

## **National Advisory Council (NAC)**

### **Recommendations on Panchayat (Extension to the Scheduled Areas) Act, 1996**

#### **Summary**

The NAC recommendations consists of (1) Amendments to the Act (2) directions by the Union Government to the States and (3) suggestions to the Central Government. These are briefly as follows;

#### **(1) Amendments to PESA 1996:**

The proposal seeks to amend and elaborate on the law with a view to strengthen it and rectify some of the weaknesses in the existing law. The proposed amendments in brief, pertain to the following:

- i. Providing list of definitions of key terms used in the Act for greater clarity;
- ii. constitution of gramsabha at the hamlet level and power to constitute committees;
- iii. mandating 'prior informed consent' as pre requisite for land acquisition and licensing for minor minerals;
- iv. reinforcing the need to align Central and State laws in conformity with PESA;
- v. enabling the State government to make rules;
- vi. enabling the Centre to issue directions and
- vii. provision for grievance redress under the Act.

#### **(2) Directions:**

Certain directions on major issues have been proposed to be issued by the Union Government under Proviso 3 of the Fifth Schedule as an interim measure. These need not await amendment to the Act and can be issued immediately for better implementation of the existing law. These pertain to the following areas:-

- i. Aligning various laws in conformity with PESA to ensure autonomy of Gram Sabha and Panchayats in Scheduled Areas.
- ii. Notification of list of hamlet/habitations to conduct gramsabha under the law
- iii. Elaboration on powers of gramsabha to identify beneficiaries, approve plans, conduct social audit and increased accountability of government functionaries.
- iv. Prevention of Land Alienation and Restoration of Illegally Alienated Lands.
- v. Regulation of intoxicants for storage, manufacture and consumption.
- vi. Control over Usurious Money Lending in the Scheduled Areas.

#### **(3) Suggestions to GOI regarding:**

- i. Inclusion of tribal habitations hitherto not included under the Fifth Schedule.
- ii. Central Govt. to expedite law on Provisions of the Municipalities (Extension to Scheduled Areas) Bill.
- iii. Constitution of Special Task Force to review functioning of VI Schedule Areas and to suggest appropriate administrative arrangements for V schedule areas.

**1. Proposed amendments to PESA 1996 have been indicated in italics .**

**THE PROVISIONS OF THE PANCHAYATS (EXTENSION TO THE SCHEDULED AREAS) ACT, 1996 No.40 OF 1996**

*(24th December, 1996)*

An Act to provide for the extension of the provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas.

Be it enacted by Parliament in the Forty-seventh Year of the Republic of India as follows:-

**Short title**

1. This Act may be called the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996

**Definition**

2. In this Act, unless the context otherwise requires,
  - a) *“Access Rights” means legal, traditional or admitted entitlements of an individual or community to sustainably use community resources and where relevant, enter into a territory defining or containing the resource.*
  - b) *“Alienation of land” means dispossession of land of an individual or community following transfer or change of ownership title or possession, or denial of access to land of any nature located within the jurisdiction of the Gram Sabha, whether to a scheduled tribe or to others.*
  - c) *“Community resources” include natural resources such as land, surface and ground water, forests, minerals, habitat and others, located within the territorial jurisdiction or the territorial domain of the community as determined by the Gram Sabha, including intellectual, socio-cultural and religious heritage of communities.*
  - d) *“Competent Authority” means a person or an institution as provided under the Rules for the purposes of this Act.*
  - e) *“Complaint” refers to any representation, whether oral or in writing, made to a competent authority regarding violation of provisions of the Act by a member/s of the Gram Sabha or the Gram Sabha itself.*
  - f) *“Cultural identity” is the recognition of an individual, group or community by virtue of belonging to or being part of a community based on a shared ancestry, history, culture, traditions, mores, beliefs, practices and institutions.*
  - g) *“Customary law” means traditional common law or rule or practice that sets an intrinsic standard of conduct of members of a community*

- h) *“Customary mode of dispute resolution” is the system of adjudication adopted by a community which is part of their culture, tradition and custom but not violating the principles of natural justice.*
- i) *“Gram Sabha”, for the purpose of this Act, shall ordinarily comprise of the assembly of the residents of one or more hamlet/habitation, comprising a community and managing its affairs in accordance with traditions and customs within its respective territorial boundaries. This unit will ordinarily be below the revenue village and is not the same as Gram Sabha at the Panchayat level.*
- j) *“Minor forest produce” is as defined under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.*
- k) *“Minor Minerals” is as defined under Mines and Minerals (Development and Regulation) Act 1957 where the term ‘building stones’ includes stones such as those used for construction of buildings, boundary walls, pavements, platforms, and wells.*
- l) *“Minor water bodies” means any flowing, impounded or sub surface water and includes all water bodies as defined by the concerned State law.*
- m) *“Money lending” means extending loans in any form for interest, with or without collateral, by individuals and institutions and includes informal advances.*
- n) *“Panchayat at appropriate level” means the Gram Panchayat in whose area a particular resource is situated or the next higher tier namely the Intermediate Panchayat/Zilla Parishad if the resource in question is situated in more than one Panchayat or Intermediate Panchayat as the case may be.*
- o) *“Prior Informed consent” means freely given written assent or agreement to permit an occurrence or to permit an act or to allow an occurrence only after a complete disclosure of facts needed to make the reasoned decision free from any coercion or inducement.*
- p) *“Scheduled Area” means the Scheduled Areas as referred to in Clause (1) of Article 244 of the Constitution.*
- q) *“Social sector” means all development and welfare activities and includes inter alia, health, education, water supply, transport, agriculture and allied activities, infrastructure, irrigation, management of natural resources such as water, forest, land, energy, welfare schemes and services, etc. provided by government and non-government entities.*
- r) *“Traditional management practices” means normative systems of resource care and use adopted by a community to ensure beneficial and sustainable use of a community resource by and for all its members.*

- s) *“Zone of influence” means the geographical area whose social, economic, and/or environmental conditions are significantly affected by changes induced by the proposed project.*
3. The provision of Part IX of the Constitution relating to Panchayats are hereby extended to the Scheduled Areas subject to such exceptions and modifications as are provided in section 4.

#### Exceptions and modifications to part IX of The Constitution

4. Notwithstanding anything contained under Part IX of the Constitution, *the Legislature of the State shall enact enabling provisions and rules for effective exercise of the rights, duties and powers of the Gram Sabha as follows, and shall not make any law which is inconsistent with these rights, duties and powers:*

- (a) a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;
- (b) *the Gram Sabha shall ordinarily comprise of the assembly of the residents of one or more hamlets/habitations, managing its affairs in accordance with traditions and customs; such hamlets/habitations for this purpose will be notified in the manner as may be prescribed. The members of the Gram Sabha at the hamlet/habitation level will consist of persons whose names are included in the electoral rolls for the Gram Panchayat.*
- (c) *the geographical access or jurisdiction of a Gram Sabha of the hamlet/habitation shall be deemed to extend to the traditional community resources like forest lands, cultivable fallows, grazing land, waste lands and water bodies that may have been so accepted by communities concerned according to their tradition which shall be demarcated by the Gram Sabha. This shall be recorded as a territorial rights or access rights, as the case may be, by the district revenue authorities and notified by the District Collector as the geographical jurisdiction and/ or access rights of the concerned village.*

*Provided that disputes concerning boundaries or access rights between neighbouring hamlets/habitations shall be referred to the Panchayat at the appropriate level/ competent authority as may be prescribed under the Rules by the concerned State governments for early settlement, after which the concerned records shall be corrected accordingly.*

- (d) (i) *Gram Sabha at hamlet/habitation level may constitute Standing/ ad-hoc Committees from amongst their members for assisting the Gram Sabha in discharging different responsibilities.*
- (ii) *The members of the Committees shall be chosen from among members of the Gram Sabha preferably by consensus in an open meeting of the Gram Sabha following such procedure as may be prescribed.*

(iii) *Any village committee constituted under any statute, executive instruction of government, department or authority shall function under the control and direction of the Gram Sabhas in regard to the functions and areas under their jurisdiction.*

- (e) 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;

*Provided that any person aggrieved by any decision of the Gram Sabha, or inaction on its part, or irregularity in the conduct of meetings or such like, can bring the matter before the Gram Sabha for review within such time limit as may be prescribed. An appeal shall lie with competent authority in such manner as may be prescribed under rules by the concerned State government. The decision of the appellate Authority shall then be final and binding on the parties and communicated in writing with reasons thereof.*

- (f) every Gram Sabha is empowered to:

(i) *prepare a perspective plan of 5 years based on development needs and determine priorities of works/programmes to be undertaken. This will form the basis for annual plans under various government schemes and programs.*

(ii) *direct the Government agencies to submit the prioritized list of works/projects to be undertaken to the Gram Panchayat or Panchayats at appropriate level as well as list of beneficiaries as selected by Gram Sabha under various programmes and schemes within the hamlet/habitation to the Gram Sabha for prior approval of the Gram Sabha.*

(iii) *consider and approve plans, programs and projects for socio-economic development of all Government and Non-Government Agencies before they are taken up for implementation at the hamlet/habitation level.*

(iv) *conduct regular social audit of works and programs taken up in the hamlet/habitation by any Panchayat, State or any other agency.*

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

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

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

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

- (i) 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;

- (j) (i) *Prior informed consent of the Gram Sabhas and the concerned Panchayats at the appropriate level, affected by the proposed project or located in the zone of influence of any land acquisition project, shall be mandatory for the acquisition of any land in the Scheduled Areas for development projects falling within the jurisdiction of the concerned Gram Sabha, irrespective of the classification of land.*

- (ii) *Prior informed consent of the Gram Sabhas and the concerned Panchayats at the appropriate level shall be mandatory regarding the rehabilitation and sustainable livelihood plan for persons affected by projects in the Scheduled Areas.*

- (iii) *The procedure for prior informed consent in (i) and (ii) above and arriving at a decision shall be prescribed by the concerned State government under the Rules.*

- (iv) *All decisions taken by the concerned Gram sabha/s and the concerned Panchayats at the appropriate level, and the decision taken by the Government or the concerned competent authority, with reasons thereof, shall be placed in the public domain by the concerned State Government ;*

- (v) *Full facts about the project for which land is proposed to be acquired, its zone of influence, its economic, social and environmental impact and rehabilitation and sustainable livelihood plans shall be placed before the Gram Sabha while taking the consent of the Gram Sabha and Panchayats at the appropriate level, as the case may be, as provided in the rules.*

*Provided if at any point of time, it is found that the consent of the Gram Sabha was obtained through fraud, force, concealment, inducement or omission of information, then the Gram Sabhas and Panchayat at the appropriate level have the right to withdraw consent in whole or in parts as the case may be after due inquiry by competent authority in a time bound manner as prescribed under the rules.*

- (vi) (a) *After the consent has been obtained, the acquiring agency shall mandatorily place before the Gram Sabha for its consideration, the progress of the rehabilitation and sustainable livelihood plan after every 3 months from the date of notification for land acquisition.*

*(b) Upon the passage of a resolution from majority of the Gram Sabhas and Panchayats at the appropriate level stating that measures for rehabilitation and sustainable livelihood have not been observed as scheduled, the implementation of the project shall be halted, till the required rehabilitation and livelihood activities are completed. The Gram Sabhas shall be entitled to compensation for any damages incurred due to delays in rehabilitation.*

*(c) No displacement/relocation of the person/s from the project area which is proposed to be acquired shall be undertaken unless all facilities under the rehabilitation package are certified to be complete and functional at the site of resettlement by the Gram Sabha.*

*(vii) If the Gram Sabha concludes that the land has been used/transferred for purposes other than for which informed consent was sought/ acquired, and such a claim has been verified by a due process, then the Gram Sabha may inform the State Government its decision in writing to withdraw its consent. Where such withdrawal occurs, the residents of the Gram Sabha shall be entitled to civil damages for fraud and to institute criminal proceedings on the same basis.*

*(viii) The acquired land shall revert back to the Gram sabha in the event that the purpose for which land was acquired is changed or the project is not taken up within five years from the date on which consent is granted.*

*(k) The concerned Gram Sabha/s, or the appropriate Panchayats if the spread of the water body falls beyond more than one village, as the case may be, are empowered to plan and manage the minor water bodies in their areas.*

*(l) the prior informed consent of the Gram Sabha, and, if necessary, the Panchayats at the appropriate level depending on the area under consideration shall be made mandatory for any grant of prospecting license or concession for exploitation of minor minerals in any manner;*

*Provided if at any point of time, it is found that information provided is false or concealed, or is inaccurate, then the Gram Sabhas and Panchayat are at liberty to withdraw consent in whole or in part.*

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

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

*(ii) the ownership of minor forest produce;*

- (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;
  - (iv) the power to manage village markets by whatever name called;
  - (v) the power to exercise control over money lending *and curbing usury to protect the interests of members of Gram Sabhas as provided in the rules*;
  - (vi) the power to exercise control over institutions and functionaries in all social sectors;
  - (vii) the power to control over local plans and resources for such plans including tribal sub-plans;
- (n) the State Legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions of self-government shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha;
  - (o) the State Legislature shall endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district levels in the Scheduled Areas.

Continuance of existing laws on panchayats:

5. Notwithstanding anything in Part IX of the Constitution with exceptions and modifications made by this Act, any provision of any law relating to Panchayats in force in the Scheduled Areas, immediately before the date on which this *amendment Act* receives the assent of the President, *along with extant rules and procedures which are inconsistent with this amended Act, shall be null and void unless brought in conformity before the expiration of one year from the date on which this amendment Act receives assent of the President*;

*Provided that other extant State subject Acts along with rules and procedures thereunder dealing with subjects covered under this amended Act, shall be null and void to the extent that they contravene this Act, unless brought in conformity within one year of this amendment taking effect.*

*Provided that Central Acts along with rules and procedures thereunder dealing with such subjects covered under this amended Act or parts thereof not in conformity with provisions of this amended Act, shall be brought in conformity within one year of this amendment taking effect.*

6. *The Central Government may, from time to time, issue general or special directions to the State Governments in writing for the effective implementation of the various provisions of this Act and the same shall be binding on the State Governments.*



7. *The State shall have powers to notify rules for implementation of this Act. These shall be in conformity with Central directions issued, if any, under this Act.*
8. *Any member of Gram Sabha can complain on a decision or procedure adopted or action taken in violation of the provisions of this Act by the Gram Sabha, a Panchayat, or a government functionary or agency, or non governmental entities or an individual. The manner of inquiry into the complaint and grievance redressal procedure shall be provided under the rules prescribed by the concerned State.*

## **2. Directions to be Issued under Proviso 3 of the Fifth Schedule**

### **I. Aligning State laws with PESA to ensuring autonomy of Gram Sabha in Scheduled Areas**

Sec.4 (n) of PESA Act of 1996 requires that the Panchayats function as institutions of self-governance, for which it is necessary to ensure that the Panchayats at the higher level do not assume the powers and authority of any Panchayats at the lower level or the Gram Sabha. The intent of Section 4(n) is to ensure that the Gram Sabha and the Panchayats at the lower level are rendered functional by enabling provisions, appropriate rules, directions and guidelines that will facilitate efficacious exercise of the multiple powers conferred by PESA on the Gram Sabha.

The following are directions to be issued under Proviso 3 of the Fifth Schedule

- 1. All provisions in the State legislations, especially those related to Panchayats, that are inconsistent with the provisions of Sec.4 (n) are null and void as the provisions of the Central legislation shall prevail. Therefore, inconsistent provisions in the State laws are to be amended suitably.*
- 2. All subject related laws covered under PESA, and their rules and procedures, of the State should be brought in conformity with the PESA Act, 1996, within a period of one year from the date of issue of directions.*

### **II. Identification and declaration of ‘Village’ and its Geographical Jurisdiction**

Section 4 (b) of PESA defines a ‘village’ as a habitation or a group of habitations, or a hamlet or a group of hamlets, comprising a community and managing its affairs in accordance with its traditions and customs and empowers the gram sabha as the assembly of the adults of the village. However, in a clear violation of PESA, the general Panchayat Raj structure has been adopted even in Schedule V areas, whereby the *Gram Sabha of Gram Panchayat*, usually spread over a number of habitations is being misconstrued to be Gramsabha under PESA. As the successful operationalisation of PESA hinges on adopting the operational definition of Gram Sabha and village, it is necessary that the identification of the ‘village’ and delineation of its geographical limits in conformity with PESA is done to enable it to function as envisaged under law.

Therefore, the following directions be issued under Proviso 3 of the Fifth Schedule

- 1) State Governments shall prepare and notify the list of hamlets (settlements) in every Panchayat for notification as “gram sabhas” for the purposes of the Panchayats (Extension to the Scheduled Areas) Act 1996 within one year from the date of issue of this direction. Such Gram Sabha shall ordinarily comprise of the assembly of the residents of one or more hamlets, comprising a community and managing its affairs in accordance with traditions and customs within its territorial boundaries. This unit will ordinarily be below the revenue village and is not the same as gram sabhas at the panchayat level.*
- 2) State governments shall devolve necessary powers and resources (both human and financial) to gram sabhas to enable them to undertake their roles and responsibilities in an effective manner through amendments in law, rules and*

*procedures in areas covered under PESA in addition to undertaking capacity building and training .*

### **III. Powers to identify beneficiaries, approve plans, programmes and projects, control over institutions and functionaries and issue of utilization certificate**

Sections 4(e) (i) and (ii), 4(f), and 4(m) (vi) and (vii) of the Panchayats (Extension to the Scheduled Areas) Act 1996 confers the power to approve the plans, programmes and projects for social and economic development to the Gram Sabha, before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level. The Gram Sabha is additionally empowered to identify and select beneficiaries under the poverty alleviation and other programmes. Gram Sabha is also empowered to control local plans and resources for such plans including tribal sub-plans, and exercise control over institutions and functionaries in all social sectors; and issue certification of utilisation of funds to the Panchayat for the plans, programmes and projects. However, notwithstanding the clear provisions of the Act, most of the said powers are not conferred de jure and de facto on the Gram Sabha

In order to effectively carry out these powers and responsibilities, the following directions are to be issued under Proviso 3 of the Fifth Schedule

- (1) *The Gram Sabha is the Competent Authority for identification of beneficiaries for development programmes and select them accordingly;*
- (2) *The list of works/projects to be undertaken by the government agencies and non-government agencies in the village along with complete details, such as their relevance, full financial details, details of the work/projects including technology to be used, participation of local work force, role of contractors, etc. shall be submitted to the Gram Sabha by the Gram Panchayat or Panchayats at appropriate level; and their approval shall be obtained from the Gram Sabha prior to granting sanction to the plan or project.*
- (3) *The Gram Sabha shall conduct regular social audit of works/projects and programs taken up by any Panchayat, State or any other agency in their area and its findings shall be sent to the Gram Panchayat and to the concerned Government agency for necessary action;*
- (4) *All agencies undertaking any work within the village shall apply for certification to the Gram Sabha together with documentary proof of expenditure, and mandatorily obtain certification of utilization of all funds and works undertaken from the Gram Sabha. The Gram Sabha will issue such certificate after inspection and verification of the work ;*
- (5) *Any objection pertaining to the quality of the work or expenditure, etc. may be placed before the Gram Sabha. The Gram Sabha may examine the issue and give proper instruction for improvement and its decision will be final;*
- (6) *The Gram Panchayat and its committees will work under the general direction of the Gram Sabha and be accountable to the Gram Sabha in respect of services and programmes for that area. Any enquiry into the functioning of the Gram Panchayat or any functionary will be conducted after consulting the concerned Gram Sabha(s). The findings and results of the enquiry shall be presented before the Gram Sabha before being finalized and forwarded for proper action;*

- (7) *The Gram Sabha shall review all social sector schemes, institutions and functionaries functioning in the village whether governmental or non-governmental;*
- (8) *On completion of any programme, the complete details thereof will be produced before the next meeting of Gram Sabha. The Gram Sabha may constitute special Committees, call for their training to fulfill their responsibilities and seek assistance of experts to assist in its reviews;*
- (9) *Instructions of the Gram Sabha, including imposition of penalties, steps to improve the implementation of social sector schemes, performance of functionaries and delivery of services shall be complied with by the concerned functionaries.*

#### **IV. Land Alienation and Restoration of Illegally Alienated Lands**

Ownership and secure access to land is very important for the wellbeing of the tribal people and land alienation is arguably the most important reason for their disaffection. Studies show that the administration has been ineffective in protecting the corpus of tribal lands and hence section 4(m) (iii) of PESA empowers the community to protect the land resources and habitations of Scheduled Tribes in Scheduled Areas, while Sec.4 (d) additionally recognizes the competence of the Gram Sabha to safeguard community resources and both individual and collective rights to land. The Gram Sabha is empowered to take prompt and appropriate action to protect the corpus of tribal lands, prevent alienation of tribal land and take efficacious steps to restore alienated land of a member of the Scheduled Tribe, acting singly or with the support of the Revenue Authorities.

All land transfers to non tribals have been banned in the Scheduled areas of Andhra Pradesh by Regulation No 1 of 1970 of the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959, which has effectively reduced tribal land alienation. Further, the principle underlying the Samata Judgement affirms that land in the PESA areas serves the interests of the tribals. Protection of the corpus of tribal land, restraint on unlawful alienation or acquisition and efforts to ensure that gains from the land accrue to the tribal people is the clear intention of the Constitution, Laws and Regulations of the States and judicial pronouncements.

It is proposed that following directions be issued under Proviso 3 of the Fifth Schedule for incorporation in the Land Revenue Code of the State and other related land laws to enable gram sabhas to carry out these powers and responsibilities pertaining to prevention of land alienation and powers of restoration of alienated tribal land.

##### ***Protection of the Corpus of Tribal Land and Prevention of its Alienation***

- (1) *Any transfer of immovable property situated in the Scheduled Area by a person, whether or not such person is a member of a Scheduled Tribe, shall be absolutely null and void, unless such transfer is made in favour of a person, who is a member of a Scheduled Tribe or a society registered or deemed to be registered under the Co-operative Societies Act of the State which is composed solely of members of the Scheduled Tribe<sup>1</sup>;*

---

<sup>1</sup> Adopted from Sec.2(1)(a) inserted by Regulation No 1 of 1970 to the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959

- (2) *The following shall be included in the provisions in the Land Revenue Code of the States and laws related to alienation and restoration of tribal land requiring*
- (a) *the Revenue Department to make an inventory of all lands in the possession of the tribals and ensure expeditious securing of appropriate titles under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 or Land Revenue Codes or relevant land laws, as the case may be;*
  - (b) *the Revenue Department to ban all sale, transfer or lease, in the Fifth Schedule areas without the express prior informed consent of the Gram Sabha;*
  - (c) *mandatory intimation from the Revenue Authorities and individual or non governmental entities to the Gram Sabha in writing through the Gram Panchayat of any proposed sale or transfer including lease, mortgage of any land/transaction in the village;*
  - (d) *mandatory provision of providing all relevant revenue records sought by the Gram Sabha concerning the proposed sale, transfer or lease of the land within 30 days of such request in writing;*
- (3) *Every State having Scheduled Area shall constitute a 'Land Consolidation Fund' (LCF). Part of this fund shall be allocated at the district level to a designated authority to be notified by the State Government. The designated authority shall release necessary fund to the Gram Sabha for purchase of any land within its jurisdiction in the manner prescribed below. The LCF shall exclusively be used for enabling the Gram Sabhas in the Scheduled Area for the following purpose:*
- (a) *purchase at market price of any land falling within the jurisdiction of the concerned Gram Sabha owned by any resident whether a Scheduled Tribe or not, and who is desirous of selling his/her land and has made a request in writing to the Gram Sabha;*
  - (b) *the land thus purchased shall be in the name of the Gram Sabha of the concerned habitation;*
  - (c) *the said land shall be put to use for common purpose by the concerned Gram Sabha;*
  - (d) *the Gram Sabha may allocate such land, partly or wholly as the case may be, to any landless Scheduled Tribe of the habitation with enjoyment rights;*
  - (e) *the Gram Sabha shall cancel such enjoyment rights if need be and reallocate the same to another landless Scheduled Tribe of the habitation or utilise the same for the common community needs;*
  - (f) *The Record of Rights with respect to such land shall be in the name of the Gram Sabha.*

### ***Restoration of Alienated Tribal Land***

- (1) *A clear and explicit provision be made in the Revenue Law and other relevant laws to include such provisions in the Land Revenue Code of the State and laws related to alienation of tribal land that*
  - (a) *confer power on the Gram Sabha to act suo motu or on a complaint from a member of the gram sabha to restore the alienated tribal land;*
  - (b) *authorize the Gram Sabha to call for all relevant revenue records concerning the alienation of such land to be provided within 30 days of such request;*
  - (c) *empower the Gram Sabha to conduct a hearing and order restoration of the land back to the concerned member of the Scheduled Tribe;*
  - (d) *The Gram Sabha may direct or seek the assistance of the Police in restoration of the land, if it so desires.*
- (2) *Gram Sabha shall inform the orders of restoration to the Sub-Divisional Officer who shall ensure restoration within a period of three months, intimate the same to the Gram Sabha and direct appropriate entries in the Record of Rights.*
- (3) *The Gram Sabha may constitute a Standing Committee from among its members and call upon the Revenue Authorities to train such members in all matters related to the maintenance of records and the exercise of the powers mentioned above.*

### **V. Regulation of intoxicants**

Sec.4 (m) (i) confers the Gram Sabha with ‘the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant’. Intoxicants, particularly liquor, have been an instrument for usurpation of resources, particularly land, in the tribal habitations with devastating effect on the lives of the Adivasis, particularly women and children. Hence empowering the Gram Sabha with the power to regulate intoxicants is critical to ensuring that the community has direct control and responsibility over this matter.

In order to effectively carry out these powers and responsibilities, the following directions are to be issued under Proviso 3 of the Fifth Schedule

- (1) *The Gram Sabha shall have the powers to grant or deny permission for brewing indigenous/ traditional inebriants for sale, and establishment of a factory to manufacture intoxicants, and will have powers to regulate collection, storage, sale and use of intoxicants within its territory;*

- (2) *The Gram Sabha shall have powers to regulate existing shops or outlets vending intoxicants in the village and direct the competent authority to close any shop or outlet operating in violation of any law ;*
- (3) *No permit to start a factory may be issued by Government without the consent of all Gram Sabhas in the area; and*
- (4) *Agreement of fifty percent of women present in the Gram Sabha meeting is necessary in all decisions concerning manufacture, sale and consumption of intoxicants.*

## **VI. Control over Money Lending in the Scheduled Areas**

Usurious money lending has been the single most important cause of impoverishment and exploitation of the tribal people after these areas were opened up by the British. Usurious money lending has been major cause of dispossession of land and resources of the tribal people, leading to widespread distress and disaffection. It is in this light that PESA seeks to empower the Gram Sabha, to regulate money lending and usury.

In order to effectively carry out these powers and responsibilities, the following directions are to be issued under Proviso 3 of the Fifth Schedule

- (1) *To include such provisions in concerned State laws, rules or procedures to*
  - (a) *Confer power on the Gram Sabha to act suo motu or on a complaint from a member of the gram sabha concerning usurious money lending by any individual or institutions and to direct the competent authorities to cancel the licence of the offending money lender/ institutions and take necessary civil and criminal action as the case may be ; and*
  - (b) *Conduct a hearing and order restoration of the monies or interest or mortgaged/ unlawful alienation /conditional sale of property back to the concerned member of the aggrieved member of the Gram Sabha;*
- (2) *Regulate Money Lending by declaring that:*
  - (a) *levying of 'compound' interest by any money lender, whether individual or institutions on loans given to members of Scheduled Tribes is illegal;*
  - (b) *no moveable or immovable property of a Scheduled Tribe shall be alienated in lieu of recovery of loan or interest.*
  - (c) *All licences for money lending by individuals to be subject to issue of no objection certificate by the concerned Gram Sabhas in its jurisdiction.*

### 3. OTHER RECOMMENDATIONS TO CENTRAL GOVERNMENT

#### I. Inclusion of tribal habitations hitherto not included under the Fifth Schedule

Fifty to seventy percent of the STs live outside the Scheduled Areas and hence are denied rights provided in Article 244. The Bhuria Committee rightly observed that the present-day administrative boundaries of the Scheduled Areas were determined during colonial times based on colonial compulsions. The earlier boundaries were modified without paying attention to the fragmentation of contiguous communities living in contiguous areas with the result that tribal communities are continuously being reduced to a minority population, be it the State, district or block and thereby making them marginal in every way.

Various committees had recommended that habitations that have been left out be included and the anomaly rectified. Further, recommendations to make the Tribal Sub-Plan areas coterminous with Vth Schedule Areas has not been implemented, entirely due to political and administrative apathy and neglect, thereby excluding large numbers of tribal habitations. This situation prevails even after the Fifth Schedule to the Constitution (Amendment) Act, 1976 (101 of 1976), which required states to include hitherto tribal habitations. But no tribal habitations in the States of Kerala, Tamilnadu, Karnataka, West Bengal, Jammu & Kashmir and Uttar Pradesh have been included under the Vth Schedule as Scheduled Area.

The provisions of the Fifth Schedule under Article 244(1)<sup>2</sup> are applicable *not only* to the administration and control of Scheduled Areas, *but also* to the Scheduled Tribes. PESA, as the extension of the 73<sup>rd</sup> Amendment to the Constitution to the Scheduled Areas cannot be applied to close to 70% of the tribal regions in the absence of their inclusion. Hence it is appropriate to call upon the State governments to make fresh proposals to bring tribal areas under the Vth Schedule.

In order to effectively carry out the inclusion of tribal areas under the Vth Schedule to the Constitution, **it is recommended that:**

*States to list out all villages whose Scheduled Tribe population is over 50 percent as per 2011 census and prepare proposal for their inclusion in Scheduled areas to the President. A Special Task Force may be constituted by the Government of India to facilitate and to expedite process of notification by the President of all proposals received from states for inclusion in Scheduled Areas.*

#### II. Upgradation of Panchayats to Municipalities in Scheduled Areas

Numerous Panchayat areas are being upgraded/ converted as municipal/urban areas in the Scheduled Area and it is being argued that PESA is no longer applicable in these areas. This has happened in Chhattisgarh, Madhya Pradesh and Maharashtra, and has resulted in cases being filed in courts. The Chhattisgarh High Court declined to stay the elections to the newly formed urban Panchayat. The Jabalpur High Court stayed elections to 52 District Panchayats and municipalities in 26 districts having Scheduled

---

<sup>2</sup> Article 244. Administration of Scheduled Areas and Tribal Areas

(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam Meghalaya, Tripura and Mizoram



Areas. In September 2009, the court held the Panchayati Raj Act did not apply to Scheduled Areas and said that the Parliament should enact a suitable law extending 74<sup>th</sup> Amendment to urban areas in Scheduled Areas. There is also a case pending in Maharashtra. More PESA areas can be expected to be upgraded, taking those out of the purview of PESA and these will exist in a constitutional vacuum and unlawfully brought under the purview of the general municipal law.

The Second Bhuria Committee Report concerning the Extension of the Provisions of the 74<sup>th</sup> Amendment to Urban Local Bodies in the Scheduled Areas was tabled in Parliament on 19 July, 1995 making a number of observations and recommendations. The Provisions of the Municipalities (Extension to Scheduled Areas) Bill 2001 based on the aforesaid Report as well as the comments from the central ministries and the concerned State governments having Scheduled Areas, was introduced in the Rajya Sabha on 30<sup>th</sup> July 2001 and was referred to the Standing Committee on Urban and Rural Development on 6 August 2001. The Standing Committee submitted its report and recommendations in November 2003 as its Fifteenth Report. However the Union Government is yet to introduce a suitable law for the administration of Municipal Areas in Scheduled Areas. The result is that the Panchayat areas within the Scheduled Areas are being upgraded into Municipal Areas and taken out of the purview of PESA provisions without the mandatory alternative protective provision extending the 74<sup>th</sup> Amendment to the Municipal Areas in place and thus creating a legal infirmity. This needs to be rectified.

**It is recommended that:**

*The Union Government takes steps to introduce the revised Provisions of the Municipalities (Extension to Scheduled Areas) Bill in the Parliament at the earliest in such a manner that the interests of the Scheduled Tribes are not adversely affected.*

**III. Structures above the Gram Sabha at district level in Scheduled Area**

Sec.4 (o) of PESA requires that the State Legislature provide the pattern of the Sixth Schedule to the Constitution while designing administrative arrangements in District Panchayats in the Fifth Schedule Areas. At present this has not been adhered to and on the contrary the efforts are to assimilate, integrate or subsume tribal habitations/villages and their Gram Sabhas in the Scheduled Areas into the prevailing Panchayat Raj system operating in the area outside the Scheduled Area where the Panchayat structure dominates rather than the Gram Sabha as envisaged in PESA.

**It is recommended that:**

*The Ministry of Tribal Affairs along with the Ministry of Panchayat Raj jointly constitute a Special Task Force of persons with the expertise on tribal matters to study the functioning of the Fifth and Sixth Schedules and laws related to the tribal people and recommend appropriate administrative arrangement for Vth Schedule Areas within one year.*