



Review Paper

Implementation of PESA: Issues, Challenges and way Forwards

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Abstract

The Provision of the Panchayat (Extension to the Scheduled Areas) Act, 1996 popularly known as PESA was enacted to bring the Scheduled Areas in nine States of the country under the purview of national framework of Panchayat. This Act was framed in conformity with traditional tribal self-rule by entrusting extraordinary power to Gram Sabha which is not laid down in the national framework of Panchayati Raj Institutions (PRIs). Ministry of Panchayati Raj (MoPR) has commissioned certain studies, made recommendations to other Ministries and State Government for amendments in certain subject laws which are in conflict with the Act, issued circulars and guideline to frame model rule and so on. Almost two decades have passed after enactment of this most powerful Act. Governments of the concerned States have made very little progress to implement this central Act in letter and spirit. This paper depicts the background for enactment of this Act, analyses the provisions and challenges thereof to implement those provisions, efforts made by the central government to accelerate the implementation process of the concerned state governments, progress made by the state governments so far and suggests for certain steps to implement the Act in time bound manner. Secondary source of data has been used for analysis of the progress. This paper will be helpful to those who are interested in the areas of Panchayat as well as local governance and tribal development.

Keywords: Local Governance, Panchayat, PESA, PRIs, Scheduled Areas, Tribal Self-Rule.

Introduction

The 73rd Constitutional Amendment Act, 1992 ushered in a national framework for local self-governance by creation of Panchayati Raj Institutions (PRIs). This national framework was more or less uniformly applicable in all the states except Scheduled Areas prescribed in the Constitution of India. The Parliament enacted PESA - The Provision of the Panchayat (Extension to the Scheduled Areas) Act, 1996 in conformity with the traditional tribal practice of local governance to cover those Scheduled Areas¹. It is one of the most powerful Acts in India which recognizes the indigenous rights of the tribes over their natural resources. This Act has laid special thrust to empower Gram Sabha which has not been conferred by any other Act in any state. The provisions made in this Act are far reaching in their implications, yet there are several problems in putting the provisions in place. All nine states having Scheduled (or Schedule – V) Areas namely; Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha and Rajasthan have enacted their State legislations more or less in pursuance with this central Act. Efforts have been made by the Central Government also to amend certain Acts, Rules and policies which are in conflict with this Act. State Governments have been requested to amend certain subject laws which are not to the tune of the spirit of the Act. Certain States have made headway in this direction but still, there is lot to be done to implement the Act in letter and spirit.

Methodology

For the purpose of the review secondary source of data was used. Data was collected from different sources like Circulars, Guideline etc. issued from Ministry of Panchayati Raj; Annual Reports, different government reports, reports of different committees formed by the government; website of the Ministry of Panchayati Raj, and other study reports from different sources.

Background of the Act: According to Census data 2011, tribes constitute 8.6% of the nation's total population. There is very high concentration of tribal population in the country in the Fifth Schedule and Sixth Schedule Areas². These are described in the Constitution of India as Scheduled Areas and Tribal Areas respectively. These tribal communities have their own rich tradition and culture. Predominantly distributed in the hilly and forest regions, they are very much dependant on nature. Since their life and livelihood is very much dependant on nature, they have been traditionally playing the role of protector of flora and fauna. Obviously, they deserve the right over the natural resources and also management thereof. Their traditional decision making process by the community is truly democratic in nature. If we have a look at their society from gender lens, it is very clear that women are traditionally empowered. Considering their typical social characteristics, mainstream Panchayat system has to be in sync with their own culture and tradition of governance if we want to establish the system there

at all. When the mainstream Panchayat system was about to roll out across the nation, Government of India felt that need. Central government was bound to making provision in the Constitution of India beyond 73rd Constitutional Amendment Act, 1992.

With regard to Fifth Scheduled Areas, under Article 243M of the Constitution of India, Parliament is required to pass legislation for extending the provision of Part IX of these areas. Accordingly, Government of India set up a committee under the leadership of Duleep Singh Bhuria for inviting suggestion. The committee proposed some recommendations to the government which were more or less accepted. On the basis of the recommendation of the committee, PESA Act was passed by the Parliament. It came into effect on 24 December 1996 for areas mentioned in the Fifth Schedule of the Constitution of India. Introduction of PESA brought about change in approaches in forest governance by highlighting the role of Gram Sabha in making decisions and recognizing the rights of tribal population over their natural resources. PESA not only recognized the rights of tribal population over land, water and forest but also laid the ground for future law making concerning the tribes in Scheduled Areas.

A Brief Analysis of the Act: PESA is a most powerful act to protect the rights of tribes. The Governor enjoys extra-ordinary power as the sole protector of the legislation in the Scheduled Areas. He or She can take action to amend the existing laws of the State or the Center which are in conflict with the provisions of the PESA. Gram Sabha under the Act has also been endowed with extraordinary power. The jurisdiction of Gram Sabha in Scheduled Area is all-pervasive. It can consider wide range of issues which has direct or indirect bearing on the life of the tribes. The preamble of Section 4 of PESA Act prohibits the legislature of a State of making any law under that Part which is inconsistent with any of the features laid down in the central Act. This may be viewed as the most crucial part of the Act.

This Act may also be considered as unique because of the provision made in Section 5. This Section envisages that any provision of a law which is inconsistent with the provisions of PESA can only continue to be in force until amended or repealed by the state; otherwise, it will automatically expire in one year from the date on which this central Act came into effect. This time limit has already expired on 23-12-1997. So, all provisions in the laws of the concerned States and the Centre that are not in consonance with the basic features laid down in Section 4 of PESA are considered to be null and void.

Under this Act, Gram Sabha has been bestowed with absolute power and authority to enable them to function as institutions of self-government. State legislature has been made responsible to ensure that the Gram Sabhas and Panchayats at the appropriate level are endowed specifically with such powers. The powers which have been bestowed upon them may be described as follows: i. Prevention of land alienation, ii. Management of

village markets, iii. Imposition of prohibition on certain issues, iv. Having ownership on non-timber forest produce, v. Exercising control over money lending, vi. Exercising control over institutions and functionaries in all social sectors; and, vii. Having control over local plans and resources.

The Act also enshrined power to Panchayats following the principle of subsidiarity i.e. Panchayats at the higher level are not supposed to assume the powers and authority of any Panchayat at the lower level. Powers, functions and responsibilities which have been given to Gram Sabhas and Panchayats under this act, may be categorized as follows:

Mandatory executive functions and responsibilities: Before taking up any plan, programme or project for implementation, Gram Panchayat has to take approval from the Gram Sabha. Gram Sabha has been bestowed with the authority for identification of beneficiaries of poverty alleviation and other programmes and issuance of Utilization Certificate of funds by the Gram Panchayat for the above programmes. Planning and management of minor water bodies can be undertaken by Panchayat after getting approval from Gram Sabha only.

Mandatory consultations: Decision regarding acquisition of land or resettling rehabilitated persons affected by such projects can only be taken after consultation with the Gram Sabha or the Panchayat at the appropriate level.

Mandatory recommendations: Decisions regarding granting of prospecting license or mining lease or granting of concession for the exploitation of minor minerals can only be taken after getting recommendations of the Gram Sabha or the Panchayat at the appropriate level.

Despite having such power inherent in this Act, there are certain major loopholes which leave the scope of misinterpretation violating the spirit of the Act. Certain languages of the Act are ambiguous in nature. In most of the cases, advantages of these dubious languages are taken. In place of taking approval from Gram Sabha or consulting Gram Sabha, the approval is taken from Panchayat at upper tier. The Gram Sabha, the most powerful platform recognized by the Act, is strategically avoided. For example, Section 4(i) envisages that '*the Gram Sabha or Panchayat at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas...*' In this case, many a State strategically excludes the concerned Gram Sabhas from the consultation process before acquisition of land by taking advantage of the term 'or' in the clause, which goes against the spirit of PESA³.

Status of Implementation in the States: All nine states having Scheduled Areas amended their existing Panchayat Acts to comply with the provisions of PESA broadly. Even the newly formed State of Jharkhand framed their Panchayat Act in line with the major provisions laid down in the central Act. But still certain critical gaps exist. There are certain provisions in the

State Panchayat Acts which are not defined clearly by making subsequent Rules – leaving the scope of ambiguity. In addition to that, there are certain subject laws and rules regarding money lending, forest and minor forest produce, mining and excise, which need to be reframed. Though the provisions in such laws which are in conflict with the provisions of PESA have become null and void after December 23, 1997, they continue to be followed by departments and their functionaries because of the simple ignorance of the governments. Contentious issues like the ownership of minor forest produce, planning and management of minor water bodies and prevention of alienation of tribal lands have remained unsettled though recognized as traditional rights in PESA. Apart from that, transfer of fund and functionaries to the lower level government has not taken place after devolving statutory powers to the Gram Sabha and Panchayats. Certain major gaps between the central legislation and provisioning at the State level are enumerated below: i. Existing state laws regarding money lending, forest, excise etc., continue without any change, ii. Transfer of ownership of minor

forest produce and planning and management of minor water bodies to Gram Panchayats and Gram Sabhas have taken place incompletely, iii. Adequate actions have not been taken on preventing alienation of tribal lands recognized in PESA, iv. As is the case with Panchayati Raj in general, devolution of functions the Gram Sabha and the Panchayat have not been followed by subsequent devolution of fund and functionaries.

Consequently, de facto compliance with PESA remains incomplete and perfunctory. Over the years, requests have been made to states repeatedly to gear up the process of implementation of PESA and the matter has been discussed in the meeting of Ministry of Panchayati Raj (MoPR) and Performance Review Committees, but too little avail as revealed by several evaluations commissioned before 2004 by the Ministry of Rural Development⁴.

State Panchayati Raj Acts which are not in compliance with different Clauses of Section 4 of PESA

Table-1
State Panchayati Raj Acts which are not in compliance with different Clauses of Section 4 of PESA

States	D	E	F	H	I	J	K	L	M					
									i	ii	iii	iv	v	vi
AP	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Chhattisgarh	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
Gujarat	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Himachal Pradesh	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓
Jharkhand	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✓
Odisha	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Maharashtra	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓
Madhya Pradesh	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rajasthan	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

(Source: Ministry of Panchayati Raj, Government of India; updated as on 31.03.2014).

Table-2
State subject laws which are not in compliance with PESA

States	Land Acquisition	Excise	Forest Produce	Mines and Minerals	Village Market	Money Lending
AP	✗	✗	✗	✗	✗	✗
Chhattisgarh	✓	✓	✗	✓	✓	✓
Gujarat	✗	✓	✗	✓	✓	✓
Himachal Pradesh	✓	✓	✓	✓	✗	✗
Jharkhand	✗	✗	✓	✗	✗	✗
Odisha	✓	✓	✓	✓	✗	✓
Maharashtra	✗	✗	✗	✗	✗	✗
MP	✓	✓	✗	✓	✓	✗
Rajasthan	✗	✗	✗	✓	✗	✓

(Source: Ministry of Panchayati Raj, Government of India; updated as on 31.03.2014)

Central Government Initiatives for Implementing PESA: Ministry of Panchayati Raj, Government of India has taken a number of initiatives to implement PESA. It has engaged Planning commission, other Ministries and Departments in different exercise and constituted different committees, sub-groups, working groups etc. to yield desired outcomes. Few major initiatives taken by the central government especially after recommendation of the Working Group on Democratic Decentralization and PRIs (2006) are enumerated below⁵.

Ministry of Panchayati Raj organized the Third Round Table Conference of Panchayati Raj Ministers in September, 2004 in Raipur. The State Ministers agreed there to comply with the provisions of PESA by holding consultation with other concerned departments.

MoPR commissioned a study in May, 2008 by the Indian Law Institute (ILI) of three Central laws viz. The Mines and Minerals (Development and Regulation) Act, 1957, the Indian Forest Act (IFA), 1927 and the Forest Conservation Act, 1980 to suggest amendments to make them in compliant with PESA. The study report was forwarded in 2009 to the Central Ministries concerned for necessary action. The Ministry of Environment and Forest (MoEF) has proposed amendments in the Indian Forest Act, 1927 particularly, the amendment to Section 68 of the Act for recording the views of the Gram Sabha concerned while compounding offences under the Act. MoPR had also given its comments on the Wildlife (Protection) Act, 1972 to the Ministry of Environment and Forests to make the Act PESA compliant.

MoPR Commissioned a study by Enviro-Legal Defence Firm (ELDF) on January 28, 2011 on compliance of State Panchayati Raj Laws and other subject laws with the provisions of PESA. The ELDF reports have been sent to the States with the request to make necessary amendments, frame rules, etc. Certain States have made amendments to various subject laws/rules in that line.

MoPR also entrusted a task to Indian Law Institute (ILI) to formulate appropriate changes in the State laws concerned, with an objective to assist State Governments to make necessary amendments in existing laws in consultation with their respective Departments of Law.

MoPR constituted three sub-committees: (i) B.D. Sharma sub-committee on 'Model Guideline to vest Gram Sabhas with powers as envisaged in PESA' (ii) Raghav Chandra sub-committee on 'Land Alienation, Displacement, Rehabilitation and Resettlement' and (iii) A.K.Sharma sub-committee on 'Minor Forest Produce'. All the sub-committees had submitted their reports and recommendations and these were forwarded to the concerned States.

Pursuant to the report of the B.D. Sharma sub-committee, Model Guideline called Gram Sabha Niyam Samhita were

drafted and forwarded to the PESA States and Tribal Research Institutes.

The Ministry constituted a Committee under the Chairmanship of Dr. T. Haque on August 23, 2010 to suggest appropriate measures on ownership, price fixation, value addition and marketing of minor forest produce. The Committee submitted its report in May 2011. Pursuant to the report, the Government has started a Centrally Sponsored Scheme of 'Mechanism for Marketing of Minor Forest Produce (MFP) through Minimum Support Price (MSP) and Development of value Chain for MFP'. The scheme seeks to establish a system to ensure fair monetary returns for the MFP to the collectors by fixing minimum support price. It also supports primary value-addition of MFP, provides for supply chain infrastructure like cold storage, warehouses etc. and emphasizes on scientific harvesting of MFP. To start with, the scheme is being implemented in eight States namely, Andhra Pradesh, Maharashtra, Odisha, Chhattisgarh, Madhya Pradesh, Jharkhand, Rajasthan and Gujarat for 12 MFPs namely; tendu, bamboo, mahuwa seeds, sal leaves, sal seeds, lac, chironjee, wild honey, myrobalan, tamarind, gums (gum karaya) and karanj.

Central Ministries/Departments and the Planning Commission took initiative to make necessary arrangement at the policy level to implement Central Sponsored Schemes dealing with matters listed in the Eleventh Schedule of the Constitution. Policy should be directed in such a way that necessary importance is given to the provisions of PESA during implementation of Central Sponsored Schemes.

A Committee on Harmonization of Central Laws with PESA has been set up on December 14, 2011 under the chairmanship of the Union Law Secretary where MoPR is also represented. The Committee has submitted its report suggesting some amendments to Central Laws. The Ministries concerned in the GOI are being requested to expedite action on the recommendations.

MoPR introduced a scheme, Rajiv Gandhi Panchayat Sashaktikaran Abhiyan (RGPSA) in order to strengthen Gram Sabhas in PESA areas and to enable its efficient functioning in areas under PESA in March 2013. It provides for deployment of one mobiliser in each Gram Sabha and one Coordinator at Block/District levels. Funds have been provided for orienting Gram Sabha on PESA related issues and States can involve NGOs, if required, in whole process. All these activities have been integrated in the overall programme of capacity building undertaken by the States in coordination with their State Institutes of Rural Development (SIRDs).

Capacity building of Gram Sabhas in Scheduled V Areas is one of the major thrust areas of the Ministry. Training module for capacity building of elected representatives and officials of the State Governments has been prepared by the respective SIRDs.

The Way Forwards: Discontent is brewing up in the tribal belt of the country and effective implementation of PESA would be a definite legal as well as political solution to redress the discontent. In recent years the legal and institutional basis for the welfare and development of Scheduled Tribe community had broadened and surveys have indicated that people in the tribal belt trust the state as the agency which can ameliorate their lot. But, implementation of PESA has not been seriously attempted by the state governments. They still want to govern the PESA areas through the centralized administration and laws that actually weaken what PESA provisions offer the tribal community. There is hardly any willingness on the part of the officials of various departments to relinquish control on resources and functions that are given to the Gram Sabhas by PESA. Nor do they have any respect for tribal lifestyle and culture.

Difficulties in implementing PESA can be broadly categorized into two: (1) Legal difficulties and (2) Political difficulties. Legal difficulties are related to the (a) definition of village, (b) gaps and inconsistencies between the Central and the State Acts, (c) clash between PESA and pre-existing laws, (d) lack of clarity about customary practices and cultural identity etc. Whereas political problems include (a) lack of political will, (b) ignorance about PESA among different segments, (c) fragmentation of well-knit tribal society because of electoral competition etc. So, a multipronged strategy needs to be adopted by the government to overcome those difficulties from different aspects.

All nine States having Scheduled Areas have enacted or amended their State Acts but not in consonance with the letter and spirit of the Central PESA. If we have a comparative analysis of the State Acts and the PESA Act we can find the fact that the PESA Act has been much diluted in the process of ratification by the states. There are number of state subject laws and policies which are not in conformity with PESA. In this juncture, central government has to play proactive role to implement the Act across the nine states. State governments need to take the steps taken by central government positively. Civil society has to work more vibrantly on right based approach to protect the rights of the tribal population of the country. As per the recommendation of different Working Groups engaged by the Central Government, the following measures may be taken by all concerned: i. The Ministry of Panchayati Raj has issued guidelines for implementation of PESA on 21.05.2010 which is generic in nature. A detailed state specific guideline considering existing conflicting laws should be in place incorporating the suggestions from already engaged expert agencies. It should also be guided by a definite time frame. ii. The MoPR should play proactive role to involve Ministry of Tribal Affairs to issue guideline to the states before preparation of respective State Plans. All issues concerning the lives of tribes in Scheduled Areas should be taken care of during preparation of plan. iii. Government of India should issue specific directions in accordance with proviso 3 of part A of the

Fifth Schedule if any State fails to implement PESA in letter and spirit. iv. The Central Government should direct the States to gear up the process of amendments to existing laws so that it follows the provisions of PESA in letter and spirit. v. A High Power Committee at the central level may be formed to oversee the progress of the concerned states regarding implementation of PESA. This committee can play advisory role with concrete suggestions to restrict deviations by the states. vi. Though there is provision for taking annual reports from Governors on regular basis but it is not given due importance. The process should be taken up seriously. The report should be made available to the public by uploading it in the website in a time bound manner. vii. Traditional tribal councils are dominated by male by and large in all respective states. Hence, in order to ensure active participation of women in tribal governance, special attention should be given. Appropriate measure should be taken to ensure at least one third participation of women in all meetings at the Gram Sabha level. viii. There is also an urgent need to amend the Indian Forest Act, Land Acquisition Act, and other related Acts so that the ownership on minor forest produce, water bodies and land resources are explicitly handed over to the Gram Sabhas of the PESA areas.

Conclusion

PESA is a most powerful legislation which can play an instrumental role in recognizing the rights of the tribal population in Scheduled areas over natural resources thus transforming their quality of life. It is almost true that due to lack of political will, their rights have been disregarded strategically. Though central government has taken several measures to implement the Act in letter and spirit, lack of initiative from concerned state government is quite evident. Central government should take appropriate action to eliminate the loopholes in the central legislation immediately followed by a strong direction from political government to abide by the constitutional mandate. State government should follow the guideline issued by the central government to incorporate changes in the state Acts proposed by state level study reports, take appropriate measures to amend state laws which are in conflict with the provisions of PESA, take initiatives to enhance the capacity of government machinery and stakeholders who play vital role in actual implementation of the Act at the ground level. Civil Society Organizations who have been fighting proactively for the issue has to play strategic role in building awareness among the stakeholders at each level and organizing the politically divided tribal communities. So, a multi-pronged strategy to address the issue from different aspect is the need of the hour.

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