

Critical Issues for Effective Implementation of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996

R.R. Prasad

Introduction

The Census of 2011 enumerates the total population of Scheduled Tribes at 10,42,81,034 constituting 8.6 per cent of the population of the country. Legally Scheduled Tribes are people belonging to tribes or tribal communities specified in the list of such tribes as per Article 342 of the Constitution. The tribal population, scattered across the country, is differently placed with respect to the politico-administrative structures existing in the country. Where they are a numerical minority, they are a part of the general administrative structure of the country, although certain rights have accrued to Scheduled Tribes across the country through reservations in educational institutions and government employment. However, where they are numerically dominant, two distinct administrative arrangements have been provided for them in the Constitution in the form of the Fifth and Sixth Schedules. The Sixth Schedule areas are some of the areas which were 'excluded' until the Government of India Act, 1935 in the erstwhile Assam and other tribal-dominant areas which became separate States. These areas have been given special provisions under Part XXI of the Constitution. The extension of such provisions to newer areas has been the result of political mobilization and social movements. Similarly, there are States where the provisions of the Fifth

Schedule are in force. The Fifth Schedule is aimed at providing protections to the tribal population through separate laws for Scheduled Areas, including a special role for the Governor and the institution of Tribes Advisory Council.

For the predominantly tribal Scheduled V area of Central India, Government had passed an Act 'The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996' (popularly known as PESA Act). It came into force on the 24th December 1996 and extends Panchayats to the tribal areas of now nine States; namely, Andhra Pradesh, Jharkhand, Gujarat, Himachal Pradesh, Maharashtra, Madhya Pradesh, Chattisgarh, Odisha and Rajasthan. The Act intends to enable tribal society to assume control over their own destiny to preserve and conserve their traditional rights over natural resources. PESA is unprecedented in that it gives radical self-governance powers to the tribal community and recognises its traditional community rights over natural resources.

Fifth Schedule

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 after consultation with the Governor of that State. The criteria for declaring any area as a "Scheduled Area" under the Fifth

Schedule are:-

- (i) Preponderance of tribal population,
- (ii) Compactness and reasonable size of the area,
- (iii) A viable administrative entity such as a district, block or taluk, and, economic backwardness of the area as compared to neighbouring areas.

The purpose and advantages of an area being declared as Scheduled Areas are as follows:-

- a. The Governor of a State, which has Scheduled Areas, is empowered to make regulations in respect of the following:
 - i. Prohibit or restrict transfer of land from tribals;
 - ii. Regulate the business of money lending to the members of Scheduled Tribes in making any such regulation, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State, which is applicable to the area in question.
- b. 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 such area subject to such exceptions and modifications as he may specify.
- c. The Governor of a State having Scheduled Areas therein, shall annually, or whenever so required by the President of India, 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 area.

- d. Tribes Advisory Council (TAC) shall be established in States having Scheduled Areas. The TAC may also be established in any State having Scheduled Tribes but not Scheduled Areas on the direction of the President of India. The TAC consists of not more than twenty members of whom, as nearly as may be, three fourth are from the representatives of Scheduled Tribes in the Legislative Assembly of the State. The role of TAC is to advise the State Government on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to it by the Governor.
- e. The provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996, vide which the provisions of Panchayats, contained in Part IX of the Constitution, were extended to Scheduled Areas, also contains special provisions for the benefit of Scheduled Tribes.

Administration of Scheduled Areas

Article 339 of the Constitution relates to control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes. This Article provides that:

- (i) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions, as the President may consider necessary or desirable.
- (ii) The executive power of the Union shall extend to the giving of directions to a State

as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State. In pursuance of the provisions of this Article, the first Scheduled Areas and Scheduled Tribes Commission was set up in 1960 under the Chairmanship of Shri U.N. Dhebar. The second such Commission was set up vide order dated 18 July, 2002 under the Chairmanship of Shri Dileep Singh Bhuria, Ex-MP (with ten other Members) (popularly known as Bhuria Commission) with a view to give a further thrust to the welfare and development of Scheduled Tribes. The Commission submitted its report to the President on 16 July, 2004.

Panchayats (Extension to Scheduled Areas) Act, 1996

This Act seeks to extend the provisions of Part IX of the Constitution as referred to in Clause (1) of Article 244 and calls for the Legislature of a State not to make any law under that Part (i.e. Part IX) which is inconsistent with any of the features given under Section-4 of the Act, some of the important features of which are:-

- (i) The State legislation should be in tune with the customary law, social and religious practices and traditional management practices of community resources.
- (ii) Every Gram Sabha should be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary mode of disputes resolution.
- (iii) Every Gram Sabha should be responsible for identification or selection of persons as beneficiaries under the poverty alleviation and other programmes.
- (iv) Every Gram Sabha should have the authority to approve the plans,

programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayats at the village level.

- (v) The reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat area for whom reservation is sought to be given under Part IX of the Constitution; Provided that the reservation for the Scheduled Tribes shall not be less than a one half of the total number of seats; Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes.
- (vi) The State Government may nominate persons belonging to such Scheduled Tribes as have no representation in the Panchayat at the intermediate level or the Panchayat at the district level; Provided that such nomination shall not exceed one-tenth of the total members to be elected in that Panchayat.
- (vii) The Gram Sabha or the Panchayat at the appropriate level should be consulted before making acquisition of land in the Scheduled Areas and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas.
- (viii) The recommendations of the Gram Sabha and the Panchayats at the appropriate level should be mandatory prior to grant of prospecting license or mining lease for minor minerals in the Scheduled Areas.
- (ix) The Gram Sabha and the Panchayats should (a) have the power to enforce prohibition or regulate or restrict the sale and consumption of any intoxicant (b) be

endowed with the ownership of the minor forest produce (c) be conferred the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of the Scheduled Tribes have the power to manage village markets and exercise control over money lending to the Scheduled Tribes have the power to exercise control over institutions and functionaries in all social sectors (d) have the power of control over local plans and resources for such plans including the Tribal sub-Plan.

It is obvious from the specific provisions of PESA Act, 1996 that the Gram Sabhas and the Panchayats have been intended to assume total responsibilities for planning and implementation of plans, programmes and projects aimed at the two objectives contained in Article 243G of the Constitution namely- (a) The preparation of plans for socio-economic development and social justice, and (b) The implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule of the Constitution. However, notwithstanding the almost plenary role assigned to the Panchayats by 73rd Amendment Act and a wide range of powers given in the PESA Act, Article 243G of the Constitution and Section 4 (n) of the PESA Act, Panchayats rely on the State Legislatures to “endow the Panchayats with such powers and authority as may be necessary to enable them to function as institution of selfgovernment” and “such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at appropriate level”. Thus in practical terms, the empowerment of Panchayats rests, by and large, with the State Governments.

Although the PESA Act, 1996 prohibits the State Govts. to make any law inconsistent with the provisions given in Section 4, it has been noticed that the enactments made by the State Govts. vary from State to State and do not strictly correspond with the provisions of PESA Act. The State Govts. are required to take necessary action in terms of Section 4(n) of the PESA Act to equip Panchayats with requisite powers and authority to enable them to function as institution of self-government.

Status of PESA – Challenges before Panchayati Raj Institutions

PESA posed a totally new set of challenges before the members of PRIs, a few of which had not been contemplated before. The first was the creation of a new center of power- a Gram Sabha with powers to deliberate, decide and monitor development; the second was the wide expanse of the powers of the Gram Sabha which brought all facets of the community's life under its mantle; the third radical role transformation of the panchayats from being the decision makers to having to implement the gram sabha's decisions; the fourth was effective disempowerment from a powerful past to an uncertain future; the fifth was the deconstruction of 'development' as disbursement of political largesse to the will of the common people and finally the sixth was the threat of the role of PRI members as the last bastion of power and the critical link between the parties and the voters. Most PRIs were protected by the effective stripping of the powers envisioned by PESA through weak laws and unframed rules. But as the cornerstone of the political edifice of 'representative' democracy, the PRIs will have to meet the challenges that an efficacious PESA will pose, a role that they have yet to visualize.

Implementation of PESA - Areas of Concern & Opportunity

- a. Documenting the present state of organization of tribal society, its customary

- laws, practices and procedures of caring for their human, social and natural environment, particularly in matters of land, water, minor minerals, forest and minor forest produce, regulation of alcohol, mechanisms of internal solidarity as well as practices of community governance which are no longer in practice but still part of collective memory.
- b. Identifying and documenting all PESA related legal, procedural and administrative frameworks currently in place the 9 states having Fifth Schedule Areas, particularly in matters of land, water, minor minerals, forest and minor forest produce, regulation of alcohol, markets and money lending and analyze current legal provisions at variance or conflicting with the requirements of PESA.
 - c. Identification of necessary changes whether by way of amendments, notifications, orders or guidelines in the legal, procedural and administrative framework related to panchayati raj, development and in matters of land, water, minor minerals, forest, minor forest produce, regulation of alcohol, markets and money lending to integrate current customary laws, practices and procedures which will promote self governance in consonance with the letter and spirit of PESA.
 - d. Drafting of the necessary amendments, notifications, orders or guidelines in the legal, procedural and administrative framework related to panchayati raj, rural development and matters of land, water, minor minerals, forest, minor forest produce, regulation of alcohol, markets and money lending to integrate current customary laws, practices and procedures which will promote self governance in consonance with the letter and spirit of PESA.
 - e. Developing the necessary sensitivities in PRI members and development functionaries to ensure that the gram sabhas in the Scheduled Areas rightfully develop as institutions of self-governance and enjoy the recognition and respect of the elected representatives and the administrative machinery. This process will also require the creation of capacities and capabilities to assist in grounding traditional community mores and customs according to the tribal ethos with grassroots participatory governance to function the recognized democratic process as required by PESA; and
 - f. Utilize the opportunities created by PESA, evolve methodologies and instruments to consolidate and strengthen and enable democratic participation. Sensitization and capacity building must gear itself for:
 - i. social mobilization for community support,
 - ii. strengthening of social, capital and human resources,
 - iii. grounding participatory democratic processes and community institutions,
 - iv. handholding communities so as to re-enable their democratic traditions and negotiate with modern governance processes,
 - v. sustaining networks of self governing communities.

R.R. Prasad, Professor, National Institute of Rural Development & Panchayati Raj, Rajendranagar, Hyderabad -500030.