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PESA Act and its Implementation in Tribal Areas: A Case Study of Odisha

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Abstract

Panchayat is an elected village council in India. The 73rd amendment brought a huge reformation in Panchayati raj system but these reformations were not for schedule areas. Primitive, geographically isolated, shy, socially, educationally and economically backward are the main traits that distinguish Scheduled Tribes of our country from other communities. Adivasis in India, numbering 104.3 million people belonging to various tribes (705) as per 2011 census, constitute about nine per cent of the total population of India. These communities in general and those who are living in hinterland States in particular, are one of the most vulnerable, marginalised and isolated or excluded social groups in the development process. There are over 500 tribes with many overlapping communities in more than one State as notified under article 342 of the Constitution of India, spread over different States and Union Territories of the country, the largest number of tribal communities being in the State of Odisha. To protect and manage the resources and livelihoods of tribals were extended to the tribal areas in 1996 through an Act of Parliament - the Panchayats (Extension to the Scheduled Areas) Act, 1996 popularly known as PESA. This article is an attempt to analyse the impact of PESA on tribal's life in Odisha.

Keywords: Panchayati raj, PESA Act, Scheduled Areas, Tribal Sub-Plan areas, Gram Sabha, Tribes Advisory Council

Introduction:

Panchayat is an elected village council in India. The word panchayat means "assembly" (ayat) of five" Panch" and raj means "rule". Traditionally these assemblies settled disputes between individuals and between villages. But now to improve the quality of governance of these Panchayati raj institutions (PRIs) has initiated different welfare measures. In recent past, the Indian Government has revived the local self-governance with more powers and financial resources devolved on Panchayati raj institutions in order to make them more people-centric and effective instruments of governance at people's door steps. The 73rd amendment brought a huge reformation in Panchayati raj system but these reformations were not for schedule areas. Primitive, geographically isolated, shy, socially, educationally and economically backward are the main traits that distinguish Scheduled Tribes of our country from other communities. Tribal communities live in about 15% of the country's areas in various ecological and geo-climatic conditions ranging from plains to forests, hills and inaccessible areas. (Jain: 1996)

Adivasis in India, numbering 104.3 million people belonging to various tribes (705) as per 2011 census, constitute about nine per cent of the total population of India. These communities in general and those who are living in hinterland States in particular, are one of the most vulnerable, marginalised and isolated or excluded social groups in the development process. Despite impressive economic growth in recent years and specific measures taken for tribal development since independence, these communities are still lagging behind in terms of several socio-economic indicators. There is a concern over how to protect the current sources of livelihood and promote economic and human development of these communities through vibrant and pro-poor institutions.

There are over 500 tribes with many overlapping communities in more than one State as notified under article 342 of the Constitution of India, spread over different States and Union Territories of the country, the largest number of tribal communities being in the State of Odisha. The main concentration of tribal population is in central India and in the North-eastern states. To protect and manage the resources and livelihoods of tribals were extended to the tribal areas in 1996 through an Act of Parliament - the Panchayats (Extension to the Scheduled Areas) Act, 1996 popularly known as PESA.

Panchayati raj System in India:

A few days before death Gandhiji wrote in Young India "True democracy cannot be worked out by twenty persons at the centre. It shall be worked out only by the villagers." Again in Harijan he wrote: "Independence must begin at the bottom when Panchayati Raj established public opinion will do what violence can never do" (Bajpai & Verma: 1995).

To fulfill Gandhi's, dream Our Constitution makers added Article-40 in our constitution which directs to form village Panchayat as the unit of self-governance. After independence, as a development initiative, India had implemented the Community Development Programmes (CDP) on the eve of Gandhi Jayanti, the 2nd October, 1952. In 1953, the National Extension Service was also introduced as a prologue to CDP. In 1958 to make Community Development Programme a reality Balwant Rai Mehta Committee recommended to introduce 3-tier Panchayati Raj in the entire country with the objective of removing illiteracy, poverty and diseases. (Das: 1996) It was however amended in 1962, 1965 and 1968. As a result of this scheme of democratic decentralization was launched in Rajasthan on October 2, 1959.

To bring new thinking in the concepts and practice of the Panchayat Raj, Ashok Mehta Committee was appointed in 1977. The committee recommended a two-tier Panchayat Raj institutional structure consisting of Zilla Parishad and Mandal Panchayat. In subsequent years in order to revive and give a new lease of life to the panchayats, the Government of India had appointed various committees. The most important among them are the Hanumanth Rao Committee (1983), G.V.K. Rao Committee (1985), L.M. Singhvi Committee (1986) Sarkaria Commission on Centre-State relations (1988), P.K. Thungan Committee (1989) and Harlal Singh Kharra Committee (1990).

Rajiv Gandhi the then Prime Minister of India introduced the 64th Amendment bill on local government on the 15th May, 1989 in the Parliament, but it failed to get the required support. A second attempt was made in September 1990 to pass the bill in the Parliament. The bill however was not even taken up for consideration. In September 1991, a fresh bill on Panchayati Raj was introduced by the Congress government under P. V Narasimha Rao, the then Prime Minister. It was passed in 1992 as the 73rd Amendment Act 1992 with minor modifications and came into force on 24th April 1993. (Jain: 1995)

To provide self-rule for tribals, a bill was introduced in Parliament in December 1996 based on the recommendations of the Bhuria Committee after a thorough examination of the tribal scenario in the country. The Bill was passed by the Parliament and became an Act after the President's assent on 24th December 1996. The Act is known as the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996. This law enacted by the Government of India for ensuring self-governance through traditional Gram Sabhas for people living in the Scheduled Areas of India. Scheduled Areas are areas identified by the Fifth Schedule of the Constitution of India. Scheduled Areas are found in ten states of India which have predominant population of tribal communities. The Scheduled Areas were not covered by the 73rd Constitutional Amendment or Panchayati Raj Act of the Indian Constitution as provided in the Part IX of the Constitution. PESA was enacted on 24 December 1996 to extend the provisions of Part IX of the Constitution to Scheduled Areas, with certain exceptions and modifications. PESA sought to enable the Panchayats at appropriate levels and Gram Sabhas to implement a system of self-governance with respect to a number of issues such as customary resources, minor forest produce, minor minerals, minor water bodies, selection of beneficiaries, sanction of projects, and control over local institutions. PESA is an Act to provide for the extension of the provisions of Part IX of the Constitution relating to the Panchayats and the Scheduled Areas.

Panchayati raj in Odisha: An Overview:

Odisha became a separate province in 1936. It is one of the few States in the post-independent period to take up the Panchayati raj as its main hinge of rural administration. The significant step in the decentralization process came after independence in 1948 when the Gram Panchayat Act was enacted. During the Chief Minister ship of Naba Krushna Choudhury, a further attempt was made through constitution of Anchal Sasan and creation of Anchal Fund under the Orissa Estate Abolition Act of 1951.

The Anchal Sasan Act (1955) was intended to accord full power to Anchal, a local authority which was at the higher level than the Gram Panchayat. It was designed to be a body corporate having fund rising out of land revenue, fees, tolls, cesses and taxes. Besides, Education Fund was made to finance educational programmes of the Sasan. The officers of the institution were to be paid out of the Anchal fund. But, the Anchal Sasan Act was not implemented which prevented Odisha pioneering role in the democratic decentralization process much earlier to the Balwant Rai Mehta Committee Report. The fate of Gram Panchayat during 1950s and early 1960s was under the mercy of several departments like Board of Revenue Department, Department of Agriculture and Community Development and then moved to the Political and Services Department.

In December 1959, it was placed under the Department of Planning and Coordination with a Secretary to head the Department. The B. R. Mehta recommendations were given effect in the year 1961 and the three-tier system of PRIs was introduced in Odisha. Both Panchayat Samiti and Zilla Parishad Acts were enacted. In July 1962, a new Department of Community Development and Panchayati raj was created. The Panchayats, Samiti, Parishads and former District Broads came under its purview. Thus, the three-tier Panchayati raj system was introduced in Odisha which took few years to get established.

By 1990 the attempts had been made at the national level to form a grass-root body so that planning can operate from below. Ultimately 73rd Amendment Act has a deep impact on the Panchayati raj system of Odisha. Biju Patnaik, the then Chief Minister acted ahead of the Central Government's initiative in the matter of Panchayati raj system. Many years ago, when he was the Chief Minister of Odisha, he could create a pro-active government for democratic decentralization. He had also introduced the concept of Panchayat industry and award to Samiti for visible industrial development. His short tenure prevented Panchayat System to get his dynamic vision and wisdom being translated into action. He reserved 33% of seats for women in local bodies.

In the year 1991, three landmark legislations were enacted to facilitate devolution of power to the PR bodies to bring about rural development through people's participation and co-operation. The elections for PR bodies were held in 1992. A new social, revolution in rural Odisha ushered and one-third seats were reserved for women in all the tiers of PR bodies. The state Legislature unanimously gave its nod to the Orissa Panchayat Laws (Amendment) Bill, 2011 by amending the Orissa Gram Panchayat Act, 1964, Orissa Panchayat Samiti Act and the Orissa Zilla Parishad Act enhancing the quota for women from the existing 33% to 50%.

As per the provision of PESA Act State governments were required to amend their respective Panchayat Raj Acts within a year and not to make any law that would be inconsistent with the mandate of it. The State of Odisha amended its Panchayati Raj Legislations in 1997 to incorporate the provisions of PESA within the Orissa Gram Panchayat Act, 1964, Orissa Panchayat Samiti Act, 1959 and Orissa Zilla Parishad Act, 1991, which largely constitutes the Panchayati Raj framework of the State. However, the manner in which PESA provisions have been incorporated in Panchayati Raj framework in Orissa, have been at variance with the letter and spirit of PESA. Finally, since the focus nationally is on reviewing the existing approaches to natural resource management in Scheduled Areas and to create an ideal framework for forest and Scheduled Area governance and also various key legislations on forest tribal interface such as new the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, have been enacted, therefore, the PESA framework in Odisha also needs to be updated in the light of national and global developments.

Tribal Population of Odisha- A Sketch:

The term Scheduled Areas has not been logically defined in the Indian Constitution. It has rather been defined as such areas as the President may by order declare to be Scheduled Areas under the Central Act. Though the Constitution has not spelt out the criteria to be followed for declaring an Area as a Scheduled Area, however, as a matter of established practice, these are preponderance of tribal population, compactness and reasonable size of the area, underdeveloped nature of the area, and marked disparity in economic standards of the people. They embody, broadly the principles followed in declaring 'Excluded' and partially Excluded Areas under the Government of India Act, 1935 and spelt out in the Report of the Scheduled Areas and Scheduled Tribes Commission, 1961. The Tribal Sub-Plan areas (Integrated Tribal Development Projects/Integrated Tribal Development Agency areas only) are usually coterminous with Scheduled V Areas in the 9 states with few exceptions.

The Indian Constitution mandates to protect the identity and rights of the Scheduled Tribes through several of its provisions as contained in Articles 15, 16, 19(5), 23, 29, 46, 164, 343(M), 243(ZC), 244, 275, 330, 332, 334, 335, 338-A, 339, 342 and 366(25) besides the Fifth Schedule and Sixth Schedule appended to the Constitution. PESA synthesizes in itself the spirit and mandates of two important Constitutional provisions, i.e. articles 243 and 244. (Singh:1996)

Odisha is bounded in the west by the thickly forested hills of the Eastern Ghats. In the East it is bounded by nearly 500 km coastline of the Bay of Bengal. It is surrounded by Jharkhand state on the North, West Bengal on the Northeast, Andhra Pradesh on the South and Chhattisgarh on the West. Odisha is one of the resource-based states of India owing to its fertile land and rich mineral sources viz. coal, iron and bauxite. It covers an area of 1.55.707 sq. km. with 4,19,74, 218 crore population as per 2011 census. The Scheduled Tribes (ST) population of the state is 9590756. The ST population constitutes 22.85% of the total population of the state.

Odisha occupies a distinct place among the Indian states and union Territories for having a rich and colourful tribal dispensation. Majority of Scheduled Tribes live in hilly and forest regions. Their economy is largely subsistence oriented, non-stratified and non-specialized. Their social system is simple but their aspirations and needs are many. Even though the Scheduled Tribes have suffered from social, educational and economic backwardness due to geo-historical reasons, they have retained their distinctness and socio-cultural milieu. Their ethos, ideology, worldview, value orientations and cultural heritage are rich and varied. They are nomadic food gatherers as well as hunters, skilled settled agriculturists, horticulturists, forests and pastoral dwellers. Therefore, they represent a variety of socio-economic panorama of life.

Almost 44.21 % of the total land area covering 118 out of 314 blocks in 12 out of 30 districts in Odisha has been declared as Scheduled Area. Except the coastal belt, many of the districts of the State have been declared as either partially or fully scheduled area. The present scheduled area of the state covers six districts wholly and seven districts partially. The districts of Mayurbhanj, Koraput, Nawa rangpur, Malkangiri and Rayagada are wholly Scheduled areas. Out of 314 Community Development Blocks in Odisha, 118 (37.3%) blocks are preponderantly occupied by the tribal communities, which are covered under Tribal Sub-Plan (TSP). The districts predominantly inhabited by tribal communities are Malkangiri (58.51%), Sundargarh (50.74%), Koraput (50.67%), whereas, the districts with a sizeable tribal population are Keonjhar (44.62%), Gajapati (47.88%), Jharsuguda (33.88%), Nuapada (35.95%), and

Deogarh (33.31%). Thus the tribal population of Odisha constitutes 22.85 % of the total State population.

The major tribes of Odisha in terms of their numerical strength, to name a few, are Kondhs, Gonds, Santals, Saoras, Bhuiyans, Parajas, Koyas, Oraons, Gadabas, Juangas and Mundas. Apart from these, there are also a good number of smaller tribal communities living in Odisha. The Chenchus, the smallest tribal community, are representing only 39 persons. There are 15 tribal groups distributed in Odisha, each covering more than one-lakh persons. When tribal communities like Santals, Gonds, Mundas, Hoes, Birhors, Koyas, Lodhas, Kondhas, Bhumijas, Kharias and Oraons cut across the state boundaries and are found in the neighboring States of Bihar, Chhatishgarh, Andhra Pradesh and West Bengal, the tribal communities like Juangas, Bondas and Didayees are found to be confined to the regions of their origin in the districts of Keonjhar and Malkangiri.(Mishra: 1996)

PESA: Beginning of New Era:

The 73rd Constitutional Amendment Act ushered in a national framework of decentralisation and local self-government through a three-tier Panchayati Raj (PR) system. While all the provisions in the 73rd amendment were not applicable to the Scheduled Areas, the provisions that suited customs or traditions of tribals and recognised their right to protect and manage their resources and livelihoods were extended to these areas in 1996 through an Act of Parliament - the Panchayats (Extension to the Scheduled Areas) Act, 1996 popularly known as PESA. It is applicable to Fifth Schedule Areas comprising 10 States, namely, Andhra Pradesh, Maharashtra, Madhya Pradesh, Gujarat, Rajasthan, Himachal Pradesh, Jharkhand, Chhattisgarh, Odisha and Telangana.

A decade later, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, became operational since 1st January, 2008**.** FRA provides substantive rights on forest land to forest dwelling scheduled tribes and other traditional forest dwellers and created an institutional mechanism for recognition of rights and the power to protect, preserve, conserve and manage community forest resources.

PESA and FRA are considered to be paradigm shifts that can impact the tribal communities favourably by ensuring access to resources and rights which facilitate self-governance.

Basic Characteristic of PESA:

PESA is the first law that empowered traditional communities to redefine the administrative boundaries of their own village. From the recognition of the principle of a community‘s collective right to self-determination which is the hallmark of PESA flows other unique features that distinguish this seminal legislation. Irrespective of the mainstream laws of the land, PESA has declared Grama Sabha to be the only competent authority to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution. Gram Sabha, the village assembly, but not the Grama Panchayat the executive arm of the Grama, is empowered to approve all development plans and also identify the beneficiaries of each programme. Further, it is Grama Sabha which is the authority to issue certificate of utilization for any money spent by any Panchayat in the village.

The concerned State legislatures while endowing the Panchayats in Scheduled Areas with powers to function as institutions of self-government, are to ensure that Grama Sabha along with Panchayats at appropriate level are entrusted with a regulatory authority in respect of regulating intoxicants, ownership of minor forest produce, prevention of alienation of tribal land and restoration of the alienated land, management of village markets, control over money-lending to the STs and control over the institutions and functionaries in all social sectors (Section 4-m).

The State legislatures are to endow the District Panchayats in Scheduled Areas with all-round powers and authority including the power to enact laws following the pattern of Autonomous District Councils in Tribal Areas under Sixth Schedule of the Constitution (Section 4-o).

Apprehensive about the untoward tendency of the Panchayats at higher level to grab and usurp the powers and functions of the Panchayats at lower level, the Act preemptively mandates the State legislatures to put in place necessary safeguards to ensure that no Panchayat at higher level encroaches on the powers and authority of Grama Sabha (Section 4- n).

To ensure that the Panchayat Bodies including Grama Panchayat in Scheduled Areas retain their overall tribal character, the Act mandates the reservation of seats for STs in every such body never to fall below 50 percent of the total number of seats and the posts of Chairperson of each Panchayat in a Scheduled Area to be reserved only for STs. Moreover, the State Government may nominate persons belonging to such tribes as have no representation in a Panchayat body at intermediate or district level, provided that such nomination shall not exceed one-tenth of the total members of that body (Section 4-i).

Above all, unlike so many instruments of law and policy, PESA issues a clear time-bound directive to all legislative and other authorities of the country, both Central and State level to ensure within a year of its enactment conformity to its letter and spirit by way of revisiting and amending each and every existing piece of law bearing on Panchayats.

Thus, PESA is a time-bound writ issued by the federal legislature to all legislatures and authorities of Union and States across the country to fall in line with its multifarious provisions on Panchayats within one year of its enactment i.e. by 24th Dec 1997.

Impact of PESA Act in Panchayati raj System of Odisha:

The Provisions of Panchayat (Extension to Scheduled Areas) Act 1996, otherwise known as PESA Act or simply PESA, is a concise and relatively unconventional legal framework, and is one of the few political legislations of India that have potential for the development of specific areas and uplift of specific categories of people. It applies to a geo-political regime specified for tribal-dominated areas, but excluding the north-eastern tribal districts of the country. Such areas are known as Scheduled V Areas or simply Scheduled Areas, and PESA recognizes various socio-cultural and political rights of the tribal communities living in these areas.

The Panchayat (Extension to Scheduled Areas) Act, 1996 has prepared the legal framework to make the Gram Sabha more or less a palpable statutory body to usher in the new era of direct democracy at grassroots level. The Act is meant to enable tribal society to assume control over their own destiny and to preserve and conserve their traditional rights over natural resources. The Panchayats have been made accountable to Gram Sabha for their every action and deed. The Act has made it virtually mandatory for Panchayats to execute their socio-economic development responsibilities transparently and ensure a corruption free development process.

In Odisha, Gram Sabhas are reportedly not working properly at many places. In some areas, meetings are held once or twice a year. Sarpanches are not convening meetings of Gram Sabha due to inefficiency and grid. The subjects of discussion in the Gram Sabha are mostly kept confined to specific issues of development of villages or the hamlets. It was observed that the proceedings of the Gram Sabha are mostly confined to individual-oriented schemes like distribution of Indira Abas, Old age pension, etc. But due to political considerations, Gram Sabhas are not performing for the larger benefit of the people in the villages and the community as a whole. (Palanithurai:1996). Planning, budget preparation and expenditure are not being done according to priority in the Gram Sabha meetings. Distribution of funds, beneficiary selection and formation

of village works committee are considered mostly on political considerations, which create confusion and chaos in Panchayats. The cause of non-attendance may be attributed to several factors namely

(i) most of them have no idea about the Gram Sabha,

(ii) they engage themselves in economic activities and

(iii) lack of information and awareness.

The PESA Act was made to address all the above problems. This act is intended to act as a protective guard of the tribal's interest. It deals with all round development of tribals. This act has a tremendous effect on the life of tribals which can be analysed in the following ways.

1. Money Lending:

Despite the existence of legal and protective measures to curb money lending in Scheduled Areas and provisions for debt-relief, enforcement has been weak and ineffective. The non-recognition of consumption needs of tribals and the non-availability of institutional consumption credit drives the tribal people to fall an easy victim to moneylenders, and the enormous rates of interest keep the tribals in perpetual debt, resulting in mortgage and ultimate loss of land and property. Section 4(M) (iii) of PESA Act envisages that the Panchayat at the appropriate level and the Gram Sabha will be specifically endowed with the power to exercise control over Money-Lending to the Scheduled Tribes. It may be mentioned that the term "Money lending" is generic and has been used here in that sense without limiting its scope to certain specific items or types of money lending. It, therefore, would cover all transactions concerning lending of money to the tribal people, private or institutional including loans and advances by cooperatives and government.

The SC & ST development department of government of Odisha has already taken steps for amendment of the "Orissa (Scheduled Areas) Moneylenders' Regulation, 1967" to empower the GPs for exercising control over money lending in Scheduled Areas. As per amended Regulation, "Orissa (Scheduled Areas) Money-Lenders (Amendment) Regulation" 2000, no moneylender shall advance loan to a scheduled tribe except on the prior recommendation therefore of the concerned Gram Panchayat accorded with the concurrence of the Grama Sasan.

2. Regulation on Consumption of Intoxicants:

The most insidious intrusion in the tribal system has been through liquor, i.e. exotic control over manufacture, sale and consumption of intoxicants of all descriptions. It is a very important area of the socio-economic life of a people, whether tribal or non-tribals in which the community alone plays an important and decisive role with no outside interference. Section 4 (M)(i) of PESA Act unequivocally envisages endowment of power on the Panchayats at appropriate level and the Gram Sabha "to enforce prohibition, or to regulate or restrict the sale and consumption of any intoxicant". The central Act (PESA) of 1996 mandates the state governments to bring conformity legislations in the existing states laws to empower PRIs particularly the Gram Sabha/Gram Panchayat to exercise control over enforcement, regulation or restriction on manufacture, sale or consumption of any intoxicants.

Revenue and Excise Department of Government of Orissa vide notification no 22977/r dt.22.04.1999 have amended the Bihar & Orissa Excise Act 1915 which provides that no such license or exclusive privilege shall be granted except with the prior approval of the concerned Gram Panchayat with the concurrence of the Gram Sasan. The GP is to give permission within

30 days. If the Gram Panchayat fails to communicate its decision within the period of 30 days, it shall be deemed that the concerned Gram Panchayat has accorded the required approval. (Mathew George: 2000),

3. Minor Forest Produce (MFP):

Forest and minor forest produce play a vital role in the day-to-day livelihood requirement of tribals. Section 4(m) (iii) o9f PESA Act envisages that "State Legislature shall ensure that Panchayat at the appropriate level and the Gram Sabha are endowed specifically with the ownership of minor forest produce". If we make an analysis the identified Scheduled Areas it is clearly portrayed the existence of vital relationship between the forests and the traditional livelihood systems of tribal inhabitants of forests for the past several centuries They enjoyed free access to forests for collecting food materials and honey besides hunting of animals and fishing in streams and common water bodies, collecting fuel woods for cooking, warmth and lighting and agricultural tools, house building materials, materials for rope making, medicinal herbs and roots and grazing land for their animals and varieties of minor forest produces for consumption and sale.

After the enactment of PESA, the state amended the Orissa Gram Panchayat Act, 1964, Orissa Panchayat Samiti Act, 1959 and Orissa Zilla Parishad Act of 1991 in Dec 1997. Rules have been framed thereafter to enable the Gram Panchayat to own control and manage Minor Forest Produce (MFP) in March 2000 and Nov.2002. This is called the "Orissa Gram Panchayat Minor Forest Produce Administration" Rules 2002. But the mainframe of forest Act of the state i.e. Orissa Forest Act of 1972 has not yet been amended to enable the Gram Panchayat to own control and manage MFP. The transit rules have been modified to lift the restrictions on the movement of MFP and handed over to Gram Panchayat. (Otta, Patnaik & Gamango: 2010)

In March 2000, (resolution no–5503/F and E 31.03.2000) the Forest Department brought out an executive order named as NTFP policy which classified the forest produce into NTFP, MFP, lease bar items, tree-borne oilseeds etc. This policy handed over 60 items to Gram Panchayat for ownership, control and management. Then the Panchayati Raj Department came up with detailed guidelines for registration of traders and management of MFP by the Gram Panchayat, role of Forest officials, TDCC and OFDC. Thereafter the forest department again brought resolution in August 2000 to handover 7 more MFP to the Gram Panchayat. Subsequently one more MFP item has been handed over to Gram Panchayats. In all 68 forests produce items have been notified for transfer to Gram Panchayats from time to time.

4. Control over minerals resources:

The state authority over mineral resources is its exclusive domain hitherto enjoyed. Mines and mineral development are the concerns of both the Union and the concern state. The major minerals are under the exclusive control of the union government whereas the states can manage minor minerals. In the PESA Act the power of the state government now stands constrained. Sub-section (k) of section-4 envisages that the recommendation of the Gram Sabha or the Panchayat at the appropriate level shall be made mandatory prior to grant of prospective license or mining lease for minor minerals in the scheduled areas.

Further under sub-section (k) the prior recommendation of Gram Sabha or the Panchayat at the appropriate level shall be made mandatory for grant of concessions for the exploitation of minor minerals by auction. In Odisha, the Orissa Minor Mineral Concession Rules, 2004 was enacted and notified on 31st August 2004. Under the rule, (Rule-4) (5), no prospecting license or mining/quarry/lease or its renewal or auction shall be granted in scheduled areas without recommendation of the concerned Gram Panchayat. (Otta, Patnaik & Gamango: 2010)

5. Acquisition/Alienation of Land:

Land is the most important source of tribal livelihood for agriculture (both for settled and shifting cultivation), horticulture, forestry and animal husbandry in mixed farming systems. As land is a state subject, various states have enacted laws to prevent alienation of tribal land. Alienation of tribal land is the most important cause of pauperization of tribals, which renders their vulnerable economic situation more precarious. Even the greater concern is the fact that lands lost are usually the most productive, and those spared for the tribals to cultivate are of poor quality lands extremely vulnerable to the vagaries of weather and rainfall conditions. The total effect of land transfers has been devastating to the fragile tribal economy. The massive inward migration of non tribals has also changed the ownership of land in the Scheduled Areas to the disadvantage of STs.

Under the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation 1956, transfer of lands belonging to tribals was permissible with prior approval of competent authority. Due to various reasons this law could not fully protect the interest of tribals in Scheduled Areas. Under the PESA Act, the state governments are required to protect the interest of tribals in regard to alienation and restoration of tribal lands. In pursuance of the constitutional mandate, the state Government of Odisha has brought out changes in the existing land regulations for tribal areas.

The Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation 1956 has been amended to read as “The Orissa Scheduled Areas Transfer of Immovable Property” (By Scheduled Tribes).

Amendment Regulation, 2000 named as Orissa Regulation 1 of 2000 effective from 4th September, 2002. This amended regulation has brought in the following changes;

(i) Any transfer of immovable property by a member of scheduled tribe shall be absolutely null and void and have no force or effect.

(ii) However, property of a scheduled tribe can be mortgaged in favor of any financial institution for securing loan for any agriculture purpose.

(iii) A member of a scheduled tribe shall not transfer any land if the total extent of land after transfer, will be reduced to less than two acres of irrigated land or five acres of un-irrigated land.

(iv)Where it is decided by competent authority to settle property with any person other than a person belonging to scheduled tribes, he shall obtain prior approval of the concerned Gram Panchayat.

(v) Transfer of agriculture land of Scheduled Tribe by fraud shall now be restored back by competent authority.

6. Management of Village Markets:

Market is the nerve center of the socio-economic life of the tribal people. Section 4(M) (iii) envisages that the Panchayats at appropriate level and the Gram Sabha will be endowed with the power to manage markets by whatever names called. The management of village markets is an important task assigned to the Panchayati Raj Institutions under the PESA. However it is found that it's functioning is not effective due to lack of knowledge among the elected representatives in scheduled areas.

7. Management of water bodies:

Management of water sources has been a vital area of natural resource management in the present day situations. Competing claims are forthcoming for water sources from sectors like agriculture, industry, urban centers etc. It is an irony that even though tribal areas are source of all major river systems, their own needs and requirement for water is nowhere in the picture of distribution and management of water and water bodies. The provision in section 4 of PESA Act envisages that "Planning and management of minor water bodies in the scheduled areas shall be entrusted to Panchayat at the appropriate level".

In Odisha, the state government has, by amendment in 1997 entrusted the work of planning of management of minor water bodies to the Zilla Parishad. In absence of any clear declaration with regard to the definition of minor water bodies in the Panchayat /Irrigation laws, the aforesaid notification specifies that water bodies up to 40 acres of area will be treated as minor water bodies. But in reality, it is noticed most of the local tribals did not know that management of such water bodies is the responsibility of Zilla Parishads.

Shortcomings of PESA:

The provisions in the PESA Act make a break from the impasse in which the formal system refused to recognize even the vibrant tribal community, which has been managing its affairs in accordance with its traditions through the ages. The new Act not only formally recognises the community, which is designated as Gram Sabha but treats the same as the pivot of the system of self-government in the Scheduled Areas. Some of the structural and implementable gaps that exist in the PESA Act can be broadly summarised as follows:

(1) The provisions of PESA Act 1996 need to be analysed in the light of claims of many activists that it has miserably failed to materialise people centric governance and accountability structures at the grass root level thereby jeopardising the very rationale of 73rd amendment and the Panchayati Raj institutional mechanism.

(2) Section 4(a) of the Act does not take into consideration the presence of multi-culture contents of different tribes even in the same geographical area. In consequence, the words "customary law", "social and religious practices" are general in nature. Since they are not tribe specific, cannot be applied uniformly.

(3) Another vital point of omission in the law in that in the event of a dispute as to whether a particular state legislation is in consonance with customary law or not, there is no specific provision in the law for reference or redressal. Therefore, there is need for a provision in the law for creating viable mechanisms to accommodate diverse claims of multi tribes in the same geographical configuration.

(4) The definition of village as mentioned vide section 4 (b) in Scheduled Areas is placed in a uniform manner probably with a view to expand the scope for assimilation of new categories of people in the village. This is likely to dilute the spirit of the legislation, as it may not claim to be in consonance with the tribal customary laws. Therefore, the definition of village could be redefined based on the ethnic composition of the people in Schedule V Areas. In fact, several communities may be living in one village where it may be difficult to demarcate a village. In that case a revenue village may not be co-terminus with traditional tribal village.

(5) The term community is not properly defined and it may lead to various complications and confusions. Therefore, declaring each hamlet as a Panchayat may not be rational in view of economic viability and other considerations.

(6) The provision under section 4(d) that "every Gram Sabha 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 relevant laws in force and in harmony with the basic tenets of the constitution and human rights”. The Orissa Act is a very restrictive provision and indirectly downsizes the self-governing power of Gram Sabha. (Ghosh & Paramaink: 1999)

(7) PESA, which is applicable only to schedule V Areas and excludes the Sixth Scheduled Areas, needs to be analysed if this law could be extended to areas other than Vth and VIth Scheduled Areas where there is preponderance of tribals. Otherwise, tribals living within this area are likely to be deprived of the benefits of the Act (PESA).

(8) For the development and advancement of the tribals, a Tribes Advisory council (TAC) is set up in every state. Speculations with regard to likely controversy in the working of Panchayati Raj institutions at the local level and the role of TAC are still active. The PESA Act hardly specifies about the linkage between the TAC and Panchayat bodies in the Scheduled Areas.

(9) The term community is clearly defined neither in the PESA Act nor in the state laws. Since there are varieties of customary laws, social and religious practices amongst the various tribes, it may not be possible to have different legislations for each of the tribes. It may not also be possible to have different legislations for each of the tribes in a particular district or the state.

(10) Although PESA is grounded on the principle of participatory democracy as the basic unit of governance, the terms Gram Sabha and Gram Panchayat are being used interchangeably. In fact, Gram Sabha is the core unit of PESA, which stands entirely on a different footing as against the Gram Panchayat. Consequently, most of the state legislations reading the two terms as synonyms have empowered the Panchayat which, for all practical purposes, actually disempowers the Gram Sabha. Therefore, adoption and implementation of PESA Act by states should take cognizance of the ambiguity.

(11) In most of the state laws, Gram Sabha exercises, control mostly over schemes and programmes sanctioned from above. Nothing is allowed to spring from below. Since many of the state governments allege to have not been consulted before PESA Act was enacted, it may be necessary to go for fresh consultations and bring out a single but small legal document after examining various state laws and the inconsistencies existing therein. What is important is to retain the principle of self-determination of the village by the community itself as a participatory democracy and the village as a self-governing village.

(12) It is almost a decade and half since PESA came into force but the obstacles in enforcing its provisions have remained largely un-addressed. States have not come out with clear-cut policies and procedures indicating definite rights of tribals in matters like forest and minor

forest produce. In matters relating to forest resources, states like Maharashtra, Gujarat and Odisha in their effort to perpetuate state control over forest resources have tried to dilute the provisions of PESA. For example, the government of Odisha has circumscribed the provisions of PESA by adding a clause "………consistent with the relevant laws in force" while incorporating the constitutional provision concerning the competence of Gram Sabha to manage community resources and resolve disputes as per the customs and traditions of the people. (Otta, Patnaik & Gamango: 2010)

(13) Implementation of PESA in Orissa has not resulted in any spectacular or specific results in terms of the ideals and objectives envisaged in the Act. The state laws have been amended more as a routine than the real application of the spirit of the Act. The Central Act envisages a strong, powerful and self-reliant Gram Sabha but Odisha law seems to have restricted its functions to as may be prescribed from time to time. The rationale behind PESA Act to empower Gram Sabha to approve and sanction all matters relating to tribal society and their economy needs to be ensured.

Conclusion:

The functioning of Panchayats in the tribal areas has received fresh impetus due to increasing role played by Gram Sabhas and Palli Sabhas in the matters of local decision making, planning and implementation of the development programmes. It is observed that in the case of tribal areas, the Panchayats under the framework of PESA Act has become instrumental in promoting local development plans and implementing socio-economic development programmes. The Palli Sabhas and the Gram Sabhas are emerged as the key institution for fostering peoples' participation in the matters of structural arrangements and functioning of these institutions. Further, in the context of the enactment of the PESA Act, these institutions have been enjoying powers of managing natural resources, controlling land alienation, controlling the selling of intoxicants, controlling money lending and above all planning and implementation of the development programmes. PESA was seen as a panacea for many of the vulnerabilities and sought to introduce a new paradigm of development where the tribal communities in such Scheduled Areas were to decide by themselves the pace and priorities of their development.

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