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The Experience of PESA in Orissa**

By Sujata Ratho

**RAJIV GANDHI INSTITUTE FOR
CONTEMPORARY STUDIES**

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Tribal Welfare Through Panchayats:

The Experience of PESA in Orissa

By Sujata Ratho*

INTRODUCTION

The reason for the creation of local government institutions in India is that government in a welfare state has the primary responsibility of providing all the public goods and services to people. The ever-expanding role of government in a welfare state has made it impossible to meet the aspirations and needs of people by national or state governments. This need has made the institutions of local-self-government indispensable insofar as meeting the local needs is concerned. Ever since the government's developmental role extended to social sector, it required a wider network of institutional mechanism to deliver the goods and services to the people. Findings of a field survey reveal that about 70 percent of the respondents feel that collective development is achievable, when Panchayats take up the works.¹ The integration of development with Panchayats through a symbiotic relationship has made Panchayati Raj Institutions (PRIs) sustainable.² So long as development remains the centre-stage of governance, Panchayats have an important role to play.

The new vision of local governance makes it imperative that local governance should be based on the principle of subsidiary and home rule thereby a function that can be performed at a lower level government/ institution should be dealt with at that level and should not be entrusted to a higher level of government/institution. A synthesis of the conceptual literature suggests that the modern role of a local government is to deal with the market failures as well as government failures. This role requires local government to operate as a purchaser of local services, a facilitator of networks of government providers and entities beyond government, and a gatekeeper and overseer of state and national governments in areas of shared rule. Local government also needs to play a mediator's role among various entities and network to foster greater synergy. The role of Panchayati Raj Institutions as a subordinate tier in a multi-tiered system is referred as dual federalism or traditional fiscal federalism.³

* Dr. Sujata Ratho worked as Research Associate, Rajiv Gandhi Institute for Contemporary Studies, during May-September, 2007. The views in the paper are those of the author and do not necessarily reflect the views of RGICS or its Governing Council.

¹ Sujata Ratho, *Women in Panchayati Raj Structure - A Micro Study in Four Districts of Orissa (Unpublished Ph.D. Thesis, Sambalpur University, 2004)*

² Ibid.

³ Anwar Shah, *Local Governance in Developing Countries* (Washington, DC: The World Bank, 2006), p.5. There are broadly five global perspectives on models of government and the roles and responsibilities of local government: (a) traditional fiscal federalism; (b) new public management; (c) public choice; (d) new institutional economics; and (e) network forms of local governance. The first two models are concerned primarily with market failures and how to deliver public goods efficiently and equitably. The second two models are concerned with government failures. The network forms of local governance perspectives is concerned with institutional arrangements to overcome both market and government failures.

This view is grounded in the history of industrial nations as well as ancient civilisations in China and India. Local government was the primary form of government until wars and conquest led to the transfer of local government responsibility to central and regional governments. The new vision of local governance argues for a leadership role by local government in a multi-centred, multi-ordered or multilevel system. In developing countries, such citizen empowerment may be the only way to reform public sector that the governments are either unwilling or unable to reform themselves.⁴

The legal status of local government institutions in the world indicates that they have been created by different legislative methods such as national constitutions (Brazil, Denmark, France, India, Italy, Japan and Sweden), by state constitutions (Australia and the US), by ordinary legislation of a higher level of central government (New Zealand, Britain and most countries), by provincial or state legislations (Canada and Pakistan), or by executive orders (China).⁵ The local government structures i.e., the PRIs in India have been established with the authority of the highest legal entity (the constitution) of the country. The Panchayats Extension to Scheduled Areas (PESA) Act, 1996, has made it mandatory for the nine states having the Scheduled Areas, to make specific provisions for giving wide-ranging powers to the tribals on matters relating to decision-making and development of their community. Technically, the Act refers to extending the provisions of Part IX of the Constitution to the Fifth Schedule Areas; politically, it gives radical governance powers to the tribal community and recognizes its traditional community rights over local natural resources. It not only accepts the validity of 'customary law, social and religious practices, and traditional management practices of community resources,' but also prohibits the state governments from making any law which is inconsistent with these. Accepting a clear-cut role for the community, it gives wide-ranging powers to *Gram Sabhas*,⁶ which had hitherto been denied to them.

The Constitution of India is distinguished from many constitutions in its elaboration of principles reflecting aspirations to end the inequities of traditional social relations and enhance the social welfare of the population. According to constitutional scholar Granville Austin, probably no other nation's constitution "has provided so much impetus toward changing and rebuilding society for the common good."⁷ However, since its enactment, the constitution has fostered a steady concentration of power in the hands of the central government. This centralization has occurred in the face of the increasing assertiveness of an array of tribal and caste groups across the society. Increasingly, the government has responded to the resulting tensions by resorting to the formidable array of authoritarian powers provided for by the Constitution.

The PESA is a bold statement addressing issues such as the tribals' customary rights,

⁴ Ibid., pp.42-3.

⁵ Ibid., p. 1.

⁶ Section 4(c) of the PESA Act, 1996, provides that every village shall have a 'Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level.

⁷ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 1999).

cultural rights, language and identity, in addition to rights to all resources within their domain such as land, water, forests and minerals, among others. The Act emphasizes the right of tribal people to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in accordance with their aspirations and needs. As Union Minister for Panchayati Raj Mani Shankar Aiyar stated in Parliament that the making of Panchayati Raj has become ineluctable, irremovable, irreversible, which constitutes in itself a major institutional success.

TRIBAL AREAS AND GOVERNANCE

Geographic Overview

According to the 2001 census, the tribal people number around 84.3 million, accounting for 8.2 percent of India's total population. There are nearly 700 state-specific Scheduled Tribes scattered all over the country, except Punjab, Haryana, Delhi and the UTs of Pondicherry and Chandigarh. Each tribe is quite distinct from the other with, usually, separate languages and dialects, customs, cultural practices and lifestyles. Despite this diversity, tribal communities do have similarities, though broad generic ones. They are known to dwell in compact areas, follow a community way of living, in harmony with nature, and have a uniqueness of culture, distinctive customs, traditions and beliefs which are simple, direct and non-acquisitive by nature. Some of these broadly similar characteristics have been used as the criteria for the last few decades to identify and declare a particular community as a Scheduled Tribe. The criteria used are: primitive traits, distinctive culture, geographical isolation, shyness of contact and backwardness.

One tribal concentration lives in a belt along the Himalayas stretching through Jammu and Kashmir, Himachal Pradesh, and Uttarakhand in the west, to Assam, Meghalaya, Tripura, Arunachal Pradesh, Mizoram, Manipur, and Nagaland in the northeast. In the northeastern states of Arunachal Pradesh, Meghalaya, Mizoram, and Nagaland, upward of 90 percent of the population are tribal. However, in the remaining northeast states of Assam, Manipur, Sikkim, and Tripura, tribal peoples form between 20 and 30 percent of the population. Another concentration lives in the hilly areas of central India (Chhattisgarh, Madhya Pradesh, Orissa, and, to a lesser extent, Andhra Pradesh); in this belt, which is bounded by the Narmada River to the north and the Godavari River to the southeast, tribals occupy the slopes of the region's mountains. Other tribals, including the Santals, live in Jharkhand and West Bengal. Central Indian states have the country's largest tribes, and, taken as a whole, roughly 75 percent of the total tribal population live there, although the tribal population there accounts for only around 10% of the region's total population.

Tribals are found in small numbers in Karnataka, Tamil Nadu, and Kerala in south India; in western India in Gujarat and Rajasthan, and in the Uts of Lakshadweep and the Andaman Islands and Nicobar Islands. About one percent of the populations of Kerala and Tamil Nadu are tribal, whereas about six percent each in Andhra Pradesh and Karnataka are tribals.

Genesis of the Scheduled Areas

Constitutional and legal history of the formation of Scheduled Areas in India can be traced back to the colonial period. As the policy of the British government was solely directed and dominated by the colonial interests, it was based on isolation and exploitation of the tribals. Since the policy favoured the vested interests, i.e. non-tribal landlords, contractors and moneylenders, they not only took possession of tribals' land, but also brought the tribals into perpetual bondage. Such encroachments on tribals' right in land and forest led to the expression of anger in the form of tribal uprisings in many places. The British used force to contain the unrest among the tribal population and evolved special laws for administering the tribal areas and to protect their interests, as they were culturally and economically different from the neighbouring peasant communities. Accordingly, a number of acts such as the Scheduled Tracts Act 1870, Scheduled Districts Act 1874 and the Government of India Act 1919 were enacted by the British Parliament wherein areas with large concentration of tribals were segregated and isolated for separately dealing with the problems of the tribal people.

While the 'backward tracts' declared under the Government of India Act 1919 were nothing but the same as those of 'scheduled tracts' and 'scheduled districts' with certain additions and omissions, in the name of helping the tribals with special protections, the Government of India Act 1935 was brought in providing for the creation of 'excluded' and 'partially excluded' areas with separate political representation for the tribes. Under the Government of India Act, 1935, while the popularly elected governments took charge of the administration of the provinces, in the 'excluded' areas the Governor functioned as per his discretion. In the case of 'partially excluded' areas, the Governor functioned with the advice of his ministry. Since the north-eastern tribal region was considered very backward, they were wholly excluded from the scope of normal laws and the central or provincial legislature had no power to make laws with regard to these areas. Only the Governor-in-Council had powers to legislate for the administration of these areas. In the second category of backward areas, which were classified as 'partially excluded' areas, the Governor was vested with powers to enforce or refrain from enforcing any provincial enactments.

These provisions were continued even after independence by having been incorporated into the Constitution, of course with some modifications. While the wholly excluded areas were incorporated into the Sixth Schedule, covering Assam, Meghalaya, Tripura and Mizoram in the North East, the Fifth Schedule covered the tribal areas of the rest of the country. Currently, the Fifth Schedule covers tribal areas in nine states namely, Andhra Pradesh, Orissa, Jharkhand, Chhattisgarh, Madhya Pradesh, Maharashtra, Gujarat, Rajasthan and Himachal Pradesh.

The term 'Scheduled Areas' has been defined in the Constitution as "such areas as the President may by order declare to be Scheduled Areas." Paragraph 6 of the Fifth Schedule to the Constitution prescribes following procedure for scheduling, rescheduling and alteration of Scheduled Areas: preponderance of tribal population; compactness and reasonable size of the area; under-developed nature of the area; and marked disparity in economic standard of the people. These criteria are not spelt out in the Constitution of India but have become well established. They embody principles followed in declaring 'Excluded' and 'Partially-Excluded Areas' under the Government of India Act, 1935, Schedule 'B' of recommendations of the Excluded and Partially Excluded Areas Sub Committee of Constituent Assembly and the Scheduled Areas and Scheduled Tribes Commission 1961.

In exercise of the powers conferred by paragraph 6 of the Fifth Schedule, the President after consultation with the state governments concerned had by Orders called 'the Scheduled Areas (Part A States) Order, 1950' and 'the Scheduled Areas (Part B States) Order 1950' set out the Scheduled Areas in the states. Further by Orders namely, 'the Madras Scheduled Areas (Cesser) Order, 1951' and 'the Andhra Scheduled Areas (Cesser) Order, 1955' certain areas of the then East Godavari and Visakhapatnam districts were rescheduled. At the time of devising and adopting the strategy of Tribal Sub Plan (TSP) for socio-economic development of Scheduled Tribes during the Fifth Five Year Plan (1974-79), certain areas besides Scheduled Areas, were also found having preponderance of tribal population. A review of protective measures available to the tribals of these newly identified areas vis-a-vis Scheduled Areas was made and it was observed that a systematic use of protective measures and other powers available to the executive under the Fifth Schedule will help in effective implementation of the development programmes in TSP Areas. Therefore, in August 1976 it was decided to make the boundaries of the Scheduled Areas coterminous with the Tribal Sub-Plan areas. Accordingly, Clause (2) of the paragraph 6 of the Fifth Schedule was amended vide the Constitution (Amendment) Act, 1976, to empower the President to increase the area of any Scheduled Areas in any state.

As a result, the President issued several Orders specifying Scheduled Areas afresh in relation to the states of Bihar, Gujarat, Madhya Pradesh, Maharashtra, Orissa and Rajasthan. The tribal areas in Himachal Pradesh were scheduled on November 27, 1975. While scheduling the areas in Himachal Pradesh the principle of making the sub plan and the Fifth Schedule Areas coterminous was kept in view. Thus, presently the TSP areas (Integrated Tribal Development Projects/Integrated Tribal Development Agency areas only) are coterminous with the Scheduled Areas in Bihar, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa and Rajasthan. As its TSP areas are not coterminous with the Scheduled Areas, Andhra Pradesh has also furnished a proposal to this effect, which is under consideration of the Ministry of Tribal Affairs at the Centre.⁸

Legal Provisions in Scheduled Areas

After independence, the Constituent Assembly appointed a Sub-committee with A.V. Thakkar as its Chairman⁹ to formulate provisions to safeguard the interests of the tribal population. The Sub-Committee examined the overall situation of the tribals and recommended that on the basis of past experience, it was necessary to provide statutory safeguards to protect the economic life of the tribals and their traditional customs and institutions. The general position according to the Sub-Committee was that the areas predominantly inhabited by tribal people should be known as the 'Scheduled Areas.' These areas were accorded constitutional identity and formally recognized under Article 342 of the Constitution and referred to the tribals as the 'Scheduled Tribes,' and the areas where substantial Scheduled Tribe population resided were declared the 'Scheduled Areas' under the Article 244(1) and the Fifth Schedule.

As for applying laws to the Scheduled Areas, the Thakkar Committee criticized the

⁸ Source: The Ministry of Tribal Affairs' website (<http://tribal.nic.in/>).

⁹S.K. Singh, ed, *Empowerment of Gram Sabha and Social Audit*, Vol. IV (Hyderabad: NIRD), p.

then prevalent system under which the Governor was required to apply legislation at his discretion. The Committee was of the view that in respect of certain subjects, the law passed by provincial legislature should not be applied to the Scheduled Areas unless the Tribal Advisory Council considers them suitable.

The 73rd Amendment

The time was ripe by the 1980s to strengthen the PRIs in the sense that the nation had acquired enough experience with their functioning. The two issues needing attention to any reform of the local governance were devolution of powers and according constitutional status to these bodies. Prime Minister Rajiv Gandhi realized that decentralization of power could, to a great extent, solve rural problems. He felt that the greatest challenge for Indian democracy was to make the fruits of development reach the villages. He said that the Bill his government introduced to revamp the system was historic and revolutionary and its introduction in the Lok Sabha was the single greatest event after the enactment of the Constitution. Two reasons prompted the Bill that sought to amend the Constitution:

1. It was felt that state governments were not enthusiastic about implementing Panchayati Raj in their respective states. They were also not prepared to share power with lower level bodies. In fact, it was argued that some state governments had gradually grabbed power from Panchayati Raj bodies.
2. Local self-government and Panchayati Raj bodies being in the State List in the Constitution meant that the Centre could not pass any legislation in these areas unless the Constitution was amended for the purpose.

However, the 1989 attempt to revolutionise local governance failed as the Rajiv Gandhi government did not have a majority in the Rajya Sabha. It was only in December 1992 that the Constitution Seventy-Third (Amendment) Bill had been passed by Parliament and became operative in May 1993, when a half of the state legislatures ratified the same. The salient features of the Act are:

- Provision for a 3-tier system of Panchayati Raj for all states having population of over 20 lakh.
- Mandatory holding of Panchayat elections every 5 years.
- Provision for reservation of seats for the Scheduled Castes, Scheduled Tribes and women (not less than 33 percent).
- Appointment of State Finance Commission in each state to make recommendations regarding the financial powers of the Panchayats.
- Constitution of District Planning Committee to prepare draft development plan for the district as a whole.

According to the Constitution, Panchayats be given powers and authority to function as institutions of self-government. The following powers and responsibilities are to be delegated to Panchayats at the appropriate level:

- Preparation of plans for economic development and social justice.
- Implementation of schemes for economic development and social justice in relation to

29 subjects given in the Eleventh Schedule to the Constitution.

- To levy, collect and appropriate taxes, duties, tolls and fees.

Bhuria Committee Report

Following the 73rd constitution amendment, a high level Committee under the Chairmanship of Dileep Singh Bhuria, MP, was constituted in June 1994, to examine the issues relating to the extension of the provisions of Part IX of the Constitution to the Scheduled Areas and to make recommendations on the salient features of the laws for extending provisions of this part of the constitution to the Schedule Areas. The Committee discussed various issues related to Part IX and examined certain unique characteristics of tribal societies and tribal areas as many tribal societies have their own customary laws, traditional practices, community ethos, political and administrative systems, among others. The Committee submitted its report in January 1995. The Committee's Report proposed a legal framework suited to participatory democracy particularly at the grassroots level. It was contemplated that the institutions proposed to be constituted at the district level and the lower levels should have a living relationship with the self-management practices, which have been in vogue in the tribal areas. The important recommendations of the committee are:

- It is essential to give due consideration to the tribal societies mode of living, organisations, cultural mores, present day predicament of exploitation, deprivation and marginalisation. Many tribal communities have been living autonomously and they have their own traditional structures and leaders. They have exercised control over the natural resources that govern their institutions. The Gram Sabhas and village councils have been vibrant institutions in the field of local administration, religion, politics, economics, justice and so on. Therefore, it is necessary to have a mix of traditional and modern institutions in the Panchayati Raj system.
- While drafting the law, advantage should be taken of both the Fifth and Sixth Schedules. The Fifth Schedule should be the fountain-head of essential and beneficial legislation. The design and contents of the Sixth Schedule could serve as the reference frame for a district within the broader canvas of the Fifth Schedule.
- The Tribal Advisory Council, envisaged in the Fifth Schedule, as a consultative body at the State level, needs to be reformed into an effective organization. The Chief Minister of the state should be its chairperson and its meetings should be held once in every three months.
- The Central Advisory Council at the Centre should be revived. It should serve as a sounding board for tribal policies and programmes and render advice in disputes between the state government and the Tribal Advisory Council. Its advice should be normally binding. The Prime Minister should chair its meetings and the members may be the state ministers for welfare, home and rural development and the Deputy Chairperson of the Planning Commission.
- The present day administrative boundaries may be considered for reorganization based on geographic, ethnic and demographic considerations and finalized within a couple of years.
- Considering the potential and ingrained attributes, the cooperative organisations

among tribals should be constituted in line with their oral traditions and social milieu.

- The proposed institutions in the Scheduled Areas and Tribal Areas should be vested with adequate competence to deal with emerging problems among tribal people like growing indebtedness, land alienation, deforestation, ecological degradation, displacement on account of industrialization and modernization.
- The lower functionaries of departments like police, exercise, forest and revenue should be assigned a minimal role and should work under the control of the concerned Panchayats.
- The Gram Sabhas should be allowed to exercise their customary role unhindered. Further, a Gram Sabha may have a traditional village council, which performs the religious, political, economic and judicial functions on its behalf. The Gram Sabhas may nominate their executive council or village council, which may be a traditional body, may delegate to it the execution of development works.
- The Gram Sabha should be empowered to prepare plans, budgets for the tribal people. It should give recommendations to the Gram Panchayat on different schemes.
- The Gram Sabha should lay down some principles for identification of beneficiaries for poverty alleviation and other programmes.
- Certification of utilization of funds shall be the responsibility of the Gram Sabha.
- A number of aggregated hamlets may have a village Panchayat, called variously as Gram Panchayat or Anchal, Parha or Pragana_Panchayat. This tier corresponds to the lower tier envisaged in the 73rd Constitution Amendment Act. Its members may be elected.
- Constituencies may be delimited for election of members to the intermediate and district tier Panchayats. The district level Panchayat may be called Autonomous District Council.
- The organisational structure of an ADC should be based on the broad outline of Autonomous District Councils in the Sixth Schedule.
- Scheduled Tribe members in the Lok Sabha should be associated with the intermediate Panchayat and the District Council. But the representation should not be restricted to the Schedule Tribe MLAs; even non-ST MLAs should be associated with both tiers.
- Since the Schedule Areas and Tribal Areas are expected to have a majority of Tribal population, the different tier Panchayats therein should have a majority of Schedule Tribe members. Further both chairpersons and vice-chairpersons should be from among the STs.
- Panchayati Raj bodies in tribal areas should be made more effective and more participative in the context of the foregoing. More than in the past they have to function as units of self-governance and development. They have to work for socio-economic goals for removal of poverty, illiteracy, ill-health etc. among the people.

- The Panchayats in this area may receive funds under the provision of Articles 243(H) and 243(1). Also, funds as per the first provision to Article 275(1) should continue to be available normally.
- Education and health sectors should be the first charge on the funds received by Panchayats in the Schedule Areas and, notwithstanding any other provision, the Panchayats should have the power to appropriate funds from any other head for meeting of this obligation.
- All government functionaries of institutions concerned with Panchayats in a Schedule Area and located within its jurisdiction should be under its control.

PESA Act of 1996

Based on the Bhuria Committee Report, the Panchayats Extension to Schedule Areas Act (PESA), 1996, was passed by Parliament and came into effect on 24th December 1996. The Act extends to the tribal areas of nine states, namely Andhra Pradesh, Jharkhand, Gujarat, Himachal Pradesh, Maharashtra, Madhya Pradesh, Orissa, Rajasthan and Chhattisgarh. Under the Act, Gram Sabhas are endowed specifically with such powers and authority as to enable them to function as institutions of self-government. These powers are:

- Ownership of Minor Forest Produce
- Power to enforce prohibition
- Power to prevent alienation of land
- Power to control local plans and resources including the Tribal Sub-Plan
- Power to manage village markets
- Power to control money lending to STs
- Power to control institutions and functionaries in all social sectors

The PESA is one of the progressive legislations for tribal welfare, providing for self-governance and recognizing the traditional rights of tribal communities over natural resources around them. Recognizing the importance of the Fifth Schedule Areas in nine states, the Act provides the Gram Sabha with powers of social audit and prevention of land alienation. The provisions of the Act are far-reaching in their implications, but there are several problems with regard to their implementation. While the tribal communities remain ignorant of its enabling provisions, the state governments have become quite uncomfortable with the mere existence of the Act, and have been trying to dilute its spirit.

CRITIQUE OF PESA

Some scholars feel that PESA is an integral part of the 73rd Amendment; hence its contents have the mandatory status of the provisions of the Constitution. But there is also a view that the PESA contents are ancillary to the Constitution and do not enjoy the mandatory status that the provisions of the Constitution enjoy. The debate is not mere academic. The holders of the first viewpoint want to force the states to adopt the provisions of PESA as they are while the other school want the specific provisions, not PESA per se, to be considered on their merits for adoption or rejection or

modification.¹⁰

Right to Self-rule Under PESA

Definition of the village: Section 4(b) 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 tradition and customs. In the section the term 'community' seems to have been used in a micro-territorial sense. Tribal communities do not live in isolation. The tribal community, which lives in isolation, inhabits in more than one habitat. Moreover, there is also the problem of authentication of tradition and customs. If a problem arises, will the existing law prevail or the tradition and customs?

As the tribal areas are scattered, with many languages, different cultures, traditions and customs, it is not possible to define the village. There is no uniform pattern of tribal rule with this cultural diversity. Most of the tribal villages exist in their current habitats with their respective territorial jurisdictions. This does not mean that status quo must be maintained in all cases. But rather than creating new territorial entities through legal instruments, the best course would be to recognize the existing villages and village boundaries, and leave it to the people as a whole to formally pass a resolution indicating, with reasons, the changes they want in their spatial jurisdiction. It is quite likely that there will be conflict in this matter among adjoining villages. In such cases intermediate level Panchayats rather than the state bureaucracy may be vested with the power of arbitration and reconciliation.

Panchayats as Institutions of Self-Government: Section 4(m) endows Panchayats in the Scheduled Areas with powers and authority to function as institutions of self-government. Such powers are essential to enforce prohibition/ regulate the sale and consumption of any intoxicant, the ownership of Minor Forest Produce, prevention of land alienation, manage village markets, control over money lending and implementation of social sector schemes, local plans including tribal sub-plans. The powers mentioned in the section are of two categories: (a) powers which are of executive nature and can be delegated by the concerned state governments, (b) law-making powers which can be exercised by various entities only by conforming to the basic structure of the Constitution.

However, the above two categories cannot be seen in isolation from each other. The Panchayats to be effective in discharging responsibilities like prohibition, curbing the evils of money-lending, etc, will require law-making powers, judicial power and control over the law enforcing machinery. In view of the famous judgement by Justice Mahajan in 1950, the state legislatures are unlikely to vest law-making powers in Panchayat bodies.¹¹ The state legislature can, of course, delegate judicial and police powers up to a point to local bodies, but to expect more will require radical transformation of political climate in the country. In fact, conferment of all the powers mentioned not only in section 4(m) but also in 4(k) & (1) will require political mobilization on a massive scale. It is doubtful whether the political culture in the country is ready for such a radical transformation. There is also another danger that as and when a state government delegates certain executive powers to the Panchayats, it

¹⁰ B.K. Roy Burman, "Analytical Appraisal of the Panchayat (Extension to the Scheduled Areas) Act 1996," *Mainstream* (New Delhi), Annual Issue, December 25, 2004.

¹¹ Ibid

will render the latter its subordinate organs. This is a far cry from the ideal of tribal self-rule.

Right to control over land and natural resources

Land Acquisition: Section 4(i) provides that the Gram Sabha or the Panchayats should be 'consulted' before making the acquisition of land for development projects and before resettling or rehabilitating persons affected by such projects. This is a very weak framework of tribal self-governance. It does not require the 'approval' or 'consent' of the Gram Sabha or the Panchayat. Moreover, it makes a vague stipulation that the actual planning and implementation of the projects be coordinated at the state level. It does not make it clear, either, among whom and through what mechanism will the coordination at the state level be done. It is also not clear whether in planning and coordination the PRIs at the appropriate level would be involved.

Management of Water Bodies: Section 4(j) provides that planning and management of minor water bodies in the Scheduled Areas be 'entrusted' to Panchayats at the appropriate level. Ethnographers know that water-body management among many tribes is a dimension of village moral economy and the entire community is involved in the decision-making process. But the PESA Act constricts this process. Who will entrust the planning and management of minor water bodies in the Scheduled Areas? Another question is whether section 4(j) is applicable only to state legislation or to central legislation as well. Given the normative nature of the section, the stipulation ought to be applicable to central legislation also. All these issues raise the question whether section 4(j) is in consonance with 'traditional management practices of community resources'? Moreover, the thrust of the section is an infringement on the moral economy of tribal peoples.¹²

Mining Lease: Sections 4(k) & (1) lay down that the recommendations of the Gram Sabha or the Panchayat at the appropriate level are made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas as well as for their auction. The language of these two sections is ambiguous. It may mean that the licence could still be granted even if the Gram Sabha sends a negative recommendation for the same so long as there is a recommendation, positive or negative. The word 'recommendation' in this section seems to be inappropriate. The appropriate word should have been 'consent.'

Right to protect culture and cultural identity

Competence of Gram Sabha to preserve tradition: Section 4(d) stipulates that "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." It may be noted that there is hardly any tribe, which lives in isolation from its compeers inhabiting in more than one habitat. Otherwise continuous inbreeding within a single habitat would lead to genetic aberrations and ultimate extinction. There are hierarchies of behavioural norms, which are regulated at different levels. There are behavioural norms, which are decided at the household level; yet

¹² Ibid., Moral economy implies non-implementation of fixed rules, but a process of continuous adjustment in resource allocation and utilization, harmonizing with culturally embedded ethical principles.

others are decided at lineage level; norms enforced at territorial-community level, and norms amplified, reinterpreted, redefined and enforced at much larger community level. It is a continuous process.

Right to Development

Role of Gram Sabha in Planned Development: Section 4(e) (i) of PESA inter alia provides that every Gram Sabha (i) approves the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by Panchayats at village level; (ii) be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes.

The PESA Act considers 'gram' as spatial expression of a self-managing community in accordance with its traditions and customs. The 'Gram Sabha' is only a legally structured expression of 'gram samaj' (village community). Logically, therefore, the core activity of the Gram Sabha should be preparing and implementing the plan, programme and strategy, drawing primarily on its traditional system of resource mobilization and utilization in the Panchayat. Any externally sponsored activities should be ancillary to its core activity. Section 4(e) (ii) betrays a misconception that tribal people are not competent to exercise their freedom. It speaks of the 'responsibility' of the Gram Sabha (not the right of the Gram Sabha) for identification and selection of persons as 'beneficiaries' (not active participants) in poverty alleviation and other programmes. The question arises whether the approach in the central act is in consonance with the ideal that state legislatures are to enact their respective laws in accordance with "customary laws, social and religious practices and traditional management." Moreover, the Gram Sabha cannot in isolation make much dent on national planning policy. Inter-linkages of tribal organizations of different levels, and networking not only among the organizations of different tribes but also involving organized forums of peoples of broadly similar socio-economic category would be necessary.

Limitation of Gram Sabha: Section 4(f) empowers the Gram Sabha to issue certification of utilization of funds for the plans, programmes and projects implemented by the Panchayat in its area. The act presupposes that there are no other agencies/ organizations of the government, who work in the Panchayats or if there are, they are not accountable. This lacuna coupled with the unwillingness of states to devolve funds to Panchayats has limited the role of Gram Sabha in its development. As such, most developmental departments continue to carry out their projects/ programmes without even consultation with the Gram Sabha. For instance, in some states there are Joint Forest Management Committees,¹³ functioning autonomously of the Panchayats. These and similar other institutions operating within the jurisdiction of a village should submit themselves to the planning, monitoring and scanning functions of the Gram Sabha. And the central act itself should be clear on this matter.

While the Bhuria Committee report gives credence to the role of traditional Panchayats of the tribal peoples, the Act supposed to be based on the report does not make any provision to recognise the role of traditional Panchayats. It is time head of the

¹³ The Joint Forest Management Committee (JFMC) is responsible for protection and regeneration of their adjutant forest and are entitled for usufruct sharing from the forest protected by them

traditional Panchayat had been given a formal role in the working of the Gram Sabha.

Minimalist interpretation of PESA

PESA is unprecedented in that it gives radical self-governance powers to the tribal community and recognizes its traditional community rights over natural resources. Prior to the passage of the Act, laws passed by central and state governments were applied mechanically to tribal areas, even when these contravened traditional tribal practices and institutions. For instance, the *Gram Sabha*, which is locus of political power under the PESA, may be in other states no more than a convenient administrative label for the relevant assembly. However, under PESA the law focuses on settlements, which the tribal people themselves perceive to be traditional and organic entities. In fact, the PESA Act is the first law that empowers people to redefine their administrative boundaries. It provides that the tribal *Gram Sabha* so defined would be empowered to approve all development plans, control all functionaries and institutions of all social sectors, as well as control all minor water bodies, minor minerals and non-timber forest resources. It would also have the authority to control land alienation, impose prohibition, manage village markets and resolve internal conflicts by traditional modes.

In a way, the Act creates a space for people's empowerment, genuine popular participation, convergent community action, sustainable people-oriented development and auto-generated emancipation. In reality, however, since its passage it has almost been forgotten and has not become part of mainstream political or policy discourse. Many state governments have passed laws not fully in conformity with the central law. The fact escaped the attention of scholars, administrators, policymakers and even parliamentarians. The tribal communities initially greeted the Act with enthusiasm but found it progressively handicapped by the lack of actual preparedness to negotiate development and democratization in the manner envisaged by the law.

The reluctance of most state governments to make laws and rules that conform to the spirit of the PESA has hampered its successful implementation. The lack of political will, coupled with bureaucratic creativity, has resulted in minimalist interpretations of the law, to the detriment of the tribal people.¹⁴

A DECADE OF PESA

The Provisions for Gram Sabha and Pali Sabha in the 73rd Amendment and the PESA Act are unique in institutionalising a direct interface between the elected representatives and the electorate. This is the basis for participatory democracy which has been enshrined in the Constitution. But, despite the legislations, participatory democracy is far from becoming a reality.

In the tribal regions, however, there is a glimmer of hope for participatory democracy, as tribal communities have a tradition of equality and democratic decision-making. Studies have shown that given the opportunity, participatory democracy can be well on the way to becoming a reality in the Fifth Schedule Panchayats. Where village committees have organized, where tribal women have joined the process, the participatory democracy has taken shape in the form of people

¹⁴ N.C. Saxena, "Issues in Panchayats," <http://www.panchayats.org/downloads/Panchayats%20NC%20Sax.PDF>

demanding accountability of the elected representatives and government functionaries, in terms of villages challenging decisions that have gone against Gram Sabha and Palli Sabha resolutions, as also asserting their right to determine the course of development in their village, as per the provisions in the PESA. With an effective devolution of financial powers, the Gram Sabhas have benefited and also experienced the effective exercises of these powers. The Eleventh Finance Commission's terms of reference included the responsibility to suggest measures to make Panchayats financially viable institutions.¹⁵

Devolution of Powers to Gram Sabha

Under PESA, Gram Sabha and Panchayats are given a wide range of powers, functions and responsibilities. Gram Sabha means a body consisting of persons whose names are registered in electoral roll. This provision also differs from state to state. While in MP the Gram Sabha means a body consisting of persons registered in the electoral rolls relating to revenue village or forest village comprised within the area of the Gram Panchayat, in Maharashtra, Gujarat, Rajasthan and Orissa, Gram Sabha comprises all persons whose names are included in the list of voters. The Himachal Pradesh Panchayat Act, however, provides that the Gram Sabha shall consist of all persons who are either qualified to be registered in the legislative assembly rolls relating to the Gram Sabha areas or who are already enrolled therein or who are ordinarily residents of Gram Sabha. In Jharkhand, under the Jharkhand Panchayati Raj Act, there may be more than one Gram Sabha in a village, which shall manage their activities as per customs and usages.

Gram Sabha is empowered to approve plans, programmes and projects for social and economic development, identify beneficiaries under poverty alleviation and other programmes, certify utilization of funds for plan, project, and programmes for social and economic development of the village by the Gram Panchayats. The states variants of this provision for Gujarat, H.P and M.P have limited the role of Gram Sabha to mere approval of plans that are to be executed by the village Panchayat. In Rajasthan, according to the State Act, the Gram Sabha approves the plans, projects and programmes approved by the Ward Sabha before the Panchayat takes them up for implementation. As per the state government order the Gram Sabha approval is necessary for the plans, programmes and projects for social and economic development of the village.

PESA also stipulates that every Panchayat at the village level be required to obtain from the Gram Sabha a certification of utilization of funds by that Panchayat for the projects and programmes for social and economic development. Gujarat state act says that the Panchayat shall obtain from the Gram Sabha a certificate of utilization of funds by the Panchayat with some sub clauses. However, the Gram Sabha does not issue utilization certificates for expenditure of programme funds but sarpanch is the competent authority to issue UCs for village-level works. In Himachal Pradesh, Madhya Pradesh, Maharashtra and Orissa, the state acts have been designed in parallel to the central act.

PESA states that the Gram Sabha or the Panchayats at the appropriate level should be

¹⁵ Mahi Pal, *Economic and Political Weekly*, December 9, 2000. p. 4379.

consulted before making the acquisition of land in the Schedule Areas for development projects and before resettling or rehabilitating persons displaced by such projects; the actual planning and implementation of the projects in the Schedule Areas should be coordinated at the State level. The PESA left it to the discretion of the states to decide the appropriate level for fulfilling this function. However, Gujarat, Maharashtra and HP have exercised the options provided for by the act. Andhra Pradesh has devolved this power to intermediate tier. The Orissa Panchayat Act has given this function to the Zilla Parishad. Maharashtra and HP Panchayat Acts have given this task to the Gram Sabha. The MP Act does not specify it in clear terms except saying that the Gram Sabha will manage natural resources including land. Rajasthan Act has given this power to the Gram Sabha or the PRI at such level, as may be prescribed. Jharkhand and Chattisgarh have not made it yet. But the rehabilitation policy makes consultation with Gram Sabha mandatory.

The planning and management of minor water bodies in the Schedule Areas are to be entrusted to Panchayats at the appropriate level. The Andhra Pradesh Act has given this function to the Gram Panchayat or Mandal Panchayat or Zilla Parishad as the case may be. Himachal Pradesh has also followed Andhra Pradesh without specifying which tier shall perform this function. The Gujarat Act has assigned this work to the intermediate tier whereas Orissa Act has given this power to the Zilla Parishad. Maharashtra has not enacted this provision. In Rajasthan planning and management of water bodies are entrusted to the PRIs as may be specified by the state government. Madhya Pradesh is the only state that has gone beyond the provision of the PESA Act, in the right direction, by providing that the Gram Panchayat would take decisions in matters relating to planning and management of the minor water bodies, only after consultation with Gram Sabha. In Chattisgarh the power is given to the Gram Panchayat in accordance with the state act.

The recommendation of the Gram Sabha or the Panchayat at the appropriate level is mandatory prior to grant of prospecting licence or mining lease for minor minerals by auction. Andhra Pradesh, Maharashtra and Gujarat have given this power to the Gram Panchayat whereas Himachal Pradesh has given this power to the Gram Sabha. Orissa has given this power to the Zilla Parishad and Madhya Pradesh has not made any mention in this regard. Rajasthan has made provisions for the Gram Sabha or the PRIs.

The same kind of inter-state variation, observed with regard to the above-mentioned areas, is visible when it comes to other subjects: prior recommendation of the Gram Sabha or the Panchayat for grant of concession for the exploitation of minor minerals by auction; prohibition or to regulate or restrict the sale and consumption of any intoxicant; the power to prevent alienation of land in the Schedule Areas and to take appropriate action to restore any unlawfully alienated land of a Schedule Tribe; power to manage village markets; the power to exercise control over money lending to the Schedule Tribes, and; the power to exercise control over institutions and functionaries in all social sectors.

Safeguards to the Traditional Laws and Practices

The law affirms that tribal peoples' customs, traditions and their religious practices be restored and preserved. It also affirms further for their cultural identity and right over natural resources. Any legislation on the Panchayats for the tribal areas is to be in

consonance with the customary laws, social and religious practices and traditional practices.

The PESA Act provides that every Gram Sabha is competent to safeguard and preserve traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. All the States included this provision in their respective acts except Orissa. Himachal Pradesh has clipped the wings of Gram Sabha by putting a condition that disputes could be settled according to customary mode of dispute resolution "without detriment to any law for the time being in force." Rajasthan has also imposed this provision in accordance with the state act. A similar situation prevails in Orissa and Jharkhand also. Provisions contained in the Andhra Pradesh and Orissa acts imply that for dispute resolutions provisions of IPC and CrPC would be applied instead of applying tribal customs and traditions. The Forest Act, not according to the customary mode of dispute resolution, would settle disputes on community resources, particularly forest. In Orissa section 5(6) of the state act "the provision has been made subject to relevant laws in force and in harmony with basic tenets of the Constitution and human rights."

The PESA Act has provided that the state legislation may endow Panchayats with powers and authority to enable them to function as institutions of self-government and shall contain safeguards to ensure that Panchayats at higher level do not assume the powers and authority of any Panchayat at the lower level or of Gram Sabha. All the states included this provision except Maharashtra, Orissa, and Chattisgarh. Jharkhand has partially met this requirement.

Reservation of Seats for STs

The reservation of seats in the Schedule Areas at every Panchayat is to 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 Schedule Tribes is not less than one half of the total no of seats;
- Provided further that all seats of chairpersons of Panchayats at all levels are reserved for the Scheduled Tribes.

The state government may nominate persons belonging to such Scheduled Tribes who have no representation in the Panchayat at the intermediate level or at the district level. But such nomination is not to exceed one-tenth of the total members to be elected in that Panchayat.

All the states have incorporated this provision, in one form or the other, in their respective laws. Only in Jharkhand the case is *sub judice*. In Chattisgarh, the state act provides that the seats are reserved in every Gram Panchayat where half or less than a half of seats are reserved both for the SCs and STs. Further, 25% of the total number of seats are reserved for OBCs and such seats shall be allotted by rotation to different Wards in the Gram Panchayat by the collector in the prescribed manner. The Act further provides that reservation for STs is not less than a half of total number of seats and also limited the reservation of seats to the Sarpanches and Presidents. In Himachal Pradesh the reservation of seats for STs is provided for the Chairman of Panchayat

Samiti and Pradhan of Gram Panchayats. In rest of the states the reservations are made in accordance with the PESA Act. As in all other respects, the issue of reservations for the tribal people in the PRI system highlights the extent of diversity in laws and in their implementation.

PESA IMPLEMENTATION MATRIX									
With reference to Section 4 of the Panchayat Extension to Scheduled Areas Act, 1996									
	Andhra Pradesh	Chhattisgarh	Gujarat	Himachal Pradesh	Rajasthan	Jharkhand	Madhya Pradesh	Maharashtra	Orissa
4(a)	Black	White	Black	Black	Black	White	Black	Black	White
4(b)	Black	White	White	Black	White	Black	White	White	Black
4(c)	Black	Black	Black	Black	Black	Black	Black	White	Black
4(d)	Black	Black	Black	Black	Black	Black	Black	Black	White
4(e)	Black	White	Black	Black	Black	White	Black	Black	Black
4(f)	White	White	Black	Black	White	White	Black	Black	Black
4(g)	Black	Black	Black	Black	Black	White	Black	Black	Black
4(h)	Black	Black	Black	Black	Black	Black	Black	White	Black
4(i)	Black	Black	White	Black	Black	White	Black	Black	Black
4(j)	Black	White	Black	Black	Black	Black	Black	White	Black
4(k)	Black	White	White	White	White	White	Black	Black	Black
4(l)	Black	White	White	Black	Black	White	Black	White	White
4(m)(i)	White	White	Black	Black	White	White	Black	Black	Black
4(m)(ii)	White	White	Black	White	Black	White	White	Black	Black
4(m)(iii)	White	White	White	White	White	Black	Black	Black	Black
4(m)(iv)	White	Black	Black	Black	Black	Black	Black	White	Black
4(m)(v)	White	White	Black	Black	Black	White	Black	White	Black
4(m)(vi)	White	White	Black	White	White	White	Black	White	White
4(m)(vii)	Black	Black	Black	Black	Black	Black	Black	Black	Black
4(n)	Black	Black	Black	Black	Black	White	Black	Black	Black

Black = IN CONSONANCE; White = NOT IN CONSONANCE; Gray = NOT KNOWN

Section 4 of The PESA Act: 4. Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:-

- 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;
- a village shall ordinarily consist of 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 traditions and customs;
- every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level;
- 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;

(e) every Gram Sabha shall-

i approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level;

ii. be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes;

(f) 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);

(g) 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;

(h) 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;

(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before reselling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level;

(j) planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;

(k) the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas;

(l) the prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction;

(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 to the Scheduled Tribes;
- (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.

PESA IN ORISSA: A CASE STUDY

Orissa occupies tenth position in area and eleventh in population in India. Its area, 155,707 sq km, is 4.7 percent of the country's total area, its population (36,804,660 as per 2001 census) accounts for 3.7 percent of India's total population. Its density of population is 236 as against the all-India figure of 325 and the female-male sex ratio is 972, the all-India ratio being 933. The state's literacy is around 48.4 percent with male (62.4 percent) and female (34.4 percent). The state comprises of 30 districts, 58 subdivisions and 171 Tahasils. In terms of local government bodies, it has 30 Zilla Parishads, 314 Panchayat Samitis (blocks) out of which 118 are Tribal blocks. It has 50,972 villages spread over 6,234 Gram Panchayats.¹⁶

The reasons for selecting Orissa as a case study are guided by the following factors:

- Orissa has the highest number of Scheduled Tribes in India and third highest number/ percentage of tribal population
- It has rich concentration of mines and minerals
- Presently Orissa is attracting highest Foreign Direct Investment especially in ore-based green-field projects
- The state is a hotbed for Naxalite violence in the tribal areas

There are 62 distinct tribal communities in Orissa including 13 primitive tribes. The ST population of Orissa constitutes 22.13 percent of its total population and 10.38 percent of the country's tribal population. About 54.41 percent of the total tribal population lives in the Scheduled Areas and the remaining 45.59 percent outside the Scheduled Areas. The Scheduled Areas constitute 69,614 sq km out of Orissa's total area of 155,707 sq km. The Tribal Sub-Plan (TSP) area comprises 120 Panchayat

¹⁶ <http://orissagov.nic.in/people/peoplehome.htm>

Samitis and 1941 Gram Panchayats of 13 districts. The table below indicates the name of the district, number of tribal blocks and no of Gram Panchayats in the Scheduled Areas (district-wise):

Name of the District	No. of Tribal Blocks	No. of GP in Scheduled Areas.
Mayurbhanj	26	382
Balasore	1	25
Keonjhar	10	218
Sundargarh	17	262
Sambalpur	3	55
Kandhamal	12	153
Gajapati	5	96
Koraput	14	226
Rayagada	11	171
Nawarangpur	10	169
Malkangiri	7	108
Kalahandi	2	37
Ganjam	2	39
Total	120	1941
Source: Government of Orissa, Rural Development		

The state government has declared the following as the Scheduled Areas in the state:

1. Mayurbhanj district
2. Sundargarh district
3. Koraput district¹⁷
4. Kuchinda tahsil in Sambalpur district
5. Keonjhar and Telkoi tahasil of Keonjhar sub-division, and Champua and Barbil tahasil of champua sub-division of Keonjhar district
6. Khandhmal tahasil of Khandhmal sub-division and Baliguda and G. Udayagiri tahasil of Baliguda sub-division in Boudh-Khandhmal district
7. R. Udayagiri tahasil, and Guma and Rayagada Blocks of Parlakhemundi tahasil of Parlakhemundi sub-division and surada tahasil, excluding Gazalbadi and Gocha Gram Panchayat of Ghumshar sub-division, in Ganjam district¹⁸
8. Thuamul Rampur block of Kalahandi tahsil, and Lanjigarh block, falling in Lanjigarh, and Kalahandi tahsils in Bhawanipatna sub-division in Kalahandi district
9. Nilgiri Community Development Block of Nilgiri tahasil in Nilgiri subdivision in Balasore district

¹⁷After reorganisation, the District of Koraput is now divided into four districts i.e., Koraput, Malkangiri, Nowrangpur and Rayagada districts.

¹⁸ After reorganisation, the District of Ganjam is now divided into two districts i.e., Ganjam and Parlakhemundi districts.

The Scheduled Areas in Orissa are nearly coterminous with the TSP areas, except Soudra tahasil of Ganjam district, which is included in the Scheduled Areas, is not under the TSP Area. The welfare of the STs in the Scheduled Areas in the state is to be ensured under Article 46 and the Fifth Schedule to the Constitution.

Pursuant to the PESA Act, Orissa amended relevant laws as: (i) Orissa Gram Panchayats (Amendment) Act, 1997 (Act 15 of 1997); (ii) Orissa Panchayat Samiti (Amendment) Act, 1997 (Act 16 of 1997), and; (iii) Orissa Zilla Parishad (Amendment) Act, 1997 (Act 17 of 1997). These acts were notified in the state Gazette dated 22nd December 1997.

The definition of Grama Sabha in the Scheduled Areas, according to the amended act, is that of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community or communities and managing its affairs in accordance with tradition and customs. Since a community in tribal areas is a functioning collective, which has face-to-face habitational relations, the formal recognition of the 'community' and the assembly of its members as 'Gram Sabha' are significant. Further, the significance of command over community natural resources as recognized by the act is not in isolation or a mere economic issue, but in relation to the cultural identity of the people. Since the community in the form of Gram Sabha enjoys the constitutional recognition, its authority cannot be questioned any more. But, unfortunately, in extending the Panchayats to the Scheduled Areas under Orissa Gram Panchayat (Amendment) Act 1997, the power has been conferred upon the 'Gram Sabha' which comprises of all the voters of a *gram* (village) consisting of many communities having distinct socio-cultural practices and different interests.¹⁹

In the Scheduled Areas, the Gram Sasan shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution, consistent with the relevant laws in force and in harmony with the basic tenets of the Constitution and human rights. This, in fact, implies that in case of any dispute, the hold of CrPC, IPC, Orissa Forest Act etc., would prevail over the customary laws of these communities. By this the state practically does not give any right to tribal people to safeguard, exercise and preserve their traditional rights.

The Orissa Act further states: Notwithstanding anything contain in any other law, in the Scheduled Areas, subject to the control and supervision of Gram Sasan, the Gram Panchayat shall exercise within its local limits such powers and perform such functions in such manner and to such an extent as may be prescribed in respect of *inter alia* the following matters, namely:

Enforcement of prohibition or restriction of the sale and consumption of any intoxicant, ownership over Minor Forest Produce, prevention of alienation of land and restoration of any unlawfully alienated land of a Scheduled Tribe, control over money lending to the tribal people, and the management of village market.²⁰

¹⁹ Avinash Samal, Institutional Reforms for Decentralized Governance and the Politics of Control and Management of Local Natural Resources: A Study in the Scheduled Areas of India, p. 7. Downloaded from: http://dlc.dlib.indiana.edu/archive/00001084/00/Avinish_Samal.pdf

²⁰ D. Bakshi Sinha and P.S.K. Menon, *Panchayati Raj in Scheduled Areas* (New Delhi: Concept

Implementation of PESA in Orissa

Transfer of Tribal Lands: Under the new rules, the land is not a transferable property. It cannot be transferred from a tribal if he possesses less than two acres of irrigated land or less than five acres of un-irrigated land. However, despite this categorical legal imperative, land alienation of the tribals persists. The Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956, has been amended by regulation in 2000, which inter alia provides that proceedings for eviction of an illegal occupant of tribal land can be initiated on the report of a Gram Panchayat. Prior approval of the Gram Panchayat with concurrence of the Gram Sasan has been made mandatory before any land in the Scheduled Areas can be settled by competent authority with a non-tribal. Moreover, it is mandatory for the competent authority to inform the Gram Panchayat on all orders of rejection of restoration of land to the tribal made by them.

As the Land Acquisition Act is a central act and land-transfer regulations have not been implemented effectively, this has given rise to a greater incidence of tribal land dispossession in the area. Commenting on this the Committee on the Development of the Backward Areas (1981) observed that "the incidence of land alienation is not of the same order everywhere. It is very high where the areas are getting opened up - along the main roads, around the growing urban centres and mineral complexes."²¹ Since 1981 the conditions further deteriorated²². The Planning Commission recognizes that while the law "enables tribal society to assume control over... natural resources including land" the law has remained only on paper and has not been operationalised by the state government. As per the report of a national-level study on Panchayat Laws in Tribal Areas for the Ministry of Rural Development, that the awareness of the 1996 law among tribals is negligible. Tribal people do not know about the law simply because the operational law does not exist.²³

Land Acquisition: Necessary amendments to the Land Acquisition Act can be made only by the central government since it is a central act. However, the revenue department has issued executive instructions to all collectors to obtain recommendation of Gram Sabha in cases of land acquisition in the Scheduled Areas. But the powers are given to the Zilla Parishad under Section 3(6) of Orissa Zilla Parishad Act of 1997. Therefore, the central act should be made compatible with the state law. It may also be noted that the Bhuria Committee used the word 'consent' of Gram Panchayat while in the Act 'consulted' has been used and with regard to the implementation both expressions are missing. The power has been entrusted to the Zilla Parishad to regulate acquisition of tribal land.

Control of Village Markets: The amended Section 58(5) of the Orissa Gram Panchayat

Publishing Company, 2003), pp. 56-58.

²¹ *Report on Development of Tribal Areas*, National Committee on the Development of backward Areas, (New Delhi: The Planning Commission, Government of India, 1981), pp. 52-56.

²² B Janardhan Rao, "Tribal Land Rights, Government and Socio-Political Movements," Working Paper No. 47, 1998, pp 8.

²³ Videh Upadhyay, "Their lands and our laws," *India Together*, March 2003. URL: [http:// www.india-together.org/2003/mar/vu-triballands .htm](http://www.india-together.org/2003/mar/vu-triballands.htm).

Act, 1964, read with Section 59 of the same act, provides similar powers to the Gram Panchayats in the Scheduled Areas as well as other areas of the state. Further, as per provision U/S 58 of OGP Act, the application of Orissa Agricultural Produce Marketing (OAPM) Act in the Gram Panchayat areas has been excluded. Under this Act, the Gram Panchayats concerned are to be paid such portion of fees levied under Section 11 thereof as may be prescribed and thereupon no licence under sub-section 4 is granted to any Gram Panchayat as aforesaid.²⁴ These powers are of executive nature and can be delegated by the state legislature to other entities within their respective jurisdiction. But by endowing such powers through delegation of authority to the Panchayats, the state government will make the latter subordinate organs of the state. This is a far cry from the thrust towards tribal self-rule.²⁵

Ownership of Minor Forest Produce: A new policy on Minor Forest Produce was notified by the Orissa State Forest and Environment Department [vide their resolution No.5503/F&E dt 31 March 2000] in which sixty-eight items had been specified as Minor Forest Produce. The ownership over these MFP items was transferred to GPs except MFPs growing in Reserve Forests, Sanctuaries and National Parks. Initially, K.L. Sal seeds and Bamboo were not included in the list of MFP. Sal seeds have now been included in the list of MFP [vide Forest and Environment Department Notification No.7220 dt 18 July 2006]. Thus, sixty-nine items of MFP have been transferred to GP for their regulation and management. Further, the OGP (MFP Administration) Rules 2002 has come into force w.e.f., 15 November 2002, which prescribes the manner of regulation and control of trade in MFP by Gram Panchayats in the Scheduled Areas. This power is given to the Gram Sabha.

Control of Money Lending: The Orissa (Scheduled Areas) Money Lenders Regulation, 1967, was amended in 2001 empowering the GP to exercise control over money lending and the issue of licence in the Scheduled Areas to provide that in the Scheduled Areas any person can be advanced. Loan by a moneylender is possible only if recommended by the Gram Panchayat with prior concurrence of the Gram Sasana. For loans advanced without such prior recommendation the debtor shall not be liable.

Manufacture and Sale of Intoxicants: The Bihar and Orissa Excise Act was also amended to require prior approval of the Gram Sabha to issue licence to manufacturer or sale of liquor within a GP in the Scheduled Areas. The excise department instructed collectors to implement the amended provisions in giving licences to liquor vendors in the Scheduled Areas.

Exploitation and Lease of Minor Minerals: The Steel and Mines Department initiated steps to amend the Orissa Minor Minerals Concession Rules, 1990. Zilla Parishad is given this power. This is due to the provision in the PESA Act itself as there is no specific level mentioned therein. The Bhuria Committee emphasised on partnership of village community while in the Act recommendation of Gram Panchayat/ Gram Sabha is made mandatory.

²⁴ Ministry of Panchayati Raj, *The State of the Panchayats: A Mid-term Review Appraisal*, Vol. II, 22 New Delhi: the Government of India, 2006), p. 621.

²⁵ Roy Burman, op cit.

Management of Minor Water Bodies: In the central act the planning and management of minor water bodies is entrusted to the Panchayats at the appropriate level. The Zilla Parishad in Orissa has been empowered to plan and manage minor water bodies (under section 3(6) (c) of the OZP Act 1991). But there is some confusion related to what is a minor water body since the central act has not defined the term. The state has made an exception to both the acts by devolving power to the Zilla Parishad. As land, minor minerals and minor water bodies are the backbone of tribal economy, questions will arise as to its implementation.

Controls over Finances, Functions and Functionaries: The state government has recently decided a package of finances, functions and functionaries, and institutions in the social sector, which will be transferred to the PRIs through Public-Private Partnerships to promote Rural Business Hubs. Welcoming this, the Union Ministry of Panchayati Raj and the Confederation of Indian Industry (CII) offered to support the development of Rural Business Hubs through Panchayats so as to upgrade local skills and products and find markets for them. It is further agreed with the Ministry of Panchayati Raj that the Fifth Schedule Areas of Orissa would be a primary locus of attention in this regard.²⁶ This power has been given to Panchayat Samiti in accordance to the, Section 20(5) (i) and 20(ii) of the Orissa Panchayat Samiti Act.²⁷ But, for the proper working of the business hubs, there should be a channel of communication to the Gram Sabha.

Principle vs. Practice

All this notwithstanding, years after PESA Act came into force the tribal regions in Orissa are still in a state of underdevelopment. The reasons are complex. On the one hand, the officials regard tribal people as an inferior species who need to be told what is good for them and, on the other, many of the existing laws and provisions contradict the letter and spirit of the PESA Act. Such contradictions between central and state laws need to be reviewed and rectified.

The table below highlights contradictions and the gaps between the principle and practice insofar as the system of governance in tribal areas is concerned:

²⁶ The statement of conclusions arrived at after the visit of the Union Minister for panchayati Raj and Petroleum & Natural Gas to Orissa from 23 October 2005 to 26 October 2005.

²⁷ Orissa Panchayat Samiti (Amendment) Act, 1997.

Principle

Every Gram Sabha is competent to safeguard and preserve its community resources.

Gram Sabha or Panchayat at the appropriate level should be consulted before acquisition of land in Scheduled Areas for development projects.

Gram Sabha in tribal areas is endowed specifically with the powers to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant.

Every Panchayat at village level is required to obtain from Gram Sabha a certification of utilisation of funds by the Panchayat for the plans, programmes and projects implemented by it

Practice

MOUs for mining and industrialisation are signed between the government and MNCs, with no participation or knowledge of the affected tribal people.

Consultations with Gram Sabha for land acquisition are organised by district administration in the presence of armed police force.

The state government decided to open 2000 liquor shops in different districts.

Gram Sabhas are almost never held on the due date. Inevitably, a second Gram Sabha is organised without proper information and the decisions are passed by proxy provisions.

Source: Agrabamee, Kashipur, Orissa

Islets of Tribal Republics?

Two issues serve as a litmus test for Orissa on the implementation of PESA. They are forest and mining within and adjunct to village limits in the Scheduled Areas. Taking up the recent cases of public unrest in these areas as a case study, the paper analyses the forces and factors that drive tribal unrest.

Forests

According to B.D Sharma, "a major cause of confrontation between the tribal people and the state has been the difference in the perceptions about the rights of the tribal people over the forests and their use. The touchstone of the validity of any system and its practices is their harmony with the right to life with dignity of the ordinary people. This right is self-evident and does not need the support of any formal announcement or even adoption in a Constitution. This right is the very essence of human civilization."²⁸

PESA does not define minor forest produce, which has led to a lot of confusion in the states with Scheduled Areas. The Ministry of Environment and Forest defines MFP as forest produce other than timber, harvestable on a non-destructive basis and the Ministry of Rural Development and Employment defines MFP as gatherable biomass collected from living trees and forest areas on a sustained and non-destructive basis. As there is no clear-cut definition, different states have come up with their own definition of MFP. Nationalised and remunerative MFPs have been earmarked for state or private agencies, while the rest have

²⁸ B.D. Sharma, URL: http://www.doccentre.net/docsweb/advivasis_&_forests/land.htm. See also, N. Murthy, "The Fight for Tribals' Rights," *Liberation* (A CPIML journal), August 1996. URL: http://www.cpiml.org/liberation/year_1996/august/feature.htm

been handed over to Gram Sabha/Gram Panchayat.

As GPs are now empowered to register the traders in their territorial jurisdiction for trading in the 69 items, the GPs naturally assume that they are the owners of these MFPs. However, they have not been legally empowered to take any penal action against traders who do not pay fair price to primary collectors who are forced to approach divisional forest officers for taking further action. The Gram Panchayats cannot collect royalty from the traders, either.

Enforcement of PESA is perceived as weakening the stranglehold of the forest bureaucracy, and it is instructive to study the interpretation of PESA favoured by the state governments in their attempts to minimize the loss of bureaucratic control.

First, Orissa and other states have argued that the power of *Gram Sabha* can extend only to forest located within the revenue boundaries of a village. This one provision, if accepted, would nullify the law because reserved forest in most states is not often located within a revenue village. The spirit of the law is clearly to extend ownership of MFP to the *Gram Sabha* from forests located in the vicinity of the village, which they traditionally access. In fact, in the case of Joint Forest Management (JFM), the Madhya Pradesh government vested the village forest committees with authority to manage forest falling within a radius of five kilometers of boundaries of the village. A similar dispensation would be appropriate in the case of PESA too.

Second, MFP has been defined to exclude cane and bamboo. This is contrary to the common-sense definition of MFP which is 'that part of a tree that can be sustainably harvested without damage to the survival of the tree.' More significantly, it denies poor tribal artisans access to two types of MFP on which their livelihoods are most critically dependent. Moreover, many state policies have subsidized bamboo for private industry.

Another controversy is in the interpretation of the concept of 'ownership' of MFP by the *Gram Sabha*. The commonly-held view is that ownership does not provide *Gram Sabha* the right to take any decisions related to stewardship, management or sustainable harvesting of MFPs. Contrary to a whole body of empirical data from national and international experience of JFM and community control of forests, it is claimed that the exercise of ownership of MFPs by *Gram Sabha*, in this sense, would inevitably lead to destruction of forests. Therefore, ownership as provided for in PESA is reinterpreted to mean the right to net revenue from MFP, after deducting administrative expenses of the forest department.²⁹

As seen above, the tribal people are yet to benefit in the real sense from state laws and rules. The real spirit of PESA has not been implemented in the Scheduled Areas. Some remedial measures that need to be taken up by the states have been discussed below:

MFPs should be properly defined by each state and all MFPs, including the nationalised ones, should be handed over to the Gram Sabha. For management of certain high revenue

²⁹ Saxena. op cit

earning MFPs like Kendu leaf (Tendu leaf), Sal seed, Bamboo, etc., different agencies including state-owned corporations, might be engaged. A mutually agreed upon plan of action needs to be developed at the GS/GP level. Necessary amendments to forest laws and rules, Panchayat laws and rules and other related legal framework need to be carried out to clear ambiguities in the definition of MFPs, to outline ownership, control and management functions and to fix duties and responsibilities of different stakeholders. The Gram Panchayat should have the legal power to penalise traders violating rules.

The capacity of GP/GS to own, control and manage MFPs should be built up. They should be supported adequately to create an interface with different agencies - both government and private - for control, management and trade of MFPs. The transfer of ownership rights to the Gram Sabha does not mean that the forest department ceases to have a role. They should constantly organise orientation programmes for GP/GS to provide trade-related information to them and help in marketing arrangements, collection procedures, etc.

Mining

During the past few years, Orissa has witnessed a flurry of visits by leading industrialists of the world promising to set up greenfield industrial projects in the state. Steel magnets like Tatas, Birlas, Larsen and Toubro (L&T), Mittals and Posco have come up with large-scale investment proposals to exploit the rich mineral resource in the state. These proposals, if materialised, would put Orissa at the top of the industrial map of the country. However, there is a price to be paid for these developments. Most of the proposed sites comprise of tribal habitations in the Scheduled Areas.

Endowed with nature's bounty, Orissa has some of the richest reserves of bauxite and iron ore in the world. The southern districts of Koraput and Kalahandi have vast deposits of bauxite, while the northern districts of Keonjhar and Sundergarh are dotted with iron ore mines. These four districts also have largest concentration of tribal population in the state. Their economy being primarily agricultural, majority of the workforce is composed of cultivators and agricultural workers. They have very little scope of getting gainful employment in these industries which would evict them from their homeland. Thus, while the state would benefit immensely from these investments, the affected tribal population would be deprived of their livelihoods.

Whether under the threat of evacuation due to mining operations, industrialization, or lack of access to livelihood, examples galore wherein about 1500 tribal villages in the resource-rich but otherwise poor regions in Orissa have declared themselves as 'village republics,' taking control over their natural resources.³⁰ May it be for controlling forest or carrying out mining operations by the state or private companies, these 'village republics' have come into existence often as a reaction to or response against specific state policies. Residents in these villages control their natural resources -forest, land, minerals and water resources. They also form effective institutions to manage these resources. They plan, execute and resolve all their affairs inside the village. The government officials and programmes are accepted only when the Gram Sabha approves them. In many such villages, the forest department,

³⁰ Richard Mahapatra, N. Verma, Jamwal and K. Ahmed, "The Second Independence: What Makes Villages Declare Themselves Republics?" *Down To Earth*, Vol. 11, No. 7, 2002

police and other officials are restricted merely to executing programmes chalked out in village meetings.³¹

The first major conflict arose in Kashipur village, Rayagada district, in 2000. Located about 60 km away from the district headquarters, Kucheipadar is a relatively big tribal village consisting of *Kondh* tribes and some Scheduled Caste population. With a population of around 340 distributed over 68 families, tribals represent 60 percent of the total population of the village. The Scheduled Castes constitute the rest in the village. There are no other castes in the village. The village has a total area of around 1600 acres of land of which 65 per cent is barren hills and mountains. Trouble started when the Indian Aluminium Company (INDAL) started to construct the boundary of their proposed site. The tribals, supported by local NGOs and some political parties, tried to resist the construction work. When the police intervened in the matter the situation went out of hand and led to violence. The police firing at a public meeting of tribals in Kucheipadar/ Maikanch village near Kashipur on 16 December 2000 killed three tribals and wounded several others. This became a turning point in tribals' fight against the state and the private companies.

Taking the cue from the incident, locals and tribals from other neighbouring industrial sites also agitated against their evacuation. It led to a situation where all the three major alumina (bauxite) projects ie, Aditya Aluminium Project of Birlas, Orissa Aluminium Project of L&T and Utkal Aluminium Project of INDAL, came to a stand still. Although seven years have passed since, the situation has not improved yet and the industrial houses are now looking for other options due to the deadlock.

Similar incidents happened with regard to the Tata's Gopalpur steel project. When the company started to acquire land the local people from that region resisted and blocked the road. This also resulted in a serious law and order problem. The project work received a serious jolt as any further progress became a near impossibility. These developments took place in spite of the best rehabilitation package offered, as claimed by the state government.

The latest incident of trouble for projects in tribal areas occurred in Kalinga Nagar, Jajpur district. The \$10-billion steel plant project by the TATAs together with the world's fifth largest steel-maker from South Korea, Posco Ltd, ran into rough weather following the police firing on local people. The South Korean conglomerate had come up with the proposal to set up largest ever steel plant in the world at Kalinga Nagar. Everything was finalised at the government level. In fact, some people did receive the compensation package. However, the conflict arose when the Posco started to work in that area. On January 2, 2006 about 12 tribals were killed when police opened fire on protesters who opposed the takeover and seizure of their land for the proposed steel plant.

All these developments point out to one reality: Villagers' access to and control over natural resources are getting restricted. Rehabilitation packages of projects may have the best financial compensation in terms of alternate land, house and even jobs to the affected families, yet the issue of livelihoods remains unanswered. The people who are used to live from agriculture and dependent on forests cannot easily accept another occupation due to

³¹ Ibid.

industrialisation. Tribal people live under constant threat of harassment, especially when they try to claim their rights over land and forests which customarily belong to them. The current spate of industrialization in tribal areas based on extraction of natural resources is leading to more and more conflict. All these have compelled the tribals to take control over their natural resources by force, leading to conflict between the government on the one side and the tribals on the other.

CONCLUSIONS AND RECOMMENDATIONS

In the fifteen years since the passage of the 73rd Constitution Amendment, Panchayats have established themselves as a vital constituent of the democratic polity in India. It has transformed the rural political and social set-up much more than ever before. In the process it also transformed India from the least representative democracy to most represented democracy with more than 30 lakh people's representatives. It also made India the most gender balanced and feminized democratic set-up in the world. However, presently the system is in its teens: it is too old to be termed being in its infancy but too young to shoulder true governmental responsibilities as the third-tier of governance.

It may be instructive that on an issue like rights of indigenous and tribal people the international community, be it the United Nations or the ILO, took more than twenty years to arrive at any consensus, whereas in the Indian context the PESA took less than two years to formulate and lesser than two weeks for Parliament to pass the Bill. The Bill was passed by the Rajya Sabha on December 12, 1996 followed by its passage by the Lok Sabha on December 19, 1996. Assent of the President was obtained on December 24, 1996 and PESA became a Constitutional Act. It remained in hibernation until its resurrection by the newly created Ministry of Panchayati Raj in 27th May 2004.

Access to and control over natural resources continues to be the most substantive matter in all issues concerning tribal people. As this is linked to livelihood issues it is fraught with high intensity, extreme posturing and resultant violence. An illustration of this can be found from the fact that the Naxalite extremism-infested area in India superimposes with the tribal belt ranging from Nepal border to the Dandakaranya region, leading up to Nagpur belt in Maharashtra, which coincidentally is the most forested area of the country. Whether it is Nandigram in West Bengal today or Kalinga Nagar in Orissa few months ago or in Muthanga in Kerala few years ago, this has become a recurring feature in Indian polity. In all these cases the rights-based approach takes precedence over developmental models and national interest.

Access to and control over forest and land will be the most problematic topic since it could lead to a very different economic order. It should be recognized that this topic strikes at the legitimacy of the higher order regimes and will be resisted.³² Naxalites are spreading

³² Most of the problems relating to Naxalism, extreme Maoism centre around the issue that the forest living people have full right to their forests not only for the minor and major forest produce but also to the mines and minerals coming under them. At present these resources are usually exploited by the government, which gets royalty or profits from mines and forests without adequately compensating the needs or desires of the tribal people. The argument that central or state government exploits not only the tribals but also their natural bounty to fill the ever-growing demand of their revenue coffers without returning commensurate benefits/services to the tribals. This has given them a feeling that the higher order regimes take away their

their influence across Orissa and there are reports that they have established a 'corridor' through the state with Jharkhand at one end and Andhra Pradesh on the other. According to the year-long study conducted by Richard Mahapatra, as part of his scholarship thesis for the Prem Bhatia Memorial Trust, shows that the tribal alienation, displacement by large projects, and government failure to ensure food security have been the main reasons for the spread of Naxalites' influence in Orissa and other states. As a remedial measure, the state government announced plans to implement a series of programmes to ameliorate the sufferings of the tribal people.

Preservation of cultural traditions and languages is a high priority for many tribal people who are usually a vocal minority in the region. Most governments have been reluctant to allow the use of tribal languages in formal governmental activities. There appears to be movement towards greater acceptance of this demand. The state should take effective measures to protect these and also to ensure that the tribal people can understand the political, legal and administrative proceedings. As the education is the most crucial requirement for the sustained growth of a developing society, tribal teachers should be appointed in the tribal areas.

RECOMMENDATIONS

The functioning of PESA cannot be considered in isolation but within the broader framework of Panchayat Raj System. It would be, therefore, appropriate to suggest recommendations firstly, for Panchayati Raj System which also has a bearing on the implementation of PESA, to be followed by PESA itself.

Legislative Council of Panchayats: The Parliament of India consists of the President and two houses - the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The Council of States is designed to maintain the federal character of the country. Rajya Sabha members are elected by the elected members of the legislative assemblies of states in accordance with the system of proportional representation. This mechanism provides indirect participation of the MLAs, who are at the middle level of governance ie, states, in highest level of governance ie, Parliament. A Similar provision can be introduced whereby members of PRIs enjoy representation at state-level legislature.

Therefore, it is appropriate that every state should set up Legislative Councils of Panchayats, which will have only elected members from Panchayats. This will not only provide an organic link between the Panchayats and the state government but also provide a forum for Panchayat Raj functionaries to have a say in the governance. Such a forum will have due representation from the Scheduled Areas. Although critics may say that this will bring the local issues to the purview of state legislature, that is the only way they can be mainstreamed in the functioning of different tiers of governance.

Devolution of powers and finances: The two biggest challenges before Panchayat Raj System are ensuring the impartiality and credibility of Panchayat elections and increasing funds to meet their functional mandate. Rajiv Gandhi had said that the devolution was not

entitlements with out any legitimacy.

only for expenditure but also for the formulation of programmes, as also for reallocation of funds from one programme to another to determine the objectives. The report, *A State of Panchayats - A mid-term review and appraisal*, released by Prime Minister Manmohan Singh on November 20, 2007, brings out the fact that incomplete devolution of funds is perhaps the greatest challenge to the effective functioning of Panchayats. One of the most important lessons learnt from past experience is that, instead of gradually building up capacity and laboriously undertaking academic exercises in training Panchayat members, it is better to entrust serious and substantial powers to Panchayats immediately and rely on hands-on experience in administrative work to train Panchayat members in their duties.

A study on the local governance in developing countries by the World Bank underlines following three key indicators to assess the financial health of the local governments. They are:

- Local government expenditure as percentage of National Gross Domestic Product;
- Local government's share as percentage of total Public Expenditure, and;
- Share of local government revenue as percentage of total local revenue.

The table below shows the figures of these three indicators in the developing countries. As can be seen from the table the Panchayati Raj Institutions in India have a share of less than one percent GDP as against the average of 5.8 percent in the developing countries and 7 to 9 percent in Brazil and China. Similarly, the share of PRIs is a meagre 3 percent out of the total public expenditure in the country, whereas in China and Brazil it is 51 percent and 20 percent respectively. Even the share of PRIs' revenue from their own areas is a pitiable 30-40 percent. There is vast scope for improvement in devolution of finances to Panchayats.

KEY FISCAL INDICATORS OF LOCAL GOVERNMENTS				
Country	Average population size	Local Govt. Expenditure as % of National GDP	Local Govt. share as % of Total Public Expenditure	Share of local Govt. revenue as a% of total local revenue
Argentina	14,972	2.75	12.0	40-50
Brazil	30,099	7.0	20.0	60-70
China	1,07,334	8.5	51.0	60-70
India	3,278	0.75	3.0	30-40
Indonesia	5,915	6.2	24.0	60-70
Kazakhstan	4,331	3.0	22.0	20-30
Poland	18,881	10.0	38.0	70-80
South Africa	2,38,839	6.5	28.0	10-20
Uganda	3,73,321	6.0	26.0	70-80
Average	79,000	5.8	25.0	40-50
Source: <i>Local Governance in Developing Countries</i> (The World Bank: Washington DC, 2006) based on World Development Indicators Online, figures are indicative (approx.)				

Recognising the fact that 75 percent of the people are under the PRIs it would be necessary to set up benchmarks for these key fiscal indicators for an effective local government at grassroots. First is the issue of the share of government revenue to Panchayats. It should be endeavoured to provide at least 50 percent share of local revenue to the Panchayats so as to make them economically viable. Second is the issue of share in public expenditure. There are enough statistics to prove that developmental public works are better executed if Panchayats oversee the work. Therefore, effort should be made to dovetail more and more developmental works through the PRIs. This will also enforce better accountability and responsiveness on the part of PRI functionaries.

JPC for Review of PESA

The PESA benefits have not reached the target population in most states because the operational laws do not exist. No doubt, legally, the Gram Sabha or Panchayat in tribal-dominated areas has been provided with an impressive array of powers such as prior consultation before land acquisition, ownership of minor forest produce, enforcement of prohibition, managing village markets, and managing institution affecting social sectors and controlling local plans. But, operationally, the state governments or their organs in the administration carry out these functions. The inadequacy in legislative drafting, reflecting an absence of a holistic legal vision for the village, has created an overcrowded regime of paper laws for Panchayats. Unless the laws are implemented in true letter and spirit they would remain ineffective.

A decade after the 73rd and 74th Constitutional Amendments came into force, the Parliamentary Review Committee on Local Self-governance was constituted to review their impact and progress. The Committee, chaired by Chandrakant Khare, comprising of 30 members from the Lok Sabha and 13 members from the Rajya Sabha, reviewed the system and made certain remarks on violation of the Constitution with respect to devolution of rights to Panchayats.³³ Even after fifteen years, some fundamental issues pertaining to the PRIs and also PESA have yet to be resolved. There is a need, therefore, for a Joint Parliamentary Committee to review the implementation of PESA and suggest measures for effective local governance in the Scheduled Areas.

Central Laws be Made PESA Compatible

Section 4 of the PESA Act provides that the legislature of a state cannot make any law, which is inconsistent with the customary laws, social and religious practices of tribal people. However, there exist several central laws such as Land Alienation Act, Indian Forest Act, Central Excise Act, Mining Act, etc., which impinge on the customary laws, social and religious practices of the tribals but continue to be in operation. If the intention of the government is to provide true autonomy to tribals in managing their own affairs then it is necessary that section 4 of PESA should also include 'central acts.' In para 5 of the Fifth Schedule to the Constitution, the Governor has been conferred extraordinary powers to make regulations for the Scheduled Areas. He is even authorized to bar, prospectively or retrospectively, in full or in part, the application of any law in a Scheduled

Area or to modify laws made by Parliament or a state legislature in its application to a Scheduled Area. The governors of the nine Scheduled Area states should exercise their power to debar applicability of all central laws to Scheduled Areas until the acts are ratified by the Tribal Advisory Council with suitable amendments.

Governor's Report in Public Domain

In Part A of the Fifth Schedule, Para 3 refers to two important provisions: first, a report is to be made by the Governor to the President, annually, or whenever required by the President, regarding the administration of Scheduled Areas in the state, and; the second provision is the executive power of the Union to give directions to the state regarding the administration of the Scheduled Areas. Over the years, the Governor's report has unfortunately become a routine document and highlights only the achievements of the state government in tribal development. In-depth analysis of the problems of Scheduled Areas is generally not included in the reports. However, the reports are rarely reported/received. Even in cases when they are received they remain in the labyrinths of the government. The Governor's report needs to be made into a significant document, reflecting the state of affairs in the Scheduled Areas in social, economic, political and cultural matters. It will be appropriate to insist on getting a regular report from the governors with respect to the administration of the Scheduled Areas as provided in the Fifth Schedule and place/table them in Parliament for discussion.

³³ Social Watch India, "Making Democracy Work, Deficits of Democracy and Governance," URL: <http://www.socialwatchindia.com/pdf/socialwatchindia2004.pdf>.

Panchayat Disputes Settlement Commission

There is considerable ambiguity about the role the Panchayats have to play in the overall governance system in the Scheduled Areas. The states have half-heartedly enacted laws supposedly in consonance with the PESA Act and created rural-level institutions which have, broadly speaking, been superimposed on the existing administrative hierarchy at the district level with the elected Panchayati Raj Institutions being given symbolic attention and some sprinkling of minor roles in rural development schemes. The enforcement of the general laws in the tribal areas has virtually eclipsed the customary rights of tribals. While the Panchayat Acts for the Scheduled Areas acknowledge the competence of tribal communities to manage the resources, the application of laws such as the Land Acquisition Act, Forest Conservation Act, Wildlife Protection Act etc. is going against the interests of tribals. This has made it difficult for the Gram Sabhas or Panchayats to operate in an independent and autonomous manner, creating conflicting situations in many cases. There is no forum to seek compliance to the provisions of PESA except through the existing usual judicial review of administrative action. It is, therefore, imperative that an ombudsman like Panchayat Disputes Settlement Commission with the powers of a high court should be established in each of the nine states to deal with the violation of the provisions of the PESA Act.

The PESA Act is meant to enable tribal society to assume control over their own destiny to preserve and conserve their traditional rights over natural resources. The Act requires the state governments to change their existing laws, wherever these are inconsistent with the central legislation. In reality, however, during the decade since PESA came into force, very little has happened. Many state governments have passed laws or amended existing ones, but not fully in conformity with the central law. The implementation of the law has been severely hampered by the reluctance of most states to make laws and rules that conform to the spirit of the law. The non-empowerment of tribal communities remains one of the most critical factors responsible for the less than desired outcomes in all the interventions, monetary or otherwise, meant for their development.

PESA is the only PRI law that provides for three roles to be performed by a Gram Sabha. One is the identification of beneficiaries. The second role is the approval of all plans, programmes or projects prepared by the Panchayat. The third and the most important of all is that only the Gram Sabha can authorize the issue of a utilization certificate. PESA is the single most important instrument in our armoury for dealing with the economic and emotional alienation of the tribal people, which lies at the root of the growing menace of Naxalism. Its effective implementation would generate a deep sense of effective participation among tribal people in the conduct of their own affairs.

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