FIFTH SCHEDULE OF THE CONSTITUTION AND TRIBAL SELF-RULE *

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Article 244(1) of the Constitution lays down that the "provision 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". In contrast, Article 244(2) lays down that the "provisions of the Sixth Schedule shall apply to the administration of tribal areas in the states of Assam, Meghalaya, Tripura and Mizoram".

It is noteworthy that while the Sixth Schedule speaks of "administration of Tribal Areas", the Fifth Schedule speaks of "administration and control of the Scheduled Areas and Scheduled Tribes". The difference in the language of the two schedules is not just semantic, it has deeper implication which has been brought out in the report of the Working Group on Development of Scheduled Tribes during the Seventh Five Year Plan (1985-90 p. 12). It reads as follows "the Fifth Schedule tends to be protective and even paternalistic, while the grain of the Sixth schedule veers towards self management".

Keeping this generalised perspective at the back of the mind, rapid appraisal will be made in this paper of the provisions of the Fifth Schedule.

Para 6, sub-para (1) stipulates that "The expression 'Scheduled Areas' means such areas as the President by order declare to be Scheduled Areas". Besides para 6 sub-para (2) vests several ancillary powers with the President in the matters of annulment, alteration of boundaries and redefinition of boundaries of the Scheduled Areas.

In exercise of the foregoing powers, Scheduled Areas have been notified in the following states: Andhra Pradesh, Bihar (now the entire Scheduled Areas have been located in Jharkhand carved out of undivided Bihar), Gujarat, Himachal Pradesh, Madhya Pradesh (a large chunk of Scheduled Areas has been included in the new state of Chhattisgarh carved out of M.P.), Maharashtra, Orissa and Rajasthan.

In all these states, only few districts, sub-districts, *tehsils* (Land Revenue Administrative Units), Development Blocks, and in some states even villages, have been notified as Scheduled Areas.

The position as in 2001 is indicated in the table below:

1	2	3	4	5	6	7	8	9
State	Total No. of Districts	No. of Districts Totally Scheduled	No. of Districts Partly Scheduled	Total No. of Sub-Districts (*Tehsils*/ Blocks) Including Those in Col. 3	No. of Sub-Districts Within 3 But Outside Col. 4	Total No. of Villages	No. of Villages Outside 3 and 6 Scheduled	Remarks
Andhra Pradesh	23	Nil	6	1,125	3	28,123	420	Lists of villages of two sub-districts are not available
Gujarat	25	1	6	226	31	18,536	Nil	One Mandal in Vadodra district has been treated as sub-district
Himachal Pradesh	12	2	1	109	2	20,118	Nil	
Madhya Pradesh	45	2	13	259	32	55,393	600	No. of villages include 51 Patwari circles, each on average is presumed to have 10 villages

Maharashtra	35	Nil	11	353	17	43,711	2,182	Col. 6 includes 20 fully scheduled *Tehsils*. 1 town in Nanded district is separately mentioned as scheduled
Orissa	30	7 (new)	6	398	16	51,349	Nil	
Rajasthan	32	2	3	241	8	41,353	81	
Jharkhand	18	5	2	210	8	32,615	Nil	
Chhattisgarh	16	2	4	97	21	20,308	Nil	One Revenue Inspector's circle in Bilaspur has been treated as a sub-district
TOTAL	**236**	**17**	**52**	**3,021**	**145**	**311,506**	**3,283**	

Out of 236 districts in the 9 states where the Fifth Schedule of the Constitution has been in operation, only 17 districts are fully covered by the Fifth Schedule; another 52 districts are partly covered. Aggregation of sub-district and village has not been made, as in some states the sub-district data are available at the *tehsil* level, though there are Development Blocks within *Tehsils*; in some other states, sub-districts data are available at Block level. Again in one state, namely Andhra Pradesh, it is at Mandal or village cluster level. Aggregation at village level would also be misleading as while in some states the names of the villages included in operational jurisdiction of the Fifth Schedule have been notified, in some others the names of the villages excluded, but not the names of the villages included, have been notified. Even then total spatial and population coverage under the Fifth Schedule is possible, as in India for each village information is available since 1961 census. But as thousands of villages are involved, it is extremely difficult for an individual to locate the villages in the census publication, with reference to the territorial jurisdiction of the Fifth Schedule; the Ministry of Tribal Affairs could have done it. But it has been ascertained that they have not made any attempt to compute the territorial and population proportion by social groups of the Scheduled Areas to the respective total at the State and district levels even 54 years after the commencement of the Constitution.

No comment on this strange lapse is necessary.

However, information about the districts which are fully or partly covered by the Fifth Schedule is furnished here, as the same has important policy implications.

Percentage of Tribal Population to the Total Population of the Districts Fully or Partly Covered by the Fifth Schedule

As in 1991 Census

State	District	Total Population of District	ST Population of the District as % of the Total Population of the District

Andhra Pradesh	Vishakhapatnam	3,385,092	14.3
	East Godavari	4,541,222	3.9
	West Godavari	3,517,568	2.4
	Adilabad	2,082,479	17.0
	Mahabubnagar	3,077,050	7.4
	Warangal	2,818,832	13.7
Gujarat	*Dang	144,091	94.0
	Surat	3,397,900	36.1
	Baruch	1,546,145	45.5
	Valsad	2,173,672	54.9
	Panchmahal	2,956,456	47.2
	Vadodara	3,089,610	26.6
	Sabarkanta	226,652	18.4
Himachal	*Lahaul and Spiti	31,294	77.0
	*Kinnaur	71,270	55.6
	Chamba	363,286	28.46
Madhya Pradesh	*Jhabua	1,130,325	85.7
	*Mandla	129,103	60.8
	Dhar	1,367,412	53.7
	Khargone (W. Nimar)	2,028,145	46.2
	Khandwa (E. Nimar)	1,431,662	26.8
	Ratlam	971,888	23.3
	Betul	1,181,501	37.5
	Seoni	1,000,831	37.0
	Balaghta	1,365,870	21.9
	Hoshangabad	1,267,211	17.4
	Rajgarh	942,764	3.3
	Sidhi	1,373,434	4.8
	Sahdol	1,743,869	46.3
	Morena	1,710,574	5.6
	Chhindwara	1,568,702	39.5
Chhattisgarh	*Bastar	2,271,314	67.4
	*Surguja	2,082,630	53.7
	Raigarh	1,723,291	47.7
	Bilaspur	3,793,566	23.0

	Raipur	3,908,042	18.2
	Rajnandgao	1,439,952	25.2
Rajasthan	*Banswara	1,155,600	73.5
	*Dargurpur	874,549	65.8
	Udaipur	2,889,301	36.8
	Sirohi	654,029	23.4
	Chittorgarh	1,484,190	20.3
Orissa	*Mayurbhanj	2,802,417	57.9
	*Sundargarh	1,573,617	50.7
	*Koraput	3,012,546	54.3
	Sambalpur	2,607,153	27.4
	Keonjhar	1,337,026	44.5
	Ganjam	3,158,764	9.4
	Kalahandi	1,707,753	31.0
	Balasore	5,522,659	7.1
	Kandhmal	647,912	-
Jharkhand	*Ranchi	2,214,048	43.6
	*Lohardaga	288,886	56.4
	*Gumla	1,153,976	70.8
	Godda	861,182	25.1
	Palamau	2,451,191	18.1
	*Paschim Singbhum	1,787,995	54.7
	*Purba Singbhum	1,613,088	28.9
Maharashtra	Thane	1,096,592	18.1
	Nasik	3,881,352	24.2
	Dhule	2,535,715	40.9
	Jalgaon	3,187,634	9.8
	Ahmednagar	3,372,935	7.1
	Pune	5,532,532	3.9
	Nanded	2,330,374	11.8
	Amravati	2,200,057	14.0
	Yavatmal	2,077,144	21.5
	Gadchiroli	1,771,994	38.7
	Chandrapur	787,010	19.7

* The asterisk marked districts are fully scheduled.

All the fully or partly scheduled districts of Bihar have been included in Jharkhand; hence Bihar is not mentioned here. On the other hand, a large number of fully or partly scheduled districts of undivided Madhya Pradesh remain in the mother State, though a few have been included in the new state of Chhattisgarh carved out of Madhya Pradesh. While computing the total number of scheduled and unscheduled districts, the number as it was in undivided Madhya Pradesh has been considered, as the relevant details about Chhattisgarh are not readily available to me.

It requires to be mentioned that the picture given here does not fully reflect the current position. A few districts, particularly in Orissa and those located in Jharkhand, have been reorganised and several new districts have been carved out during 1991-2001. Some of the reorganised districts or new districts seem to include the scheduled portion of old districts. As a result, a few of the newly formed districts may be within the ambit of the Fifth Schedule regime. However, based on the current imperfect and incomplete information, the pattern that emerges is as follows:

There are 15 fully scheduled districts where the ST population constitute more than 50 percent of the total population. Among them the district with lowest percentage of ST population (50.7) is Sundargarh in Orissa; the district with highest percentage of ST population (94.0) is Dang in Gujarat. There are two fully scheduled districts with less than 50 percent tribal population, i.e., Purva Singbhum (28.9%) and Ranchi (43.6%), both in Jharkhand.

Among the partly scheduled districts, there are five with 5 percent or less ST population. In this category, the lowest position is that of West Godavari district of Andhra Pradesh, with 2.9 percent ST population.

There are:

6 districts with	6-10% ST population
4 districts with	11-15%
16 districts with	16-25%

11 districts with	26-40%
7 districts with	41-50%

Interestingly, there is one district, Dhar in Madhya Pradesh with 53.7 percent ST population, which is not fully scheduled.

At this stage, digressing from the analysis of the other paras of the Fifth Schedule, one policy implication of the foregoing pattern underlying the demographic profile will be discussed here. One of the Directive Principles of State Policy as enshrined in Article 40 of the Constitution provides that the "State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government". As a follow-up of the foregoing Directive Principle "The Constitution (Seventy-Third Amendment) Act" and "The Constitution (Seventy-Fourth Amendment) Act" were adopted by Parliament in 1992. In April 1993 these were incorporated in Part IX and Part IX-A of the Constitution. Article 243G of the Constitution as amended in 1993, provides that the Legislature of a State may by law, endow the panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for devolution of powers and responsibilities upon panchayats at the appropriate level". Article 243B(1) stipulates that "There shall be constituted in every State, Panchayats at the village, intermediate and district levels." Some exceptions were also indicated. Article 243M *inter alia* stipulates in Clause (1) that "Nothing in this Part shall apply to the Scheduled Areas referred to in Clause (1) and the Tribal Areas referred to in Clause (2) of Article 244 of the Constitution". Article 243M(4)(b), however, *inter alia* stipulates that "Notwithstanding anything in the Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the Tribal Areas referred to in Clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368".

In accordance with the foregoing authorisation, the Parliament enacted "The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996", in short PESA 1996. Clause 4(g) of PESA 1996 stipulates as follows:

(1) 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*.

(2) Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats.

(3) Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes.

(*Part IX provides for reservation for Scheduled Castes and Scheduled Tribes).

The foregoing provisions of PESA Act, 1996 when examined with the pattern inherent in the demographic profile, as already indicated in this paper, bring out in sharp focus several problems, as follows:

In a fully scheduled district like Purba Singbhum where the STs constitute only 28.9 percent of the population, it is safe to presume that there would be many villages without presence or with nominal presence of ST population. Will such villages be required to import tribal persons to become heads of the panchayats?

Perhaps the same type of problem would arise in respect of some intermediate level panchayats even in fully scheduled districts like Surguja (with 53.7% of the population being tribals).

At the district level, from the wording of the law it is not clear whether even in partly scheduled districts with tribal population of 2.9%, 3.3%, 4.8% and so on, the provision that all seats of chairpersons of panchayats at all levels shall be reserved for the Scheduled Tribes would apply. If not, what is the cut off point?

As already indicated, out of 236 districts in the nine states where the Fifth Schedule operates, only in 16 districts (including one which is only partly scheduled) the STs are in the majority. In the others their percentages vary from around 3% to 48%. The PESA Act, 1996 does not

give any indication that the policy formulators have applied their mind to the problem in respect of the districts of the latter category. In fact, it appears that the policy formulators never cared to examine the population composition of the areas covered by the Fifth Schedule and in an amateurish manner went ahead with policy formulation based on wrong assumptions. While introducing the Bill for the extension of the provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas, the concerned Minister stated in Parliament that the bulk of tribal population live in the Scheduled Areas and Tribal Areas; but this is not a factually accurate statement. Based on 1991 Census, it is estimated that when the minister was making his statement, only around 50% of the tribal population of the country were living in Tribal and Scheduled Areas. In fact, in some states, Andhra for instance, only around 20% ST population of the state lived in Scheduled Areas. It seems that his advisers had also assumed that the bulk of the population in the Scheduled Areas always belongs to ST category, which has already been indicated is not correct. In fact, the first Scheduled Areas and Scheduled Tribes Commission (Dhebar Commission) had given an indication of this in its report submitted in 1960. However, unless an early policy decision is taken on this issue of considerable importance, it will be difficult to operationalise the PESA Act in the bulk of the Scheduled Areas.

As a heuristic device, assuming that the Sixth Schedule and the Fifth Schedule provide appropriate instruments for tribal self-governance, when it is found that only one-half of the total tribal population in the country lives in the Tribal Areas and Scheduled Areas covered by the two schedules, a question naturally arises: what is the state policy to especially facilitate self-rule of ST peoples living outside these two categories of areas?

But, are the provisions of the Fifth Schedule really meant to promote tribal self-rule? Already, mention has been made of the Report of Seventh Plan Working Group for Scheduled Tribes, Government of India, which has categorised the Fifth Schedule as paternalistic in its thrust. The rationale of this categorisation needs a careful look.

Para 1 of the Schedule reads as follows “In this schedule, unless the context otherwise requires, the expression “State” does not include the states of Assam, Meghalaya, Tripura and Mizoram”. It is because parts of these four states including Meghalaya (which contain a few

mauzas or cluster of revenue villages, which are not covered by any schedule) contain areas within the Sixth Schedule regime.

Para 2 stipulates that subject to the provision of this schedule, the executive power of a state extends to the Scheduled Areas therein. It is interesting to note that some leading campaigners for extension of the Fifth Schedule to all ST predominant areas of the country and at the same time ecstatic about the PESA Act, 1996 (going to the extent of terming it as a revolutionary Act), complain that one state, even after enacting the state legislation completely in the model of the central legislation, makes the panchayati raj institutions in the Scheduled Areas submit to the executive power of the state. Their allure to see the logical contradiction of their position is rather surprising.

They cannot campaign for extension of the Fifth Schedule in an unqualified manner and at the same time resent the exercise of the ubiquitous power conferred on the state by para 2 of the schedule.

The ubiquitous power of the Indian State in the Scheduled Areas is further reinforced by provision 3 of the Schedule. It stipulates that the governor of each state having Scheduled Areas therein shall annually or whenever so required by the President make a report to the path regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the state as to the administration of the said areas. The deeper implication of this provision in the Fifth Schedule comes out in sharp relief when it is examined along with the powers exercisable under the 73rd and 74th amendments of the Constitution as contained in the 11th and 12th Schedules of the Constitution. One of the powers exercisable by the Panchayati bodies is Agriculture, including Agricultural extension. Under the WTO agreement, the Union Government may adopt an agricultural policy of allowing terminator seeds, developed by the multinational corporations, to be introduced in any area. The panchayats outside the Scheduled Areas may try to offer resistance to the policy as it would disrupt the agricultural economy of the region; but panchayats under the Fifth Schedule regime will have no option but to fall in line. The third para of the Fifth Schedule is a negation of tribal self-rule.

Part B of the Schedule relates to administration and control of Scheduled Areas and Scheduled Tribes. It consists of two paras, namely para 4 and para 5.

Para 4 provides for a Tribes Advisory Council (TAC) to be established in each state having Scheduled Areas and also if the President of India so directs, in any state having Scheduled Tribes but no Scheduled Area, of which as nearly as possible three-fourths shall be representation of the STs in the legislative Assembly of the state. If, however, the number of tribal MLAs of the state is less than the number of seats in the TAC, the remaining seats will be filled up by the other members of the TAC. If, however, the number of tribal MLAs in a state is more than 20, there is no indication in the Schedule how the 20 members out of them would be chosen. Sub-para (3) of para 4 however lays down that the governor may make rules prescribing or regulating as the case may be (a) the number of members of the council, the mode of their appointment and the appointment of the Council, and the officers and servants thereof, (b) the conduct of its meetings and its procedure in general, and (c) all other incidental matters. The string is thus held by the governor as the constitutional head of the state.

Most important, however, is sub-para (2) of para 4 which stipulates that it shall be the "duty" of the TAC to "advise" on such matters pertaining to the "welfare and advancement" of STs in the state, as may be referred to it. It is to be noted that the TAC can only 'advise' on such matters, as are referred to it by the governor. TAC on its own cannot get its meeting convened, decide what are the matters of relevance for the "welfare" and "advancement", whatever these terms mean, on which it should render its advice. There are several other issues involved in this sub-para. For instance, one is perplexed by the use of the word "duty to advise" in this sub-para. What happens if the TAC refuses to advise on a matter referred to it and thus fails in its "duty"? There is also no indication whether the TAC can take remedial measures if the governor fails to abide by the advice.

Para 5 deals with laws applicable to Scheduled Areas. What follows, however, is not law or a visible and coherent general principle, but specific laws in the sense of specific legal instruments. Sub-para (1) stipulates, "Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the

Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the state subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect".

Sub-para (2) of para 5 stipulates, "The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area".

"In particular and without prejudice to the generality of the foregoing power, such regulations may (a) prohibit or restrict the transfer of land by or among the members of the Scheduled Tribes in such area; (b) regulate the allotment of land to the members of the Scheduled Tribes in such area; and (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area".

Sub-para (3) of para 5 enables the governor to repeal or amend any Act of Parliament or of the Legislature of the State, or any existing law which is for the time being applicable to the area in question. However, unlike in case of sub-para (1) of para 5, sub-para (4) of para 5 stipulates the regulations made under para 5 shall have no effect until assented to by the President; besides sub-para (5) of para 5 stipulates that no regulations shall be made under para 5 unless the government making the regulation, has in the case where there is a TAC for the State, consulted such council.

There are many grey areas and disturbing questions in the whole of para 5. These are as follows:

1. In sub-para (1) use of the qualifying word 'this' in respect of the Constitution is rather perplexing.
2. While the word 'governor' has been uniformly used all through the schedule, the word 'government' has been used in sub-para (5) of para 5 in a context which also seems to be perplexing. As already mentioned, sub-para (5) of para 5 requires the government not to promulgate a regulation without consulting the TAC in case there is a TAC in the state. This seems to imply that:

(i) There may be states with Scheduled Areas but without TAC.

(ii) Government can promulgate regulation on its own in respect of Scheduled Areas in the absence of a TAC in the state. But para 4 makes it mandatory for states having Scheduled Areas to have a TAC. Besides, there is no overt provision in the Schedule enabling the government to suspend a TAC. One wonders whether there is a covert provision under para 4(3)(c) which authorizes the governor to make rules in "all other incidental matters"? In that case has the word 'government' been used in para 5(5) for a special unsavoury and potentially undemocratic situation, or has it been used to reiterate that keeping to the basic structure of the Constitution the word 'governor' whenever used in the schedule means nothing more than the constitutional head of the state? Or does it mean that except where the word 'government' has been used, 'governor' means, governor's authority to exercise his discretion? It seems it is necessary to obtain legal opinion on the issues raised here.

(iii) Para 5(1) mentions governor's far reaching power manifested through simple public notification, on the other hand paras 5(2), 5(3) and 5(4) mention governor's restricted regulation making power. Prima facie exercise of power by "simple public notification" is very different from exercise of power by "promulgation of regulation". If jurists confirm that these are powers of two different categories, then governor's power as depicted in para 5(1) is thoroughly undemocratic and may be subversive of the basic structure of the Constitution, particularly when it is noted that in his exercise of power under this sub-para the governor is not required to obtain advice of the TAC or assent of the President. It may be a hidden explosive in the Constitution and should be defused as early as possible. It is to be noted again that it is para 5(2) and not para 5(1) which may not be fortuitous.

(iv) Many Scheduled Areas are highly resource-rich and many non-tribal persons and corporate bodies have acquired vast tracts of land in such areas legally or illegally. Para 5(2)(a and b) make specific mention about land transaction of tribals but does not make any mention of control of land transaction by non-tribals. It may be argued that governors can control and regulate such transactions by exercise of the generality of their law making power. In the era of hegemonic globalisation when covetous eyes are focussed on the resources of the

Scheduled Areas, it is necessary to know whether the governors have actually exercised their power to cover the emerging menace.

Part C of the Fifth Schedule deals with the procedure for specification of Scheduled Areas. This has already been discussed and flawed functioning of the concerned authorities has been highlighted.

Part D provides procedural details about the amendments of the Schedule. It mentions that no law in this regard shall be deemed to be an amendment of the Constitution for the purposes of Article 368. No comment is called for on this.

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