under the Fifth Schedule, is not bound by the aid and advice of the Council of Ministers and must exercise the function independently. This position has received affirmation from the Courts as well.<sup>29</sup>

Be that as it may, the Governor has been vested with enormous powers under the Fifth Schedule. Under Paragraph 4, he has rule-making powers with regard to the number of members, mode of appointment, and functioning of the Tribes Advisory Council (TAC). The TAC renders advice to him when called upon by him, never on its own.

Paragraph 5(1), which lies at the heart of the Fifth Schedule, gives the Governor the power to restrict the application of any Central or State legislation to the Scheduled Area, either completely, or subject to exceptions and modifications. It has been held by the Supreme Court that the power to make exceptions and modifications includes the power to amend these laws.<sup>30</sup>

Paragraph 5(2) empowers the Governor to make Regulations for the 'peace and good government' of a Scheduled Area. This power is general in nature, and the terminology adopted by the Constitution is not only wide in terms of the subject matter covered, it is also categorically stated that this power inheres "notwithstanding anything contained in this Constitution." Clearly, therefore, the power to make regulations for 'peace and good government' extends to all subject matters which could conceivably be so described, notwithstanding the segregation of subject matters between the Central, State and Concurrent Lists contained in the Seventh Schedule. It is further stated that the Governor, while making such regulations, can amend or repeal any Central or State legislation for this purpose with regard to its application to Scheduled Areas.

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<sup>29</sup> *BK Manish & Ors. vs. State of Chhattisgarh & Ors.* judgment and order dt. 12<sup>th</sup> March 2013 in WP (PIL) 23 of 2012, Bilaspur High Court.

<sup>30</sup> *Edwingson Bareh vs. State of Assam* (1966) 2 SCR 770.

Specifically, this paragraph empowers the Governor to make regulations with regard to:

- (i) Prohibition and restriction of transfer of land from and between Scheduled Tribes – almost every State in the country, and certainly all States with Scheduled Areas, have enacted legislations relating to prevention/prohibition of land transfer in Scheduled Areas by tribals to non-tribals, and in some cases, even the transfer of land between tribals inter-se is restricted.
- (ii) Regulation of allotment of land to tribals in Scheduled Areas;
- (iii) Regulation of moneylending in Scheduled Areas to tribals.

Laws made under paragraph 5 by the Governor require prior consultation with the TAC, and the assent of the President is necessary for them to be brought into force.

In large part, the Governors have failed to use their powers. As an official committee found:

‘The Governors, on their part, remained oblivious about the state of the tribal people. Even the mandatory annual Reports by the Governors to the President regarding the administration of Scheduled Areas under Para 3 of the Fifth Schedule are irregular. They comprise largely stale narrative of departmental programmes without even an allusion to the crucial issues in administration, the main thrust of the Fifth Schedule.’<sup>31</sup>

In an article entitled ‘Tribal People and Forests’, Rao and Sankaran have argued that given the abuse of forest legislation against forest dwelling tribals, there is a need for Governors of States to obstruct the application of the Forest Conservation Act, 1980, and its attendant Forest Policy of 1988, to Scheduled Areas. The authors, themselves retired civil servants, called for issue of notifications under paragraph 5 by the concerned Governors declaring that the FCA shall not apply to Scheduled Areas.<sup>32</sup> Unsurprisingly,

<sup>31</sup> *Report of MPs and Experts to make recommendations on the salient features of the law for extending provisions of the Constitution (73rd Amendment Act, 1992 to Scheduled Areas, 1994, p.14.* Accessible at [http://www.odi.org.uk/projects/00-03-livelihood-options/forum/sched-areas/about/bhuria\\_report.htm](http://www.odi.org.uk/projects/00-03-livelihood-options/forum/sched-areas/about/bhuria_report.htm)

<sup>32</sup> Rao, R.K., IFS (Retd) & S.R. Sankaran, IAS (Retd) “*Tribal People and Forests*” (undated).

this demand has long remained unaddressed, until the recent notification issued by the Governor of Maharashtra, which takes this forward to some extent (see Box 2 below and Appendix B). But the articulation of this idea based on the constitutional design served to galvanise the tribal rights movement in the country to accelerate its long standing demand for an affirmative legislation recognising the rights of forest dwelling communities over forest lands, both in Scheduled Areas and otherwise, which resulted in the Forest Rights Act of 2006.

### Box 2: Regulation for Scheduled Areas in Maharashtra

The powers under Paragraph 5(1) of the Fifth Schedule to the Constitution of India were recently exercised by the Governor of Maharashtra in passing a Regulation<sup>33</sup> under which the operation of the following Central and State legislations was restricted or modified in their application to Scheduled Areas in the State, namely:

- *Indian Forest Act, 1927*: This statute has been modified to provide that decisions regarding transit, collection and sale of minor forest produce shall be taken by the Panchayat at the appropriate level and the Gram Sabha, or a Committee thereof.
- *Water (Prevention and Control of Pollution) Act, 1974*: Section 25 of the Water Act makes it mandatory to obtain the previous consent of the State Pollution and Control Board before setting up any industry, operation, process, treatment or disposal system, or addition/extension thereof, which is likely to discharge effluent into a water body or land. It further provides for the procedure to be followed for this purpose. The Maharashtra Regulation modifies this provision so that, in case of a minor water body in Scheduled

Contd..

<sup>33</sup> Notification dated 30<sup>th</sup> October 2014 bearing No. RB/TC/e-11019(89)(2013)/Notification-4/1120/2014, issued by the Office of the Governor of Maharashtra. A copy of the Regulation is placed in Appendix B.

Areas, the State Pollution Control Board must obtain the prior informed consent of the concerned Gram Panchayat before providing this approval under Section 25. It is further provided that where a Gram Sabha sends a resolution to the SPCB that a minor water body is being polluted, it shall conduct investigations and take remedial action within one month.

- *Markets and Fairs Act, 1862*: This statute has been modified to the extent that prior informed consent of Gram Sabhas and Panchayats at the appropriate level is required before establishing markets and fairs under the Act.
- *Maharashtra Village Panchayats Act, 1959*: Provisions of this Act have been modified to bring some of the above amendments into effect, and also to include fishing activities in minor water bodies under the purview of the Gram Panchayat. In addition, provision has been made for a proportionate share for Gram Panchayats in the Tribal Sub Plan funds.
- *Maharashtra Land Revenue Code, 1966*: It is provided that prior to the grant of prospecting licence or mining lease or auction of minor minerals in Scheduled Areas, the consent of the Gram Sabha or Panchayat at appropriate level shall be mandatory.

A key area in which laws/regulations applicable to Scheduled Areas have been made under this paragraph is land alienation by tribals and of tribal lands. In fact, it is not just States with Scheduled Areas where such laws have been enacted, but almost all States in the country which have tribal populations. For a list of State level legislations on the subject see **Appendix C**.

The constitutional validity of these legislations has often come under challenge, as social justice legislations with affirmative provisions often are, on the grounds of violation of fundamental rights to equality (Article 14), right to life and livelihood (Article 21), and right to carry on profession, business or trade (Article 19(1)(g)). These challenges have firmly been rejected by the Courts, and the law is quite well laid down today that laws regulating or

prohibiting transfer of land in tribal areas and Scheduled Areas, are protected by the Fifth Schedule as well as by Article 15(4), among others.

## ■■■■ | Role of the Tribes Advisory Council

Paragraph 4 of the Fifth Schedule requires the constitution of a Tribes Advisory Council (or 'TAC') in each State which has a Scheduled Area. Such TAC can also be constituted in other States which have large tribal populations, if the President so directs. The TAC should have not more than twenty members, of whom at least three-fourths must be drawn from the elected representatives of the Scheduled Tribe communities in the State Legislature. Further, if the number of elected representatives is less than twenty, then the remaining seats can be filled with other members of the Tribal communities.

The main function of the TAC is to provide advice to the Governor, when he seeks it, on matters relating to "welfare and advancement of Scheduled Tribes" in the State. Thus, the TAC does not render advice to the Governor suo motu, but only when asked by him to do so.

Such advice is not binding upon the Governor. It is, however, compulsory for the Governor to consult the TAC before making any Regulations relating to governance in the Scheduled Areas, including land alienation, land transfer, and control of money-lending (see para 5(5)). Again, the provision requires a 'consultation' rather than consent, but as has been held in numerous Court judgments, any such consultation must be meaningful and must inform the decision-making process in a substantial way.

Unfortunately, the Tribes Advisory Councils of most States have been quite lack-lustre. Some part of this malaise may lie in the Rules framed under para 4(3). Recently, the *Chhattisgarh Tribes Advisory Council Rules, 2006* were challenged in a writ petition before the Bilaspur High Court. One of the grounds of challenge was the fact that the quorum for a meeting was a mere 5 members (out of a total of twenty) and that the Chief Minister was the Chairperson of the TAC.<sup>34</sup>

<sup>34</sup> The challenge was unsuccessful and the writ petition came to be dismissed by the High Court. *Supra* n. 29.

# Part II: The Panchayats (Extension to Scheduled Areas) Act, 1996

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Part IX of the Constitution contains a large number of provisions relating to the definition and constitution of Panchayats, Gram Sabhas, their powers and functions, and elections. Article 243-M of the said chapter, however, provides that where Scheduled Areas are concerned, provisions of this Chapter will not apply unless a special law is enacted by Parliament making such exceptions and modifications as necessary. This provision is based on the understanding that with regard to Scheduled Areas, a special constitutional dispensation is in place under Article 244 read with the Fifth Schedule. Therefore governance mechanisms which may be appropriate for the rest of the country ought not to be applied to such areas without necessary changes in order to bring them in conformity with the constitutional design.

This means that provisions in Part IX of the Constitution, and the existing Panchayat legislations in different States, cannot be applied to Scheduled Areas until a special law is enacted by Parliament laying down the

exemptions and modifications required in the existing law for this purpose. This provision is premised on the recognition that adivasi communities in such Scheduled Areas must be provided with a governance regime which respects their constitutional right to autonomous self governance.

It is in this context that Parliament in 1996 enacted the *Panchayats Extension to Scheduled Areas Act* (hereafter 'PESA') to extend the panchayati raj system to the Fifth Schedule areas. PESA lays down the exceptions and modifications necessary in the law, both the constitutional provisions as well as the State panchayati raj legislations, while extending the panchayati raj institutions to Scheduled Areas. The States having Scheduled Areas were required to enact state legislation within a year of the passage of PESA in the Parliament.

### ■ ■ ■ ■ | Essential ingredients of the law

Two aspects require attention at the outset. First, while PESA contains crucial principles, both in the actual provisions as well as in the spirit of the law, which are enforceable in courts of law, in itself it is not a statute which is capable of being implemented.

The second important factor is that under Entry 5 of List II of the Seventh Schedule to the Constitution, local self government and village administration<sup>35</sup> is a State subject, and therefore the power to legislate on panchayati raj institutions rests solely in the State Legislatures.

Thus, for the purpose of implementation, necessary changes in accordance with the provisions of PESA need to be carried out in the State level panchayati raj legislations. However, since PESA defines the substantive content of the law, in terms of Article 243-M of the Constitution, the amendments/ laws enacted at the State level must necessarily conform to the spirit and the letter of PESA. Therefore, while examining the different

<sup>35</sup> Entry 5 List II of the Seventh Schedule to the Constitution states:

*"Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self government or village administration."*



provisions of PESA, it is important to keep in mind that any understanding of the said law is incomplete until the provisions of the State level panchayati raj statutes have also been examined. It is not possible for the time being to test all State level statutes for conformity with PESA, and therefore we would use examples where and when required. However, the reader is advised to examine the specific provisions of the State legislation on the subject matter being discussed for purposes of completion. Eight of the nine States having Scheduled Areas, namely, Andhra Pradesh, Gujarat, Himachal Pradesh, Madhya Pradesh, Chhattisgarh, Maharashtra, Odisha and Rajasthan have amended pre-existing Panchayat Acts to incorporate the PESA provisions. The State of Jharkhand, however, enacted a new Panchayat Act in 2001 soon after its formation.

### ■■■■ | The spirit of PESA

Section 4 (a) and 4(d) of PESA, which encapsulate the essential spirit of the law, recognise the supremacy of customary law, traditional management practices for community resources, and traditional methods of dispute resolution in Scheduled Areas. These provisions state as follows:

(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;*

...

(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.*

It is apparent, therefore, that PESA makes it a duty of the State to ensure that any law enacted for the Scheduled Area on panchayats must give primacy to existing customary law and traditional mechanisms, and also give primacy to the community in the management of its community resources. It is generally agreed that these clauses encapsulate the essential ingredients of the approach of PESA for all law relating to panchayats and local self governance in Scheduled Areas. The critical elements of such an approach are:

- (i) The centrality of traditional mechanisms, whether with respect to law, dispute resolution, or resource management;
- (ii) The necessity to protect these traditional mechanisms, including cultural identity, customs and religious practices of the community;
- (iii) The centrality of the Gram Sabha, or the village community in this function, and the vesting of power in such Gram Sabha for this purpose.

While discussing the directives contained in PESA that State governments bring their existing Panchayati raj laws in conformity within one year, K.B. Srivastava has observed that the State governments are required to take into cognisance the following three principles:<sup>36</sup>

1. The Gram Sabha should be accorded prime place in the scheme, and is endowed with powers relating to management of natural resources and developmental projects;
2. The three tier panchayats are the executive arms of the Gram Sabha, and therefore should not statutorily be allowed to overlook the authority of the Gram Sabha;
3. The intention is devolution of power to the Gram Sabhas, not delegation of power, and the Gram Sabhas should be able to function as institutions of local self governance. He also refers to the 'Principle of Subsidiarity', meaning that the panchayats at the higher level should not assume the powers and authority of any panchayats at the lower level or of the Gram Sabha.

PESA requires State laws in Scheduled Areas to be amended within one year to ensure that every Grama Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resource and customary mode of dispute resolution. Most States, while amending their State panchayati raj legislations, have a blanket statement to this effect, but there are no further Rules, guidelines or mechanisms for bringing this into effect.

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<sup>36</sup> K.B. Srivastava *Panchayats in Scheduled Areas: An Analysis of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (Central Act no 40) and Extent of its Adaptation by the State having Fifth Schedule Areas*, National Institute of Rural Development (1999).

Thus, in **Maharashtra**, except for a statement in Section 54A(a) of the Bombay Village Panchayats Act 1958 which is related to the competency of the Grama Sabha, there is no indication of how this provision is to be translated into provisions in other State legislations. The corresponding amendment made by the **Odisha** government in 1997, qualified this requirement by providing that these powers will vest in the Grama Sasan insofar as they are “*consistent with the relevant laws in force and in harmony with the basic tenets of the Constitution and human rights.*”<sup>37</sup> No provision was made to operationalise this power, such as it is. Similarly, **Madhya Pradesh, Jharkhand** and **Chhattisgarh** enacted their respective State legislations envisaging ‘*due regard to the spirit of other relevant laws for the time being in force*’. There are also no provisions for redressal when a State legislation is not in consonance with the customary law, social and religious practices and traditional management practices of community resources, and therefore contrary to the substantive provisions of PESA.

While on the one hand such provisions create the space enabling the Gram Sabha to not blindly follow the letter of every relevant law, but rather to honour the spirit of the law, in effect these amendments are treated as subordinate to existing State legislations. The fact remains that the existing legal framework relating to natural resources across the country is steeped in the concept of eminent domain. This approach has been adopted across the board with regard to a large number of statutes with clear *non obstante* clauses which state that these laws will be applicable “*notwithstanding any law, tradition, custom or local practice*”. When existing laws specifically debar the application of tradition and customary laws, and no amendments have been made to these laws, it becomes imperative that the provisions incorporating PESA into State legislations give the Gram Sabhas and other PRIs in Scheduled Areas real power to enforce customary laws and traditional practices in the management and control of natural resources.

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<sup>37</sup> Section 5(6) Orissa Gram Panchayat Act, 1964.

## ■■■■ | Definition of a village

Perhaps the key provision of PESA is Section 4(b) which gives the special definition of “village”. This is a very important provision, since the defining feature of PESA is the Gram Sabha as a community at the village level and in which numerous powers of governance are vested. The Gram Sabha, being the key decision-making body, must be a cohesive and traditional unit.

The reason this definition is important is that the revenue village, which serves as the guideline for demarcation of panchayat areas in the ordinary course, often does not coincide with a community’s own definition of itself. It is found that in non-Scheduled Areas, often more than one village comprise the Gram Panchayat, apart from the fact that these are revenue villages which may or may not represent actual kinship and traditional customary ties of the community. The larger the demographic coverage of such a Gram Panchayat, the less homogenous it will be. Decision-making in such large culturally as well as socio-economically differentiated groups becomes difficult, and the possibility of dominant elites taking over is very strong. Therefore the need in Scheduled Areas to ensure that the village as defined in the statute for Scheduled Areas is the smallest unit possible.

When testing State level legislations, it is found that all States except **Gujarat** have amended their laws to purportedly ensure that “village” is defined in conformity with this provision of PESA. For instance, the State of **Himachal Pradesh** amended the definition of “village” in a Scheduled Area as:<sup>38</sup>

*‘a habitation or a group of habitations or a hamlet or a group of hamlets thereof comprising a community or communities and managing their affairs in accordance with traditions and customs’.*<sup>39</sup>

However, at the operational level, village in Scheduled Areas continues to be demarcated as one or more revenue villages.

<sup>38</sup> See Khanna, Shomona “Law relating to rights of panchayats over water and water based resources in Himachal Pradesh”, Society for Rural Urban and Tribal Initiative (SRUTI), February, 2003.

<sup>39</sup> Section 97-B of the *HP Panchayati Raj Act, 1994* on Declaration of Village in Scheduled Areas.

The panchayati raj law in **Maharashtra** makes it a point to assert that the definition of village in Scheduled Areas shall **not** differ from that in other parts of the State as under:

*“village” and “a group of villages” means the village or as the case may be, a group of villages specified in the notification issued under clause (g) of Article 243 of the Constitution of India.*<sup>40</sup>

In two States – **Himachal Pradesh** and **Odisha** – a fourth tier of governance has been created in the law, known as the “Up Gram Sabha” and “Palli Sabha” respectively.<sup>41</sup> This body is often at the Ward level, and conforms much more closely to a community group which is bound together by tradition. However, as will be seen below, the powers of the Gram Sabha as contemplated under PESA are not devolved to the Up Gram Sabha or the Palli Sabha in either State.

The definition of ‘village’ has its most important and immediate impact on the constitution of the Gram Sabha, or the body which comprises the village community. Section 4(c) of PESA provides that every village, as defined above, shall have a Gram Sabha, which consists of all persons whose names are included in the village level electoral rolls. While examining the State laws, however, it is found that few, if any States have adopted this specific definition for the purpose of defining who actually are the members of the Gram Sabha, and have simply adopted the definition as contained in the parent statute of that particular State.

## ■■■■ | Consultation

Section 4(l) of PESA contains the critical mandatory provision relating to prior consultation before:

- a. Acquisition of land in the Scheduled Area for development projects; and
- b. Re-settling or rehabilitating persons affected by such projects in the Scheduled Areas.

<sup>40</sup> Section 3(24) the *Bombay Village Panchayat Act, 1958*.

<sup>41</sup> In both States, this fourth tier of village governance extends to both Scheduled and Non-Scheduled Areas.

Unfortunately, while enacting this section, the Parliament provided a huge loophole in the clause which requires that the said consultation must be with the *“the Gram Sabha or the Panchayats at the appropriate level”*. As a result of this vague statement, State governments have sought to protect their power to unilaterally decide where and when to acquire land under the applicable land acquisition laws for public purpose.

As a result, several State governments have interpreted this provision to mean consultation with a panchayati raj institution at the Panchayat, Block or District level, but not the Gram Sabha. The panchayati raj laws in **Maharashtra** require that the Gram Sabha will be consulted. However, the States of **Odisha** and **Gujarat**, which have some of the largest Scheduled Areas in the country, have provided for consultation to take place at the level of the Zila Parishad which is at the District Level. In **Andhra Pradesh**, consultation takes place with the Mandal (Block) Parishad. The law in **Jharkhand** has no provision in this regard.

Such an approach is contrary to the essential spirit of PESA which has been described in an earlier section, for the simple reason that if PESA recognises the supremacy of the traditional village community over the community resources it has been managing since time immemorial, then the “appropriate” panchayati raj institution for consultation on whether and how the use of these community resources is to be altered for the purpose of a “development project”, must necessarily be the Gram Sabha. It is the Gram Sabha in which PESA vests this power and responsibility. For the State governments to narrowly interpret the provisions of PESA militates against the spirit of the law, as well as the express provisions of the law in Section 4(a) and (d).

What does “consultation” mean? Here too, there has been enormous contestation across the country on the true meaning and ingredients of a consultation, be it with the Gram Sabha, or any other panchayati raj institution (or ‘PRI’). The courts have consistently held that wherever the term consultation has been used in a law, there is a requirement that such consultation must be meaningful so that the views expressed are

taken into consideration in the decision-making process.<sup>42</sup> As a result, the key ingredients of the kind of consultation required by the provisions of PESA are:

- The consultation must be **prior**, that is, before the decision of the government is taken and acted upon;
- The consultation must be **informed**, so that information relating to the purpose of the land acquisition, such as project reports describing the development activity proposed, the environmental impact assessment reports, the rehabilitation scheme planned, must be provided well in advance and in the vernacular language. Any suppression of information could vitiate the consultation process and make it meaningless;
- The views expressed in the consultation process must be taken into **consideration** by the government while taking a final decision. If it is found that the views of the panchayat are simply brushed aside or ignored, the final decision of the State government would be invalid;
- The consultation is **mandatory**, as opposed to only directory, in nature.<sup>43</sup>

The Ministry of Rural Development guidelines about consultation with the *Gram Sabha* in the case of land acquisition on 11 November 1998 prescribed a procedure to be followed by the requisitioning body and the Land Acquisition authorities, with the Collector having the central role robbing the *Gram Sabha* of its role. The Ministry of Mines also issued guidelines on 28 December 1997 about consultation with the *Gram Sabha* in respect of grant of leases etc. of minor minerals making the recommendation of the *Gram Sabha* binding in cases of grant of leases of minor minerals and grant of concessions etc. But this has been ignored. The State of Madhya Pradesh (which then included Chhattisgarh), made elaborate rules in 2000 about consultation with concerned *Gram Sabhas*, which are applicable in Chhattisgarh as well, before acquisition of land, but these too have not been followed.<sup>44</sup>

<sup>42</sup> See, for instance, *Indian Administrative Service (SCS) Association U.P. vs. Union of India* 1993 Supp (1) SCC 730, which laid down six propositions of law regarding the meaning and content of "consultation".

<sup>43</sup> *Ibid.* A distinction has been drawn by the Supreme Court, based on the principle that when the action in question affects fundamental rights, consultation is mandatory, and non-consultation renders the action ultra vires or invalid or void.

<sup>44</sup> *Report of the Sub-Committee to draft Model Guidelines to vest Gram Sabhas with powers as envisaged in PESA*, Ministry of Panchayati Raj, Government of India.

Failure to effect the provisions regarding consultation with the Gram Sabhas, in the true spirit of PESA, is perhaps the most serious flaw in the extension of PESA to the Scheduled Areas as also its implementation.

Interestingly, this has not meant that the true meaning of PESA has not been articulated, argued, and asserted by local communities who find themselves presented with a *fait accompli*, their lands and resources taken over by force, and the spaces for their participation in the decision-making process submerged in legalese. It is important to note that this fundamental principle regarding meaningful participation of local communities and their right to be consulted in advance has found resonance in other socio-economic legislations, such as the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* (or 'Forest Rights Act'). The Forest Rights Act is not restricted in its application to Scheduled Areas, and lays important foundational processes for democratic governance at the level of the traditional village community, including the right not merely to be consulted, by the right to decision-making regarding developmental activities within its jurisdiction. In a recent decision relating to the State of Odisha, the Supreme Court of India upheld the requirement of decision-making at the Palli Sabha level in the State of Odisha,<sup>45</sup> where ironically under the State panchayati raj law consultation with the Zila Parishad would have sufficed. Clearly, the Supreme Court in this decision has pierced through the veil of legislative artifice in order to arrive at a finding in consonance with the essential spirit of PESA.

## ■■■■ | Minor Minerals

PESA contains important provisions relating to grant of licences and leases relating to minor minerals in Scheduled Areas. Section 4(k) and (l) state:

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

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<sup>45</sup> *Supra* note 18.



- (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;*"

These provisions state that it is **mandatory** that the **recommendation** of the Gram Sabha or panchayat at appropriate level be obtained **before** granting:

- Prospecting licence for minor minerals
- Mining lease for minor minerals
- Auction of minor minerals for exploitation.

The language of the law is forceful and appears to indicate a strict approach. For one thing, the law requires a "recommendation" rather than a "consultation", which is definitely on a higher footing. Clearly the lack of such a recommendation would amount to a veto of the mining proposal. Further, the recommendation is compulsory, and has to be obtained in advance.

Unfortunately, this appearance of forcefulness does not stand scrutiny. Firstly, while PESA clearly indicates that it would like the State governments to vest this power in the Gram Sabha, it also leaves the decision to the State governments to determine which PRI it would rather vest this power in. Therefore, while analysing State legislations we find that only three States – **Gujarat**,<sup>46</sup> **Madhya Pradesh**<sup>47</sup> and **Himachal Pradesh** – have vested the power in the Gram Sabha. In **Maharashtra**, while the State panchayati raj statute vests this power in the Gram Sabha, correlating amendments have not been made to the *Land Revenue (Extraction and Removal of Minor Minerals) Rules, 1968* which vest all rights in the State government, giving concession to villagers only with respect to removal for domestic use. **Chhattisgarh** makes no provision regarding grant of prospecting and mining leases for minor minerals, but requires prior recommendation of

<sup>46</sup> Proviso to Rule 10 (1) of the *Gujarat Minor Mineral Concession Rules, 2010* states that prior to the grant of a quarry lease in a Scheduled Area, the Competent Authority shall obtain the recommendations of the concerned Gram Sabha where the area of quarry is situated.

<sup>47</sup> Prior recommendation of the Gram Sabha is mandatory. Auctions are done by State government and royalties must be paid to the Gram Sabhas/Panchayats.

Gram Sabha for auction of minor minerals. **Andhra Pradesh** and **Odisha** vest the power in the Gram Panchayat and the Zila Parishad respectively, while **Jharkhand** makes no provision in this regard.

Secondly, for all its bravado, the provision makes hardly a dent on the complex and powerful statutory framework already in place on mining. The law relating to mining is contained in the *Mines and Minerals (Development and Regulation) Act, 1957* (or 'MMDRA') and the Rules and regulations framed under it. The mining law regime, drawing on powers which are found in the Constitution itself, are very categorical about the eminent domain of the state over mineral resources, not only in state owned lands but also in private lands, water bodies, and sea beds. Moreover, primacy in decision-making and control is vested in the Central government, which has been given enormous powers to override the decisions and territorial control of even the State governments when it comes to minerals.

The definition of minor minerals in Section 3(e) of MMDRA is as follows:

*“minor minerals” means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be minor mineral.*

Thus, while minerals of a very low economic value are classified as minor in the statute itself (stones, gravel, ordinary clay and ordinary sand) the power to determine which other minerals are classified as 'minor' lies in the hands of the Central government. During the period after independence, the terrain of control over minerals has been fiercely contested between the Centre and the States, and today large multinational mining corporations. Something more powerful than Section 4(k) and (l) of PESA is required to make an inroad in this hotly contested space. That this provision has been incorporated into State legislations in an equally lack luster manner renders it quite impotent.

Thirdly, a key area of mining has been completely left out, and it can only be concluded that this has been done by design. The power of Panchayats, at whichever level, over reconnaissance operations, and the permits

granted by the state (whether at the Centre or the State) for this purpose, has been completely left out of PESA. This leaves tribal populations in Scheduled Areas very vulnerable to all manner of intrusions in the name of reconnaissance, and pressure by the state machinery as well as private capital, once valuable minerals are found in their lands.

Finally, and perhaps most importantly, the failure to include major minerals in the purview of PESA, is a significant and insurmountable flaw in the parent Act itself. This is a matter of serious concern given that the biggest threat to the very existence of tribal populations, and to the constitutional fabric of the Fifth Schedule, is from mining. And the threat is not from corporations or individuals extracting minor minerals. It is, in fact, mega projects and mega corporations pursuing profits of unprecedented quantum, who are the most serious threat to the customary practices and self governance by local communities in Scheduled and Tribal Areas across the country. For instance, in Andhra Pradesh vast tracts of agency areas (as Scheduled Areas were described under the colonial regime) of Visakhapatnam district have been handed over to a private corporation for bauxite mining, blatantly ignoring statutory provisions relating to consultation with the Gram Sabhas and the Tribes Advisory Council.<sup>48</sup>

More recently, the intransigent position of the Central and State governments that PESA does not apply to acquisition of lands under the *Coal Bearing Areas (Acquisition and Development) Act, 1957* has been placed on affidavit before the Bilaspur High Court.<sup>49</sup>

## ■■■■ | Minor Forest Produce

Section 4(m)(ii) of PESA contains a very important and potentially powerful provision which requires that, in the State government, for the purpose of enabling them to “function as institutions of self-government”, to endow the “Panchayats at the appropriate level and the Gram Sabha” with:

*“the ownership of minor forest produce”.*

<sup>48</sup> *Ibid* at page 97.

<sup>49</sup> Court records in Writ Petition (PIL) No. 5 of 2013, *Sarthak Srijanatmak Sanstha vs. Union of India & Ors.* High Court of Chhattisgarh at Bilaspur.

As demonstrated in the analysis above, this provision is also open to misinterpretation and legislative manipulation. For instance, “minor forest produce” by its very definition is distinguished from the more economically viable forest produce of “timber”; in some States the more profitable of even such forest produce, such as tendu leaves, sal seeds, and so on, are either nationalised through special legislation, or reclassified as “non-timber forest produce” to take them out of the purview of these provisions. State panchayati raj legislations have either pointedly ignored this subject matter, or vested the power with the PRIs at the Block and District level. When the power is vested in the Gram Sabha and Gram Panchayats, it is done in a manner where the state supremacy remains unchallenged.

In **Gujarat**, for instance, the amendment to the State panchayati raj law states that minor forest produce found in a forest area situated in the jurisdiction of a village “shall be vested in the village panchayat.” Immediately thereafter, this provision is countermanded in the same legislation by stating that ‘minor forest produce’ shall have the same meaning as assigned to it under the *Gujarat Minor Forest Produce Trade Nationalisation Act, 1979*, notwithstanding that the produce is vested in the village panchayat.<sup>50</sup> In addition, the provision specifically excludes National Parks and Wildlife Sanctuaries.

This kind of legislative chicanery serves no purpose, leave alone the purpose intended by the provisions of PESA.

In **Maharashtra**, the ownership of minor forest produce is in the Gram Panchayat. However, this laudable statement of intent is subject to 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*. Accordingly, such ownership is specifically excluded

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<sup>50</sup> Section 108(5) of the *Gujarat Panchayats Amendment Act, 1998*.

from National Parks and Sanctuaries, and does not include the ownership of the trees or land in the Panchayat area, which is to be governed by the provisions of the Indian Forest Act, 1927.<sup>51</sup>

Further, the statute goes on to state that the Panchayats so vested with the “ownership” of minor forest produce shall strictly adhere to the Working Plans made by the State Forest department, and failure to do so is a criminal offence which could invite imprisonment of up to one year.<sup>52</sup> These statutes have recently been modified for Scheduled Areas by the Governor.<sup>53</sup>

In purported compliance with the mandate of PESA, **Odisha** enacted the *Orissa Gram Panchayats (Minor Forest Produce Administration) Rules* in 2002, which vests the power in the Gram Panchayat. The main features of these Rules are:<sup>54</sup>

- The Gram Panchayat (GP) regulates procurement and trading of 67 MFPs, whether produced in government lands and forest areas within the limits of the Grama or collected from the reserved forests and brought into the Grama. Priority will be given to the JFM Committees and its members for collection and trading of MFPs.
- Traders must register with the GP for procurement of MFPs.
- Price fixation is done by the Panchayat Samiti (Block level). The Grama Sabha ratifies all the prices fixed and necessary changes can be made based on the local needs.

<sup>51</sup> Section 4(1) of the Maharashtra Minor Forest Produce (Regulation of Trade) Act, 1997 provides as under:

*“The ownership of Minor Forest Produce found in the Government lands in the scheduled areas, excluding the National Parks and Sanctuaries, shall vest in the **Panchayat** within whose jurisdiction such area falls.*

*Explanation: The expressions “National Parks” and “Sanctuaries” used in this section shall have the same meaning, respectively, assigned to them under the Wild Life Protection Act 1972.”*

<sup>52</sup> Bijoy, C.R. Martin Kamodang, *Local Governance in Fifth Scheduled Tribal Areas: A Case Study of Maharashtra and Odisha in the Light of Panchayat Raj (Extension to Scheduled Areas) Act of 1996*, Indian Institute of Dalit Studies (New Delhi) 2012.

<sup>53</sup> *Supra* note 33.

<sup>54</sup> Dr. Manoj Pattnaik, *Ownership, Control and Management of MFP in Schedule V Areas: The Role of Gram Sabha. Village Panchayat (Orissa Chhattisgarh and Jharkhand)* in *People’s Empowerment through PRIs in Schedule V Areas and Studies in Laws Affecting the Poor*, NIRD, Hyderabad.

- In case of violation of payment of minimum procurement price by the registered traders, the Sarpanch conducts an enquiry, after which the Gram Panchayat can pass a resolution to cancel the registration of the trader.
- If a trader is engaged in procuring MFP without registering with the GP, the Sarpanch or Secretary will lodge a complaint before the DFO for taking appropriate action.
- No role is envisaged for the Palli Sabha.

In other States, such as **Madhya Pradesh, Jharkhand, and Andhra Pradesh**, the situation is indeterminate. It is interesting, therefore, that in spite of the disabling features of the law, the struggle to re-claim community control over all forest produce which they have traditionally managed, developed and harvested, and not just the low-income ones, continues on the ground across the country. The enactment of the Forest Rights Act has strengthened efforts at the ground to shift the balance of power in the swathes of forest areas in the country, both in Scheduled and non-Scheduled Areas, where traditionally tribals and forest dwellers have their homelands.

### ■■■■ | Minor Water Bodies

In much the same way as land is subject to the power of eminent domain of the state, water bodies and sources are treated as being under the essential control of the state. Thus the complex web of laws which govern the ownership, use, sharing, development and management of water resources, clearly vest all control in the hands of the administration at the State level, and in the case of larger water resources, in the hands of the Central government.<sup>55</sup>

PESA attempts a departure from this overarching approach of the law, and Section 4(j) of PESA requires that “planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level”. This provision is based on the understanding that

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<sup>55</sup> See, for instance, the *Northern India Canal and Drainage Act, 1873*.

at the level of the village, the local community should have the power to manage its local water resources and plan for their sustenance, sharing and development. It is in this context the term “minor” water bodies is used, clearly indicating that “major” water bodies are not covered.

However, in many States the term ‘minor water bodies’ is not defined in law or in administrative practice, and therefore remains vague and unenforceable. The definitions, where they exist, do not appear to be based upon any common rationale. Thus, in **Maharashtra**, the term “minor water bodies” is defined as any water storage and irrigation storage including village tanks, percolation tanks, lift irrigation works upto 100 ha. In **Odihsa**, on the other hand, minor irrigation systems are defined as projects that irrigate less than 2000 ha of land, leaving out streams etc. used for purposes other than irrigation.<sup>56</sup> In **Madhya Pradesh** the Gram Sabha has the power:

*“to lease out any minor water body up to a specified area for the purpose of fishing and other commercial purposes;*

*to regulate the use of water of rivers, streams, minor water bodies for irrigation purposes.”<sup>57</sup>*

In other States, it is never clear whether the law covers just the small water springs and ponds which are within the local limits of the Gram, whether groundwater is protected or not, and whether minor irrigation canal networks such as *kuhls* (which are traditionally shared between several villages in mountainous areas such as Uttarakhand and Himachal) and aqueducts which traverse from one Gram panchayat boundary to another, are covered by this law. Nor does the law assist in this understanding in any way, or indicate who would take a decision if a conflict arose. Where small rivers and streams are concerned, which travel long distances and where multiple villages (and often multiple States) have riparian rights, the situation becomes even more confused.

<sup>56</sup> Section 2(o) Explanation (iii) of the *Orissa Pani Panchayats Act, 2002* defines “Minor Irrigation System” as “irrigation system under an Irrigation Project having irrigable commanded area upto 2,000 hectares and shall include Lift Irrigation Points and Creek Irrigation Projects”.

<sup>57</sup> Section 129-D (iv) of the *Madhya Pradesh Panchayati Raj (Second Amendment) Act, 1997*.

A further problem is that the State amendments have rarely vested this power in the Gram Panchayats. Instead, advantage has been taken yet again of the clause “panchayats at the appropriate level” to vest the power of management and planning of minor water bodies, such as it is, in panchayat bodies at the Block and District level. **Jharkhand** and **Gujarat** invest the Gram Panchayat with these powers, while **Odisha** supersedes all the governance institutions at the Ward, Village, and Block level to invest these powers in the District Panchayats. In **Maharashtra, Madhya Pradesh, and Chhattisgarh**, this power is vested in the Gram Sabha. But even the **Madhya Pradesh** law cited above in Section 129F reserves the power to “plan, own and manage minor water bodies up to a specified water area” in the Zila Parishad at the District level.

An analysis of the law relating to minor water bodies in **Himachal Pradesh**, demonstrates that power of planning and management of minor water bodies in scheduled areas is vested in “*Gram Panchayats, Panchayat Samitis or the Zila Parishads, as the case may be, in such manner as may be prescribed.*”

<sup>58</sup> It was further observed:

“This act of entrustment has been left to some future date by the state government, thus rendering the entire exercise of amending the state laws futile. The whole purpose of the exercise by which state governments were required to bring in amendments to their existing panchayati raj legislations was to ensure that the objectives of PESA as well as the constitutional amendments are implemented. What the state amendment has done is merely copied the provisions of PESA into the parent Act, without applying its mind to how these can be actualised. That there is no real will to make these changes is also reflected in the fact that such changes have not been made even till date, five years after the amendments came into force.”<sup>59</sup>

<sup>58</sup> Section 97-G, *Himachal Pradesh Panchayati Raj Act, 1994*.

<sup>59</sup> See Khanna, Shomona “*Law relating to rights of panchayats over water and water based resources in Himachal Pradesh*,” Society for Rural Urban and Tribal Initiative (SRUTI), February, 2003.



In such a scenario, it is very important to read Section 4(j) together with the earlier provisions of PESA in Section 4 (a) and (d), which are also incorporated in most State legislations, regarding the control of the local village community over its traditional community resources. The reality is that in many parts of the country, village communities continue to manage their traditional water resources, as well as the sharing of the water, and it is these customary practices which are to be asserted while asserting the right to manage 'minor water bodies'. Traditional methods of community control and management are not necessarily substantiated in every case by 'written records', but that does not diminish their legitimacy, which might be far superior to any other. For example, the law relating to minor canals in most States makes much of the issue of ownership of canals, based on a colonial understanding that all resources which are not privately owned are State-owned. On the ground, the reality is different, and it is important to draw strength from the enabling provisions of PESA as well as the spirit of the law, to assert the primacy of the local village community over the management and control of its water resources.

### ■■■■ | Prevention of Land Alienation

Section 4(m)(iii) of PESA requires the State to enact laws for the purpose of empowering Gram Sabhas and Panchayats at the appropriate level

*"to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe."*

It is important to understand that the source of this law lies within the Constitution of India, and in the design of Scheduled Areas as contained in Article 244 and the Fifth Schedule. Paragraph 5 of the Fifth Schedule requires the Governor to enact Regulations in for the advancement of peace and good government, including to

*"prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area."*

Therefore, the mandate to enact laws preventing land alienation is contained in the constitutional design itself, recognising the fact that tribals are vulnerable to the vagaries of the land market, and require the protection of the law in order to prevent the takeover of their lands by dominant groups from within the areas, or from market savvy populations who have migrated into these areas from other parts of the country.

While the extent of prohibition or regulation, as the case may be, is different in different State legislations on land alienation, it is interesting to notice that laws restricting alienation of lands from tribals to non-tribals are in force not only in Scheduled Areas, but also in many non-Scheduled Areas across the country. Sometimes the embargo is contained in the land revenue codes; in other States specific Regulations/statutes have been framed which restrict alienation of not only tribal lands, but also lands belonging to dalits. A list of such laws is provided in **Appendix C**. Most of these legislations have been included in the Ninth Schedule of the Constitution in order to protect them from constitutional challenges in the courts of law.

While it is not possible to go into the content of each of these laws here, a few illustrations from these laws will be useful.

### ***Andhra Pradesh***

The *Andhra Pradesh (Scheduled Areas) Land Transfer Regulation, 1959* (as amended in 1970, 1971, and 1978) explicitly prohibits any person in a Scheduled Area from transferring lands to anyone other than a Scheduled Tribe. The premise of the regulation is that all land in Scheduled Areas is presumed to have been Adivasi land; hence, not only should no land now pass into the hands of non-Adivasis, but any land presently owned, if being transferred by non-Scheduled Tribes, should come back to the hands of Scheduled Tribes.<sup>60</sup>

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<sup>60</sup> However, the protection of this law extends only to Scheduled Areas, and there is no legal protection to Scheduled Tribe land outside the Scheduled Areas in Andhra Pradesh.

In *Samatha vs. State of Andhra Pradesh*<sup>61</sup> a three judge bench of the Supreme Court delivered a landmark judgment which is still considered an authority on the subject of tribal land alienation in Fifth Schedule areas. The Court was asked to rule on whether the grant of a mining lease in a Scheduled Area to a non-tribal was in violation of the 1970 Regulation. The question before the Court was whether the grant of a mining lease on government land to a non-tribal violated this principle.

The Supreme Court held that the government is a 'person' within the meaning of the Regulation and that the grant of a mining lease amounted to transferring the land to a non-tribal, violating the provisions of the Regulation and the spirit of the Fifth Schedule. Choosing not to rely purely on the specific clauses of the Regulation, the Court held that Regulation should be interpreted 'expansively' in order to fulfill the mandate of the Fifth Schedule. It is a Constitutional requirement that land in Scheduled Areas should remain with the Adivasis to preserve their autonomy, culture and society. As a result, the grant of the mining lease was held to be illegal, and the Court ruled that henceforth mining leases in Scheduled Areas in Andhra Pradesh could only be granted to the State government's mining company or cooperatives of Scheduled Tribes. In the meantime, the Andhra Pradesh government had amended the MMDRA as far as it applied to that State to specifically include such a bar, and the Court also directed other State governments to constitute committees to look into the passage of similar regulations and laws.

The Committees set up in the wake of the *Samatha* ruling produced no result, with the Central as well as other State governments taking the stand that the judgment would not apply to other States. This approach is based on the flawed reasoning that other States do not have laws barring transfer of government lands to non-tribals, and rather restrict only the transfer of private lands from tribals to non-tribals.

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<sup>61</sup> (1997) 8 SCC 191.

This is very unfortunate indeed, for the reason that only a small proportion of tribals who are victims of land alienation approach the legal system for restoration of their lands. After many years of litigation, they find they are unable to secure possession despite a court victory, simply because of the superior socio-economic status of the person in possession. It is in this context that the provision of Section 4(m)(iii) of PESA becomes important, because it contains a direction to the State government to enact laws which will empower the Gram Sabhas to restore alienated lands to the tribal owners.

### **Odisha**

The transfer of lands belonging to tribals in Scheduled Areas of Odisha is governed by the *Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956 (OSATIP)* which was substantially amended in 2002.<sup>62</sup> Main features of the OSATIP are in the Box 3 below. The OSATIP not only contains stringent provisions prohibiting the alienation of tribal lands, it also makes forcible alienation a criminal offence, and provides mechanisms for eviction and restoration of possession. The Gram Panchayat plays a key role in the initiation of the action taken under the law. Not unlike numerous other land alienation statutes, OSATIP previously suffered from a serious loophole in that provision was made for transfer of land in tribal areas from a tribal to a non-tribal with the permission of the Collector. In 2002, this provision was done away with.

#### **Box 3: Main features of OSATIP as amended in 2002**

- Notwithstanding anything contained in any other law in force, any transfer of immovable property by a tribal in favour of a non-tribal is null and void, and will have no force or effect whatsoever.
- The only kind of transfer permitted by the law is by way of mortgage in favour of a public financial institution for securing a loan for an agricultural purpose.<sup>63</sup>

Contd...

<sup>62</sup> Vide the *Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Amendment Regulations, 2000*, being Orissa Regulation 1 of 2002.

<sup>63</sup> The term 'agricultural purpose' has been widely defined to include a range of activities contiguous to agriculture, such as horticulture, poultry farming, and so on.

- Prior to the amendment, such transfers were permissible upon previous consent in writing of a competent authority, but after the 2002 amendment, this provision has been deleted, and therefore the prohibition is absolute.
- In certain situations transfers between Scheduled Tribe persons are also prohibited. One such situation is when the transfer would render the land holding of the transferor less than 2 acres of irrigated or 5 acres of unirrigated land.
- Additional protection in relation to evidence and burden of proof.
- Forcible possession of tribal lands by non-tribals is also covered by the Regulation, and a procedure for eviction and prosecution laid down.
- Offences under the Regulation upon conviction, attract severe punishments of imprisonment, which could go up to 3 years, and fines upto Rs. 10,000.
- Section 3-B (after the 2002 amendment) requires every person who is in possession of agricultural land which belonged to a ST person at any time starting from 4<sup>th</sup> October 1956, to notify the Sub-Collector and show how he came into this possession. Failure to do so within 2 years of the amending statute will result in a presumption that the possession of the land is unauthorised, and the land shall revert to the person it originally belonged to, or his heirs.
- The time limit for claims of adverse possession in relation to lands belonging to tribals is extended to 30 years (from 12 years).

It is unfortunate that land alienation statutes in other States do not contain stringent provisions like the AP Regulation or OSATIP, and as a result the implementation at the ground level has been abysmal.

In this regard, it must be pointed out that the land revenue code of **Madhya Pradesh** empowers the Gram Sabha to restore unlawfully alienated lands

to Scheduled Tribe landowners.<sup>64</sup> The Gram Sabha has the power to direct the Sub-Divisional Officer to restore possession within 3 months. However, these provisions have not been replicated in other State legislations. Giving effect to the full meaning and intent of Section 4(m)(iii) of PESA and empowering Gram Sabhas and Gram Panchayats to take action with regard to both restoration of land and eviction of illegal occupants of these lands, is one way to ensure that the constitutional mandate of the Fifth Schedule is realised.

### ■■■■ | Control over Institutions, Functionaries and Planning

Even a superficial analysis of State level panchayati raj legislations will reveal that an approach which gives the Gram Sabha a pivotal role in the development planning and implementation at the local level, is a major departure from the norm. In spite of similar expression of intent in the provisions of Part IX of the Constitution (incorporated through the 73<sup>rd</sup> Amendment), it is the Gram Panchayat and PRIs at the Block and District level which dominate these processes, and which are in turn dominated by the block, district and State level administrative machinery. The Gram Sabha ordinarily is relegated to the role of a rubber-stamp.

Challenging this status quo, PESA contains several provisions which give a primary role to the Gram Sabha in development planning at the local level, and exercising control over local institutions. Section 4(e) specifically provides that it will be the role of the Gram Sabha to:

- 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.*

<sup>64</sup> Section 170-B(2-A) of the *Madhya Pradesh Land Revenue Code, 1959* states:

*"(2-A) If a Gram Sabha in the Scheduled area referred to in clause (1) of Article 244 of the Constitution finds that any person, other than a member of an aboriginal tribe, is in possession of any land of a bhumiswami belong to an aboriginal land, without any lawful authority, it shall restore the possession of such land to that person to whom it originally belonged and if that person is dead to his legal heirs: Provided that the Gram Sabha fails to restore the possession of such land, it shall refer the matter to the Sub-divisional Officer, who shall restore the possession of such land within three months from the date of receipt of the reference."*

It is also provided that the Panchayat must obtain a certificate of utilisation from the Gram Sabha of the funds spent by it on these categories of projects and programmes, which is an important tool for ensuring transparency in the spending of funds.

Apart from these enabling provisions, Section 4(m) (vi) and (vii) provide that the Gram Sabha and the Panchayats at the appropriate levels shall be empowered to:

- Exercise control over institutions and functionaries in all social sectors;
- Control local plans and resources for such plans including tribal sub-plans;

The law further requires that the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level.

It is not surprising that the amendments to the State level legislations incorporating these provisions of PESA into the PRI regime fall short of the mark. In **Maharashtra**, while the power over local plans and resources is vested in the Gram Sabhas in Scheduled Areas, these plans are prepared by the Panchayat Samiti (Block level), approved by the Zila Parishad (District level), and implemented by the Panchayat. In **Odisha**, the Panchayat Samiti (Block level) or the Zila Parishad (District level) make the plans, programmes and projects, and there is no provision to obtain the approval or consent from the Grama Sasan. Further, the Palli Sabha is not empowered in this regard. **Andhra Pradesh, Himachal Pradesh and Gujarat** vest this power in the intermediate or District level PRIs. Control over government functionaries and institutions is vested in the Gram Sabha only in **Madhya Pradesh**.

Nevertheless, these provisions create an enabling space for the Gram Sabhas to participate in development planning, ensure proper implementation, and oversee the spending of funds in a transparent and proper manner. In many parts of the country, these provisions have been used for the purpose of enhancing the role of the Gram Sabha in local governance, and correcting some of the key errors in the State level legislations as pointed out above. These provisions have been found to be useful when exercised in conjunction with varying powers

and functions of PRIs in various socio-economic legislations, such as the *Mahatma Gandhi Rural Employment Guarantee Act, 2005 (MNREGA)*, the *National Food Security Act, 2013*, and so on.

The Tribal Sub Plan (or 'TSP'), started in the fifth Five Year Plan (1974-1979), was conceived to ensure coordinated expenditure of funds on projects for Scheduled Tribes in areas where they are the majority. As per the TSP approach, the Central government was to ensure that out of its total Plan budget at least 8.6% (the proportion of tribal population in the country) is earmarked for the development of Scheduled Tribes in the Annual Budget. However, the budget allocations have never met this target, and even so the funds have been plagued by inadequate allocation, underutilisation, diversion and lapse of funds. In the Tenth Five Year Plan, Rs. 251.8 billion was provided as 'Special Central Assistance' to State governments for expenditure on Tribal Sub Plan activities.<sup>65</sup> However, the TSP has in practice largely failed to achieve this objective. According to the Eleventh Five Year Plan:

"The implementation of ...TSP leaves much to be desired. This applies equally to the Central as well as State governments. Though there may be several reasons for this lackluster implementation, lack of statutory or clear-cut administrative sanction is an important one."<sup>66</sup>

Clearly, the aforesaid provisions of PESA have not been able to ensure that development planning and funds, as envisaged by the said law, are converted into a meaningful reality for the tribal peoples in Scheduled Areas.

## ■■■■ | Reservations

Article 243D of the Constitution of India requires that seats for Scheduled Tribes and Scheduled Castes be reserved on the basis of the SC/ST population in each Panchayat area. For the most part, States are faithfully following the mandate of Article 243D, and have incorporated the

<sup>65</sup> Eleventh Five Year Plan, Chapter 6, Planning Commission, Government of India.

<sup>66</sup> *Ibid.*



necessary amendments in the State level panchayati raj legislations. These reservations have also been implemented over several rounds of elections overseen by the State Election Commissions.

With regard to Scheduled Areas, the provisions for reservations in PRIs are slightly different. Section 4(g) of PESA requires as follows:

- The mandate of Article 243D that reservation of seats be proportional to the population of the communities in that Panchayat, is sought to be maintained;
- However, whatever be the proportion of population, in no case will reservation for Scheduled Tribes be less than one-half of the total number of seats;
- Further, the seats of Chairpersons of PRIs at all levels shall be reserved for the Scheduled Tribes.

When combined with the mandatory requirement of 33% reservations for women in PRIs, and reservations for Scheduled Castes, backward classes of citizens, and nominations from tribes otherwise unrepresented, the provisions relating to reservations in State panchayati raj legislations present a complex and often mystified arena. As with any other form of reservations, here too the statutory provisions have been hotly contested and their constitutionality vehemently debated, both inside and outside the Courts.

After the formation of the State of Jharkhand in 2000, elections were held up for almost ten years. This was because of challenges to Section 4(g) of PESA, and the corresponding provisions in the Jharkhand State laws on PRIs, on the ground that reservation of all posts of Chairpersons of PRIs in Scheduled Areas violated the right to equality under Article 14. The constitutional challenge posed by a batch of writ petitions was first heard by the High Court at Ranchi, and thereafter by the Supreme Court, which pronounced a detailed judgment<sup>67</sup> upholding the constitutional validity of these provisions.

<sup>67</sup> *Union of India etc. vs. Rakesh Kumar & Ors etc.* (2010) 4 SCC 50.

The Supreme Court observed thus:

‘...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.

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‘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 the 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 policy choices...’<sup>68</sup>

The Supreme Court in the above judgment also issued a direction to the State government and the State Election Commission to conduct elections to the Panchayati raj institutions as early as possible.

### ■■■■ | Additional Powers

In the interest of local self government, according to Section 4(m) of PESA, the State governments are required to empower “Panchayats at the appropriate level and the Gram Sabha” to regulate the sale and consumption of intoxicants, manage village markets, and control money-lending. Most State legislations relating to panchayats have, in fact, empowered the Gram Sabhas and also PRIs at the Panchayat, Block and District level, to take necessary steps towards these powers.

<sup>68</sup> *Ibid* at paragraphs 34 and 37.

### ***Sale of liquor and other intoxicants***

The power to regulate the sale and distribution of liquor and other intoxicants in the State level statutes, is vested in the Gram Sabha (**Andhra Pradesh, Chhattisgarh, Madhya Pradesh, Maharashtra**) or the Gram Panchayat (**Andhra Pradesh, Jharkhand, Odisha**) and can extend to complete prohibition. However, the requisite amendments to the excise laws regulating licensing of sale and distribution of liquor have not been made, rendering such provisions inchoate. An amendment to this effect in the excise law<sup>69</sup> in **Madhya Pradesh**, introducing a new Chapter entitled 'Special Provisions for Scheduled Areas', remains buried in official files with no Rules, Guidelines or Regulations to operationalise it. On the contrary, in **Odisha** the State excise law provides that if the Gram Sabha has not granted approval within a prescribed time, the licence will be deemed to have been approved. The politico-economic dynamics of the liquor trade, with its close connections to criminal mafias cannot be underestimated while assessing the ground level impact of such a statutory provision.

### ***Money-lending***

Similarly, while Section 4 (m)(v) of PESA seeks to vest in the Gram Sabha the power to exercise control over money lending to the Scheduled Tribes, State panchayati raj legislations are found wanting. The States of **Andhra Pradesh, Gujarat, and Odisha** vest this power in the Gram Panchayat, while the **Jharkhand** Act has assigned this power to the District Panchayat. The States of **Chhattisgarh, Madhya Pradesh and Maharashtra** invest the Gram Sabha with the power to be consulted before grant of licence to a moneylender. In some States, additional special laws have also been enacted, such as the *Bombay Money Lenders Act, 1946* and the *Orissa (Scheduled Areas) Money-Lenders' Regulations, 1967*, which provides that no loan can be given to a Scheduled Tribe except upon recommendation of Gram Panchayat and concurrence of Gram Sasan.

<sup>69</sup> Section 61-E of the *Madhya Pradesh Excise Act, 1915*, as amended by the Madhya Pradesh Excise (Second Amendment) Act of 1997, states that Gram Sabha "along with the Panchayat at appropriate level" in Scheduled Areas shall have the power to Regulate and prohibit manufacture, possession, transport, sale and consumption of intoxicants within its territorial jurisdiction.

When juxtaposed with the fact that the existing laws with regard to the regulation of money lending remain unchanged, these powers of the Gram Sabhas in Scheduled Areas can only be exercised with a proactive assumption of this regulatory power.

Nor is it possible any longer to disregard the new and myriad ways in which financial institutions manipulate their way into the lives of the poorest of the poor and seduce them into debt traps from which no rescue is possible. The recent exposure of wrongdoings by Micro Finance Institutions, under the guise of helping Self Help Groups comprising women from economically deprived sections of the population, including tribals,<sup>70</sup> is a lesson in how innovative the traditional moneylender has become in the century of the global village.

### ■■■■ | In Summation

We find that the radical shift towards meaningful local self governance which PESA represents has in fact not been effectively translated into law at the State level, and even the limited provisions which find adequate reflection in the law are not implemented in their true spirit, often not at all. According to a Committee appointed by the Ministry of Panchayati Raj to draft model guidelines for PESA, the “main reasons for the non-implementation of PESA in the concerned States, on the whole, are:

- (i) Lack of appreciation about the place of Fifth Schedule read with PESA in tribal affairs and confusion about its legal status;
- (ii) The formal responsibility of (a) implementation of PESA that stands for total transformation of the paradigm of governance in the Scheduled Areas and (b) dealing with tribal affairs in general is vested with two different Ministries in the Union Government, namely, the Ministry of Panchayati Raj (earlier the Ministry of Rural Development) and the Ministry of Tribal Affairs respectively that are virtually functioning in isolation;

<sup>70</sup> See, for instance, M. Rajshekhar, *Bottom of the Pyramid: Conflict of Interest*, The Economic Times New Delhi, 8<sup>th</sup> March 2010.

- (iii) There is lack of information and understanding about PESA in general and its radical character in particular amongst the political executive and even concerned administrators; and
- (iv) There is virtually no effort to convey and disseminate the message of PESA amongst the concerned people.<sup>71</sup>

However, only 4 States have enacted PESA Rules till date, namely, **Andhra Pradesh, Himachal Pradesh, Maharashtra and Rajasthan.**

An additional area of concern is the fact that most State PRI legislations contain several provisions which vest enormous amounts of control as well as punitive powers in the hands of the State administration qua the functioning of panchayats. Panchayati raj laws across the country have managed to subvert the notion of local self governance by making provision for varying degrees of control and monitoring of these institutions by the district administration. The amending provisions extending these laws in terms of PESA do not contain any exemption for panchayats in scheduled areas from these provisions.

### *An Example from Odisha*

For this purpose, it may be useful to closely examine the law relating to PRIs in the State of **Odisha**. The *Orissa Gram Panchayat Act, 1964* states that the Director, Collector, District Panchayat Officer or such other authorised officer of the State government:

*“shall exercise general powers of inspection, supervision and control over the exercise of powers, discharge of duties and performance of functions by the Grama Panchayat under this Act.”<sup>72</sup>*

This general provision is supplemented and supported by a host of other provisions which give the State government the power to monitor plans, inspect documents and records, inspect any panchayat property or works, take disciplinary action, and even rescind or alter resolutions passed. The

<sup>71</sup> Report of the Sub-Committee to draft Model Guide-lines to vest Gram Sabhas with powers as envisaged in PESA, Ministry of Panchayati Raj, Government of India.

<sup>72</sup> Section 109, *Orissa Gram Panchayat Act, 1964*.

Collector also has the power to suspend or remove the Sarpanch and Naib Sarpanch (section 115). The State government retains the power to dissolve the Grama Panchayat in case it is of the opinion that the GP is “not competent to perform or consistently makes a default in performing the duties imposed on it by law or exceed or abuses its powers”.<sup>73</sup> The Act also creates a number of offences which are punishable with imprisonment or fine.

Such provisions do not facilitate the functioning of Grama Sabhas or the elected executive body, the Grama Panchayat, as institutions of self governance, and instead reduce them to subordinates of the State administration.

The *Orissa Zila Parishad Act, 1991* provides that the executive powers of the Zila Parishad (or ‘ZP’) shall vest in the President, who has the power to implement all the resolutions of the ZP. There is also a provision that in “cases of emergency”, a term which remains conveniently undefined, the President can take necessary action on his own subject to the approval of the ZP at its next meeting. Meetings are to be held once in 3-4 months, so this gives the President a lot of power to take action in ‘emergencies’, which would not get approved for several months till the ZP meets again.<sup>74</sup> The Act also provides that the District Collector shall be the Chief Executive Officer (or ‘CEO’) of the ZP, and perform such functions as are prescribed, but no Rules or guidelines specifying the role of the CEO. The Project Officer DRDA is the ex officio secretary of the ZP.<sup>75</sup>

In a chapter entitled “CONTROL”, Section 19 of the *Orissa Zila Parishad Act, 1991* states unambiguously that:

*“It shall be the duty of the Government and such officers or authorities as may be authorised by the Government to see that the proceedings of Parishads are in conformity with the provisions of the Act and the*

<sup>73</sup> *Ibid*, Section 116.

<sup>74</sup> Section 9 of the *Orissa Zilla Parishad Act, 1991*

<sup>75</sup> Section 13 of the *Orissa Zilla Parishad Act, 1991*.

*rules, and that the implementation of the decision taken therein and all actions taken by the Parishads for carrying out the provision of this Act and the rules are free from fraud, misappropriation, embezzlement and other criminal bearings."*

The statute further invests the State government with enormous powers to enter, inspect records, property and works in progress, call for reports, and so on. Section 23 gives the Government the power to cancel any resolution or order passed by the ZP (except resolutions of no confidence against the president or vice president), if in the opinion of the State government such resolution or order is:

- (a) not legally passed;
- (b) in excess or abuse of powers;
- (c) against public interest;
- (d) is likely to cause danger to human life, health or safety;
- (e) is likely to cause a riot or affray.

In accordance with the rules of natural justice, before taking any such step the State government should normally give the ZP an "opportunity for explanation". However, if the government feels that immediate action is necessary, such a resolution or order can be suspended immediately.

As if these powers were not enough, the 1991 Act also gives the State government the power to remove the President and Vice President,<sup>76</sup> supersede, or even dissolve<sup>77</sup> and reconstitute the Zila Parishad. When the Zila Parishad is thus dissolved or superseded, its properties and functions devolve on the State government and the officers appointed for this purpose.

<sup>76</sup> If the President or Vice President willfully omits or refuses to carry out or violates the provisions or the panchayati raj laws, or abuses the power vested in him, and the government is satisfied that his further continuance would be detrimental to the interest of the ZP. Section 26, *Orissa Zilla Parishad Act, 1991*.

<sup>77</sup> If ZP is not competent to perform or persistently makes default in performing its duties or exceeds or abuses its powers. Section 28, *Orissa Zilla Parishad Act, 1991*.

There can be little doubt that the Zila Parishad, as with the PRIs at the Village and the Block level, is very much under the control of the District administration, at least as far as it has been conceived by the *Orissa Zila Parishad Act, 1991*. This context is extremely important for the reason that Orissa law, in purported compliance with PESA, gives the power of prior consultation before land acquisition and development projects in Scheduled Areas to the Zila Parishad. Apart from the popular criticism that the Zila Parishad is not the body which was conceived as holding this power by PESA, there is also ample space in the law for the government to intervene and invalidate the resolutions of the Zila Parishad even if it takes a stand opposing such acquisition. And the resolutions passed by a Zila Parishad when it is under the control of the State Government would be legally binding on all subsequently elected Zila Parishads, and on the entire electorate comprising the Gram Sasans in the project area.

Neither PESA, nor any of the State amendments which extend the operation of the panchayati raj system to Scheduled Areas “modify” any of these restrictive provisions in the mainframe laws. The powers of the State functionaries to actively interfere in the functioning of Gram Sabha and other PRIs therefore continue to remain on the statute book, to be activated whenever required.

Clearly, it is imperative to identify specific provisions in the law relating to panchayats in every State where too wide powers are vested in the State governments to override the decisions of the PRIs, take over the properties controlled by them, inspect and seize their documents and records, and in some cases even initiate proceedings against them for dereliction of duty. It is important to shift our focus away, therefore, from the enabling provisions of PESA and the State level PRI legislations, and address the restrictive fabric of the mainframe laws which have prevented the spirit of PESA from coming to life.



# Part III: Testing the Law Against Reality

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In the previous sections we have seen that there is a complex arrangement of constitutional provisions, Central and State legislations, as well as judicial precedents which give legal recognition to the rights of tribals to their traditional homelands and resources, and to decision-making processes regarding developmental activities.

But does this promise of law translate into reality on the ground? Increasingly in the past two decades in particular, we have witnessed a slow but sure dilution of the constitutional protections to Scheduled Areas, to the extent that today the constitutional barriers which protected the tribals living in these areas are often invisible.

## ■■■■ | **Land Alienation and Acquisition**

Loss of land remains the single biggest cause of deprivation of the livelihoods, lives and homelands of tribals across India. One would expect that the constitutional design, specifically aimed at protecting tribal homelands from just such loss, would have had a visible impact. Instead,

we find that expropriation continues unabated, with only the mechanisms for such expropriation of land varying over different statutory and constitutional regimes.

Scheduled Tribes have, by and large, enjoyed traditional and customary rights over vast swathes of land. However, the process of recognition of traditional rights of Scheduled Tribes to land is significantly uneven and incomplete. Over time, the state and non-tribals have deprived them the access of their lands by appropriation of these lands. Of the recorded land rights, despite the constitutional and legislative safeguards at the Central and State level, land alienation has been widespread. As stated earlier, in compliance of Paragraph 5(2)(a) of the Fifth Schedule, most States have enacted legislations restricting/prohibiting the transfer of land from tribals to non-tribals in Scheduled Areas.

However, these legislations have not been able to fulfill the constitutional objective of ensuring that tribals retain control over their homelands. Even though most litigants which approach the Courts meet a positive result, it is still true that these laws rely heavily upon their activation by the affected parties, and the number of cases which are actually activated in courts are a mere tip of the iceberg. According to a Report of the Department of Land Resources, Ministry of Rural Development, Government of India,<sup>78</sup> in July 2013:

- 3.75 lakh cases of tribal land alienation were registered covering 8.55 lakh acres of land;
- Out of the above, 1.62 lakh cases (43.2%) were disposed of in favour of tribals covering a total area of 4.47 lakh acres (58.28%);
- 1.55 lakh cases (41.1%) covering an area of 3.63 lakh acres were rejected by the courts on various grounds.

The above data demonstrates that 41.1% of cases filed by tribals for restoration of alienated lands were rejected by the Courts, an alarming figure given that tribals tend to have poor access to the judicial systems and

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<sup>78</sup> Draft National Land Reforms Policy, 24th July, 2013, Department of Land Resources, Ministry of Rural Development, Government of India.

to legal advice and representation in the first place. It is also noteworthy that the aforesaid numbers have not changed at all since a previous report prepared by the same Department in 2005. At that time, 57,521 cases involving 0.44 lakh acres of land were pending in various courts of the country, but the present status of pendency of such cases is not known.

There is no quantification of the number of cases where, even when judicial decisions were given in favour of the tribal party, actual restoration of the land was effectuated. Thereafter, even assuming the litigants are able to withstand the high cost of litigation and delays to obtain a positive verdict, the actual restoration of possession remains a continuing problem. As has been documented by various writers, this last link remains the weakest in all existing land alienation and restoration laws.

Where the tribals do retain possession and control over their traditional lands, in resistance to market forces, it is the power of eminent domain of the Indian state which poses the greatest threat. The power of eminent domain of the state has unfortunately been interpreted, both in jurisprudence as well as in policy, to mean the power to forcibly acquire private property (and divert common property) to any use it sees as appropriate. Usha Ramanathan<sup>79</sup> observes:

“The nineties, with its agenda to open up the economy, the emphasis on privatisation and liberalisation, and the re-definition of opportunity costs, as also of the role of the state, that the process of disinvestment set in place, has given cause for further discontent. This is illustrated by the re-prioritising that has emerged where tribals, for instance, who had been sheltered within the constitutional dispensation, receded to zones in the penumbra of state concern even as the state privatised its interests in public sector enterprises for which it had taken tribal land.”<sup>80</sup>

<sup>79</sup> Ramanathan, Usha 'Eminent Domain, Protest and the Discourse on Rehabilitation' in M.M. Cernea and H.M. Mathur (eds.) *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-sharing*. London-New Delhi: Oxford University Press (2008).

<sup>80</sup> *Ibid.*

The tribal populations have been disproportionately targeted, displacing them from their lands and livelihoods, as their resources have been seized and diverted for the 'larger common good'. The Constitution of India as originally adopted provided for a fundamental right to property<sup>81</sup> which was slowly whittled away for the stated purpose of easing land reform until it was finally repealed in 1979. Sadly, today when the lands of millions of tribals, some of which were the subject of these very land reform processes, are under grab, there is no such protection.<sup>82</sup>

The Twelfth Five Year Plan document acknowledges this fact as follows:

"The disproportionately large impact of displacement of tribals is evident from the fact that at least at 55 per cent of all displaced people are tribals and in States like Gujarat the proportion is 76 per cent. It has been an important reason for their pauperisation, often leading them to a state of shelterless and assetless destitution. The presumption that displacement is an inevitable consequence of all developmental efforts needs to be reassessed in the light of the enormous cost of human suffering in such projects. The need to avoid such large-scale displacement, particularly of tribals and in cases of unavoidable displacement, their comprehensive resettlement and rehabilitation (R&R) has become one of the central issues of the developmental process itself."<sup>83</sup>

<sup>81</sup> Article 19(1)(f) of the Constitution provides that all citizens shall have the right "to acquire, hold and dispose of property". Article 31(1), under the sub-heading "right to property" provides "(n)o person shall be deprived of his property save by authority of law". These provisions, among others, were repealed by the Constitution (Forty-Fourth Amendment) Act, 1978 which came into force in 1979.

<sup>82</sup> The right to property is recognised as a constitutional right under Article 300-A of the Constitution of India, which states:

*"Article 300-A. Persons not to be deprived of property save by authority of law: No person shall be deprived of his property save by authority of law."*

Under Article 31A the state has the power to acquire private lands upon payment of due compensation.

<sup>83</sup> *Social Inclusion* (Chapter 24 @ para 24.85 page 237), Volume-III (Social Sectors), Twelfth Five Year Plan (2012–2017) Planning Commission, Government of India. It may be noted that the Eleventh Five Year Plan document estimated that 8.5 and 10 million Scheduled Tribes were displaced on account of acquisition from 1951 to 1990, and that only 21.20 lakh of them have been rehabilitated during the period.

The failure of rehabilitation in the specific context of tribals is thus noted:

“Even according to Government estimates only 29 per cent of the affected have been rehabilitated leaving almost 13.2 million people uprooted from their homes (Roy 1994). All that the displaced persons are left with is their labour—most often unskilled and are therefore desperate for whatever work comes their way for survival. In addition, displacement of tribals from their land amounts to violation of the Fifth Schedule of the Constitution as it deprives them of the control and ownership of natural resources and land essential for their way of life.”<sup>84</sup>

The courts have also largely failed to provide any relief in this regard. Ironically, in a judgment relating to displacement of tribals in large numbers in the State of Gujarat as a result of submergence in the Sardar Sarovar project, the Supreme Court has chosen to rely upon a provision<sup>85</sup> in the ILO Convention No. 169 to arrive at a finding that displacement of tribals for the purpose of ‘development’ is unavoidable and therefore cannot be held to be in violation of the obligations of the Indian State under the said Convention.<sup>86</sup>

In the *Narmada Bachao Andolan case*,<sup>87</sup> while dealing with the serious objections to the project raised by organisations regarding the environmental as well as socio-economic impact of the dam, the Supreme Court took note of the detailed articulation by the petitioner of the right to life under Article 21 of the Constitution read with

<sup>84</sup> *Ibid.* @ para 24.87 page 238.

<sup>85</sup> The Supreme Court has relied upon the following two sub-sections of Article 16 of ILO Convention 169:

*‘1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.*

*2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.’*

<sup>86</sup> *Narmada Bachao Andolan vs. Union of India (2000) 10 SCC* and also *State of Kerala vs. Peoples Union for Civil Liberties & Ors (2009) 8 SCC 46.*

<sup>87</sup> *Ibid.*

Article 12 of ILO Convention No. 107. While accepting the legal proposition that international treaties and covenants can be read into domestic laws, the Court went on to dismiss the contention of the petitioners regarding specific violation of Article 12 as follows:

‘The said article clearly suggested that when the removal of the tribal population is necessary as an exceptional measure, they shall be provided with land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss of injury. The rehabilitation package contained in the award of the Tribunal as improved further by the State of Gujarat and the other States prima facie shows that the land required to be allotted to the tribals is likely to be equal, if not better than what they had owned.’<sup>88</sup>

More recently, in a litigation arising out of the failure of the State of Kerala to implement its own commitments to restore lands to the original tribal owners which had been alienated through sale to non-tribals, the Supreme Court examined Article 21 of the Constitution, the ILO conventions and the UNDRIP, and arrived at the following finding:<sup>89</sup>

‘It is now accepted that the Panchsheel doctrine which provided that the tribes could flourish only if the State interfered minimally and functioned chiefly as a support system in view of passage of time is no longer valid. Even the notion of autonomy contained in the 1989 convention has been rejected by India.’<sup>90</sup>

The Court went on to note that there is cogent evidence that the tribals in Kerala are far better off than their counterparts in other States, and therefore thought it is safe to conclude that many of them have been absorbed into various institutions in the State of Kerala and in other parts of the country, even though there was no such evidence placed before it. The Court further concluded:

<sup>88</sup> *Ibid* at paragraph 58.

<sup>89</sup> *State of Kerala vs. Peoples Union for Civil Liberties & ors* (2009) 8 SCC 49.

<sup>90</sup> *Ibid* at paragraph 18.

‘Indisputably, the question of restoration of land should be considered having regard to their exploitation and rendering them homeless from the touchstone of Article 46 of the Constitution of India. For the aforementioned purpose, however, it may be of some interest to consider that the insistence of autonomy and the view of a section of people that tribals should be allowed to remain within their own habitat and not be allowed to mix with the outside world would depend upon the type of Scheduled Tribe category in question.’<sup>91</sup>

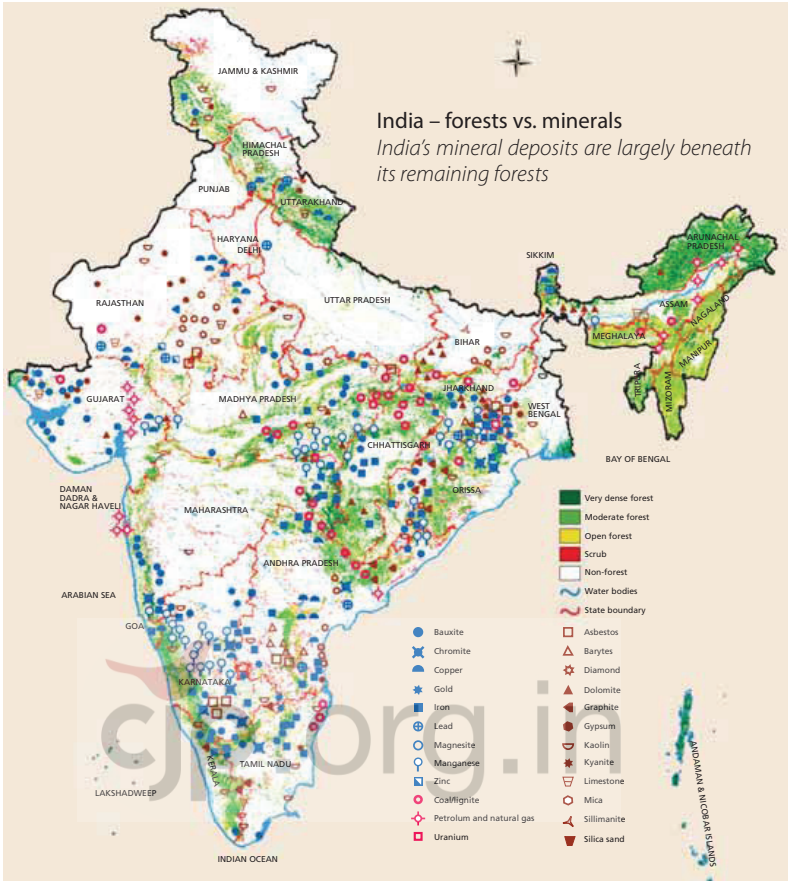
These observations appear to accede to the process of mainstreaming which the Fifth Schedule and other constitutional provisions relating to Scheduled Tribes and tribals were meant to resist.

## ■■■■ Forests

It has been argued that the largest expropriation of tribal resources that has taken place in independent India has occurred in forest areas and in the areas classified as “forest lands”. India’s forests are governed by a matrix of laws, rules, and executive instructions, both at the Central and the State level, which are founded on the parent statute, the colonial *Indian Forest Act, 1927*. It is trite that this law, and the attendant legal as well as governance regime, was constructed by the British to facilitate better management of India’s forests towards unhindered exploitation of timber. It is toward this end that the colonial state asserted its ownership and control over forests, and all resources subsumed in them, riding roughshod over the traditional forest dwelling communities and their traditional methods of use, conservation and access. The myriad uses of forests and forest resources, and their holistic interconnectedness, became fragmented into exclusionary classifications and legal definitions. Almost a century later, many of these boundaries and classifications remain obscure and incomprehensible to the lay person.

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<sup>91</sup> *Ibid* at paragraph 18.



Source: Anon, 2001, *Environmental Atlas of India*, Central Pollution Control Board, New Delhi

The *Forest Conservation Act, 1980* and the *Wildlife Protection Act, 1972* while purporting to be based on more modern goals of conservation and environment protection, continued to use the colonial forest law architecture as their foundation, thereby reinforcing its entrenchment. Thus the approach continued to be based on statutory classifications, often forced, and an exclusionary approach supported by legal sanctions, often in the form of criminal offences. The result was similar expropriation and denial of rights. In fact, as per data submitted to the Supreme Court in 2005, 60% of sanctuaries and 62% of national parks had not even



completed the required process of rights settlement, though many had been declared more than two decades earlier.<sup>92</sup> The Tiger Task Force of the Government of India summed up the situation when it declared that ‘in the name of conservation, what has been carried out is a completely illegal and unconstitutional land acquisition programme.’<sup>93</sup>

However, the 1980 Act did significantly alter the balance of power between the Centre and the State governments with respect to management of forests. Where earlier sole power was vested in the State governments to take decisions on how to manage forests, and where required alter land use, with the passage of the 1980 Act, permission had to be sought from the Central Government for the diversion of forest land by State governments across the country. State governments struggled to retain control over forests, even as illegal mining, timber smuggling, and rampant destruction of the forests, which constitute the homelands of the tribals, continued.

Taking note of this situation, the Supreme Court in a pending public interest litigation passed several far-reaching judgments which have completely altered the face of forest management in the country.<sup>94</sup> The PIL, long converted into a continuing mandamus of mammoth proportions, presently is heard by a Special Bench of the Supreme Court comprising of three judges, which dedicates one afternoon a week to this case, apart from enormous administrative and technical inputs. A recent report<sup>95</sup> comments as follows:

“Interestingly, while the debates within the court room rage around various issues relating to the diversion of forest land for all manner of non-forest activity, such as mining, industries, large dams and so on, the voices of the people who inhabit these lands – the tribals – are faint indeed. Rarely have communities affected by these orders

<sup>92</sup> Khanna, Shomona, *Exclude and Protect: A Report on The WWF Case on Wildlife Conservation in the Supreme Court of India*. SRUTI, New Delhi, 2008.

<sup>93</sup> *Joining the Dots: The Report of the Tiger Task Force*, Tiger Task Force, Ministry of Environment and Forests, Government of India, June 2005.

<sup>94</sup> See, for instance, *TN Godavarman Thirumalpad vs. Union of India & Ors.* (1997) 2 SCC 267.

<sup>95</sup> Bijoy, CR, Shankar Gopalakrishnan and Shomona Khanna, *India and the Rights of Indigenous Peoples*, Asia Indigenous Peoples Pact, Bangkok, 2010.

approached the Forest Bench, and when they have, they have either found themselves ignored or have not been permitted to address arguments at all. Information regarding orders passed in this case, which often have life and death implications for the tribals living in a particular forest, rarely if ever trickles down to them. Instead, the primary result of the case has been to place control over national forest management policies in the hands of the court and its appointed committees, which are completely out of the reach of Adivasi communities.”<sup>96</sup>

The Andhra Pradesh government has embarked on an ambitious scheme to take up large irrigation projects across the major rivers in the State. Among the largest of these is the Polavaram Project which will impound water from the Godavari River. Apart from irrigating the coastal districts, it would also divert a portion of the stored water to the Krishna river. This project is expected to irrigate 2,91,114 hectares in the plains, and will also submerge 300 villages and displace more than 175,000 people, mostly Adivasis. A significant portion of these now fall within the geographical boundary of the newly formed State of Telangana, thus complicating matters further. While complex debates rage in the High Court of Andhra Pradesh and Telangana as well as the Supreme Court of India regarding violations in the grant of environmental clearances, forest approvals, and the like, discussion on the violation of the Constitutional provisions relating to Scheduled Areas has taken a back seat.

With the enactment of the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* (hereafter ‘Forest Rights Act’) the landscape of the law relating to forests and their governance has been radically transformed. This is a new legislation, and it remains to be seen how far it will be able to achieve its full potential. Even so, it is true that the Forest Rights Act has seen some dramatic successes in recent years.

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<sup>96</sup> *Ibid* at page 95.

The transformative potential of the Forest Rights Act has been noted in a recent judgment of the Supreme Court in the *Niyamgiri case*<sup>97</sup> where the constitutional and statutory scheme relating to the rights of Scheduled Tribes over land and its resources has been explicated at some length. The Court traces the right of forest dwelling Scheduled Tribes to be consulted before their traditional lands are diverted for commercial non-forest purpose to the fundamental right to protect and preserve religious and cultural rights in Article 25 of the Constitution. The court has also held that the prior decision of the Gram Sabha is a necessary ingredient of the law.

### ■■■■ | Environmental Damage and Destruction of Livelihoods

Tribal communities have also undergone, more than any other community in the country, unprecedented environmental devastation of their lands and resources by rampant industrialisation, leaving these resources destroyed or degraded. Those whose livelihoods depend on these resources are left bereft, and often without any compensation or rehabilitation at all. A complex, though emerging, architecture of environmental laws, has not been able to ensure that legal redress is at hand.

The aforesaid report by Bijoy, Gopalakrishnan and Khanna, records three forms which such devastation takes, as follows:

- (i) *"Desertification and destruction of water resources:* Overuse of water resources, both underground and overground, is rampant in many of the industrial and mining clusters of the country. Iron ore mining, for instance, used 77 million tonnes of water in 2005-2006, much of it in Adivasi areas; this amount of water would be sufficient for the needs of 3 million people. Similarly, the controversial Coca Cola plant in Plachimada, Kerala, released toxic effluents in a fertile agricultural area while draining the groundwater table. Indeed, the company sold its waste material to the local farmers as fertiliser. The Adivasis around the plant found their wells polluted with toxins forcing them to depend on water a few kilometers away. They eventually mounted a protest

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<sup>97</sup> *Supra* note 18.

that has so far been successful in having the plant closed, though compensation for the destruction and a final resolution to the problem remain distant.

- (ii) *Deforestation*: The close relationship between Adivasis and forests makes them particularly vulnerable to the consequences of wholesale forest destruction for mining, dam or industrial projects. The rights of Adivasis to forest resources were not even legally acknowledged until the passage of the 2006 Forest Rights Act. Therefore, the destruction of forests was treated as a matter purely within the domain of the Central government, which exercised the power to grant permission for such destruction under the Forest (Conservation) Act of 1980 (such permission is referred to as 'diversion' of forest land). In total, between 1980 and 2005, around 1.3 million hectares of forest was diverted for various projects; on average, between 2002 and 2008, roughly 78,000 hectares of forest was diverted annually. Moreover, between 1998 and 2005, an average of 216 mining projects was granted forest clearance every year. This moreover does not include the very large areas lost to illegal forest destruction by industries, mines, plantations and large landholders.
- (iii) *Pollution*: The final form of environmental destruction is through air, water, land and soil pollution that accompanies mining and industrial projects. Despite the fact that such pollution is supposed to be taken into account during the environmental impact assessment process (see next sub-section below), in practice it is rarely accounted for in planning and even more rarely addressed after the projects come up. Maintenance and counter-measures against even deadly pollution are extremely poor. In one example, the Jadugoda uranium mine, the largest source of uranium in India, has seen its tailings pipeline burst no less than four times between 2006 and 2008. This has spread radioactive wastes among the Adivasi communities of the area.<sup>98</sup>

Despite a complex system of environmental laws and jurisprudence that is meant to address such issues, in practice the forums and institutions meant to enforce these principles are inaccessible to

<sup>98</sup> *Supra* note 95 at page 99-100.

marginalised communities in general and to Adivasis in particular. The State Pollution Control Boards, which are set up to enforce the pollution laws, tend to be inaccessible and unaccountable, and prone to lethargy unless prodded by specific court orders. As the aforesaid report notes:

“It should be noted in particular that environmental jurisprudence in the Indian courts has, in recent years, taken on an increasingly stark class character, equating environmental protection with cleanliness, ‘beautification’ and wilderness while ignoring issues of pollution, workers’ health, destruction of livelihoods and loss of common property resources (all of which are often justified in the name of ‘development’).”<sup>99</sup>

It is a matter of concern that the recent TSR Subramaniam Committee set up by the Ministry of Environment, Forests and Climate Change to examine the architecture of environmental laws in India, in its report<sup>100</sup> practically ignores the constitutional and statutory protections to Scheduled Areas while recommending a complete overhaul of the environmental law regime.



## Mining

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Mining represents one of the most serious threats to the lives, livelihoods and homelands of tribal communities in India, and it is this threat that has most aggressively tested the constitutional framework relating to Scheduled Areas as well. While official data does not quantify the amount of mining that takes place in Scheduled Tribe areas or the number of Scheduled Tribes affected in the process, some estimates of the extent and impact of mining on tribals have been made. One report estimates that:

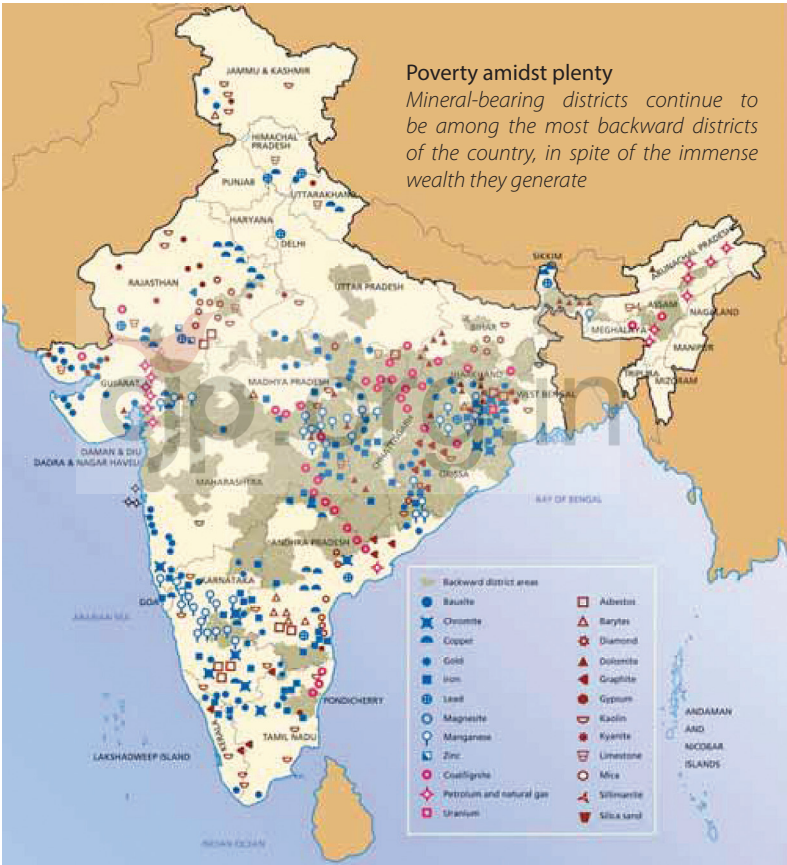
“out of 4,175 mines in the country in 1991, 3,500 were in Adivasi areas, while minerals found in Adivasi areas reportedly contributed more than half of national mining production. Another estimate states that,

<sup>99</sup> *Supra* note 95 at page 100.

<sup>100</sup> *Report of High Level Committee to Review various Acts administered by MoEF&CC, GoI*, submitted in November 2014.

between 1950 and 1991, at least 2,600,000 people were displaced by mining projects, of whom only 25% received any resettlement whatsoever. Of those displaced, an estimated 52% were STs.”<sup>101</sup>

Current official estimates of these numbers are unavailable, and would arguably reflect a reality which has become further confounded. The report goes on to observe that existing legal instruments for the protection of Adivasi rights are simply ignored by government agencies in many mining projects.



Source: Anon, 2003, 'Identification of districts for wage and self-employment programmes', Report of the Task Force, Planning Commission, New Delhi

<sup>101</sup> *Supra* note 95 at page 96.

The fact that there is a geographical co-relationship between tribal areas and mineral deposits has been noted often enough. The maps cited below demonstrate clearly this coincidence. The existing law relating to mining, however, much like the forest law which also bears its foundation in colonial legislative frameworks, completely ignores the existence of tribal communities, and of the constitutional framework for protection of the rights of these communities over their land and resources. The foundational assumption on which mining law is based is that all minerals found underground are state property, and private ownership of the land, or easementary rights over the land, are irrelevant. In fact, mining laws are characterised by a tendency towards centralisation, which override even the principles of federalism.

The *Mines and Minerals (Development & Regulation) Act, 1957* ('MMDRA') the *Mineral Concession Rules, 1960*, and a host of subordinate rules and guidelines, are primarily focused on the procedures for grant of permission for prospecting, reconnaissance, and mining operations to companies and individuals. The power to grant such permissions lies with the Central government for major minerals (routed through the State Governments) and with the State governments for minor minerals. The entire structure of mining legislation does not require that the affected community be informed, leave alone consulted, before such permits are granted. The *National Mineral Policy*<sup>102</sup> only refers to Adivasis in the context of the need to ensure effective rehabilitation of displaced persons, making no mention of resource rights except a vague recommendation that Scheduled Tribes should be given preference in granting mining leases for small scattered deposits of minerals.<sup>103</sup>

<sup>102</sup> *National Mineral Policy, 2008 (for non-fuel and non-coal minerals)*, Ministry of Mines, Government of India. Available at

[http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fmines.nic.in%2FNMP2008.pdf&ei=iqnMVPz6J4ON8QXmk4LYCg&usq=AFQjCNFYr7CfVrQJ81O1XaRuaMfE1TMSg&sig2=D7xYmYif7XSZfQ\\_XEbZ5kA](http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fmines.nic.in%2FNMP2008.pdf&ei=iqnMVPz6J4ON8QXmk4LYCg&usq=AFQjCNFYr7CfVrQJ81O1XaRuaMfE1TMSg&sig2=D7xYmYif7XSZfQ_XEbZ5kA)

<sup>103</sup> *Ibid* 109.

Among other things, the process for expropriation of minerals involves acquisition of lands under the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* (LARR) (which replaced the *Land Acquisition Act, 1894*), in the case of private lands, and of obtaining clearance under s.2 of the *Forest Conservation Act, 1980*, in case of forest lands. In both these situations, it would be expected that the provisions of PESA relating to consultation of the Gram Sabha, as well as the various constitutional protections under the Fifth Schedule, would provide the essential space to affected tribal communities to register their opposition to the diversion of their lands and resources towards mining.

However, in practice, acquisitions under special laws such as the *Atomic Energy Act, 1962* and the *Coal Bearing Areas (Acquisition and Development) Act, 1957* often override the protections under PESA and the mainframe land acquisition laws.

In 1996 a three judge bench of the Supreme Court delivered a landmark judgment in the case *Samatha vs. State of Andhra Pradesh*,<sup>104</sup> where the Court relied upon a purposive construction of the Fifth Schedule of the Constitution, to arrive at the finding that the government is a 'person' within the meaning of the Regulation and that the grant of a mining lease amounted to transferring the land to a non-tribal, violating the provisions of the law and the spirit of the Fifth Schedule.

As a result, the grant of the mining lease was held to be illegal, and the Court ruled that henceforth mining leases in Scheduled Areas in Andhra Pradesh could only be granted to the State government's mining company or cooperatives of Scheduled Tribes. In the meantime, the Andhra Pradesh government had amended the Mines and Minerals Act as far as it applied to that State to specifically include such a bar, and the Court also ordered other State governments to constitute committees to look into the passage of similar regulations and laws.

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<sup>104</sup> (1997) 8 SCC 191.



Unfortunately, this landmark judgment has not been able to achieve its full potential, and has been the subject matter of considerable debate and semantics. The Committees set up in the wake of the *Samatha* ruling produced no result. It is telling that the Supreme Court itself took a contrary stand in the *BALCO Employees Union case*<sup>105</sup> where it observed:

‘While we have strong reservations with regard to the correctness of the majority decision in *Samatha case*, which has not only interpreted the provisions of the aforesaid Section 3(1) of the A.P. Scheduled Areas Land Transfer Regulation, 1959 but has also interpreted the provisions of the Fifth Schedule of the Constitution, the said decision is not applicable in the present case because the law applicable in Madhya Pradesh is not similar or identical to the foresaid Regulation in Andhra Pradesh’ (@ para 71)

...In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus of change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy of the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court’ (@ para 92).

Such narrow interpretation of this judgment, and its consequent restriction to the State of Andhra Pradesh, is clearly rooted in the alignment of the state with mining interests, rather than on any honest interpretation of the law it lays down. Numerous decisions of the Special Forest Bench of the Supreme Court<sup>106</sup> have permitted extensive industrialisation and mining in forest lands which are the traditional homelands of Scheduled Tribes, without consideration of the Constitutional framework.

Today we find that, even in the State of Andhra Pradesh, these principles are followed in the breach. The State government has on occasion ignored the statutory provisions relating to consultation with the local *Gram Sabhas*

<sup>105</sup> *BALCO Employees Union vs. Union of India and Ors.* (2002) 2 SCC 333.

<sup>106</sup> In *TN Godavarman vs. Union of India and others*, Writ Petition (Civil) No. 202 of 1995, pending.

and the Tribes Advisory Council.<sup>107</sup> Nevertheless, the fundamental premise of the Samatha judgment, and the Fifth Schedule, continues to find resonance in struggles across the country.

## ■■■■ | Urbanisation in Scheduled Areas

Article 40 of the Constitution requires that ‘the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.’ A systematic beginning was made only in 1993 through the 73<sup>rd</sup> and 74<sup>th</sup> Amendments to the Constitution, which incorporated two additional chapters entitled ‘Part IX-The Panchayats’ and ‘Part IX-A-The Municipalities’ respectively. These made detailed provisions for decentralised governance in rural and urban areas.

What is often lost sight of is that the constitutional amendments of 1993 specifically **barred** their own application to panchayats and municipal areas in the Scheduled Areas, mandating that this can be done only when a special law is enacted for this purpose, with the necessary exceptions and modifications, by Parliament.<sup>108</sup> It was in this context that Parliament enacted the *Panchayats (Extension to Scheduled Areas) Act 1996* (or ‘PESA’) in 1996, and subsequently amendments were made across the board in State level panchayati raj legislations in order to, purportedly, incorporate the ‘exceptions and modifications’ into the State laws.

The Constitutional provisions relating to municipalities,<sup>109</sup> and the mechanisms for governance of the same, are similar in their approach to the provisions relating to panchayats.<sup>110</sup> These provisions provide the basic structural guidelines for re-vamping existing municipalities, the elected bodies in urban areas, across the country, requiring State governments to

<sup>107</sup> Sarma, EAS, *The Adivasi, the State and the Naxalite: Case of Andhra Pradesh*, EPW April 15, 2006.

<sup>108</sup> See Article 243M (Panchayats) and 243ZC (Municipalities).

<sup>109</sup> *Constitution (74<sup>th</sup> Amendment) Act, 1992*, inserting ‘Part IX-A- The Municipalities’ brought into force on 1.6.1993.

<sup>110</sup> *Constitution (73<sup>rd</sup> Amendment) Act, 1992*, inserting ‘Part IX- The Panchayats’ brought into force on 24.4.1993.

amend their State-level municipal legislations in order to bring them in conformity with the constitutional design. However, the extension of this chapter to municipalities in Scheduled Areas (under Fifth Schedule) and tribal areas (under Sixth Schedule) has been expressly barred under Article 243-ZC<sup>111</sup> except through a special law enacted by Parliament containing necessary exceptions and modifications.<sup>112</sup> Some 23 years later, no such law has been enacted, even though a bill to give effect to this provision was placed before Parliament in 2001 being the *Municipalities (Extension to the Scheduled Areas) Bill*. This Bill was drawn with the objective of ensuring that urbanisation in Scheduled Areas does not impose an alien governance structure upon tribal communities, and provides the space for traditional mechanisms of self-management and community decision-making to continue through the transition from a rural to an urban area. This Bill has long been forgotten and shelved.

Meanwhile, not only do elections to municipal bodies in Scheduled Areas continue, but new areas continue to be urbanised. Due to the unconstitutional application of existing municipal laws to these areas, little pockets of 'unscheduled areas' are being created within Scheduled Areas, as the cities and towns lose touch with their traditional roots and governance systems. Challenges to these processes have met with stiff opposition in the Courts, and till date have not been successful. In a batch of petitions challenging this process in the State of Jharkhand, the Ranchi High Court reached a rather perverse finding that Article 243-ZC would not

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<sup>111</sup> Article 243-ZC states as follows:

*'(1) 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.*

...

*(3) Notwithstanding anything in this Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368.'*

<sup>112</sup> A similar prohibition exists in Article 243-M of the Constitution with regard to the extension of the chapter on Panchayats to Scheduled Areas, and it is in this context that the *Panchayats (Extension to Scheduled Areas) Act, 1996* was enacted. It is therefore widely viewed as a legislation which has constitutional status.

apply to Municipal laws existing prior to the 74<sup>th</sup> Constitutional Amendment.<sup>113</sup> The Ranchi High Court was called upon to decide upon the application of the Bihar Panchayati Raj Act to Scheduled Areas prior to the enactment of PESA. The Court stayed the application of the law until a law in conformity with Article 243-M was enacted, that is, until PESA came into force.<sup>114</sup> One would expect the same constitutional principles to apply with regard to extension of municipal laws to Scheduled Areas. This strict approach was taken in the past by the Bilaspur High Court, when hearing a writ petition challenging the application of municipal laws to Scheduled Areas. The Court passed an interim order staying elections to municipal bodies.

However, in a recent challenge from Odisha<sup>115</sup> a contention was raised that the existing Municipalities in Sundergarh Dist. (a total of 4) cannot continue beyond one year of 1.6.1994 (when Part IX-A of the Constitution came into force) in light of Article 243ZF, as no law in terms of 243ZC has been enacted. Sundergarh district is a Scheduled Area. The key question before the Court, therefore, was whether the provisions of the *Orissa Municipal Corporation Act, 1950* (1950 Act) are applicable to Sundergarh District. The Supreme Court relied upon an order dated 14.8.1995 issued by the Governor whereby the 1950 Act was extended to Scheduled Areas. It must be pointed out that the Governor's order itself was not under challenge. Further, the Supreme Court held that the issue of whether there is inconsistency between the 1950 Act and Part IX-A of the Constitution is left open. It observed that there are several High Court decisions on this issue, but since this judgment is on the specific facts in issue, they are not being examined. It could be argued, therefore that this judgment, while adverse, is not a barrier to raising the issue again in a different factual matrix.

<sup>113</sup> *Uday Shankar Ojha and Ors vs. Jharkhand State Election Commission and Anr*, judgment and order dated 29.02.2008; High Court of Jharkhand; 2008 (2) JCR 249 (Jh).

<sup>114</sup> *Basudeo Besra vs. Union of India* (1996) 1 BLJR 425.

<sup>115</sup> Judgment dated 7.5.2013 in *Sundergarh Zilla Adivasi Advocates Association vs. State Govt of Odisha*, WP (C) No. 215 of 2012, Supreme Court of India.

Since a comparatively small proportion of Scheduled Areas in the country are urbanised, the issue of self-management of towns and cities in areas falling under the Fifth Schedule of the Constitution has received little attention. However, with the increasing trend towards urbanisation in the country, this issue cannot be neglected any longer.

## ■■■■ | Conclusion

What we see today is an unfortunate erosion of the constitutional mandate giving special status to Scheduled Areas, where the Fifth Schedule firewall, which was meant to protect tribal homelands, is starting to crumble. The Standing Committee on Social Justice and Empowerment of the 15<sup>th</sup> Lok Sabha, in its 2010-2011 report made a scathing indictment of the Ministry of Tribal Affairs, for its failure to play a pro-active role in the implementation of laws and schemes in Scheduled Areas and for Scheduled Tribes. In particular, the committee observed the abysmally slow implementation of the Forest Rights Act 2006.

Five years later, the implementation of the Forest Rights Act has seen remarkable advances, both in the area of individual forest rights and in the area of community and community forest resource rights. The implementation continues, however, to remain uneven across states.<sup>116</sup>

This is true for all statutory protective legislations, as we have seen above, whether these be with regard to land alienation, local self governance, control over resources, or environmental legislations. Clearly, the process of erosion of the rights contained in the Constitution, and the various protective legislations enacted by the state, has gained momentum in the last few years. The time is not far when the entire fabric of the letter and spirit of the law relating to Scheduled Areas could be rendered irrelevant.

At the same time, we also see the emergence of an increasingly combative resistance to these processes emerging from within the Scheduled Areas,

<sup>116</sup> The Standing Committee on Social Justice and Empowerment (2010-2011), 15<sup>th</sup> Lok Sabha 2010-2011.

and the tribal communities which refuse to accept the progress of the industrial behemoth. Refusing to be deterred by the narrow and legalistic interpretation of the limited rights available to the tribal peoples, these movements rather assert fundamental, moral, and constitutional principles of a new democracy. K.G. Kannabiran<sup>117</sup> has described it thus:

'Legitimacy does not concern itself so much with whether governmental exercise of power is lawful. Rather, what is at issue is the manner and purpose of the exercise of constitutional power and the justification of such an exercise.'

Kannabiran, an inspired and inspiring stalwart of the civil rights movement in India, spent a lifetime pushing the boundaries of legality and legitimacy, to bring to the Indian polity a commitment to the rule of law. Today we are faced with the challenge of taking this struggle forward, towards the Constitution as it was meant to be.



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<sup>117</sup> Kannabiran, K.G., *The Wages of Impunity: Power, Justice and Human Rights*, Delhi, Orient Longman, Delhi, 2004

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APPENDICES

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## ***Fifth Schedule to the Constitution of India: Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes***

### PART A

#### GENERAL

1. **Interpretation.**—In this Schedule, unless the context otherwise requires, the expression “State” does not include the States of Assam, Meghalaya, Tripura and Mizoram.

2. **Executive power of a State in Scheduled Areas.**—Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

3. **Report by the Governor to the President regarding the administration of Scheduled Areas.**—The Governor of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

### PART B

#### ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

4. **Tribes Advisory Council.**—(1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, 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:

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor<sup>1\*\*</sup>.

(3) The Governor may make rules prescribing or regulating, as the case may be,—

- (a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof;
- (b) the conduct of its meetings and its procedure in general; and
- (c) all other incidental matters.

5. **Law applicable to Scheduled Areas.**—(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.



In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
  - (b) regulate the allotment of land to members of the Scheduled Tribes in such area;
  - (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.
- (3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.
- (4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.
- (5) No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

#### PART C

##### SCHEDULED AREAS

6. **Scheduled Areas** —(1) In this Constitution, the expression “Scheduled Areas” means such areas as the President may by order<sup>3</sup> declare to be Scheduled Areas.

(2) The President may at any time by order<sup>4</sup>—

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;

(aa) increase the area of any Scheduled Area in a State after consultation with the Governor of that State;

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

(d) rescind, in relation to any State or States, any order or orders made under this paragraph, and in consultation with the Governor of the State concerned, make fresh orders redefining the areas which are to be Scheduled Areas;

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

#### PART D

##### AMENDMENT OF THE SCHEDULE

7. **Amendment of the Schedule.**—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368.



# महाराष्ट्र शासन राजपत्र

## असाधारण भाग आठ

वर्ष ६, अंक ३७]

गुरुवार, ऑक्टोबर ३०, २०१४/कार्तिक ८, शके १९३६

[पृष्ठ ५, किंमत : रुपये २७.००

असाधारण क्रमांक १८

प्राधिकृत प्रकाशन

महाराष्ट्र विधानमंडळाचे अधिनियम व राज्यपालांनी प्रख्यापित केलेले अध्यादेश व केलेले विनियम आणि विधी व न्याय विभागाकडून आलेली विधेयके (इंग्रजी अनुवाद).

### OFFICE OF THE GOVERNOR OF MAHARASHTRA

Raj Bhavan, Malabar Hill, Mumbai 400 035,  
dated the 30th October 2014.

#### Preamble

CONSTITUTION OF INDIA.

No. RB/TC/e-11019(89)(2013)/Notification-4/1120/2014.— The following notification issued by the Governor of Maharashtra is published for the general information :—

**Whereas**, under sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor may, by public notification, direct that any particular Act of Parliament or of Legislature of the State shall not apply to the Scheduled Area referred to in clause (1) of article 244 of the Constitution of India or any part thereof in the State or shall apply to the Scheduled Area or any part thereof in the State subject to the exceptions and modifications specified in the notification;

**And whereas**, the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (40 of 1996) has been enacted with intent to extend the provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas, and to ensure a large degree of self-governance to the appropriate Panchayats and the *Gram Sabhas* in the Scheduled Areas ;

**And whereas**, the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, requires that all the State Acts shall ensure that the appropriate Panchayats and Gram Sabhas are endowed with a number of powers outlined in the said Act ;

(१)

भाग आठ-१८-१

महाराष्ट्र शासन राजपत्र असाधारण भाग आठ, ऑक्टोबर ३०, २०१४/कार्तिक ८, शके १९३६

**And Whereas**, it is expedient to bring certain State Acts in consonance with the said Act;

**Now, therefore**, in exercise of the powers conferred by sub-paragraph (1) of Paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Maharashtra hereby makes the following notification, namely :—

#### NOTIFICATION

CONSTITUTION OF INDIA.

In exercise of the powers conferred by sub-paragraph (1) of Paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Maharashtra hereby directs that the Markets and Fairs Act, 1862 (Bom. IV of 1862), India Forest Act, 1927 (16 of 1927), in its application to the State of Maharashtra, the Maharashtra Village Panchayats Act (III of 1959), the Maharashtra Land Revenue Code, 1966 and the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974) in its application to the State of Maharashtra, shall apply to the Scheduled Areas referred to in clause (1) of article 244 of the Constitution with the following exceptions or modifications, namely :—

#### PART I

#### MODIFICATIONS TO THE MARKETS AND FAIRS ACT, 1862.

In the Markets and Fairs Act, 1862 (Bom. IV of 1862), at the end of Section 4 the following proviso shall be added :

“Provided that in the Scheduled Areas referred to in clause (1) of article 244 of the Constitution of India, no such order permitting the establishment of the proposed market or fair shall be passed without the prior informed consent of the Panchayats at the appropriate level and the Gram Sabha, and on such terms and conditions as they may specify ;

Provided further that the Panchayats at the appropriate level and Gram Sabha may give their opinion within one month from the date of reference for such consent received from the District Magistrate, failing which consent shall be deemed to have been given.

*Explanations.*—For the purposes of this section,—

(i) “Panchayats at the appropriate level” means:

(a) if the market or fair falls in the jurisdiction of two or more Gram Sabhas, then the Gram Panchayat,

(b) if the market or fair falls in the jurisdiction of two or more Gram Panchayats, then the Panchayat Samiti,

(c) if the market or fair falls in the jurisdiction of two or more Panchayat Samitis, then the Zilla Parishad ;

(ii) “Gram Sabha” shall have the same meaning as assigned to it in Chapter III A of the Maharashtra Village Panchayats Act.”

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PART II

**MODIFICATIONS TO THE INDIAN FOREST ACT, 1927**

In the Indian Forest Act, 1927 (16 of 1927), in its application to the State of Maharashtra,

(i) After Chapter III, the following Chapter shall be inserted, namely :—

**“ CHAPTER III A**

**OF MINOR FOREST PRODUCE IN SCHEDULED AREAS.**

**28A.** (1) Notwithstanding anything contained in this Act, the transit permits, in relation to transportation of minor forest produce in the Scheduled Areas referred to in Clause (1) of article 244 of the Constitution of India shall be modified and given by the Panchayats at the appropriate level and the *Gram Sabha* or a committee thereof.

Provisions  
for Minor  
Forest  
Produce in  
Scheduled  
Areas.

(2) All decisions for the collection and sale of minor forest produce in the Scheduled Areas, and the sharing of all sale proceeds shall be taken by the Panchayats at the appropriate level and the concerned *Gram Sabha*.

*Explanations.*— For the purposes of Chapter III A,—

(i) “ minor forest produce ” in Scheduled Areas shall have the same meaning as assigned to it in 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,

(ii) “ Gram Sabha ” shall have the same meaning as assigned to in Chapter III A of the Maharashtra Village Panchayat Act. ”

PART III

**MODIFICATIONS TO THE MAHARASHTRA VILLAGE  
PANCHAYATS ACT.**

In the Maharashtra Village Panchayats Act, (III of 1959),—

(i) in section 54A,—

(a) in clause (f) , after the words “ (Amendment) Act, 1997 ” the words “and Chapter III A of The Indian Forest Act, 1927 (16 of 1927), in its application to the State of Maharashtra ” shall be inserted,

(b) in clause (j), after the words “ the Panchayat concerned ” the following shall be inserted, namely :—

“ and also to manage fishing activities in minor water bodies within its jurisdiction ”;

(c) in clause (n),—

(I) after the words “ Panchayat Samiti and Zilla Parishad ” the words “and to other Departments concerned with the implementation of programmes, projects, and schemes in the social sector” shall be inserted;

(II) in the Explanation of the term “ social sector ” after the words “ section 45 of the Act ” the words “ and any Department of the State Government executing similar schemes, programs, and projects. ” shall be inserted ;

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(ii) in section 54B,—

(a) in clause (h) after the words “minor water bodies” the words “and also to manage fishing activities in minor water bodies within its jurisdiction” shall be inserted ;

(b) a new clause (o) shall be inserted after clause (n) as follows :—

“be competent to exercise control over local plans and resources for such plan including the Tribal sub-Plan ;

Provided that not less than 5% of the total Tribal sub-Plan funds of the respective annual plan shall be devolved to the Gram Panchayats in Scheduled Areas in proportion to their population ;

Provided further that the Panchayat shall utilise these funds for the purpose and to the extent as recommended by the Gram Sabha ;

Provided also that in case a Panchayat has more than one Gram Sabha these funds shall be utilized in proportion to the population of the respective Gram Sabhas.”

#### PART IV

### MODIFICATIONS TO THE MAHARASHTRA LAND REVENUE CODE, 1966

In the Maharashtra Land Revenue Code, 1966 (Mah. XLI of 1966), in section 48, after sub-section (9), the following sub-section shall be added, namely :—

“(10) Notwithstanding anything contained in this Act, prior to grant of prospecting license or mining lease for minor minerals and for grant of concession for the exploitation of minor minerals by auction in the Scheduled Areas referred to in clause (1) of article 244 of the Constitution of India, the consent of the *Gram Sabha* or the Panchayats at the appropriate level shall be mandatory.

Explanation.—For the purposes of this sub-section “Gram Sabha” shall have the same meaning as assigned to it in Chapter III A of the Maharashtra Village Panchayats Act.”

#### PART V

### MODIFICATIONS TO THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974.

In the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), in its application to the State of Maharashtra,—

(i) in section 2, after clause (c), the following clause shall be inserted, namely :—

“(c) “minor water body” in the Scheduled Areas shall have the same meaning as assigned to it in the Explanation to Section 54 B (h) of the Maharashtra Village Panchayats Act ; ”

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(ii) in section 2, after clause (f), the following clause shall be inserted, namely :—“(ff) “Scheduled Areas” means the areas referred to in clause (1) of article 244 of the Constitution;”

(iii) in section 25, to sub-section (3), the following proviso shall be added, namely :—

“Provided that, the State Board shall not grant its consent referred to in sub-section (1) in respect of the minor water body in the Scheduled Areas unless prior informed consent of the *Gram Panchayat* is obtained by it.”;

(iv) after section 30, the following section shall be inserted, namely:-


“**30A.** If the *Gram Sabha* in a Scheduled Area sends a resolution to the State Board stating that there is pollution of minor water body in the Scheduled Areas within its jurisdiction, it shall be imperative for the Board to investigate and ensure taking of necessary remedial action under the Act and the rules made thereunder, at the earliest, and in any case, not later than a month from the date of receipt of such resolution.”

Power of the State Board to take remedial measures in Scheduled Areas.

CH. VIDYASAGAR RAO,

Governor of Maharashtra.

By order and in the name of the Governor of Maharashtra,

  
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PARIMAL SINGH,  
Deputy Secretary to Governor.

**List of State level laws/regulations on prevention of tribal land alienation and its restoration<sup>1</sup>**

S. No.	State	Legislation in force	Main features
1.	All India	The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989	Applies to the whole of India except the state of Jammu & Kashmir. Section 3(1)(iv) of this Act makes it a punishable offence to wrongfully occupy or cultivate any land owned by or allotted to a member of a Scheduled Tribe, or gets land allotted to him, transferred.
2.	Andaman & Nicobar Islands	The Andaman and Nicobar Protection of Aboriginal Tribes Regulation, 1956	Mandated to protect the Scheduled Tribes in the four tribal reserves, this Regulation empowers the government to prohibit and regulate the entry of outsiders, and restricts the transfer of lands to non-tribals in the Reserves.
3.	Andhra Pradesh	The Andhra Pradesh (Scheduled Areas) Land Transfer Regulation, 1959, amended by The Andhra Pradesh (Scheduled Areas) Land Transfer (Amendment) Regulations of 1970, 1971, and 1978.	Prohibits all transfer of land to nontribals in Scheduled Areas. Authorises government to acquire land in case a tribal purchaser is not available. There is, however, no legal protection to ST land outside the scheduled areas. <sup>2</sup>

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S. No.	State	Legislation in force	Main features
4.	Assam	The Assam Land and Revenue Regulations 1886, amended in 1981.	Chapter X of the Regulation prohibits alienation of land in tribal belts and blocks.
5.	Arunachal Pradesh	Bengal Eastern Frontier Regulation, 1873, as amended.	Prohibits transfer of tribal land
6.	Andaman & Nicobar Islands	Andaman and Nicobar islands (protection of aboriginals' tribes) regulation, 1956.	Protects tribal interest in lands.
7.	Chhattisgarh	(a) Sections 165 & 170 of Madhya Pradesh Land Revenue Code, 1959.  (b) Madhya Pradesh Land Distribution Regulation Act, 1964.	Sections 165 and 170B of the Code protect STs against land alienation.  The 1964 Act is in force in the scheduled areas.
8.	Dadra & Nagar Haveli	Dadra & Nagar Haveli Land Reform Regulation, 1971.	Protects tribal interest in lands
9.	Gujarat	The Bombay Land Revenue Code as amended by Bombay Land Revenue (Gujarat Second Amendment) Act, 1980.	Sections 73A, 73AA, 73AB, 73AC and 73AD prohibit transfer of tribal lands and provide for restoration of alienated land, in entire State of Gujarat.
10.	Himachal Pradesh	The Himachal Pradesh Transfer of Land (Regulation) Act, 1968.	Prohibits transfer of land from tribals to non-tribals.

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S. No.	State	Legislation in force	Main features
11.	Jharkhand	(a) Chhota Nagpur Tenancy Act, 1908 (applies to old Ranchi district, mostly comprising Mundas and Uraons).  (b) Santhal Parganas Tenancy (Supplementary Provision) Act, 1940.  (c) Bihar Scheduled Areas Regulation, 1969.  (d) Wilkinson's Rule, 1837 (applies to Hos of Singhbhum).	Prohibit alienation of tribal land and provide for restoration of alienated land.
12.	Karnataka	The Karnataka Scheduled Caste and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1975.	Prohibits transfer of land assigned to SCs and STs by government. No provision to safeguard SC/ST interest in other lands. <sup>3</sup>
13.	Kerala	The Kerala Scheduled Tribes (Regulation of Transfer of Land and Restoration of Alienated land) Act, 1975.	Act of 1975 made applicable with effect from 1 <sup>st</sup> June, 1982 by notification of January, 1986 prohibits transfer of land of tribals and provides for its restoration. <sup>4</sup>
14.	Lakshadweep	The Laccadive Islands and Minicoy Regulation I of 1912.  Lakshadweep (Protection of Scheduled Tribes) Regulation, 1964.	Alienation of tribal lands prohibited in entire UT of Lakshadweep. <sup>5</sup>

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S. No.	State	Legislation in force	Main features
15.	Madhya Pradesh	(a) Sec 165 & 170 of Madhya Pradesh Land Revenue Code, 1959. (b) Madhya Pradesh Land Distribution Regulation Act, 1964.	Sections 165 and 170B of the Code protect STs against land alienation. The 1964 Act is in force in Scheduled Areas of MP.
16.	Maharashtra	(a) The Maharashtra Land Revenue Code, 1966, as amended in 1974. (b) The Maharashtra (Restoration of Lands to Scheduled Tribes) Act, 1974.	Prohibits alienation of tribal land and provides for restoration of both illegally and legally transferred lands of a ST. <sup>6</sup>
17.	Manipur	The Manipur Land Revenue and Land Reforms Act, 1960.	Section 153 forbids transfer of tribal land non-tribals without permission of the District Collector. Act has not been extended to hill areas and therefore hill area tribals not covered.
18.	Meghalaya	Meghalaya Transfer of Land (Regulation) Act, 1971.	Prohibits alienation of tribal land.
19.	Nagaland	Bengal Eastern Frontier Regulation, 1873 and Assam Land and Revenue Regulation, 1866, as amended vide Nagaland Land and Revenue Regulation (Amendment) Act 1978.	Prohibition of transfer of tribal lands.

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S. No.	State	Legislation in force	Main features
20.	Odisha	The Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956.  The Orissa Land Reforms Act, 1960,	Prohibits transfer of tribal land and provides for its restoration, both in Scheduled Areas (1956 Regulation) as well as non-Scheduled Areas (1960 Act).
21.	Punjab	The Punjab Land Alienation Act, 1916	Prevents alienation of tribal lands to non-tribals. <sup>7</sup>
22.	Rajasthan	The Rajasthan Tenancy Act, 1955, The Rajasthan Land Revenue Act, 1956.	Section 175 and 183B specifically protects tribal interest in land and provides for restoration of alienated land to them.
23.	Sikkim	Revenue Order no. 1 of 1917 The Sikkim Agricultural Land Ceiling and Reform Act, 1977	Order of 1917 still in force. Chapter 7 of 1977 Act restricts alienation of lands by STs but is not in force.
24.	Tamil Nadu	Standing Orders of the Revenue Board BSO 15-40. Law against land alienation not enacted.	BSO 15-40 applies only to Malayali and Soliga tribes. Prohibits transfer of assigned land without approval of District Collector.
25.	Tripura	Tripura Land Revenue and Land Reform Act, 1960, as amended in 1974.	Act prohibits transfer of ST land to others without permission of the Collector. Only lands transferred after 1.1.1969 are covered under restoration provision.

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S. No.	State	Legislation in force	Main features
26.	Uttar Pradesh/ Uttarakhand	Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as amended by U.P. Land Laws (Amendment) Act, 1981	Provides protection of tribal land. However, amending Act stayed by Allahabad High Court in <i>Swaran Singh vs State Govt</i> (1981).
27.	West Bengal	West Bengal Land Reforms Act, 1955, as amended.	Chapter II-A prohibits alienation of tribal land and provides for restoration.



- <sup>1</sup> This table has been compiled using a variety of sources, including Bijoy CR, *The Adivasis of India: A History of Discrimination, Conflict and Resistance*, (February 2003), PUCL Bulletin, <http://www.pucl.org/Topics/Dalit-tribal/2003/adivasi.htm> (last accessed 15.12.2014); *Report of the Committee on State Agrarian Relations and Unfinished Task of Land Reforms*, Department of Land Resources, Ministry of Rural Development, Government of India, New Delhi, 2009 available at <http://dolr.nic.in/agrarian.htm>; Bijoy CR, Shankar Gopalakrishnan and Shomona Khanna, *India and the Rights of Indigenous Peoples* (Bangkok 2012) Asia Indigenous Peoples Pact.
- <sup>2</sup> The constitutional validity of these Regulations has been upheld by the Supreme Court in *Samatha vs. State of Andhra Pradesh* (citation) and *P. Rami Reddy and Ors. vs. State of Andhra Pradesh and Ors.* (1988) 3 SCC 433.
- <sup>3</sup> Constitutional validity examined and upheld by Supreme Court in *Manche Gowda & Ors. vs. State of Karnataka & Ors.* (1984) 3 SCC 301.
- <sup>4</sup> The constitutional challenge to this legislation was decided by the Supreme Court in *State of Kerala and Anr vs. Peoples Union for Civil Liberties & Ors.* (2009) 8 SCC 46.
- <sup>5</sup> *Bamban vs. I.I. Officer* AIR 1957 Madras 433.
- <sup>6</sup> Constitutional validity examined and upheld by Supreme Court of India in *Lingappa Pochanna Appelwar vs. State of Maharashtra* (1985) 1 SCC 479.
- <sup>7</sup> Constitutional validity upheld by the courts in *Lala Khazanchi Shah vs. Haji Niaz Ali* AIR 1940 Lahore 126; *Wazir Mohd & Ors. vs. Said Alam & Ors.* AIR (34) 1947 Peshawar 25; *Ram Swarup vs. Ram Chander & Ors.* AIR 1976 Punjab & Haryana 246.

# Abbreviations

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CEO	Chief Executive Officer
DFO	Divisional Forest Officer
DRDA	District Rural Development Agency
FRA	The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
GP	Gram Panchayat
ILO	International Labour Organisation
ILO Convention 107	The Indigenous and Tribal Populations Convention, 1957 (No. 107)
ILO Convention 169	Indigenous and Tribal Peoples Convention, 1989 (No. 169)
JFM	Joint Forest Management
LARR	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013
MADA	Modified Area Development Approach
MFP	Minor Forest Produce
MGNREGA	Mahatma Gandhi Rural Employment Guarantee Act, 2005
MMRDA	Mines and Minerals (Development and Regulation) Act, 1957
OSATIP	Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956
PESA	The Panchayats (Extension to Scheduled Areas) Act, 1996
PRI	Panchayati Raj Institutions

R&R	Resettlement and Rehabilitation
ST	Scheduled Tribes
TAC	Tribes Advisory Council
TSP	Tribal Sub-Plan
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UT	Union Territory
ZP	Zila Parishad





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