

Whither PESA?

(A monograph on current discourse on PESA Act 1996 with special reference to its position in Orissa by Chitta Behera, 4A Jubilee Tower, Choudhury Bazar, Cuttack-9, Orissa, Mobile- 9437577546, Email: chittabehera1@yahoo.co.in Dt 24 Feb 2011)

Chapter-1: BACKGROUND

A Peep into history

The Provisions of Panchayat (Extension to Scheduled Areas) Act 1996, popularly known as PESA Act, though brief in size is a highly nuanced and debatable legislation. It consists only of 5 Sections, each deriving its rationale from India's complex history of colonial and post-colonial times. Without undertaking a combined and critical reading of political history, Constitutional evolution, sociology and anthropology of modern India, one is surely to miss the basic truths as to what drove the Parliament of India to enact PESA, why it hibernated for more than a decade and above all, why there is a hyped discourse along with a feverish effort now to reinstate it into its pristine position in India's multi-layered, fractured system of governance, which its authors had envisaged to do at the moment of its enactment.

During the colonial period, the British first made efforts to penetrate into the tribal areas through the policy of territorial conquest with the aim of laying the foundation for a modern State. In response, however, the tribal communities resorted to armed revolts whenever their traditional terrains were encroached. But, as a part of their mercantile colonial expansionist strategy, the British in due course made conciliatory efforts by declaring them as non-regulatory areas and recognized their traditional system of administration. Further, in order to count and classify 'subject' people, the colonial Government undertook a more detailed study of isolated social groups, especially the Tribes. It was the first attempt to gather information about all these isolated Tribes.

The first enactment, which dealt with these areas as a class, was the Scheduled District Act, 1874. The apex executive, under this law, was vested with the power to exclude the Scheduled Areas from the normal operations of ordinary law and give them such protection as they might need. Thereafter Montague-Chelmsford Report (1918), which formed the basis of the Government of India Act 1919 concluded that the political reforms contemplated for the rest of India could not apply to these backward areas as "there was no material on which to establish political institutions".

Since the Scheduled District Act of 1874 was enacted to keep large tracts of tribal areas outside the jurisdiction of normal administration, the executive was endowed with wide powers in respect of these areas. The administrative policy was based on the principle of noninterference into the affairs of the tribes. All the provinces were provided with autonomy to rule the tribal areas under their control, following broad guidelines formulated for this purpose. In accordance with this policy, Agency Rules were formulated in the year 1924 by the Government of Madras Province (G.O. No.1116-Revenue, dated 23-7-1924) subsuming all the existing rules. The Agency Rules provided for the Revenue and Judicial administration of these areas. In the new system of administration, local chiefs of the tribal areas were given recognized position for administrative purposes and thus they acquired linkages with the higher levels of administration.

The policy of having excluded areas was extended further by the Government of India Act, 1919 which divided these areas "based on their backwardness" into two categories: those that were wholly excluded from the scope of reforms as they were considered very backward and those, where a system of modified exclusion was applied. In the former, neither the Central nor the Provincial legislature had the power to make laws. The power of legislation was vested only in the Governor and his executive council. However, these arrangements for total exclusion applied then only to the three backward Areas of Chittagong Hill Tracts in Bengal.

The Simon Commission (1928), whose Report ultimately provided the framework for Govt. of India Act 1935, for the first time talked of providing legislative protection to the tribes living in the excluded and partially excluded areas so as to bring them to the main-stream of national life. The Commission suggested the tribal area to be brought under the direct administration of the elected governments and the provincial Governments to devote special attention for their upliftment. In the words of the Simon Commission, "There were two dangers to which subjection to normal laws would have specially exposed these peoples, and both arose out of the fact that they were primitive people, simple, unsophisticated and frequently improvident. There was a risk of their agricultural land passing to the more civilized section of the population, and the occupation of the tribals was the most part agricultural; and, secondly they were likely to get into the 'wiles of the moneylenders'. The primary aim of Government policy then was to protect them from these two dangers and preserve their tribal customs; and this was achieved by prescribing

special procedures applicable to these backward areas." Such a scheme for providing protective legislation to the excluded and partially excluded tribes of India not only informed the Government of India Act, 1935 but also the Cabinet Mission Statement of May 16, 1946 that emphasised the special attention on the tribal areas.

The Government of India Act 1935 offered detailed provisions inter alia for administration of Excluded and Partially Excluded Areas. In pursuance of the Act of 1935 the Excluded and Partially Excluded Areas Order 1936 was promulgated, and 8 areas were declared as Excluded and 28 as Partially Excluded in the British India. So far Orissa was concerned, such Partially Excluded Areas were comprised in the newly formed State of Orissa as District of Angul, District of Sambalpur, the areas transferred from the Central Provinces under the provisions of the Government of India (Constitution of Orissa) Order, 1936, the Ganjam Agency Tracts and the areas transferred to Orissa under the provisions of the aforesaid Order from the Vizagapatam Agency in the Presidency of Madras.

It is worthwhile to mention here that in accordance with the provisions of the Scheduled Districts Act of 1874, Ganjam and Vizagapattam Act was promulgated in 1939. The Act provided for a separate system of administering justice in both civil and criminal matters, rights of collection and superintendence of Revenue of every description within the specified tracts in the scheduled areas of Ganjam and Vizagapattam Agencies under the Madras Presidency.

Thus, it is evident that the British devised a system of governance, whereby the tribes in excluded areas enjoyed full immunity and those in partially excluded areas enjoyed relative immunity from the mainstream dispensation in matters of revenue administration, socio-cultural traditions and customs and dispute resolution.

It is interesting to know that the Fifth Schedule of the present Constitution of India virtually replicates the provisions made in Sections 91 and 92 constituting the Chapter V (Excluded Areas and Partially Excluded Areas) of Part-III (The Governor's Provinces) Government of India Act 1935. Section-91 vested His Majesty with the power, exercisable through an Order in Council, to declare any area as an Excluded Area or a Partially Excluded Area or bring about any rectification or alteration in the boundaries of such areas. Section-92 (Administration of Excluded Areas and Partially Excluded Areas) while recognizing the executive authority of a Province over such areas mandated, "notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded or a partially excluded area, unless the Governor by public notification so directs; and the Governor in giving such a direction with respect to any Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit". Then, the said Section further vested another special power, proactive in nature, on the Governor of the Province, who may "make regulations for the peace and good government of any area in a Province, which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing law, which is for the time being applicable to the area in question". Of course, the regulations if any so made shall have effect only after receiving the assent of the Governor General on behalf of His Majesty. Further, the Section-52 (Special Responsibilities of Governor) in its Sub-section-1(e) had enjoined upon the Governor "*the securing of peace and good government of areas which by or under the provisions of this Part of the Act are declared to be partially excluded areas*".

It is interesting to learn that the justification for treating certain areas of the country as excluded and partially excluded so as to allow and devise special and extraordinary systems of self-governance for them was brought out with great force and fervor by the then Secretary of State for India, the Marquess of Zeitland on 25 Feb 1936 while moving in the House of Lords the Draft Order Specifying the Excluded and Partially Excluded Areas of British India to give effect to Section 91 of Government of India Act 1935. It is worth quoting the salient extracts from his speech, which sound still relevant after an elapse of long 75 years. "*Let me explain briefly the need for provisions of this kind. The population of India, as your Lordships are well aware, is far from homogeneous. In addition to great differences of race, of creed and of language, there are also great differences of civilisation and culture. Indeed, it is not too much to say, I think, that there are to be found living side by side in India at the present day representatives of almost every epoch of civilisation from the stone-age to the twentieth century. It is only to be expected in those circumstances that there will be some segments of the population of India for whom a modern representative system of government will prove to be wholly unsuited. Perhaps I might venture to give your Lordships an example of the primitive simplicity of some of these aboriginal and backward people which are found living scattered about in different parts of India. . . . Of course, the fact that there are considerable tracts in India inhabited by peoples of this kind who required a simpler form of government than is now proposed has been recognised for a very long time past. Indeed, it was recognised as soon as the system of government in India lost some of its patriarchal character and acquired a considerable volume of Statute law. Thus, in the year 1874, there was passed what is known as the Scheduled Districts Act, an Act to enable a clear declaration of law to be made -of the law, that is to say, which was*

enforced in those parts of India which . . . had never been brought within, or had from time to time been removed from, the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature. These districts are known as the Scheduled Districts, and one of the main results of the Act of 1874 was to exclude such districts from the direct control of the Legislatures, both Central and Provincial. Then, when the Constitution set up under the Act of 1919 was brought into force, power was given to declare certain areas to be backward areas, and power was taken to provide that in such areas the ordinary law should be operative subject to modifications. . . . Perhaps I might explain for a moment to those of your Lordships who are sufficiently interested in the difference between a wholly excluded area and a partially excluded area. In the case of a wholly excluded area, the administration is reserved exclusively to the Governor, that is to say, the Governor will be acting in his discretion or, in other words, in responsibility to Parliament here. In the case of a partially excluded area, the Governor will consult his Ministers and will seek their advice, but he will not be bound to act upon it. If he is satisfied that in the interests of the persons residing in the partially excluded areas he should act contrary to the advice of his he will be entitled to do so. That applies in both cases- in the case of a wholly excluded area and in the case of a partially excluded area—to matters of legislation and to matters of administration. . . . In Section 92 of the Act it is laid down that the executive authority of a Province- and the executive authority of a Province is, of course, the Governor by definition in another part of the Act- extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area unless the Governor by public notification so directs... another section of the Act- namely, Section 59 (1) (e), says that in the exercise of his functions the Governor shall have as a special responsibility: The securing of the peace and good government of the areas which by or under the provisions of this Part of this Act are declared to be partially excluded areas. . . . In conclusion, I need only, perhaps, say a word as to the extent and nature of the excluded and partially excluded areas. So far as it is possible to judge, . . . something like 50 per cent of the total number of people in India who may be described as aboriginal tribes or as very primitive peoples will come under the operation of this Order. Of course, it is not possible to grant to backward people who are living scattered among people in more advanced areas quite the same measure of protection as is provided for those who live together in specified areas. The criterion which the Government have accepted for a partially excluded area is this: that it shall be inhabited by a preponderance of backward or primitive peoples; that it shall be of such a size that special legislation can conveniently be applied to it; and that it shall be susceptible, without inconvenience, to special administrative treatment. This further condition is laid down, that the boundaries of such areas shall be defined in easily intelligible terms—that is to say, the boundaries shall be easily recognisable. . . . Perhaps, in support of my contention, I might give your Lordships very briefly the opinion of an Indian whose official duties necessitated that he should reside for a considerable period amongst these peoples in the Chittagong hill tract. He pointed out that, in their simplicity, they are very liable to suffer when they come into contact with the more sophisticated peoples of the plains, and he urged very strongly that measures should be taken to protect them against exploitation by their more sophisticated neighbours. He described the effect of allowing exploitation by the peoples of the plains. . . . The effect of this would almost be akin to that of putting the innocent lamb and the rapacious wolf into one cage. . . . Perhaps an example better than this would be that of a parasitic creeper which has no root in the soil- referring here, of course, to the people from the plains - but which envelops the foliage of a vigorous tree in a veritable net, flourishes by slowly but surely sapping the life streams of the tree and reducing it in time to dead wood. I have only one general observation to make with regard to the partially excluded areas as a whole, and I make this observation because there seems to be a misunderstanding, not only in this country but even in some parts of India, as to what the actual effect upon the people who live in the partially excluded area is. If they live in a partially excluded area they are not cut off or segregated in any way from normal intercourse with the people who live in the ordinary districts of the country on their borders. The broad effect of declaring an area to be a partially excluded area has been put very concisely by the Government of India in their Despatch. What they say is that the broad effect of partial exclusion is simply to subject the normal legislative and executive jurisdiction of the Province in selected areas to a degree of personal control by the Governor. . . . that there is an essential necessity for treating these backward parts of India in the special way proposed.”

The Constituent Assembly on January 24, 1947 set up the ‘Advisory Committee on the Rights of citizens, minorities and tribal and excluded areas’ under the chairmanship of Sardar Ballav Bhai Patel. But the Committee further set up two Sub-committees, one chaired by Shri G.N. Bardoloi to report on the North-East Frontier (Assam) tribal and excluded areas, and the other chaired by Shri A.V. Thakkar to look into the excluded and partially excluded areas in the Provinces other than Assam. The Bardoloi Sub-committee gave its report in July 1947 and the Thakkar Subcommittee gave its report in two parts in August 1947 and September 1947 respectively. The two Sub-committees had also met in a joint session in August 1947 and recommendations arising out of this joint session were also given to the Advisory Committee. The Advisory Committee was thus enabled to take a holistic look at the requirements of the above areas.

The Thakkar Sub-Committee made several recommendations. One important recommendation was that the State should bear the responsibility of the tribal people. It laid emphasis on the protection of tribal lands and prevention of exploitation by moneylenders. It also suggested certain statutory safeguards for the protection of tribals. Although, the Thakkar Sub-Committee's jurisdiction was restricted to the excluded and partially excluded areas, it also felt concern for a sizeable population of tribes in the non-excluded portions of British India. The Sub-Committee therefore recommended, "The whole tribal population should be treated as a minority community, for the welfare of whom, certain special measures are necessary". It further maintained that the geographical inaccessibility of these areas was largely responsible for the exclusion and the backwardness of such areas. Therefore the Sub-Committee recommended that the Constitution should provide for setting up of a body in each province, which would keep the provincial Government constantly in touch with the welfare of the tribes in general and the needs of the aboriginal tracts in particular. This body was known as the Tribal Advisory Council (TAC). The TAC was to have a strong representation of the tribal population. In respect of certain subjects, the application of a law, were it enacted by the Parliament or by the State legislature, would be suspended if the TAC considered such a law as unsuitable from the point of view of tribal interest. These subjects included matters of village management, including the establishment of village Panchayats. The State Government was statutorily enjoined to give effect to the advice of the Council. It was obligatory for the Governor to act accordingly on the advice of TAC on matters such as land, village administration, village Panchayats and customs of tribes. The transfer of land in a Scheduled Area from a tribal to a non-tribal was forbidden and the State Government was prohibited from allotting State land in a Scheduled Area to a non-tribal person. Likewise, if advised by the Council, the Governor would be obligated to license money lending. These complicated provisions were subject to critique by the Advisory Committee and it was felt that conferring so much legislative and executive powers on the Council in not-so-easy-to-handle matters involving law and legal procedure might adversely affect the safeguarding of the interests of the tribal population. Consequently, in course of the Constituent Assembly proceedings several amendments were proposed and the role of the TAC was eventually reduced to a purely consultative body. The responsibility for the welfare of Scheduled Areas rested squarely on the State Government subject to the control of the Central Government.

In comparison, what the Fifth Schedule of the Constitution offers extra vis-à-vis Chapter V of GoI Act 1935 is 3 provisions, namely (1) the duty of the Governor to make a report to the President annually or whenever so required in respect of administration of Scheduled Areas, (2) the constitution of a Tribes Advisory Council to advise the Governor on matters relating to welfare and advancement of Scheduled Tribes in the State, and (3) an illustrative list of important matters around which regulations may be made by the Governor for 'peace and good government' of a Scheduled Area, such as to "*(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area; (b) regulate the allotment of land to members of Scheduled Tribes in such area; (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area*".

Though the Constitution through its special provisions for Fifth and Sixth Schedule Areas has apparently adapted the British principle of exclusion and partial exclusion, the tribal populations in both areas have acquired a new complexion in post-independence period, as they were also provided with several avenues of opening up to the mainstream of Indian polity, especially through participation in Parliamentary and Assembly Elections. The Government of India did also launch various bodies and projects for tribal welfare as required under the Constitution and the Scheduled Tribes were required to transact with them. The main provisions relating to Scheduled Tribes as contained in the Constitution are 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 Fifth Schedule and Sixth Schedule appended to the Constitution.

Constitutional Provisions bearing on Scheduled Tribes

It is worthwhile to briefly deal with various provisions made in the Constitution amended till date, that have bearing on the status of Scheduled Tribes as a special category of population in the polity.

Article 15:

The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. However, nothing in this Article shall prevent the State from making any special provision inter alia for the advancement of Scheduled Tribes.

Article 16:

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. However, nothing in this Article shall prevent the State from making any provision for reservation of appointments or posts in favour of any backward class such as Scheduled Castes or Scheduled Tribes.

Article 19(5):

While the rights of free movement and residence throughout the territory of India are granted to every citizen under Article 19 (1-d and e), special restrictions may be imposed by the State to protect the interests of the members of the Scheduled Tribes under Article 19(5).

Article 23:

Article 23 prohibits traffic in human beings, beggars and other similar forms of forced labour.

Article 29:

According to Article 29, any section of citizens residing in territory of India shall have the right to conserve their language, script or culture. By implication this Article provides protection to Scheduled Tribe communities to preserve their languages, dialects and culture.

Article 46:

This Article provides for promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

Article 164:

This Article provides inter alia for a Minister in charge of tribal welfare to be appointed in the States of Chhatisgarh, Jharkhand, Madhya Pradesh and Orissa.

Article 243(M):

It says that the provisions of 73rd Amendment (Panchayats) shall not apply immediately to Scheduled Areas and to some Areas in North-East States. The legislature of the concerned North-East States may extend the said provisions to the areas covered under it on passing a resolution to that effect. The Parliament may however enact a separate law to extend the provisions of the said Amendment to the Scheduled Areas specifying such exceptions and modifications as are necessary in the context of the Scheduled Areas.

Article 243 (ZC):

It says that the provisions of 74rd Amendment (Municipalities) shall not apply immediately to Scheduled Areas or to Tribal Areas as referred to in Article 244 of the Constitution. The Parliament however may enact a separate law to extend the provisions of the said Amendment to the Scheduled Areas and Tribal Areas specifying such exceptions and modifications as are necessary in the context of the Scheduled Areas and Tribal Areas.

Article 244:

This Article constituting Part-X (The Scheduled and Tribal Areas) of the Constitution mentions that the provisions of the Fifth Schedule shall apply to the administration and control of Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalay, Tripura and Mizoram, and the provisions of the Sixth Schedule shall apply to the administration of Tribal Areas in the States of Assam, Meghalay, Tripura and Mizoram. The Article 244-A inserted following the 22nd Constitution Amendment Act 1969 provides for formation of an autonomous State comprising certain Tribal Areas in Assam and creation of local Legislature or Council of Ministers or both therefore.

Article 275:

Captioned as 'Grants from Union to States', it provides for sanction of grant-in-aid from the Consolidated Fund of India to the revenues of the concerned States to promote tribal welfare and as well administration of tribal areas.

Articles 330, 332 and 334:

Seats shall be reserved in the house of the people for Scheduled Castes and Scheduled Tribes (330).

Seats shall also be reserved for the Scheduled Castes and Scheduled Tribes in the legislative Assembly of every State (332). Such Reservations shall cease to have effect on the expiration of period of 60 years from the commencement of the 79th Constitution Amendment Act, 1999 (334).

Article 335:

The claims of members of Scheduled Castes and Scheduled Tribes shall be taken into consideration in the matter of appointment to the service and posts under the Union and the States as far as may be consistent with the maintenance of efficiency of administration.

Article 338-A:

There shall be a National Commission for the Scheduled Tribes comprising a total of 5 members to be appointed by the President and its job shall be to investigate into all matters relating to the safeguards provided for the STs under

the Constitution, to enquire into the specific complaints, to advise on the socio-economic development on STs and to present Annual Reports to the President on the state of safeguards guaranteed for STs and to recommend measures necessary for the development and welfare of ST communities. The Reports so submitted by the Commission shall be laid before each House of Parliament.

Article 339:

This Article is captioned 'Control of the Union over the administration of Scheduled Areas and the welfare of the Scheduled Tribes'. It provides for appointment of a Commission by the President at any time and after the expiration of ten years from the commencement of the Constitution to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. Besides the article states that the executive power of the Union shall extend to the giving of directions to a State in respect of execution of any scheme for the welfare of the Scheduled Tribes in the State.

Article 342:

The President may in consultation with the Governor of the concerned State, specify by way of a public notification a tribe or tribal community as the Scheduled Tribe in relation to that State. The Parliament may by law include in or exclude from the list of Scheduled Tribes so notified.

Article 366(25):

The Scheduled Tribes are defined as such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 of the Constitution to be the Scheduled Tribes.

Fifth Schedule-

Comprising 7 Clauses, it contains the provisions for administration and control of Scheduled Areas and Scheduled Tribes. Among its salient provisions are the obligation of the Governor of the concerned State to submit yearly and occasional reports to the President of India, constitution and functions of Tribes Advisory Council, special powers of Governor in respect of applicability of any Central or State legislation to Scheduled Areas, and President's Power for declaration and alteration by way of increase, decrease or redefinition of the boundaries of the Scheduled Areas.

Sixth Schedule:

Comprising 21 Clauses it provides for formation and administration of Autonomous Districts and Autonomous Regions in the tribal areas of 4 North-East States of India (Assam, Meghalaya, Mizoram and Tripura), constitution and powers of District Councils and Regional Councils, administration of justice in such Districts and Regions, and allied matters.

Besides the above Constitutional provisions, two important Acts made by the Parliament are in force throughout the country, namely Civil Rights Protection Act 1955 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, the objective of both being to protect the SCs and STs from untouchability, misbehaviour, ostracism, torture or atrocities on the grounds of caste or tribe.

Abounding definitional ambiguity

For all said and done, the Constitution lacks in a determinate definition of two crucial terms 'Scheduled Tribe' and 'Scheduled Area'. As per Article 366 (23), "'Schedule' means a Schedule to this Constitution", and "'Scheduled Tribes' means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribe for the purposes of this Constitution". Now coming to Article 342, it merely says that President in consultation with Governor of a State may specify by way of public notification a tribe deemed as a Scheduled Tribe for the purposes of this Constitution, and only the Parliament has the power to amend by way of inclusion or exclusion the presidential order so made. Thus a circuitous reasoning (example- Man is a human being.) colours the various attempts made in the Constitution to define the crucial term 'Scheduled Tribe'. Similarly, the term 'Scheduled Area' also suffers from absence of a succinct definition. The Paragraph 6(1) of Fifth Schedule says, a Schedule Area is the one which the President may by order declare to be a Scheduled Area. As per Article 244 (Administration of Scheduled and Tribal Areas), while the areas covered under Fifth Schedule are called Scheduled Areas proper (States other than Assam, Meghalaya, Tripura and Mizoram), the areas under Sixth Schedule can be called Tribal Areas (Assam, Meghalaya, Tripura and Mizoram). It seems that such a peculiar practice of leaving a frequently used expression undefined is the unalloyed carryover of an ambiguous tradition from the colonial laws made on tribes of India- such as the Schedule appended to Excluded and Partially Excluded Areas Order 1936, which mentioned the lists of Excluded and Partially Excluded Areas in the territory of British India.

The currently prevailing Provisions of Panchayats (Extension to Scheduled Areas) Act 1996 or popularly known as PESA Act, as per its Section 3, applies to ‘the Scheduled Areas as referred to in Clause (1) of Article 244 of the Constitution’, which means the Fifth Schedule Areas existing at present, corresponding roughly to the Partially Excluded Areas in British India.

Scheduled Areas

As already mentioned, the term ‘Scheduled Areas’ has been defined in the Indian Constitution 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 Report of the Scheduled Areas and Scheduled Tribes Commission, 1961.

In exercise of the Constitutional provisions, the President after consultation with the State Governments concerned had passed the Orders called, ‘the Scheduled Areas (Part A States) Order, 1950 and the Scheduled Areas (Part B States) Order 1950 which set out the Scheduled Areas in the States. Further, by an Order, namely the Madras Scheduled Areas (Cesser) Order, 1951 and the Andhra Scheduled Areas (Cesser) Order, 1955 certain Areas of the then East Godavari and Vishakapatnam districts were de-Scheduled. At the time of formulating and adopting the strategy of Tribal Sub-Plan (TSP) for socio-economic development of Scheduled tribes during Fifth Five Year Plan I (1974-79), certain areas besides the then existing Scheduled Areas, were also found to be having preponderance of tribal population. A review of protective measures available to the tribal of these newly identified areas vis-à-vis Scheduled Areas was made and it was observed that a systematic use of protective measures and other powers available to the executive under Fifth Schedule will help in effective implementation of the development programmes in Sub-Plan Areas. Therefore, in August 1976 it was decided to make the boundaries of the Scheduled Areas co-terminus with the Tribal Sub-Plan areas. Accordingly, Clause 6-2 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. Pursuant to above the President have issued from time to time 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 in 1975, keeping in view the principle of making the Sub plan and the Fifth Schedule areas coterminous. Thus, broadly speaking, the Tribal Sub-Plan areas (Integrated Tribal Development Projects/Integrated Tribal Development Agency areas only) are coterminous with Scheduled Areas in various States. As of now 9 States have Fifth Schedule areas to which PESA applies, such as (i) Andhra Pradesh (ii) Chhattisgarh (iii) Gujarat (iv) Himachal Pradesh (v) Jharkhand (vi) Madhya Pradesh (vii) Maharashtra (viii) Orissa and (ix) Rajasthan.

Fifth Schedule Areas

State	Areas
Andhra Pradesh	Visakhapatnam, East Godavari, West Godavari, Adilabad, Srikakulam, Vizianagaram, Mahaboobnagar, Prakasam (only some mandals are scheduled mandals)
Jharkhand	Dumka, Godda, Deogarh, Sahabgunj, Pakur, Ranchi, Singhbhum (East&West), Gumla, Simdega, Lohardaga, Palamu, Garwa, (some districts are only partly tribal blocks)
Chhattisgarh	Sarbhuja, Bastar, Raigad, Raipur, Rajnandgaon, Durg, Bilaspur, Sehdol, Chindwada, Kanker
Himachal Pradesh	Lahaul and Spiti districts, Kinnaur, Pangi tehsil and Bharmour sub-tehsil in Chamba district
Madhya Pradesh	Jhabua, Mandla, Dhar, Khargone, East Nimar (khandwa), Sailana tehsil in Ratlam district, Betul, Seoni, Balaghat, Morena
Gujarat	Surat, Bharauch, Dangs, Valsad, Panchmahl, Sadodara, Sabarkanta (partsof these districts only)
Maharashtra	Thane, Nasik, Dhule, Ahmednagar, Pune, Nanded, Amravati, Yavatmal, Gadchiroli, Chandrapur (parts of these districts only)
Orissa	Mayurbhanj, Sundargarh, Koraput (fully scheduled area in these threedistricts), Raigada, Keonjhar, Sambalpur, Boudhkondmals, Ganjam, Kalahandi, Bolangir, Balasor (parts of these districts only)
Rajasthan	Banswara, Dungarpur (fully tribal districts), Udaipur, Chittaurgarh, Siroi (partly tribal areas)

What is so special about Fifth Schedule to the Constitution ?

The main features of the Fifth Schedule include:

1. Governor's Report to the President.
2. Tribes Advisory Council.
3. Special Legislative Powers of the Governor.
4. President's Power to declare and redefine the Scheduled Areas

1. Fifth Schedule (Cl. 3) of the Constitution provides that the Governor of each State having Scheduled Areas should annually or whenever required so by the President make a report to the President, to keep the Union Government informed of the administration in Scheduled Areas. On the basis of this Report, the Union Government is to issue directives to the respective State Governments for better administration of the Scheduled Areas.

As learnt from the information gathered from Ministry of Tribal Affairs, GoI in response to an RTI application by Mr. Venkatesh Nayak of CHRI, New Delhi, the Governors of the concerned States including Orissa have been sending Annual Reports to the President on administration of Scheduled Areas, if not on a regular basis. But hardly the members of public are in the know of the contents of such reports, and conversely, the Union Government also hardly took any action on such reports.

The fact that the Reports of Governors in this regard lacked substance in reference to the PESA, has of late been unequivocally conceded by the Central Government. Mr. A.N.P. Sinha, Secretary, Min. of Panchayati Raj, GoI in his Letter to Secretary Ministry of Tribal Affairs, GoI (D.O.No. N-16012/1/2008-P&J dated 29 July 2008 observed with concern, "It is noted that under the provisions of Para 3 of the Fifth Schedule, States concerned are required to submit to the President an Annual Report on the administration of the Fifth Schedule areas. We have obtained copies of two such reports. Their examination reveals that the reports are largely silent on the implementation of PESA. You would agree that effective implementation of the PESA Act is necessary for removing the discontent among the tribal population and for their progress. In fact several expert groups have recommended that the Governor's Annual Report about Administration of the Fifth Schedule Areas should be comprehensive and cover all aspects of governance, especially the provisions of PESA. . . . I would, therefore, request you to kindly have the matter examined and consider issuing suitable guidelines/ instructions to all the nine States having Fifth Schedule areas, for including a chapter in the Governor's Report, about implementation of PESA. A mechanism may also be instituted by which these reports are also shared with this Ministry so as to enable us to examine these".

2. The Clause 4 of the Fifth Schedule recommends the constitution of a Tribes Advisory Council in each State having Scheduled Areas. If the President so directs, this kind of Council may also be established in the States, which do not have Scheduled Areas, but Scheduled Tribes. TAC shall consist of maximum 20 members, nearly three-fourths of whom shall be tribal members of the State Legislative Assembly. The Council's duty is to offer advice on matters pertaining to the welfare and advancement of the Scheduled Tribes in the States as referred to them by the Governor. It is intended to serve as a consultative forum to facilitate the Governor for decision making about the kind of laws, policies and programmes that are required for the concerned Scheduled Areas. However, the Clause 5(5) provides that Governor shall not make any Regulation without having consulted the TAC working in the concerned State.

There is presently a 20 member Tribal Advisory Council in Orissa with Chief Minister as Chairman and Minister-in-charge of SCSC Welfare Dept as Vice-Chairman. As revealed from the Dept.'s website, it has held a few meetings in the recent past. But hardly any outstanding issue concerning Fifth Schedule Areas of the State has ever been discussed, let alone thrashed out by the State TAC. For instance, in the years 2007 and 2008 Kandhmal district (having Scheduled Areas) was rocked by a series of violent communal-ethnic riots and normal life remained paralysed for prolonged periods. But there is no evidence to show that the Orissa TAC did ever deliberate upon this unprecedented tragedy and advised the Governor on appropriate course of action to be taken to meet the said challenge.

3. The Governor of a State has special powers of legislation with respect to the Scheduled Area. They are legislation by notification and legislation by regulation. The Governor of a State is responsible for deciding whether an act of Parliament or of the State legislature is suitable or unsuitable for Scheduled Areas. The State Governor by public notification can direct that any Act of Parliament or the State Legislature shall not apply to a Scheduled Area. The Governor can issue such notification without any reference either to the State Tribal Advisory Council or to the President of India. Further the Governor has been empowered to make regulations for peace and good Government of Scheduled Areas. Such regulations may in particular prohibit or restrict the transfer of Scheduled Area land by or among members of the Scheduled Tribes, regulate the allotment of land in Scheduled Area to members of the

Scheduled Tribes or regulate the business of moneylenders, who lend money to members of the Scheduled Tribes in Scheduled Areas. The regulation making power of the Governor is subject to some limitations as specified in the Paragraph-5 of Fifth Schedule i.e. regulation to be made after consultation with the Tribal Advisory Council (Cl. 5-5), and regulation to have no effect until assented to by the President (Cl 5-4).

In the past the Governor Orissa has exercised his regulatory powers under Fifth Schedule in the interest of tribal populations, as evident from such regulations as Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation 1956, Orissa Scheduled Area Money-Lenders Regulation 1967, Orissa Schedule Area Debt Relief Regulation 1967 and their subsequent amendments. But the basic loophole of such regulatory exercises was excessive dependence on the mainstream bureaucracy for implementation and on the mainstream judiciary for grievance redressal and penal action. The ground reality therefore remained unaffected, rather worsened in the aftermath of such regulations. In the name of compliance to the provisions of the Fifth Schedule, such regulations forced the poor and illiterate tribal to reckon with too powerful and crafty agents of State and elite, against whom he was no match.

4. The Clause 6 of Fifth Schedule says, a Schedule Area is the one which the President may by order declare to be a Scheduled Area. The President has also the powers to alter, by way of increase or decrease, the size and boundaries of a Scheduled Area, and even to direct the cessation of SA status of an area. Also he may rescind an order made under this Clause and issue a fresh order in consultation with the Governor of the concerned State. As already mentioned, several orders have been made by the President in exercise of the said powers for declaring and altering the Scheduled Areas in various parts the country including the well-known declaration of Scheduled Areas to be coterminous with Tribal Sub-Plan areas during 5th Plan period, facilitated by the 1976 Amendment to the Fifth Schedule.

Given the enormous powers vested by the Constitution itself under its Fifth Schedule to such politico-executive heads as President, Governor and Chief Minister to mete out a special treatment to the Scheduled Areas and Scheduled Tribes, it was expected that the said powers would be exercised meticulously by the powers-that-be for transforming most backward areas and communities of the country into better-off positions. But as is well known, the overall state of governance in the Scheduled Areas as of today is visibly worse than what it was at the time of commencement of the Constitution. It won't be an exaggeration to observe, if the provisions of Fifth Schedule, meant to promote the development of Scheduled Tribes along with protection of their traditions and customs were given a fair trial, a special legislation like PESA Act 1996 might not have been necessitated at all after 47 years of proclamation of the Constitution.

From 73rd Amendment onto PESA

The tribal communities are traditionally self-governed in respect of regulation, control and conduct of their domestic, religious, socio-economic, political and judicial affairs through the age-old, collective wisdom of their traditional leaders and village councils. Moreover, having lived in a setting of exclusion or partial exclusion for most part of history, they were not accustomed to a rigid, statutory 3-tier Panchayati Raj system which was sought to be institutionalized through the 73rd Constitution Amendment Act, 1992 along with its incorporation as Part-IX (Panchayats) into the Constitution. This Amendment, no doubt, held forth path-breaking provisions for an effective system of local self-government for mainstream, non-scheduled areas of the country. But keeping in view the unique characteristics and special needs of the Scheduled Tribes, the 73rd Amendment was not automatically extended to the Scheduled Areas or Tribal Areas. The Article 243(M), expressly titled 'Part not to apply to certain areas' preemptively stipulated under Clause (1) that the said Amendment won't apply either to the Fifth Schedule Areas otherwise called Scheduled Areas or to the Sixth Schedule Areas otherwise called the Tribal Areas. However, Section 243 (M) did also provide for the route through which the 73rd Amendment could be applied to Scheduled Areas and Tribal Areas. Its Clause 4(a) empowered the Legislature of the concerned State, if it wished so, to extend the Amendment to its Tribal Areas by way of adopting a Resolution to that effect. Its Clause 4(b) vested the power with the Parliament to extend the Amendment to Scheduled Areas or Tribal Areas by way of enacting a law incorporating the requisite 'modifications and exceptions as may be specified in such law'.

Needless to say, the enactment of 73d Amendment did go a long way in arousing the aspirations among the people including the Scheduled Tribes of the country for a stronger and institutionalized system of self-governance through its adaptation in an appropriate manner. Because, it promised the endowing of the Panchayats not only with statutory tenure and wider representation of weaker sections including STs, SCs, OBCs and women, but also with powers and responsibilities in respect of formulation and implementation of schemes for economic development and social justice (Article 243-G). In such a situation of heightened expectation, a High Powered Committee comprising select Members of Parliament and Experts with Shri Dileep Sing Bhuria MP as Chairman was appointed in 1994 to recommend exceptions and modifications to the Part IX (73rd Amendment) of the Constitution in its application to

the Scheduled Areas. The Committee (popularly known as Bhuria Committee) submitted its Report in 1995. It is worthwhile to recollect the strident optimism that permeated Bhuria Committee Report through and through- *“The unfortunate confrontation between the tribal people and the State that has been accentuating ever since the independence will dissipate and disappear once the traditional system of the tribal people is taken as the foundation of governance in the tribal areas. The people will be able to perceive the supra structure of the administration as continuation of their own system with no traces of antagonistic relationship”*. What is now known as PESA or Provisions of Panchayats (Extension to Scheduled Areas) 1996 is nothing but the Committee’s well thought charter of exceptions and modifications necessitated by the unique position of the Scheduled Tribes, subject to which the 73rd Amendment for introduction of a 3-tier Panchayati Raj could be applied to the Scheduled Areas. PESA was enacted on 24 December 1996. Rather than a law in strict sense of the term, PESA is a pre-emptive legislative guide for the concerned State legislatures forewarning them not to transgress the unique tenets of community self-rule as specified in its Section-4 while extending 3-tier Panchayati Raj of 73rd Amendment to the Scheduled Areas. PESA is also a mandatory whip in respect of every competent legislature Central or State pressing them to review the entire corpus of existing laws and purge them of everything inconsistent with it within a period of 1 year i.e. by 24 Dec 1997. PESA is also a proactive instrument for deepening and strengthening the processes of self-governance further in the 5th Schedule Areas, because it expects the concerned State legislatures to redesign their administrative arrangements in line with a more radical system of self-government that is in vogue in Sixth Schedule Areas.

PESA- its Differentia Specifica

As already mentioned, long before the PESA Act 1996 was enacted, several Constitutional provisions were available to the concerned States to protect and promote the interests of the Scheduled Tribes in the Scheduled Areas. For the first-time, the PESA unequivocally articulated the system of self-governance as the indispensable need of the communities living in Scheduled Areas and recognized their traditional collective rights over natural resources. Prior to the passage of this Act, very many laws passed by Central and State Governments were applied mindlessly to tribal areas, even when these laws disregarded traditional community practices and institutions. For instance, prior to PESA, the Gram or Village even in a Scheduled area was defined in relevant Panchayat laws in most of the States as an administrative arrangement notified by the State Government (For instance, vide Section 3-1 of Orissa Grama Panchayat Act 1964), whereas under the PESA (vide Section 4-b) primacy has been accorded to a living environ, which a self-regulating community perceive to be their traditional or organic habitation. In fact PESA is the first law that empowers traditional communities to redefine the administrative boundaries of their own village.

Form the recognition of the principle of a community’s collective right to self-determination which is the hallmark of PESA do flow other unique features that distinguish this seminal legislation from an inconsequential plethora of laws and regulations. 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 (Section 4d). 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 (Section-4e). Further, it is Grama Sabha which is the authority to issue certificate of utilization for any money spent by any Panchayat in the village (Section 4-f). The concerned State legislatures while endowing the Panchayats in Scheduled Areas with powers to function as institutions of self-government, shall 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 ought to endow the District Panchayats (called Zilla Parishads in Orissa) 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. Of course, a flawed reading of this particular provision has become widespread across both official think-tanks and non-official intelligentsia, which says that the whole of PESA including this time-bound directive is a mandate addressed to only state legislatures. But, they tend to forget the crucial lexicological difference between the opening line of Section-4 and that of Section 5. While the mandate of Section 4 is to be fulfilled by the concerned 'Legislature of a State', that of Section 5 is to be fulfilled by any 'competent Legislature or other competent authority'. The latter expression obviously includes legislative and other authorities at all levels, Central and State.

That the PESA also casts obligation on the Central legislature i.e. Parliament to streamline the entire corpus of legislation in line with its provisions has been conceded albeit in a roundabout way by the Ministry of Panchayati Raj, Government of India in the following words, "PESA & Central Government- "Notwithstanding the fact that PESA casts a direct responsibility only on State Legislatures in terms of limiting their legislative competence by disabling them to make any law which would be inconsistent with the features referred to in the Act . . . nevertheless considering that PESA is a Central legislation and is a logical extension of the Fifth Schedule, a duty is cast upon the Central Government to see that the provisions are followed properly". Then it continues, "According to available information, no integrated exercise has yet taken place of examining the relevance of different Central Laws to Schedule V Areas and to harmonize them with the aims and objectives of PESA. Therefore, there is a need for undertaking this task now. Among the laws which warrant particular attention are- The Land Acquisition Act, 1894; Mines and Minerals (Development and Regulation) Act, 1957; The Indian Forest Act, 1927; The Forest Conservation Act, 1980; The Indian Registration Act 1908. Accordingly, the Ministry of Law & Justice, Department of Legal Affairs have been requested to intimate action taken and progress made by the Department of Legal Affairs in this regard". (*vide Annual Report of Ministry of Panchayati Raj, GoI for 2007-08*)

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.

Grey Shades in PESA

However, apparently deflecting from a Grama Sabha centric ethos, the Act has provided for an either-or option between Grama Sabha or Panchayat at the appropriate level in respect of taking decision in certain matters. But Grama Sabha remains the common forum of reference. Consultation with Grama Sabha or an appropriate Panchayat body is necessary prior to land acquisition or resettlement and rehabilitation of displacees in a Scheduled Area. But as a matter of critique, it must be said that the Act has whittled down the authority of not only Grama Sabha but also that of other Panchayat Bodies above by saying that actual planning and implementation shall be coordinated at the State level (Section 4-i). Similarly the planning and management of minor water bodies in the Scheduled Areas shall be entrusted to a Panchayat at appropriate level (Section 4-j). Then, recommendation of Grama Sabha or appropriate Panchayat shall be mandatory prior to grant of prospecting license or mining lease for minor minerals in the Scheduled Areas (Section 4-k). Besides, prior recommendation of Grama Sabha or appropriate Panchayat shall be mandatory for grant of concession for the exploitation of minor minerals by auction (Section 4-l). Such either-or approach in above respects has legitimized the centralizing drives of most of the State legislatures for divesting the Grama Sabha of control and authority over certain crucial areas.

Above all, in absence of any monitoring or penal mechanism in PESA, its passage was soon forgotten, and so much so that it never entered or informed the mainstream political or policy discourse across the country for more than a decade. On the other hand, with a careless attitude shown by many State Governments and the Centre towards the mandate of Fifth Schedule, all of them treated PESA with a cold unconcern. In their half-hearted attempts to comply with the mandate of PESA, all the concerned State Governments have enacted legislations, which are far from a genuine compliance to the letter and spirit of the Central law. The tribal communities, who initially felt euphoric and greeted the new law with great enthusiasm, got disillusioned by the lack of an iota of corresponding reform and reorganization at grassroots level envisaged by PESA. Notwithstanding the constant high-pitch campaign run by the civil society groups across the country highlighting PESA as a new charter of Gram Swaraj in tribal areas, the common people including the tribes for whom PESA was designed dismissed it as another good piece of paper that carried no weight with the system managers at any level. Not only that. An outrageously unconscionable stream of fiats and interventions by the Governments and administrations running diametrically opposite to the promise of PESA overtook the field everywhere with the power-starved Panchayats including Grama Sabhas either playing to their tune or getting crushed asunder. Forcible acquisition of tribal land by the use of colonial LA Act 1894 coupled with accelerated alienation of tribal land by circumvention of the deterrent regulations in Scheduled Areas- all carried out nefariously and vigorously by the Governments in the naked interest of both domestic and foreign companies in the market-centric milieu of strident globalisation - emerged to be the defining acts of the Indian State

in the decade that followed the enactment of PESA. As a result, the inevitable happened. The ruthless Corporate-State alliance met its natural counterpoint in another equally ruthless force i.e. armed bands of Maoists that could consolidate their position in Scheduled Areas taking advantage of the widespread anti-State disaffection among the public, especially tribal population at large.

It won't be out of place here to observe that were the provisions of PESA given a fair deal as per the statute by the Governments at Centre and in concerned States, not only the tribal population, but the whole nation would have been spared from the horrible saga of confrontationist violence and bloodshed perpetrated by both parties to the conflict during the last 12/13 years.

Again, were the provisions of PESA given a fair deal, the massive scale corruption and misappropriation of public funds meant for tribal and public welfare, such as NREGA, Bharat Nirman, PDS and NRHM etc. won't have been so nefariously indulged in by a dubious nexus of bureaucrats-contractors-politicians as was witnessed during the years post PESA.

It is worthwhile to note here that though belatedly, even the official discourse at GoI level has perforce identified some inherent infirmities in the PESA Act, and of course made it the scapegoat for the official failure in implementation of this landmark legislation. A Circular issued by Government of India, Ministry of Panchayati Raj dated 31st March, 2010 on the Subject 'Amendment to the Panchayats (Extension to Scheduled Areas) Act, 1996' observed inter alia as follows:

“a) The PESA Act does not specify rule making powers or provide a time period by which the States have to frame rules. States have generally not framed appropriate rules under PESA, and therefore the official system has not operationalized PESA. While draft model rules for PESA have been framed by MoPR and circulated to the States, the response is yet to come forth.

b) State and Central subject laws relating to mines and minerals, forests, land acquisition etc. are not PESA compliant. In spite of repeated urging by MoPR, appropriate action in this regard has not been taken.

c) The wordings of some sections of the PESA Act have been interpreted against the spirit of the Act. Particularly, as the Mungekar Committee has observed (Para 4.22), the States in many cases have taken advantage of the flexible provision of 'Gram Sabha or Panchayats at the appropriate level' in PESA and used the discretion in favour of Panchayats, which goes against the basic tenets of PESA.

d) There is no provision for appeal against the decision of the Gram Sabha, which is not in conformity with the democratic process and introduces an element of absolute power, rather than checks and balances on power of institutions”.