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“GOVERNOR’S DISCRETION UNDER THE FIFTH SCHEDULE VS. LOCAL SELF-GOVERNMENT UNDER PESA: A CONSTITUTIONAL TENSION”

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ABSTRACT

There is a major constitutional tension between the discretionary powers of the Governor under the Fifth Schedule of the Indian Constitution and the system of local self-governance envisaged under the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA). Although the Fifth Schedule grants the Governor extensive administrative powers to maintain peace and good governance in Scheduled Areas, PESA aims to grant power to Gram Sabhas that are tribal institutions of self-governance. Such a dual mechanism not only tends to produce overlapping jurisdiction, administrative ambiguity but also narrows the democracy of the grassroots. This paper is critical in addressing the question of whether the discretionary powers of the Governor are supportive or detrimental to the model of disseminated decentralised government advocated by PESA. It also examines judicial interpretations, state practices, and implementation difficult to understand the level of contrast between the intent of the constitution and the administrative reality. The paper suggests more explicit harmonisation of the law in order to compensate the autonomy of tribality and constitutional state and local governance structures.

INTRODUCTION

In India, the popular governance of Scheduled Areas has a complicated constitutional framework structure to evenly balance administrative authority and safeguarding tribal rights. The Constitution in the Fifth Schedule grant the Governor the special powers, which include the power to issue regulations about peace and good governance, the control of the enforcement of laws in the Scheduled Areas. These legislative authorities were seen as hedging devices that would allow the interests of tribal communities to be guarded in terms of exploitation and foreign encroachment.

Nevertheless, the passing of Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) was a paradigm shift in accentuating back

toward the concept of decentralised management by considering Gram Sabha as a foundation of self-government in tribal areas. PESA empowers local people significantly with their control of natural resources, their traditional activities, and the choice of area, the socio-economic existence of the communities. The ideology behind this creation of the legislature was the idea of democratic decentralisation, and a set of operationalising the tribal self-government.

Although such is progressive in motive, there is a constitutional tension of existence of these two frameworks. The Fifth Schedule discretionary powers of the Governor frequently balance with, and even occasionally override the autonomy of Gram Sabhas provided in

PESA. This poses confusion on where the decision-making authority lies and open up concern on bureaucrats dominating the grassroots. To put it bluntly, state governments and administrative authorities often practice control in a manner that water down the spirit of PESA.

This paper aims at critically reviewing such tension through the analysis of the provisions of the constitution, the intent of the legislature and the application of the provisions on the ground. It examines how the role of the Governor is either a guarantee or a limitation to tribal self-government, and proposes a more rational legal structure to harmonize these two competing powers.

MAIN BODY OF THE ARTICLE

1. Constitutional Frame work of Scheduled Areas.

The constitutional provisions that underpin governance of Scheduled Areas in India, include the Fifth Schedule of the Constitution that addresses a special administrative framework of a region to which tribal population is the major constituency. The framers of the Constitution were aware of the historical marginalisation and socio-economic vulnerability of these groups, and thus they had a vision where they would create a structure that would protect them as well as slowly integrate them into the larger constitutional system.

According to the Fifth Schedule the Governor of any State plays a central role. The Governor may make regulations relating to peace and good government within Scheduled Areas, such as the power to bar or limit changes in ownership of land, the issuance of money at usurious rates and to alter or exempt the operation of laws made by Parliament or as enacted by a State Legislature. This executive authority is aimed at serving as a protection against exploitation and make sure that the ruling is sensitive to the tribal interests.

Also, the creation of Tribal Advisory Council (TAC) is also stipulated to make recommendations on the issues of the welfare and development of Scheduled Tribes. The advisory character of the TAC can however in most cases neutralize its efficacy since the overall decision in a matter remains with the Governor. Consequently, the constitutional framework establishes a top-down form of government whereby the protective control takes precedence over participatory decision-making.

Although the intention of this framework is good, it sets the grounds in the future to falter with future legislative changes that focus more on decentralisation and community involvement, especially PESA.

2. Development and Vision of PESA, 1996.

The approval of the Panchayats (Extension to Scheduled Areas) Act, 1996 was a watershed in the governance of the tribes. PESA was proposed to further the provisions of Part IX of the Constitution, which applied to Part IX with respect to Panchayati Raj Institutions to Scheduled Areas but with required amendments to the existing laws in order to save the tribal traditions and practices.

PESA acknowledges the Gram Sabha as the basic unit of self-governance and gives it vast powers. These involve powers to endorse development plans, regulation of natural resources, protection of assets within the community, consultations in issues of land acquisition and rehabilitation. Notably, PESA recognizes legitimacy of custom laws, social values, and tribal dispute resolution systems.

PESA was derived through the intentional legislation aimed at changing the governance approach to participatory form of democracy rather than the paternalistic one. It aimed at enabling the tribes to gain some control over their socio-economic and cultural lives and that would enhance self-determination.

Nonetheless, the application of PESA relies to a great extent on state laws, which results in the

differences and inconsistency among various states. Its provisions have been watered down by many states, by restricting the authority of Gram Sabhas or by not implementing the provisions of the PESA in line with the provisions of the prevailing laws. This has created a great discrepancy between normative framework and ground realities.

3. Nature of Governor's Discretion under the Fifth Schedule

The Fifth Schedule has wide but vague discretionary powers of the Governor. In contrast with other constitutional roles in which the Governor exercises his powers with the assistance and advisory papers of the Council of Ministers, the Fifth Schedule enables to a certain extent independent decision making, especially as far as Scheduled Areas are concerned.

The ability of the Governor to amend or override laws is an important means to advance tribal interests. As an example, the Governor can limit the implementation of some land laws that may pave the way to alienation of tribal land. In the same vein, the mining activity or rules relating to forest resources can be shaped so that they are not exploited.

Nevertheless, the lack of clear guidelines on how this discretion is exercised normally causes the issue of arbitrariness. Practically, Governors hardly make decisions on their own but likely are influenced by the counsel of the state executive. This jeopardizes the protective essence of the Fifth Schedule and begs the question of whether this constitutional shield is working or not.

Moreover, the lack of accountability mechanisms further complicates the issue. Given that the measures undertaken by the Governor are not directly open to judicial review in most instances, it has limited the ability to question the decisions made that can have negative implications on tribal sovereignty.

4. Gram Sabha and Local Self-Governance with PESA.

PESA sees Gram Sabha as direct democracy institution as alive as possible. It is not only a consultative organ but a decision-making organ, having substantive powers. The Act requires that Gram Sabhas should be consulted during land acquisition and in some situations, their approval is mandatory. They also have the responsibility of managing minor forest produce, water bodies as well as local markets.

This empowerment is an acknowledgement of the special association between tribal people and the natural natural environment. PESA tries to provide sustainable development which is compatible with traditional knowledge systems by offering a control over the resources.

The operations of Gram Sabhas are however sometimes hampered by control by the administration and incompetence. Most of the decisions, especially made by the higher authority, are not made in any consultation and the Gram Sabha is a mere shadow. Also, lack of knowledge to the tribal societies on their rights is another factor that undermines the PESA efficacy.

In spite of these hurdles, Gram Sabha has become a very important institution towards the achievement of the constitutional dream of self-governance. It is crucial to enhance its role, which must be accomplished through both legal reforms and institutional support and capacity-building.

5. Overlapping of Powers and Jurisdiction.

The joint presence of the Fifth Schedule and of PESA results in a twoway system of governance that tends to overlap responsibilities and jurisdictions. Whereas the Fifth Schedule concentrates the power of the office of the Governor, PESA devolves it to the Gram Sabha. This contradiction is inherent, which gives rise to ambiguity in the locus of decision making.

As an example; in land acquisition issues PESA demands either consultation or concession of gram sabha and the Governor still has the

authority to control transfer of land. Equally, the PESA laws are usually conflicted with statutory mining and forest laws and regulations which control the mining and forest objects.

Such overlaps are further compounded by the place of the state governments which often come up with laws that differ with PESA. This absence of harmonisation between central and state law implies that the area of the law will be disjointed and effective governance in Scheduled Areas will become hard to achieve.

This is not only compromising tribal autonomy but also results in administrative inefficiency and legal ambiguity. These conflicts can only be solved by clearly defining the powers, and a logical system should be taken into consideration which should combine the goals of the Fifth Schedule and PESA.

6. The Interpretation of the Courts and the Jurisprudence in Flux.

The judiciary has been instrumental in its interpretation of the provisions of the Fifth Schedule and PESA, and in many cases tried to act to a compromise on between these two competing interests. The need to safeguard tribal rights and the efforts to ensure they are not exploited have been highlighted.

A number of instances have seen the judiciary acknowledging the centrality of the Gram Sabha in the decision-making process, especially with land and natural resources issues. Simultaneously, it is also clear that the courts have considered constitutional role of the Governor and the state in seeing to it that governance and development is assured.

Nevertheless, the interventions of the courts have not been regular. Some of the decisions enhance the independence of Gram Savas whereas there are those that give more focus to developmental agendas, thus bankrupting the spirit of PESA. This inconsistency indicates the bigger conflict between economic development and tribal rights.

However, courts continue to play a significant role as a venue in the resolution of complaints

and legalities that are not well understood. A more logically and rights-driven jurisprudence is capable of helping to dissolve the tensions of the existing framework.

7. Issues of administrative practice and implementation complications.

As seen in the practical application of PESA and the fifth schedule, there are great challenges evident beyond the legal provisions. The practices of administration usually prefer centralised forms of decision-making, wherein the local societies are not much consulted.

Lack of coordination between the various levels of the government is one of the biggest problems. State departments are often isolated and they result in duplication of efforts and conflicting policies. Also, bureaucracy and opposition to decentralisation are some of the factors that impede effective operation of Gram Sabhas.

Lack of sufficient capacity of local institutions is another key crisis. A number of Gram Sabhas do not have funds, training and institutional resource to conduct their activities effectively. This is worsened by the fact that tribe communities do not have a lot of awareness regarding their rights under PESA.

Also, politically, the decision making in Scheduled Areas is usually influenced. The needs of local communities are often overridden by development projects, especially mining- and infrastructure-related ones. It leads to displacement, environmental degradation and social conflict.

These challenges need a comprehensive approach that involves legal reforms and administrative restructuring and empowerment of communities.

8. Harmonisation and Legal Reform requisite.

The conflict between the Fifth Schedule and PESA highlights the necessity to have a more consistent legal system. Laws should be harmonised so that there are no overlaps and so that laws are clear.

The first strategy would be to define what the discretion of the Governor is supposed to cover and put guidelines on how it should exercise its discretion. This would increase responsibility and minimize chances of haphazard decision making. Meanwhile, state capabilities of Gram Sabhas should be reinforced by producing the effective implementation of PESA and harmonizing state legislation.

The reforms at the institutional level are also needed to enhance coordination between the various levels of the government. Institutionalisation of mechanisms of consultation and collaboration is necessary to make sure that the interests of tribal communities are reflected in the decisions.

Gram Sabhas can be empowered to exercise their powers and this can be done through capacity-building initiatives such as training, awareness programmes etc. Moreover, increased transparency and participation of citizens can increase the legitimacy of the processes of governance.

After all, a middle ground between administrative regulation and local self-rule must be a results of adherence to the constitutional principles of justice, equality and democracy.

Conclusion

The constitutional interaction between the discretionary powers of the Governor on the Fifth Schedule and the organization of local self-governance on the PESA exemplifies an essential conflict in Indians policy towards the administration of tribes. Although both mechanisms were established with the aim of safeguarding the interests of the tribes, the concomitance of both mechanisms has led to overlaps in powers, the lacklustre legal clarity, and uneven application.

The Fifth Schedule represents a protectionist approach to government, placing a lot of faith in the position of the Governor to ensure that tribal people are not exploited. PESA, in its turn, is a revolutionary change in the way of

participatory democracy, where the Gram Sabha is the main institution of self-governance. The tension between these two strategies is clear in practice in which centralised administrative control can negate the autonomy envisaged by PESA.

This analysis has shown that the issue is not just in the design of the constitution but also in the way in which it has been enacted. Bureaucracy and reluctance to decentralise has watered down the efficacy of both systems as Governors tend to take the recommendations of their state governments. Also, there is no harmonisation between central and states laws which also increases conflict of jurisdiction.

legal and institutional reforms are urgently needed to deal with such challenges. Defining the boundaries of the discretion of the Governor, enhancing the authority of Gram Sabhas, and making the legislation of the state conform to PESA are necessary measures that will allow reaching a harmonious system of governing.

To summarize, this would require the Fifth Schedule protective intent to be reconciled with the PESA democratic aspirations in order that the self-government of the tribes in the Scheduled Areas be achieved. The promise under the constitution of justice and autonomy of tribal communities can only be brought to pass through the approach of coherence and participation.

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