

Chapter-2: Official Discourses on Failure of PESA

All-out failure in implementation of PESA

That PESA has met an all-out fiasco from the States is now openly confessed in very many official handouts without any pretension. The Annual Report of Ministry of Panchayati Raj, Govt of India for 2007-08 admits, "While all States have enacted requisite compliance legislations by amending the respective Panchayati Raj Acts, certain gaps continue to exist. Further, some states are also yet to amend the subject laws, like those relating to money lending, forest, excise etc. Consequently, compliance remains incomplete, perfunctory and formal in virtually all states. Vital issues like the ownership of minor forest produce, planning and management of minor water bodies, prevention of alienation of tribal lands etc., which have been duly recognized in PESA as the traditional rights of tribals living in the Scheduled Areas have still not received attention and the necessary correctives remain unapplied. There are also issues relating to powers statutorily devolved upon the Gram Sabha and the Panchayats, not being matched by concomitant transfer of funds and functionaries resulting in the non-exercise of such powers. The states have, over the years, been repeatedly urged to expedite this process and the matter has been discussed a number of times at the meetings of the Ministers of Panchayati Raj as also in the meetings of the Committee of Secretaries of Panchayati Raj of the States. In view of inadequate response from the State Governments, the Ministry of Rural Development had commissioned research studies on implementation of provisions of PESA in some States as also regarding the evaluation of the status of PESA in different States. The matter was again discussed in the Third Round Table of Panchayati Raj Ministers in September, 2004 where the State Ministers agreed to enforce the provisions of PESA and also to undertake a wider consultation with other government departments so as to harmonize the provisions of the concerned laws with the aims and objectives of PESA". (*Annual Report of Ministry of Panchayati Raj, GoI for 2007-08*). More than 6 years have elapsed since the concerned Ministers of Panchayati Raj from different States agreed in the Round Table on PESA to enforce it. But there is no evidence to show that even a single, small step has been taken by any State in the promised direction.

As regards the failure of the Centre in bringing compliant amendments to Central laws in tune with the provisions of PESA, the above Report of the Ministry of Panchayati Raj, GoI admits thus, "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; and The Indian Registration Act 1908". (*Annual Report of Ministry of Panchayati Raj, GoI for 2007-08*).

Even the President of India made a loud confession of failure on PESA front while addressing the Governors' Conference called by her on 16.9.2008-

I understand that "*The provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) has extended Panchayati Raj to the nine States namely, Andhra Pradesh, Gujarat, Himachal Pradesh, Chhatisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa and Rajasthan under Fifth Schedule. However, they are yet to frame requisite local enactments to comply with the PESA Act. Since the quality of government-citizen interface at the grassroots level determines the quality of governance, you may urge the State Governments to have informed discussions on this matter and chart out the most optimal path for the good of the people.*"

Above all, the Article 243 (ZC) occurring under Part IX-A (Municipalities) of the Constitution (inserted following the 74th Amendment Act, 1992), like the 73rd Amendment Act 1992 enacted in respect of Panchayats, had envisaged that its provisions shall not apply to urban formations in Scheduled Areas or Tribal Areas mutatis mutandis, and the Parliament may, by law, extend its provisions to such areas subject to necessary exceptions and modifications. However, after a lapse of about 15 years, no such law in respect of urban formations in Scheduled and Tribal Areas has been enacted. As a result, a paradoxical situation prevails in the Scheduled Areas – while the village Panchayats may be formally ruled by PESA, the urban centres continue to be ruled by the old, mainstream municipal laws handed down since colonial days. Thus there is a crying need for bringing about a special legislation like PESA for urban centres in Scheduled Areas.

PESA and Extremism

It seems the Governments in concerned States and at Centre won't have woken up to the urgency of operationalising PESA, did they not have to grapple with the intractable problem of extremist violence in PESA areas across the country. As per the admission by the Secretary Ministry of Panchayati Raj, GoI in his circular dated 31st March 2010 on the subject Amendment to PESA Act 1996, "**The Schedule V areas to which PESA extends are characterized by a high degree of poverty, lack of infrastructure, illiteracy, exploitation and marginalization. Of 94 PESA districts, 32 are also Extremist Affected Districts (EADs). Of 76 EADs, 32 are PESA districts. Of 33 Most**

Extremist Affected Districts, 16 are PESA districts. The major causes of extremism in these areas are indifference to the needs of the people in governance, distress caused by land alienation and displacement (loss of land, livelihood, collective identity, culture) and lack of control over local resources. People-centric governance and people centric planning & implementation in these areas is essential for containing Left Wing Extremism, and can be brought about through the implementation of PESA in letter and spirit. This point has been emphasized in the Seventh Report of the Second Administrative Reforms Commission, 'Capacity Building for Conflict Resolution', the report of the Expert group constituted by the Planning Commission on 'Development Challenges in Extremist Affected Areas' and the Standing Committee on Inter Sectoral Issues relating to Tribal Development on Raising Standards of Administration in Tribal Areas (known as Mungekar Committee)". {Vide 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'}

That the driving leitmotif of the ongoing hyped official discourse on PESA is the Government's frenzied concern for containing extremism in tribal pockets of mainland India had been clearly borne out in the Circular issued to all Chief Secretaries of 9 PESA States by Mr.A.N.P. Sinha, Secretary, Min. of Panchayati Raj, GoI (D.O.N-11011/9/07-P&J dated 24th Oct 2008)- "*Compliance with PESA is also an administrative necessity since various Expert Groups have opined that effective implementation of PESA is the answer to various causes of discontent leading to extremism in the tribal areas*".

In pursuit of the recently picked-up agenda for empowering Grama Sabhas in PESA areas as an antidote to rising extremism, Mr.A.N.P. Sinha, Secretary Ministry of Panchayati Raj, Government of India issued a circular to Principal Secretaries, Panchayati Raj Deptt. of 9 PESA States on the theme of 'Model Guidelines for vesting Gram Sabhas with powers as envisaged in the PESA Act, 1996 (*vide D.O. No. N-16014/3/08-P&J Dated: 31st March 2009*)', which inter alia observed as follows:

"It might be recalled that we had forwarded the B.D. Sharma Committee Report on Model Guidelines to vest Gram Sabhas with Powers as envisaged in the Panchayat (Extension to the Scheduled Areas) Act, 1996 to the PESA States for furnishing comments. The last reminder was sent vide D.O. letter No.N-11011/11/2007-P&J dated 28th September 2007. In the mean time, the corresponding Gram Sabha Niyam Samhita has been prepared for operationalising the provisions of PESA. I shall be grateful if comments of the State Government are furnished to us on both the Report and the Samhita (available on our website: www.panchayat.gov.in) at the earliest".

However, having received no reply to the above instructions, Mr. A.N.P. Sinha, Secretary, Ministry of Panchayati Raj, GoI did issue a fresh bunch of instructions to Chief Secretaries of 9 PESA States under the rubric 'Meeting Development & Security Challenges in the Extremist Affected Areas {*vide D.O. No. N-12012/6/2005-P&J, Government of India, Ministry of Panchayati Raj, dated 30th April, 2009*}, which ran as follows:

Left Wing Extremism (LWE) has emerged as a great challenge to the internal security of the country. It is growing in strength particularly in the forest and tribal areas. According to the Ministry of Home Affairs, 76 districts in nine States are afflicted with LWE forming a Naxal Corridor. The Ministry of Rural Development report on Priority Development Schemes for EAAs has correctly identified weak governance in general and insufficient delegation of administrative & financial powers to PRIs in particular as the critical problem. Evidently, with the huge vacancies and the rampant absenteeism of staff in these districts, it is the PRIs, with whatever capacities they have, that can best plan & implement schemes so that the development process becomes possible, participatory and sustainable. On 18-19 Dec. 08, Planning Commission had organised a two day workshop of the relevant Union Ministries, State Governments and the District Collectors of 33 most affected districts. The way forward proposed in the workshop proposed inter-alia:

- Operationalising the provisions of PESA concerning Gram Sabha in the Scheduled Areas, and substantial empowerment of Gram Sabha in the non-Scheduled Areas.
- Making participatory, integrated and decentralized planning compulsory as envisaged under Article 243(ZD) and the Planning Commission guidelines of 25.8.06, for the convergence of schemes/resources and better outcomes.
- Implementing guidelines dated 19.1.09 issued by MoPR on the role & responsibilities of PRIs in CSSs/ ACAs.
- Raising the level of administration, including incentives for the personnel, in terms of First Proviso to Art. 275 (1).
- Including additional 9 Extremist Affected Districts (EADs) under BRGF and enhancing basic allocation under BRGF for 76 EADs.
- Expanding the scope of rules framed under the Forest Rights Act for operationalising the provisions concerning 'ownership of MFP' and empowering community to protect forest resources.
- Formulating suitable guidelines for revival and strengthening of Chowkidari system as the effective bridge between the Community and the Police.
- Constituting Inter-Ministerial Group to monitor implementation of the various suggestions.

Keeping in view the crucial significance of the above referred Two-day Workshop of Planning Commission, it is worthwhile to state a summary of its those recommendations which have a direct bearing on the administration at grassroots level in PESA areas. These are: (a) saturate these & surrounding districts by development initiative, (b) adopt “Apki Sarkar Aapke Dwar” initiative of Bihar, (c) prepare District Action Plans with focus on MoRD identified 69 schemes, (d) implement PESA & Forest Rights Act, (e) improve quality of governance & service delivery and sensitize particularly the lower level functionaries, (f) provide incentives to personnel to stay, (g) use ICT for transparency, accountability etc., (h) improve connectivity, both road & telecom, (i) address livelihood issues, (j) set up residential schools & ITIs, (k) recruit locals in govt. jobs, (l) set up a cell in Planning Commission to monitor schemes & policies, and (m) a separate funding window to meet additional requirements based on the District Plans.

Mungekar Committee

Elaborating on the feeling of disillusionment, discontentment and disaffection that went on accumulating among the people in Scheduled Areas right since independence, Mungekar Committee (Standing Committee on Inter Sectoral Issues relating to Tribal Development on Raising Standards of Administration in Tribal Areas) in their report made some seminal observations which are worth perusing to grasp the real factors that prodded the rise of extremism in these areas. The Committee noted, *“The most sensitive aspect of tribal life is self-governance. Even the British were forced to recognise and reconcile themselves to this fact. That is why they resorted to the creation of ‘excluded areas’. They however succeeded in penetrating some tribal areas surreptitiously by entering into some agreements with them and extending the British-made laws to these areas. These areas came to be known as the ‘Partially excluded areas’. In 1950, with the adoption of the Constitution, all laws of the Centre and concerned States got extended to the ‘Scheduled Areas’ (Partially Excluded Areas) in routine. This was a qualitative change in the legal regime in the tribal areas which happened after India attained Independence from British yolk”*. However, according to the Committee, several fallouts occurring in a reverse direction were noticed across the country, such as -

- (a) There was no place in the new Indian legal regime for the tribal community and the system of self-governance according its customs and traditions.
- (b) The traditional frame of ‘community ownership and individual use’ went into the oblivion. The community resources were transformed into State resource with some concessions, or at best right to use, albeit at the will of the State;
- (c) Thus, the tribal got stripped of his/her protective shield of community, the very essence of his/her ‘being’. He/She was obliged to face the unknown world all alone;
- (d) The claim of the people over land and other resources got circumscribed to what were acknowledged by the State in the form of pattas in favour of individuals, severally or collectively, in respect of specific areas.
- (e) Even the actual possession of land had to be ratified by a prescribed procedure failing which the concerned person would be deemed as an encroacher;
- (f) The symbiotic relationship between the people and their habitat including land, water and forest was disrupted;
- (g) The extensive resources in the traditional territorial expanse of the tribal people including some of those in their possession and in active use for sustenance, thus, came under public domain that could be dealt with by the State or even other interested parties using the provisions of relevant laws, or even otherwise, depending on the situation in each case;
- (h) All practices sanctified by the hoary tradition, which formed the basis of the tribal system of self-governance, were transformed into acts of ‘violation of the law of the land’ rendering the people vulnerable and virtually defenseless;
- (i) It rendered tribal people resource-less, vulnerable and virtually defenseless;
- (j) In the face of other legal claims it resulted in ‘criminalisation’ of the tribal community’ and also to the de jure ‘loss of command’ over their resources for the tribal communities.
- (k) Unfortunately all concerned, including the Governors, having full powers to adapt laws, remained virtually unaware about this tragic transformation;
- (l) In sum the simple tribal was obliged under the law to approach some authority or other out somewhere there in the unknown wide world beyond.
- (m) The situation has been worsening incessantly.

Dealing with the background to enactment of PESA, the Mungekar Committee observed that the Directive Principles of State Policy (Article 40 of the Constitution) envisaged organisation of ‘Village Panchayats’ as virtual ‘Village Republics’ through ‘Panchayati Raj’. However, it was forgotten by the administrators and law makers that the tribal people had a strong functioning system of self-governance. This was so notwithstanding its non-recognition under the formal system. This omission has had adverse and disastrous consequences. The community was greatly handicapped in facing the new situation that had resulted in serious unrest through out tribal India. The

idea of 'Panchayati Raj' was resurrected in 1980s in search of an alternative for the dysfunctional politico-administrative system that has been incessantly running down. In the debate that followed about the structure of Panchayati Raj it was realised that any attempt to superimpose a formal system of Panchayats on tribals would lead to further accentuation of the confrontation. Accordingly a historic decision was taken by the Government of India in 1988 not to extend the general scheme of Panchayats to the Scheduled Areas (SA). Accordingly the draft 68th Amendment Bill concerning Panchayats excluded SAs from its purview and authorised the Governor to extend the same suitably to those areas. The Bill, however, could not be introduced for want of quorum. The issue was again taken up in early 1990s. By the 73rd and 74th Constitution Amendments, Part IX (concerning Panchayats) and Part IXA (concerning Municipalities) were added to the Constitution in 1993. They were not extended to the Scheduled Areas. These Acts underlined the need for extending the provisions concerning Panchayats/ Municipalities to the SAs with such exceptions and modifications as might be deemed necessary. Thus, the 73rd and 74th Amendments to the Constitution became the first ever laws after independence, which did not cover the SA in routine as they were. A High-powered Committee comprising select Members of Parliament and Experts with Shri Dileep Sing Bhuria as Chairman was appointed in 1994 to recommend exceptions and modifications in Part IX of the Constitution in its application to the SAs. The Committee submitted two Reports in 1995, one for Panchayats and the other for Municipalities. The Government of India generally accepted its recommendations. As a consequence, in 1996 the Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA) was enacted, which came into force on 24.12.1996. PESA brings the community at the village level in the form of Gram Sabha to the centre of governance. It acknowledges its 'competence' to manage all its affairs in accordance with its customs and traditions. PESA covers all aspects of people's life.

Before grasping the broad schema of PESA, it needs to be understood that the Fifth Schedule of the Constitution provides the basic frame for administration of the SA. But the canvass of administration in PESA is inclusive and comprehensive. As already mentioned, PESA brings the community in the form of Gram Sabha (GS) at the centre of governance at the village level. Gram Sabha comprises the people themselves where all other institutions are representative bodies. The scheme of PESA, however, is at variance with Article 243(A), which envisage 'endowment' of powers, as may be necessary, on the Gram Sabhas. But, any representative body including the Parliament cannot endow powers on Gram Sabha in a Scheduled Area since it is a self-created and self-empowered entity. The PESA corrects this gross anomaly of the Indian Constitution. That is the reason PESA acknowledges the 'competence' of a Gram Sabha to manage all their affairs, including community resources and dispute resolution, in accordance with their customs and traditions. The frame of governance of the Panchayats including Gram Sabha as envisaged for the tribal areas in PESA is comprehensive. It covers all aspects of people's life including the matters concerning intoxicants, prevention of alienation of land and restoration of illegally alienated lands, consultation before acquisition of land, grant of mining leases and concessions, control over money lending, regulation of village markets, management of water bodies, ownership of minor forest produce, developmental programmes and social services. Moreover, the Gram Sabha remains at the Centre of the stage in the system of tribal self-governance.

Before PESA, the simple tribal was obliged under the law to approach some authority or the other somewhere there out in the unknown wide world beyond. After PESA, all roads were supposed to lead to the familiar setting of the open assembly of the village formally specified as Gram Sabha. Thus with the enactment of PESA, the Directive Principle of State Policy about establishment of a virtual 'Village Republic' as envisaged in Article 40, after a long neglect, has become mandatory for SAs, with the extension of provisions of Panchayats in Part IX of the Constitution thereto with crucial changes as provided. PESA obviously engendered great fervour and high expectations throughout the tribal territory. After PESA, all roads were supposed to lead to the familiar setting of open village assembly (i.e. the Gram Sabha). The promise of real self governance in PESA tickled the feelings of one and all with the image of 'MY VILLAGE, MY RULE'.

Having recognized the primacy of community at the village level in the form of Gram Sabha, PESA forewarned every State legislature vide Section 4(n) to ensure that 'Panchayats at higher level do not assume the powers and authority of any Panchayat at the lower level or the Gram Sabha.' In practice, however, the States in many cases have taken advantage of the flexible provision of 'the Gram Sabha or/and Panchayats at the appropriate level' in PESA vide Section-4(i, k, l and m) to exercise their discretion in favour of Panchayats. But in States with strong people's movement as in MP, the Gram Sabha has been kept at the centre-stage while Panchayats are expected to play a supporting role. The Government of Madhya Pradesh made a notable beginning in 1997 for bringing about the following legislative reforms in line with PESA:

- The Land Revenue Code was amended to empower Gram Sabha to prevent unlawful alienation of land and restoration of unlawfully alienated lands.
- The Gram Sabha and Panchayats were authorised to grant mining leases of specified minor minerals up to annual letting value of Rs. ten lakh.

- The State Excise Act was amended empowering Gram Sabha to regulate all aspects of excise including enforcement of prohibition if it so decided.
- Comprehensive rules were made in 2000 in respect of 'consultation' with Gram Sabha before starting proceedings of land acquisition.

Mungekar Committee further noted that PESA engendered great fervor and high expectations throughout the tribal territory especially about the vision of self-governance at the village level with primacy to the assembly in the open in the form of Gram Sabha. But the initial euphoria over PESA was destined to be short lived. It was badly mauled by the anti-climax of non-action and even perverse action. In fact, nothing changed on the ground. The ritual of Gram Sabha degenerated into command performance under duress including fabrication and destruction of documents in land acquisition cases. Necessary Guidelines in keeping with the spirit of PESA were not issued for more than a decade. The concerned Ministries are still debating whether PESA is a part of the Constitution. If this debate becomes public, it may prove to be the last straw on the credibility of and faith in the System.

Dealing with the phenomenon of 'unattended ambivalence in the era of liberalization' Mungekar Committee observed that there surfaced a total confusion in SAs on the role of the State as a defender trustee of STs after the wave of liberalization set in with its thrusts on unregulated market and money power. The ambivalent 'protector predator' administration was found to be pitched against the people in promoting industries and acquiring land and natural resources, all in the interest of and in overt or covert alliance with the corporate barons, using the old, unchanged, incongruous laws in open defiance of the Fifth Schedule of the Constitution and PESA.

The issues about command over resources have not been reasonably settled even after the SC verdict in the Samatha case. It is adding to the confusion, creating strife amongst various interest groups and accentuating inherent confrontation in SAs. No guidelines, in keeping with the spirit of PESA, have been issued after 14 years of its enactment by the concerned State Governments and Central Ministries.

Notwithstanding the grand design incorporated in PESA, the Panchayati Raj (PR) institutions have so far largely occupied themselves with the so-called developmental programmes only. The establishment virtually treats these institutions as their subordinate formations. Even the Gram Sabhas are ignored or their authority neutralized through a variety of subterfuges including the reference to a jumble of rules and procedures. The so-called rules and procedures, as often insisted upon by the administration above, constitute a violation of the scheme of PESA since the latter does not admit the concept of 'endowment' of powers by the State to the GS as in the general areas but acknowledge its 'competence' for self-governance as per the existing traditions and customs in Scheduled Areas. Moreover, the formalities prescribed by the so-called rules and procedures are beyond the comprehension of the simple tribal. And here lies the crux of the crisis of governance in tribal populated areas- in the name of rule of law the tribal people were asked to follow the very bureaucratic nitty-gritty, with which there were absolutely unacquainted.

As regards the Panchayats at District level Mungekar Committee observed that PESA has a very significant provision for reforming and empowering Panchayats at district level, which is hardly alluded to in any discussion about Panchayats in Scheduled Areas. It is worth mentioning that the State Assembly of Madhya Pradesh had passed a unanimous resolution in 1993 to bring Bastar under the Sixth Schedule of the Constitution. In fact a Committee was constituted for the purpose under the Chairmanship of Professor B.K.Royburman. That proposal obviously created a scare amongst the outsiders in Bastar. However, the proposal was not pursued for the simple reason that it would require an amendment in the Constitution and was likely to open the Pandora's Box. Moreover, the proposal was shelved, because in the meantime PESA was enacted projecting its ultimate vision of Zilla Panchayats moving forward in the direction of Autonomous District Councils in Sixth Schedule Areas. To quote Section 4(o) of PESA – ***“the State Legislature shall endeavour to maintain the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district level in the Scheduled Areas”***. It is disheartening to note that no authority in the States concerned or the Centre has cared a farthing, even to examine the proposition, let alone making an endeavour in the envisaged direction.

Bemoaning the lack of focus and political will among the ruling coalitions and parties in respect of PESA, Mungekar Committee said, the irony is that all partners in governance in Scheduled Areas are still quibbling whether PESA is a part of the Constitution. For example, many States have not adopted the PESA definition of 'village' (Section 4-b), which envisages village as a swayambhu (self-created) entity in contrast with its definition in the general areas as a purely legal construct (Article 243-g of Constitution that authorizes the Governor to notify a 'village'). Even the Ministry of Rural Development, Government of India has run counter to the PESA's mandate for an empowered Gram Sabha in its flagship enactment National Rural Employment Guarantee Act, 2005, since

Section-13 of the Act declares Gram Panchayat as the Principal Implementing Authority at the Village level in contrast to PESA's insistence on Grama Sabha's absolute role in respect of approval of plans and programmes, identification of beneficiaries and certification of expenditures in Scheduled Areas.

Further in this connection, Mungekar Committee taking a dig at the Ministry of Panchayati Raj, Govt of India observed that even after countless Conferences and Working Group Reports in the last three years, the Ministry has preferred to remain silent on this issue because it holds that PESA is an ordinary Central Act and does not have the status of a Constitutional amendment banking on the clause '*no such law shall be deemed to be an amendment of the Constitution for the purposes of Article 368*'. However, it has ignored the fact that this provision relates to the procedure and not the substantive issue whether PESA is a part of the Constitution or not. Yet debate continues within the system that has served as a serious hurdle in the onward journey with no one mustering moral courage to come out in the open. If this internal debate about Constitutional position of PESA becomes public, it may prove to be the last straw before the total collapse of the faith of the tribal people in the System.

The Committee therefore opined that in sum, virtually nothing has changed on the ground after the enactment of the most radical law of the 20th Century except introduction of a few rituals in the name of Gram Sabha. The rapid spread of extremist activity in Jharkhand, Orissa and Chhattisgarh is just a logical corollary that followed the loss of faith after the great fervour was manifest around the enactment of PESA.

Delving into the ground reasons that led to the emergence of extremist groups as a potential power centre the Committee explained that "*the voice of discontent and dissent in the wake of virtual failure on all fronts in SAs has been subsumed in euphoria of liberalisation. It has hit resource rich areas the hardest. The people are left totally defenseless as goons of new lords out for virtual loot, law or no law, are ravaging one area after another in the name of development with servile administration at their beck and call. This change has signaled a new phase in SAs where its protector State has joined the rank of predators. This change has marked virtual collapse of even tokenism of Constitutional Regime in remote tribal territories*".

The Committee further observed that "*the only people whom the simple tribal, faced with any challenge of any description whatsoever, can approach are 'revolutionary groups' who have entered these areas largely for reasons tactical and strategic. The accentuating confrontation between people and State has brought to life memories of their early rendezvous with imperialist invaders. They appear to have apparently faded out but are still very much a part of their vivacious folklore. The State has ironically preferred to ignore the real issues or has remained satisfied with action in the nature of tokenism. It continues to treat the accentuating confrontation between people and State as a law and order problem notwithstanding its rhetoric about the avowed socio-economic approach*".

The Committee concluded, "*As noted earlier the sharp contradiction that engulfed the tribal life with the automatic extension of general laws with the adoption of the Constitution remained unattended. The irony is that enactment of PESA in 1996 that aimed at erasing that contradiction through creating space for the community and its tradition in the legal frame and acknowledging its competence to manage its tradition has remained virtually a nonstarter. The fact that PESA is an integral part of the Constitution for the Scheduled Areas is not appreciated. This has resulted in confusion, loss of confidence and a state of confrontation in many areas. It is high time that this state of ambivalence is put to an end and the Union and the concerned States make PESA operational*".

As regards the tricky issue of governance in the urban enclaves of Scheduled Areas, the Mungekar Committee observed that "*the urban Centres, except in North East, have hardly any tribal population. They are Centres of exploitation with torrential backwash effect on the hinterland. A number of suggestions were made from time to time for meeting the situation. A comprehensive frame for 'Taming the Transition', however, was presented by Bhuria Committee on Urban Bodies in 1995. It basically envisages partnership in all facets of development on terms of equality and dignity. This sentiment is also echoed by hon'ble Supreme Court in Samatha Case. However, the provisions of Part IXA of the Constitution concerning Municipalities remain to be extended to the Scheduled Areas till date even after 14 long years. The governance in the urban enclaves of Scheduled Areas is in existence without any authority of law. It is a matter of deep concern that all urban bodies in SA have been functioning without any authority of law now for more than a decade simply because Part IXA of the Constitution concerning urban bodies has not been extended there to. Part IXA should be extended to SA forthwith with exceptions and modifications as recommended by Bhuria Committee*".

COMMITTEE ON MINOR FOREST PRODUCE IN PESA STATES, FEB 2007

The Section 4(m-ii) of PESA Act 1996 has enjoined upon the State legislature to entrust both Grama Sabha and Panchayat at appropriate level with the ownership of minor forest produce. Though various State Governments paid lip-service to this mandate through their respective compliance amendments, the situation at grassroots level has registered no improvement favouring the communities in PESA areas- a fact which led to rising discontent among the tribal and other forest dwelling populations, and its eventual exploitation by the extremist groups. Seized with the slow progress in effective implementation of various provisions of the Act including those relating to minor forest produce across the concerned States, the Government of India in the Ministry of Panchayati Raj called for consultations with Secretaries of PESA States at Vigyan Bhavan, New Delhi on 14th July 2006. However, no satisfactory detailed information about the existing arrangements and status in concerned states, compliant or otherwise with PESA, was available. Doubts were also voiced as to the participation and involvement of GSs/GPs in the collection/trade and the sharing of income from MFP. Despite the gloomy scenario that prevailed, most significantly there was noticed a unanimity in favor of obtaining 'the best, most remunerative deal' for the Tribal. It was further observed that "simply because the co-operatives [FEDs / FDCs / TDCs] are earning good profit, it does not mean that they are paying good remuneration to the Tribal." Among other issues, the following ones relating to MFP came up for deliberation: "*What is the status of ownership of Minor Forest Produce in Scheduled Areas?, and If there is a MFP Federation [FDCs / TDCs], do the proceeds go to the GS /GP or Shareholders in the co-operative [primary societies]? What is the experience in this regard?*" The said meeting on the suggestion of Dr.B.D.Sharma (ex-Secretary, Madhya Pradesh Govt. and presently Convener of the Bharat Jan Andolan recommended the constitution of a Committee (of officers) to examine *the issues of Tribal interests on Minor Forest Produce to frame guidelines*. It was in this context that a Committee came into being with Shri A K Sharma, IFS, Managing Director, Gujarat State Forest Development Corporation Ltd., VADODARA as its Chairman. The Committee submitted its Report on 28 FEBRUARY, 2007.

In their Report the Committee admitted that though most of PESA States have made the compliance amendment to the concerned laws and regulations in respect of minor forest produce, however at ground level the Grama Sabhas didn't enjoy real power over minor forest produce nor did the net benefits of MFP trade flow to the tribal and forest dwelling communities in the Scheduled Areas.

From the state-wise detail analysis made by the Committee on the situation of minor forest produce, the situation in Orissa was revealed to be as follows.

OWNERSHIP of 69 MFP items formally lies with the Gram Panchayats.

COLLECTION/ PROCUREMENT- Collection/ procurement is regulated by the Gram Panchayats.

PRICING- Pricing is regulated by the Gram Panchayats and it is done at the Gram Panchayat / Panchayat Samiti / District level.

TRADE- Trade of MFP is also regulated by the Gram Panchayats. No specific mechanism has been evolved or organisation/ authority constituted for the purpose of regulating these aspects. However, the Gram Panchayats are expected to oversee and regulate such activities.

GOVERNING STATE ACTS- The Orissa GP (MFP Administration) Rules, 2002 provides for the collection/ procurement, pricing and trade of MFP in the State.

DEFINITION OF MFP UNDER THE GOVERNING ACT- Definition of MFP is not available.

MFP NATIONALISED- List of MFP nationalised is not available.

ROLE OF FDCs / TDCs AND G.S. / V.P.s- There is no specific provision for participation of State Forest Development Corporation / Tribal Development Corporation in MFP trade. However, they participate in such trade in the specific area along with the traders. But ideally the role of State FDCs / TDCs should be significant for ensuring payment of minimum support price or approved rate of MFP to the Primary Collectors. As a matter of fact, distress sale can be avoided with participation of FDCs / TDCs in minor forest administration.

ROLE OF GRAMA PANCHAYATS- Gram Panchayats are empowered in the licensing of trading in MFP for particular items in the specific areas. However, their participation is mainly in regard to licensing. The pricing is approved at the intermediary level i.e. Panchayats Samiti. Whenever there is necessity the decision is taken at the District level.

STATUS OF FDCs/TDCs- No information about the status of Orissa State Forest Development Corporation Ltd. was made available. However, its annual report for the year 2003-04 revealed that it has not been faring well and has become a sick company with huge accumulated losses.

From the above note by the Committee on Orissa it is absolutely clear that contrary to the mandate of PESA Grama Sabha has not been given any role or power in minor forest administration, and Orissa Forest Development

Corporation has not been involved in any manner except in the capacity of traders along with private traders in some areas.

Further it is worthwhile to note that the Committee also analyzed the latest audited annual reports of five states that were available. These were Chattisgarh, Gujarat, Jharkhand, Madhya Pradesh and Orissa. Its findings rated the Jharkhand FDC as being the healthiest Corporation with a Return on Investment (ROI) as high as 64%, a Turn over Ratio (TOR) of 16:1 and above all a reasonably ideal Net Profit Ratio (NPR) of 4%. On the other extreme of the spectrum stood the Orissa FDC with its extremely high manpower cost and a rare Current Ratio (CR) of 0.67:1 and with an idle cash surplus worth Rs.42.22 crores!

Report of Raghav Chandra Committee formed by The Govt of India, Ministry of Panchayati Raj {To recommend the measures for seeking co-ordination between different Central and State Acts in the light of land and mineral provisions in PESA i.e. Section 4(i) Section 4(k) Section 4(l) and 4 m(iii)}.

This Committee was formed to recommend the measures for seeking coordination between Central and State Acts in the light of the following four provisions of PESA Act 1996-

Section 4(i) -Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled areas; the actual planning and implementation of the projects in the Scheduled Areas shall be co-ordinated at the State level.

Section 4(k) - The recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas.

Section 4(l): The prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction.

Section m(iii) - Panchayat at appropriate level and Grama Sabha to be endowed with the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe.

The Raghav Chandra Committee in their Report first of all recommends that the PESA being an Act of Parliament and Clause-5 of Fifth Schedule of the Constitution enjoining upon the Governor of the concerned State to give a direction as regards the applicability of a Central or State Act or extent thereof to a Scheduled Area, the opinions of Governors of PESA States should be sought as to whether, in which respects and to what extent the provisions of PESA should be made applicable in the Scheduled Areas in their respective States. It is worth citing the words in which he has argued out the above position. "As per the Fifth Schedule of the Constitution, which contains provisions as to the administration and content of the scheduled areas and scheduled tribes, "notwithstanding anything in this context, the Governor may by public notification direct that any particular Act of Parliament or of the Legislation of the State shall not apply to a scheduled area or any part thereof in the State or shall apply to Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any directions given under this sub-paragraph may be given to as to have retrospective effect. ***Thus, the Governor can, by public notification, direct that the PESA Act shall not apply to a Scheduled Area or any part thereof in the State, or shall apply to Scheduled Area or any part thereof in the State subject to such exceptions and limitations as he may specify. Since the powers of the Governor can have retrospective effect hence it is appropriate that first and foremost, the State Governor's consent is necessarily obtained in PESA areas to allow for the constitutional compatibility of PESA***".

Section 4(i) of PESA states that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level.

Firstly, the Land Acquisition Act, 1894, which is a Central Act is silent regarding the powers or role of the Gram Sabha or the Gram Panchayat as mandated under the PESA Act. Hence provisions will have to be drafted into the L.A. Act of 1894 to make it consonant with the PESA Act. **Secondly**, it is not enough to seek consultation with either the Gram Sabha or the Panchayat. A situation is likely here wherein the developer for whom land is being

acquired may incentivize a select few prominent members of the Panchayat Samiti (including the Sarpanch) directly, or through the help of other public functionaries in the public administration domain, upon whom the Panchayat Samiti members are dependent for the purpose of supervision, coordination, audit and financial scrutiny. Hence, the ideal arrangement would be for the rules to stipulate that where the Gram Sabha is not being convened and consulted, the full Panchayat body will have to formally meet to give its concurrence with the acquisition and resettlement/rehabilitation proposals. Merely an informal meeting of the Panchayat Samiti or of a few of its members in which a letter of assent is issued under the signatures of the Panchayat Secretary (at the best with the dual signature of the Sarpanch) would not be adequate. **Thirdly**, keeping in view the fact that a Gram Sabha of tribes is likely to be less commercially savvy, to be able to protect the interest of the tribes whose land is being acquired, it would be necessary for a representative of the Tribal Development Commissioner of that State along with a representative of the Collector to be mandatory present during the deliberations in which any proposal for acquisition or resettlement and rehabilitation package is discussed. **Fourthly**, it is necessary to balance the rights of the tribal with the eventuality of the State having to invoke the eminent domain power because it feels convinced that the acquisition is in significant public interest for the larger good of society. It is possible that a Gram Sabha may stymie the sovereign powers and eminent domain rights of the State acting in "public interest". In such a case what is the safeguard against a recalcitrant Gram Sabha whom the State is not able to convince about the significant public interest and the safeguard packages built into the R& R. What can, perhaps, be done is that if the land is in the periphery and the Gram Sabha resolves to keep it out of acquisition, this should be acceded to and permitted; however, where the land falls between areas whose Gram Sabhas have not objected to the acquisition, then that Gram Sabha can be overruled by the State after passing a reasoned judgment in this regard.

How should the Consultation be made? How shall the Gram Sabha be consulted? Again, the views of the Tribal Development Commissioner should necessary be taken along with those of the Gram Sabha/Gram Panchayat. Here again, either the Gram Sabha themselves, or the full and formal Panchayat Samiti body shall meet and give its stamp of approval and further suggestions in this regard.

What should the compensation be determined? There is a symbiotic environmental and cultural relationship between the tribal denizen and his land. Bereft of his land a tribal is pushed further back in the evolutionary ladder. He becomes nomadic, more dependant on the forest and more likely to violate the provisions of the Forest Conservation Act. Community assets and community values and networking which are the parts of the tribal way of life are easily denigrated and destroyed. Assimilation into other service sector professions is ruled out because of the non-existent literacy level. Thus merely monetary compensation would not be adequate or appropriate for the sustainable maintenance and development of the tribals. Land should necessary be given as compensation. In the eventuality that an offset arrangement cannot be carved out whereby land for land is arranged by the prospective developer, it should be the duty of the State to acquire land for the tribals, until which time they should not be dispossessed of their land. Also, the land should be such that it is (A) cultivable and (B) in the tribal areas itself- this safeguard is necessary to ensure that the tribals are not alienated from their cultural moorings and comfort-zone. That such an arrangement has been duly made should have to be certified by the Tribal Development Commissioner or the District Agriculture Officer. In fact, a more generous compensation, resettlement and relocation package should be provided than in other cases – i.e. land plus solatium plus resettlement grant. Where for some exceptional reason equivalent land rights cannot be conferred, this should be truly rare and to be certified by no less than a Committee of Secretaries to be so designated by the Government. In such an exceptional instance where only monetary compensation is possible, then three things should be done. Firstly, compensation equivalent to the market price of alternate cultivable land in the nearest non-tribal areas should be given along with solatium etc. Secondly, a Convertible Bond Certificate (Convertible debenture) assigning a value to the land, which is redeemable after say 5 years should be kept with the Commissioner of Tribal Development. In the case of conversion into equity, the Bond can be priced at a fraction of the overall Equity of the Project. A suitable formula can be devised (based possibly on assigning a value to the land as a fraction of the overall equity of the Project) so that the tribal (or his family) whose land is being taken away is able to reap the fruits of the Project for which he has surrendered his land. Thirdly, as land is not being replaced, the tribal's land should not be taken away for good, but in this case only leased to the Project and should automatically revert back to the tribal after a concession period of 15 years.

As regards **resettlement and rehabilitation**, the principle of least displacement is the ideal to follow. An exhaustive social impact assessment should have to be conducted prior to the acquisition process apart from seeking the consultation with the Gram Sabha and the Gram Panchayat. The Project affected tribals would have the first right to jobs in the Project and the Commissioner Tribal Development will be the nodal agency to safeguard the rights and opportunities of the tribals for proper resettlement and rehabilitation and compensation. Any infringement of this should become punishable.

Section 4(k) : The recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas. The Committee felt that it would be sufficient to take the views of the Gram Sabhas or the Gram Panchayat but that their advice need not be made binding and mandatory on the government before granting of prospecting licences. In Maharashtra before grant of prospecting licenses the survey is conducted by the GSDA (Ground Surveyor and Development Authority) and based on their recommendation decisions are taken after considering the environmental aspects.

Section 4(l): The prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction. Granting of concessions for the extraction of minerals has to be viewed from two angles. Firstly, extraction of minerals on government land often involves the cornering of “nistar” or community rights over the land reserved for grazing or playground etc and thereby has an adverse impact on the community and habitat. Secondly, where private land is involved, it involves dispossession of the tribal from his traditional land holding. Here again the implications are as serious as in the case of land acquisition and hence the entire drill and the entire set of safeguards and safety nets should be thrown in as in 4(i) above. The Gram Sabha must be convened or the full body of the Panchayat and the compensation, resettlement and rehabilitation package discussed, delineated and chalked out to the mutual satisfaction of all parties under the supervision of the representatives of the District Collector and the Commissioner for Tribal Development.

Section m(iii) : The power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe. The Maharashtra Land Revenue Code and Tenancy Laws, 1974 prevents alienation of land belonging to the Scheduled Tribes. The Maharashtra Restoration of Land to Scheduled Tribe Act, 1974 restores tribal land that has been alienated. The only State to have made these provisions consistent with the PESA is the Government of Madhya Pradesh. The MP Land Revenue Code had hitherto provision for restoration of tribal land that had been alienated only through the intervention of the Sub-Divisional Officers, that is representatives at a senior level of the State. The Panchayat had no powers in this regard. However, by amending Section 170(B) and inserting Subsection 2-A to it a provision has been made that if any Gram Sabha in the PESA area finds that a non-tribal is in illegal possession of tribal land, then the Gram Sabha can restore possession of the land to the original holder and if he is no longer alive then to his legal heir. Also, if the Gram Sabha is unable to restore the possession back, then it can forward such a case to the Sub-Divisional Officer who will then restore possession of such land in 3 months time. Also the Gram Sabha quorum should be revised to ensure that at least 50% of those present should be Tribal members. Presently the quorum is 10% only. Such enhanced quorum for tribal members should be made universal to prevent tribal persons from getting alienated from their land.

PESA, a charter of self-governance for Scheduled Areas (Expert Group Report)

Keeping in view the need for understanding and tackling the growing incidence of extremism in the tribal terrains of mainland India, the Planning Commission had set up an Expert Group on “Development Issues to deal with the causes of Discontent, Unrest and Extremism” in May, 2006. The 16-member Expert Group had Mr.D.Bandoadhyay, a Retd. IAS Officer as its Chairman and Dr.B.D.Sharma Chairman Bharatiya Jan Andolan as a member among others. Its terms of reference included an item to ‘Suggest measures for strengthening the implementation of Panchayat Extension to Scheduled Areas Act (PESA) and the functioning of Autonomous Councils in the Sixth Schedule and other areas to ensure empowerment of the communities and their representative & participatory institutions in the design of developmental activities and their implementation’. The Expert Group submitted their Report titled ‘**Development Challenges in Extremist Affected Areas**’ in April 2008. The Report has five chapters. The first chapter gives the context in which the whole situation developed. Second chapter deals exclusively with the Tribal issues in the Fifth Scheduled Areas. The third chapter deals specifically with the elements of discontent of the people arising out of failure of the system. The fourth chapter discusses the responses of the state to these issues of rural violence and the fifth chapter contains recommendations which arose from the analysis contained in the preceding four chapters.

In its **Chapter-1** itself, the Report had brought out the concern for the disturbed fate of Scheduled Tribes and Scheduled Areas and its overarching import for the rising scale of social tensions and extremist violence gripping the said populace and terrains. It observed, *“The architects of the Constitution, being conscious of the distinct identity of the tribal communities and their habitat, provided certain articles exclusively devoted to the cause of the tribal people, including Articles 244, 244A, 275(1), 342, 338(A) and 339. Following these provisions in the Constitution aimed at ensuring social, economic and political equity, several specific legislations have been enacted by the Central and State Governments for the welfare and protection of tribal people and their tribal domain. In the seventies, a serious attempt to focus on the tribal population in the planning process was made in the form of a Tribal Sub Plan strategy. The process of bringing all tribal majority areas under the Fifth Schedule*

of the Constitution was also taken up. The 73rd and the 74th amendments to the Constitution of India, followed by the Provisions of Panchayats (Extension to Scheduled Areas) Act 1996 (popularly known as PESA), brought in a new model for self-government in the Fifth Schedule areas of the country. Despite the plethora of development plans, programmes and activities initiated in the tribal areas, the majority of Scheduled tribes still live in conditions of serious deprivation and poverty. The tribal people have remained backward in all aspects of human development including education, health, nutrition, etc. Apart from socio-economic deprivation, there has been a steady erosion of traditional tribal rights and their command over resources. Unrest and discontent are not new to tribal areas, nor is it just a post-independence phenomenon. The earliest uprisings against the British, in the closing decades of the 18th century, were triggered by colonial expansion into the forests. The uprisings were generally suppressed by force. Over the last century, all the tribal communities have had their political, social and economic life changed under the impact of the colonial administrative system. The most significant of these changes has been the loss of command over their resources. In general, the contradiction between the tribal community and the State itself has become sharper, translating itself into open conflict in many areas. Almost all over the tribal areas, including Nagaland, Manipur, Tripura, Assam, Jharkhand, Orissa, Chhattisgarh, Maharashtra, Andhra Pradesh and Kerala, tribal people seem to feel a deep sense of exclusion and alienation, which has been manifesting itself in different forms. .. Apart from poverty and deprivation in general, the causes of the tribal movements are many: the most important among them are absence of self governance, forest policy, excise policy, land related issues, multifaceted forms of exploitation, cultural humiliation and political marginalisation. Land alienation, forced evictions from land, and displacement also added to unrest. Failure to implement protective regulations in Scheduled Areas, absence of credit mechanism leading to dependence on money lenders and consequent loss of land and often even violence by the State functionaries added to the problem. .. Much of the unrest in society, especially that which has given rise to militant movements such as the Naxalite movement, is linked to lack of access to basic resources to sustain livelihood”.

The concluding observations of Chapter-1 ran as follows: *“The development paradigm pursued since independence has aggravated the prevailing discontent among marginalized sections of society. This is because the development paradigm as conceived by the policy makers has always been imposed on these communities, and therefore it has remained insensitive to their needs and concerns, causing irreparable damage to these sections. The benefits of this paradigm of development have been disproportionately cornered by the dominant sections at the expense of the poor, who have borne most of the costs. Development which is insensitive to the needs of these communities has invariably caused displacement and reduced them to a sub-human existence. In the case of tribes in particular it has ended up in destroying their social organisation, cultural identity, and resource base and generated multiple conflicts, undermining their communal solidarity, which cumulatively makes them increasingly vulnerable to exploitation. . . The pattern of development and its implementation has increased corrupt practices of a rent seeking bureaucracy and rapacious exploitation by the contractors, middlemen, traders and the greedy sections of the larger society intent on grabbing their resources and violating their dignity. It has invariably happened that in situations where the interests of the larger community have clashed with the interests of the tribal communities, the former have prevailed to the detriment of the latter. The participation of these communities in the articulation of this paradigm of development is at best symbolic and at worst non-existent. ... What is surprising is not the fact of unrest, but the failure of the State to draw right conclusions from it. While the official policy documents recognize that there is a direct correlation between what is termed as extremism and poverty, or take note of the fact that the implementation of all development schemes is ineffective, or point to the deep relationship between tribals and forests, or that the tribals suffer unduly from displacement, the governments have in practice treated unrest merely as a law and order problem. It is necessary to change this mindset and bring about congruence between policy and implementation. There will be peace, harmony and social progress only if there is equity, justice and dignity for every one”.*

The **Chapter-2** of the Report titled ‘Extending Panchayati Raj to the Scheduled Areas (PESA)’ is an excellent exposition of the unique features of PESA Act which if given effect to shall minimize, if not eliminate altogether, the mounting social unrest, and confrontationist and extremist violence in the Scheduled Areas. It brings out certain unique nuances of PESA Act, which are not usually taken notice of in mainstream official or civil society discourse running around it.

Firstly, it observed that Part IX concerning Panchayats was added to the Constitution in 1993 by the 73rd Amendment Act. The 73rd amendment was the first ever law after independence which did not cover SA in routine as it was. Accordingly a high powered Committee comprising select Members of Parliament and Experts was appointed in 1994 to recommend exceptions and modifications that may be made in Part IX in its application to the SA. The Committee submitted its Report in 1995. The Government of India generally accepted its recommendations. The Provisions of Panchayats (Extension to the Scheduled Areas) Act (PESA) was enacted in

1996. The provisions of Part IX of the Constitution were extended to SA subject to the special features mentioned in Section 4.

Secondly, the Fifth Schedule (FS) of the Constitution provides the basic frame for administration of the SA. The canvass of administration in this case is inclusive and comprehensive. The Governor is the supreme legislator for the SA. He enjoys limitless powers under Para 5 of the FS for (i) adapting any law of the State or the Union in its application to the SA in the State or any part thereof, and (ii) framing Regulations 'for the peace and the good government of...a Scheduled Area', cutting across the formal boundaries set out in the Seventh Schedule. Thus, the FS has the great potential for creating a flexible and comprehensive frame of administration dedicated to the protection and advancement of the tribal people. It is a pity that this potential has remained largely unexplored. Instances where Governors have used the powers under Para 5 (1) of the FS for adaptation of any law are few and far between, notwithstanding the accentuating dissonance between the ground reality and the legal frame in the tribal areas.

Thirdly, it is important to note that tribal affairs and SAs are not specifically mentioned in any of the three lists in the Seventh Schedule. Accordingly any law concerning these items can be enacted either in term of specific provisions in the Constitution including 'regulations' under the FS, or under Item 97, 'any other matter...' of the Union List. The various laws enacted by the State Legislatures (SL) automatically cover the SA. Such laws may have even special provisions for the SA. This legal frame has given rise to a milieu of ambivalence about tribal affairs, compounded by indecision and inaction on the part of the executive.

Fourthly, PESA for the first time brings the State Legislature (SL) in the picture in matters concerning Panchayats located in SA. Space has been created in the frame of PESA for this purpose. Section 4(m) specifically mentions 'endowing Panchayats in SA with such powers and authority as may be necessary to enable them to function as institutions of self government'. This provision is on the same lines as in the general areas. However, the jurisdiction of the State Legislative (SL) envisaged here is subject to the specific provisions of PESA that have been set out in unequivocal terms in Section 4 as the basic 'features' of governance in the Scheduled Areas (SA), in keeping with the spirit of the Fifth Schedule (FS). It begins with a mandate, making the features listed therein as non-violable by the State Legislatures- 'Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features'.

Fifthly, Section 5, in the same vein, mandates the fall out of non-action by the concerned authorities. It envisages that any provision of any law relating to Panchayats which is inconsistent with the provisions of PESA 'shall continue to be in force until amended or repealed by a competent legislature or other competent authority or until the expiry of one year from the date on which this Act receives the assent of the President'. Accordingly, all inconsistent provisions in relevant laws are deemed to have lapsed on 23.12.1997.

Sixthly, the most distinguishing 'feature' of governance at the village level in PESA is the 'creation of space' in the legal frame for the functioning system of self-governance of the tribal people. Moreover, detailed provisions have been made in PESA itself in that regard, leaving no choice with the SL, which is mandated to ensure that the frame of governance is in consonance with the local situation.

Seventhly, the provisions about Panchayats, especially the District Panchayat, in the SA in Part IX read with PESA are transitory. PESA places special responsibility on the SL with regard to redefining the role of Panchayats at the District level, drawing upon the provisions of the Sixth Schedule in that regard. Section 4(o) of PESA envisages that: The State Legislature shall endeavour to maintain the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at the District level in the Scheduled Areas.

Eighthly, the roles and responsibilities of Panchayats, even at the intermediate level, may undergo qualitative change once a SL turns its attention to this crucial provision. It may be mentioned here that demand for converting FS Areas into Sixth Schedule Areas has been raised ubiquitously.

Ninthly, the basic objective of the special provision in PESA about adopting the pattern of the Sixth Schedule at the district (level quoted) above is to facilitate structural transformation in higher-level Panchayats, once the foundation has been laid at the village-level. ... Any attempt to create a superstructure without laying the foundation can prove to be dysfunctional.

Tenthly, the community at the village level was excluded from the general legal frame adopted by the British in India beginning with 1860s. The objective was clear, viz., 'Break the community so that the authority of the Imperial Regime remains unchallenged.' The tribal tradition of self-governance during this period, however,

remained largely undisturbed in the face of their dogged resistance against the intruders. This continued till the adoption of the Indian Constitution. The colonial legal frame got inadvertently superimposed, as it was, on the tribal people living in hitherto excluded areas. This inadvertent action of the State has rendered the tribal people totally helpless in dealing with the outside world.

Eleventh, this paradigm of governance would have been totally transformed into a non-centralised frame if PESA had been honestly implemented. The Act begins with redefining the village in terms of habitations that comprise a 'community' and accepting 'the competence of the community' to manage its affairs as is clear in the following: Definition of 'Village'. According to Section 4(b) of PESA: 'a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs.' Thus, PESA accepts that the 'village' essentially comprises a functioning 'community'. The members of this community at the village level, albeit 'whose names are included in the electoral rolls', together constitute the formal legal entity 'Gram Sabha'. Thus, in the new frame of governance the formal 'village' of PESA and the organic 'community' comprising the village become congruous. This special feature of PESA stands out in contrast with the general definition of 'village' in Article 243(g) of the Constitution, which is purely legal and tautological, with no reference to the community living therein - "village" means a village specified by the Governor by public notification to be a village for the purposes of this Part and includes a group of villages so specified. Thus Gram Sabha (GS) in a village in general areas comprises merely individuals whose names are recorded in the voter list of the concerned Panchayat. There is no mention about the community, if any.

Twelfth, there is a basic difference between the Gram Sabha (GS) as specified in PESA for the SA and 'Gram Sabha' in general areas. The provisions in Articles 40 and 243G concerning Panchayats or even in Article 243A in the case of GS in general areas envisage 'endowment of powers as may be necessary to enable them to function as institutions of self-government'. There is a paradigm shift in Section 4(d) of PESA. It does not envisage 'endowment of powers' as in general areas, but simply acknowledges the 'competence' of the GS to manage all its affairs in accordance with its customs and traditions. Thus: 'Every Gram Sabha shall be competent to safeguard and preserve the traditions and the customs of the people, their cultural identity, community resources and the customary mode of dispute resolution.' This provision, without in any way limiting the scope of self governance, specifically refers to two crucial aspects of governance at the village level, namely, (a) management of community resources and (b) resolution of disputes. These two along with the 'competence to safeguard cultural identity' together comprise the quintessence of governance at the village level.

Thirteenth, while PESA does acknowledge the centrality of the traditional system, albeit with reference to the community at the village level in the form of GS, it makes no provision for or even reference to the place and role of any of the existing traditional institutions at the village and higher levels. For example, command over and management of community resources and dispute resolution, are two crucial features that have been specifically covered in the frame of competence of the GS. But the community at the village level is not the last arbiter in these matters. The livelihood resources in the village may be shared by the people with other people in the neighbouring villages. Similarly the traditional frame for dispute resolution comprises not only the concerned village assembly but also institutions at level of a group of villages, and higher levels, for dealing with inter village disputes and appeals against decisions at lower levels.

Fourteenth, while the outline of the frame of traditional institutions described above is universal, there are significant variations of detail in this regard amongst different communities in the same area, or even the same village, and also within the same community in different areas. The great diversity of the traditional systems of the extensive tribal areas cannot be captured within the ambit of a single central legislation like PESA that aims to cover only the special 'features' of the governance in the SA. In fact any such attempt would have been dysfunctional. Accordingly, the responsibility for covering these aspects can be deemed to rest with the concerned Legislative Assembly (LAs), in terms of the special jurisdiction that has been endowed on them in PESA with regard to the 'administration' of the SAs. Moreover, wherever necessary, the powers vested in the Governor under Para 5 of the FS can also be suitably invoked, to ensure that the new frame is comprehensive and fully in tune with the spirit of PESA.

Fifteenth, the responsibility for preparing the legal frame for governance of the SA imbibing the spirit of PESA rests unequivocally with the concerned State Governments. Nevertheless, the overall responsibility for ensuring that the concerned States act accordingly is with Union Government, in terms of the provisions in Para 3 of the FS.

The Chapter-2 of the Report also takes a panoramic view of the trend of tardy implementation of PESA Act at the level of concerned States and also by the Union.

Firstly, the adaptation of the Panchayat Acts has been pursued by the States in a routine way. The current review shows that hardly any relevant Acts of the Centre, or even the concerned States, have been amended to make them consonant with the relevant 'features' of governance in SA. Madhya Pradesh, including Chhattisgarh, is the only exception, which made a commendable beginning in this regard but left the same halfway through. Jharkhand holds the record of sorts with its claim that PESA has not come into effect in the State because of no elections to Panchayats. Accordingly the 'Gram Sabhas' have not been formed. The State Government is oblivious about the nature of governance at the village level in SA as envisaged in PESA. No one in the Union Government has considered this issue worthy of intervention in terms of Para 3 of the FS. Andhra Pradesh has adopted the safe strategy of writing down everything mandated by PESA in its amendment to the State's Panchayat Raj Act, with the riders 'to such extent and in such manner as may be prescribed', and has left what is to be prescribed unprescribed, so that the whip is finally in its rule-making pocket.

Secondly, the rudderless implementation of PESA, albeit partial and perfunctory, faces the first estoppel at the level of defining the 'village' that comprises the community, and 'competence' of GS to manage the affairs of the community in terms of its customs and traditions. Once these 'features' are incorporated in the legal frame, the paradigm of administration at the village level would undergo a total transformation, with community at its centre and in a commanding position.

The Chapter-2 also undertakes a critical review of PESA Framework to bring out into bold relief a nuanced understanding about some of its basic tenets, which are usually missing from the mainstream discourse around PESA in official or civil society circles.

Firstly, the jurisdiction of GS under PESA is comprehensive. It covers all aspects of people's life -social and economic, as also their relationship with all other institutions including the State. The ground reality at the moment is that in case a citizen is faced with any problem in life, he is obliged to approach concerned authorities of the State. He has to seek their indulgence, favour or directions in terms of the laws of the land about which ironically he knows virtually nothing. The formal position in this regard stands transformed after enactment of PESA. If a person faces any problem, the solution is within the community. It is not a favour or special dispensation; it is envisaged as the natural right of the community. After providing for a comprehensive general frame in Section 4(d), specific features of governance are outlined in other Sections of PESA.

Secondly, the jurisdiction of GS so defined covers the entire gamut of developmental activities including control over institutions and functionaries as also control over local plans and resources in the village under Sections 4(e), (f), and Sections 4(m) (vi) and (vii). The Panchayat at the village level is unequivocally answerable to the GS and is its executive agency. Further, the State is obliged to consult the GS before acquisition of land and rehabilitation of displaced persons under Section 4(i) and before granting of lease etc of minor minerals under Section 4(k) and (l). The SL is mandated under Section 4(m) that while endowing powers and authority to the Panchayats to enable them to function as institutions of self-government, it must, inter alia, ensure that Panchayats and the GS are specifically endowed with powers in relation to matters specifically mentioned therein including all aspects of control over excise, moneylending, managing village markets, ownership of minor forest produce, prevention of land alienation and restoration of unlawfully alienated lands.

Thirdly, notwithstanding the comprehensive frame of PESA, the developmental activities loom large in the agenda of GSs even in SA. This is particularly so because the agenda of GSs and Panchayats in various States goes by the practice prevalent in general areas where the Panchayat system is largely concerned only with development. In contrast, the developmental activities in SA are formally subsumed in the comprehensive agenda of the community in the form of GS.

Fourthly, viewing Gram Sabha, Panchayats and the State as a harmonious construct the Report observes that according to PESA, there are three partners in governance at the village level in SA, namely, the community in the form of GS, Panchayats and the State. In this frame the position of GS is unique by virtue of the fact that it comprises 'We, the People of the Village' themselves, while other institutions, at best, comprise people's representatives. Therefore all institutions, including Panchayats and the State itself, are expected to assist GS, behoving its stature and authority. This would require fine-tuning between the powers and jurisdiction of different authorities. Extra caution has been taken in PESA itself under Section 4 (n) to avoid any confusion about their position. It envisages that the SL, while 'endowing' powers on the Panchayats, has to ensure that 'Panchayats at the higher level do not assume the powers and authority of any Panchayats at the lower level or the Gram Sabha'. The powers of GS under Section 4(d) are plenary and inclusive. Therefore, the powers that a Panchayat at any level may be endowed with, be it the village, intermediate or district, cannot be inconsistent with the plenary character of the powers of GS. They must be construed in such a way that the role of Panchayats is supportive to that of GS.

Fifthly, It may be underlined here that the special provisions for self-governance, especially at the village level in the form of GS in PESA, do not absolve the State of its special responsibility to provide effective protection to the tribal people against adverse elements and exploitation, and also its duty to work for their advancement. The State, however, will have to proceed cautiously and ensure that it does not transgress the limits of a truly democratic polity in the name of protection and development. The role of the State, therefore, has to be strictly supportive.

Sixthly, emphasizing the harmony between the Traditional and Formal inherent in PESA framework, the Report underlines that the most crucial task in the implementation of PESA is to redefine the 'village' and redraw the village map on the ground. The existing 'villages' are purely administrative units. The 'village' as envisaged in PESA is a social unit. The basic unit in this case is a habitation or a group of 'habitations', 'comprising a community and managing its affairs in accordance with customs and tradition'. The current review shows that most of the States have adopted the definition of village as in PESA, but mechanically. Moreover, virtually no steps have been taken to transform and realign the existing administrative village structure into community-centred village structure.

Seventhly, the 'Gram Sabha' as envisaged in PESA is an assembly of people of a village comprising the functioning community at that level. Unless the 'village' is properly delineated, the assembly of people belonging to an administrative unit known as 'village' cannot be deemed to comprise a GS in keeping with the spirit of PESA. There is open violation in this regard in the Panchayat Laws themselves, as in Orissa and Rajasthan. The GS in Orissa comprises a dozen or even more Paliases, which in turn may comprise one or more habitations. The assembly that gathers from a dozen Paliases in the name of GS is not a community but a crowd. Similarly, Rajasthan treats Village Panchayat area as the basic administrative unit. The Panchayat area is mechanically divided into a number of electoral wards. The dividing line between two wards may cut through natural habitations, which according to PESA, are indivisible entities. The Ward Sabha so constituted does not comprise the natural community. In Gujarat the revenue village is treated as the building block of the self-governing system in the SA, ignoring the community centric mandate.

Eighthly, views and decisions of traditional and customary institutions should be accepted by Gram Panchayats, unless they are overridden by the GS. In other words, the respective GS in SA have the power to change or override a customary or traditional practice / decision.

Ninthly, Section 4 (a) of PESA mandates that 'State legislation on the Panchayats shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources'. However, it is obvious that the Provisions of the Constitution and individual and community rights provided in other relevant laws of the Centre and states are relevant and their spirit and purpose should have primacy. Justice related issue of criminal, social and welfare spheres would be binding on traditional and customary bodies and also on GS in SA. Human rights and Constitutional values are sacrosanct and nothing that the traditional and customary bodies do or practice shall be against these rights and values.

Tenthly, 'Dispute resolution according to customs and tradition of the community' is basic to effective governance at the village level. This aspect has been totally ignored by the States and no worthwhile steps have been taken in this regard so far. In some States, such as M.P., Adalati Panchayats have been established in general areas for groups of villages, with jurisdiction over a number of penal provisions in the Indian Penal Code (IPC) and also Minor Criminal Acts. This new system has not been extended to the SA in deference to the provisions in PESA about the 'competence' of GS about dispute resolution. Separate mechanisms require to be worked out urgently for resolution of disputes in each state in FS, relating to implementation of PESA provisions other than customary models of disputes, and for appeals / revisions of GS decisions. However, traditional/customary dispute settlements machinery and process should not violate, transgress or offend the established laws of the land.

The Chapter-2 then moves forward to bring out the protective dispensations built into the provisions of PESA, and simultaneously points out how these have been deliberately ignored by the States while framed their compliance amendments. At places the Report also indicates where PESA suffers from inadequacy or ambiguity and suggests necessary amendment to remedy them. It says that the concept of self-governance has no meaning unless the Community is competent to protect its resources and the habitat that sustains the community. These aspects are reasonably covered in the plenary powers of Gram Sabha under Section 4(d) discussed above. Nevertheless, the Panchayats at appropriate level have also been brought into the schema of governance, but their role has to be specified in the State Law. State laws have tended to specify the 'appropriate level' as the middle tier rather than the lowest tier, thereby increasing the distance from the community. However, in view of the central position of Gram Sabha in governance, the role of Panchayats in the conjunctive frame cannot but be supportive.

Firstly, the issue of land is crucial. Experience shows that wherever the traditional system of ‘community ownership and individual use’ is continuing, there is no land alienation. So long as land is treated as property and a commodity it will pass over to the persons with money, especially in the current milieu of liberalisation.

Secondly, the crucial element that renders even the most radical laws in fructuous is the unfamiliar setting of the judicial process, in which the simple tribal simply feels lost. It is in this context that GS has been empowered in PESA for ‘prevention of land alienation as also restoration of illegally alienated land’. However, no worthwhile action has been taken in this regard by the concerned States.

Thirdly, there is no specific provision in PESA about handling labour issues. It is well known that tribal youths, both male and female, are ensnared in labour markets elsewhere, where they are exploited both economically and sexually. GS in PESA areas should be made aware of the prevailing protective laws on the subject, so that the GS may initiate action with appropriate authorities in cases of flagrant violation.

Fourthly, preparation and use of inebriants has been a part of all tribal social customs from time immemorial. The British entered this social arena and commercialised the same with disastrous consequences for the tribal people. The policy continued even after independence, notwithstanding pot-full of good wishes and even some nominal correctives. The commercial vending of intoxicants was prohibited in 1974 throughout the tribal areas as a part of TSP strategy in a bid to eliminate exploitation. The new policy envisaged full community control on all aspects of excise. The gains of total ban on commercial vending of intoxicants were fabulous. But they did not last long because States ignored the advice about community control over intoxicants. Surreptitious brewing, open sale in markets and unbridled consumption became the order of the day. Even the new Policy itself went into oblivion. In this milieu, even the Constitutional mandate about vesting full powers on GS under PESA has been totally ignored.

Fifthly, Rampant usury has been the biggest curse for the tribal people. Even the general measures for effective check on moneylenders have been half-hearted and ambivalent. All sorts of vested interests in a variety of forms are operating in these areas with virtually no effective legal control. The tribal people are groaning under the heavy debt liability in respect of fake loans, loans already repaid, developmental schemes that may be only on paper, programmes that may have proved to be unrealistic or beyond the capacity of the simple tribal. Nevertheless, ‘the power to exercise control over money lending to the Scheduled Tribes’ in PESA has remained a dead letter so far, except in rare cases where a GS may invoke its authority and intervene on behalf of the affected tribals. In view of above, it is both desirable and necessary that the GS in PESA area should be made fully aware of the legal authority and responsibility, so that they may initiate appropriate action in such cases, and explore alternative sources of credit.

Sixthly, the village market holds the key to the entire economy of the tribal people. However, some stray interventions in village markets from above, with no involvement of the people, have been ineffective. Outside forces have functioned as outposts of exotic forces of exploitation. Under PESA however, it is for the first time that the village markets of any description have been accepted as a part of governance at the village level, with power of control in the hands of GS. They should be empowered to exercise the authority given to them under the PESA to ensure the elimination of all forms of market exploitation. No State has taken any measure to implement this provision though it has tremendous potential for elimination of exploitation.

Seventhly, even with clear provisions about management of community resources, including forest and ownership over Minor Forest Produce in PESA, no action in this regard has been taken by any State. However, special detailed provisions have been made in the Scheduled Tribes and other Forest Dwelling Communities (Recognition of Forest Rights) Act 2006, which will reinforce the spirit of PESA.

Eighthly, the provisions in PESA in respect of planning and implementation of developmental programmes at the village level are clear and categorical. Section 4(e) envisages that the GS shall approve any programme before it is taken up by the GP, and shall also be responsible for identification and selection of beneficiaries. The GP is mandated under Section 4(f) to obtain certification of utilisation of funds by GS. These provisions have been incorporated as they are by the States in their Panchayat Acts. However, there is a general feeling that there is a laxity in operationalising these authorities. The State Government should ensure that GSs are endowed with the technical support and funds to discharge these functions.

The above Chapter then goes on to deliberate on the term ‘consultation’ used in PESA but subjected to diverse and contentious interpretations at various levels and by various actors including the State authorities and PESA activists.

Firstly, consultation with 'GS or Panchayats at appropriate level' is mandatory in the case of land acquisition, as also rehabilitation of project affected people under Section 4(i), and in respect of grant of license etc of minor minerals under Sections 4 (k) and 4 (l) of PESA. The multiple ambiguity in this provision has served to defeat its purpose. What exactly does 'consultation' mean, whether both the GS and the Panchayat must be consulted, and whether the word 'appropriate' leaves the matter to the discretion of the Government, or must necessarily take colour from the legislative mandate of self-governance that defines the contours of PESA, remain matters of contention, with Governments wishing to reduce the process to as much of a farce as possible. Guidelines were issued by the Ministry of Rural Development in 1998 about consultation before land acquisition, and by the Ministry of Mines in 1997 about minor minerals, which were rather ineffective. The State laws have generally ignored GS and provided for consultation with higher-level Panchayats only. This choice, though technically valid, militates against the spirit of PESA. The process of consultation before acquisition of land, as envisaged under Section 4(i) of PESA, has not been formalized in most of the States. The Rules adopted by M.P. (including Chhattisgarh) are, however, in keeping with the spirit of PESA. These Rules envisage 'consultation with GS before issuing notification under Section 4 of the Land Acquisition Act' that is informed and transparent.

Secondly, as regards consultation in respect of leasing of minor Minerals, the follow-up action about consultation before lease of minor minerals is granted has been rather poor. The Madhya Pradesh (including Chhattisgarh) Rules envisage that 'quarry permits shall be granted and renewed by the respective Panchayats, after obtaining prior approval of the Gram Sabha of the Panchayat in which the quarry area is situated.' But in the case of other minerals in Schedule I or Schedule 2, consultation with Gram Panchayat alone, ignoring the Gram Sabhas totally, has been made obligatory.

Thirdly, as regards consultation before Environmental Clearance, many developmental projects, especially mining and industrial activities, have serious implications for the ecology and environment. Accordingly the opinion of concerned people is sought about the possible impact of such activities on the environment, water regime, livelihood resources and such like through public hearings. Such hearings in large gatherings, however, have become mere rituals. They have earned notoriety for a command performance, and for ignoring or even distortion of opinions expressed. The concerned authorities in the Union Government have not even taken note of the provisions of PESA and the role of GS in these processes.

Fourthly, as regards consultation in respect of Rehabilitation & Resettlement, even though consultation before land acquisition and rehabilitation became a Constitutional mandate under Section 4(i) of PESA, there is no appreciation that consultation, without placing a clear picture about their future before the concerned people, has no meaning. The National Rehabilitation and Resettlement Policy (NRRP) 2007 seeks to involve the people, especially the tribal people, in the rehabilitation and resettlement. The early and vigorous implementation of this Policy together with a proper operational manual would go a long way in strengthening of Gram Sabhas the voice of tribal people in social impact assessment and in the administration of rehabilitation and resettlement packages.

The Chapter-2 of the Report then enters into a tricky problematic i.e. the role Central Government in respect of implementation of PESA.

Firstly, it admits that the Union Government took a commendable lead in attending to the crucial issue of administration of SA in 1990s. It culminated in the enactment of PESA. But there was an anticlimax in 1997 itself when the Conference of State Ministers convened for implementation of PESA ended with no clear agenda of action and follow up thereafter. PESA got lost in the bewildering expanse of the Ministry of Rural Development that was formally responsible for handling it. It was a minor item for the Ministry, concerning strange people in the far off lands about whom not much is known. On the other hand, the Ministry dealing with Tribal Affairs has remained totally innocent about PESA, for the simple reason that it was not an item in its duty-chart. Besides the Ministry of Home Affairs (MHA) that deals with SA, according to the Rules of Business, has no concern on this legal front. Even the formation of a separate Ministry in charge of Panchayats has made no difference even though PESA looms large in its agenda. The irony is that the Ministry is still battling with the legal status of PESA and its real scope.

Secondly, the fact that PESA confers specific powers upon GS in SA has been virtually ignored. Only two ministries cared to issue guidelines to the States in 1997 with regard to two items in PESA. One was about the role of GS in land acquisition by the Ministry of Rural Development, and the other related to its role before granting of leases for minor minerals by the Ministry of Mining and Minerals. There has been total silence ever since about the holistic frame of PESA in the entire establishment. There is hardly any realisation in the Union Government that implementation of PESA has to be a collaborative effort of almost all Central Ministries, in keeping with the policy that had been formally adopted in early 1970s in the Tribal Sub-Plan Strategy.

Thirdly, this Committee endorses the views of the Ramchandran Committee (Planning at the Grass root Level: March, 2006, New Delhi) about the duties of the Central Government to ensure that PESA is effectively and correctively implemented in the Fifth Scheduled areas. PESA casts direct responsibility on the state legislature but being a central legislation and logical extension of the Fifth Schedule, a duty is cast on the Central Government to see that the provisions are strictly implemented. A critical issue in the implementation of PESA is to harmonize its provisions with those of the Central legislations concerned and also recast relevant policies and schemes of Central Ministries/Departments. According to available information, no integrative exercise has yet taken place to examine the relevance of different Central Laws to Schedule V Areas and to harmonize them with the aims and objectives of the PESA. The Land Acquisition Act, 1894, Mines and Minerals (Development and Regulation) Act, 1957, The Forest Act, 1927, The Forest Conservation Act, 1980, and The Indian Registration Act 1908 are among the laws which warrant particular attention in this context. Besides, The National Policy on Resettlement and Rehabilitation of Project Affected Persons, 2007, National Water Policy, 2002, National Minerals Policy, 2008, and National Forest Policy, 2004 would require detailed examination from the viewpoint of ensuring compliance to the provisions of PESA.

Fourthly, Scheduled V of the Constitution and PESA are powerful legislation, which gives considerable power and responsibility to the Union Government, but implementation of this law is weak and ineffective. The provisions of PESA are specific and mandatory and to that extent, they repeal the provisions in state laws. However, this fact has not been fully realized both by the Centre and States, and old procedures continue despite not having legal validity. This situation has to be remedied urgently. As a first step, the Ministry of Panchayati Raj should analyse the state laws and persuade the State Governments to implement the Act. The Ministry should immediately finalise and issue the guidelines for implementation of PESA and suggest specific state-related provisions and guidelines. If any state is not implementing the provisions of PESA in letter and spirit, the Government of India should not shy away from issuing specific directions in accordance with its powers to issue directions under provision 3 of part A of the Fifth Schedule. Effective implementation of PESA providing for rightful role of governance to the GS and through it to GP would douse the embers of discontent and disaffection among the tribal populations in the Scheduled Areas.

RECOMMENDATIONS of Expert Group

As already noted above, the Chapter-5 of the Report carries the recommendations of the Committee as to how to meet the development challenges in extremist affected areas. It is worthwhile to jot down those recommendations which have a direct bearing on PESA and Scheduled Areas.

- Recommendations for Effective Implementation of Protective Legislation-

The State's response to continued unrest and social dissension in areas predominated by scheduled castes and tribes was to formulate three protective laws and a major policy decision. These three Acts are the Provisions of the Panchayats Extension of the Schedule Areas Act 1996, the National Rural Employment Guarantee Act, 2005 and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and the National Rehabilitation & Resettlement Policy, 2007 (for which a Bill has been put up before the Parliament). It is necessary to build up an impregnable protective shield of the State, against multi-faceted exploitation of these communities. This should be done by effective implementation of the existing constitutional provisions, protection of civil rights and SC/ST (Prevention of Atrocities) Act laws and programmes in place for this purpose.

- There are many custodians of interests of schedule castes and scheduled tribes and marginalized groups viz; (i) Tribes Advisory Council in States with Scheduled Tribes, (ii & iii) National Commissions for SCs under Act 338 and National Commission for STs under 338, (iv) National Human Rights Commission, (v) the National Commission for Women, (vi) the National Commission for the Rights of Children (vii) National Commission for Minorities and (viii) National Commission for Safai Karmachari. There is neither clear focus nor dynamic coordination among all these venerable institutions. Their studies, reports and recommendations languish without any interest whatsoever. The neglect by Parliament of their work and recommendations is a matter of deep regret. The Expert Group seriously urges consultation among all these bodies and launching of joint initiatives for concerted and compulsory action on their joint recommendations, which should become mandatory for Chief Ministers. There are counterpart commissions in the States. In addition there is a standing Parliamentary Committee on SC & ST. Without any disrespect for any of the high powered Commissions, it is felt that they themselves feel inadequate to deal with the subjects assigned to them. To make these Commissions effective, they should be given power of investigation and to pass orders which they could enforce. This is because the recommendations are not carried out by different authorities. So, National Commissions on SC & ST and National Human Rights Commission would have to be given powers to make them effective in cases of violation of laws.

- Usury and indebtedness are the chief causes of acute distress and exploitation like land alienation and bonded labour. Indebtedness among STs is particularly widespread on account of food insecurity, non-availability of

production and consumption credit through public institutions, and corruption in the public lending agencies. Laws to check indebtedness and regulate credit through private sources do not get implemented. This should be corrected by the following measures: All debt liabilities of weaker sections should be liquidated, in cases (i) wherein the debtor has paid an amount equivalent to the original principal amount and (ii) wherein the intended benefit for which the loan was advanced has not accrued to the borrowers. The onus to establish that such benefit did accrue will be on the lending agency. The processes should be completed within six months after the notification.

- The revival and restructuring of the Large Area Multi-purpose Cooperative Societies (LAMPS) and Primary Agricultural Cooperative Societies (PACS), with the specific targets of meeting all credit needs of the Scheduled Castes and Scheduled Tribes and weaker sections, should receive highest priority. Similarly, the cooperative banking structure which is the most accessible to the poorer sections should be urgently revamped and revitalised in the light of multitude of recommendations made in this regard, and the Central legislation to enable member-controlled and member-dominated cooperative societies. There is also need for widespread provision of Grain Banks managed by Gram Sabhas in tribal areas. Special provision of long-term loans for purchase of land by assetless poor and resourceless families who are dependent upon agriculture for their livelihoods should be arranged. NREGA should be intensively implemented in the indebtedness prone areas.

- Forest produce should be provided a protective market by fixing minimum support price for various commodities, upgradation of traditional haats, and provision of modern storage facilities to avoid post harvest losses. At the same time, the public distribution system should be specially designed for the specific requirements of the forest dwellers. In this respect the existing Tribal Development Corporations and cooperative marketing organizations such as Girijan Cooperative Corporation, Orissa Tribal Cooperative Corporation and Trifed in Government of India can play an effective role just like the Food Corporation of India in regard to rice and wheat for ensuring support price to procurement and professional marketing support. The State should support the expenses relating to the infrastructure, administration and operation of these corporations and they should not have monopoly rights to procurement.

- The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is a very significant step in recognizing and vesting the forest rights and occupation in forest land in forest dwelling, scheduled tribes and other traditional forest dwellers who have been residing in such forest for generations but whose rights could not be recorded. It provides for a framework for recording the forest rights so vested. The Act has addressed this issue of long standing insecurity of tenurial and access rights of forest dwelling scheduled tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to state development interventions. This Act needs to be strictly operationalised in letter and spirit. The clarifications in the draft rules circulated for this Act on 19th June, 2007 for certain difficult points like "other traditional rights", "primarily reside in and dependent on forest or forest land", "Rights to minor forest produce" etc. for removing any ambiguity and for easy implementation, which were summarily deleted in final notification of the Rules published on January 01, 2008, should be fully restored.

- All petty cases registered under forest related legislations against the Tribal people and other poor persons should be withdrawn.

Recommendations for Land Related Measures

- Laws prohibiting transfer of adivasi lands to non-adivasis and acquisition of land by non-adivasis in Fifth Schedule areas, where such laws exist, suffer from numerous loopholes besides tardy implementation. These loopholes are adequately documented state wise but states have not amended their laws to remove them and strengthen protective measures against alienation of tribal land. This must be done as a priority national programme and action taken regularly to monitor its progress. Thereafter, all cases decided against all tribals must be reopened and disposed of afresh. Meanwhile, pending cases should be decided expeditiously and all alienated lands should be restored to Adivasis in a time bound manner. The provisions of PESA relating to the power of the Gram Sabha in this regard must be fully incorporated in existing legislation. States having sizeable adivasi populations and not included in the Fifth Schedule shall enact suitable laws/ amend existing laws for the protection of Adivais in the same manner as in the Fifth Schedule. The land holdings of Scheduled Castes should be similarly protected against alienation of their land.

- The entire Tribal Sub Plan area should be brought under the Fifth Schedule. A policy decision in this regard taken as far back as 1976 should be implemented without any further delay.

- Wherever any occupation group like fisherfolk, graziers, honey gatherers and the like had customary rights over Common Property Resources and other natural resources, such rights should be statutorily protected and properly recorded and user pattas should be issued jointly for husband and wife and for female headed households.

- A time bound survey is needed of all land under cultivation of SCs/STs culminating in (i) grant of title to those who do not have title, (ii) identification of land of STs alienated illegally, and restoration through Gram Sabhas under powers vested in them under provision of Panchayat Extension to the Scheduled Area) Act 1995) and in an analogous manner in non-Scheduled areas. This protective shield should be extended suitably to Scheduled Castes in all areas and Scheduled Tribes beyond the Scheduled Areas, through appropriate legal provision as recommended by various Commissions and as is prevalent in parts in some States (Rajasthan/M.P). Any move to relax or dilute existing protective measures in respect of these communities should be strongly opposed.

- Declare all small landless poor encroachers of government land as seemed to be having pattas on as is where is basis.

Recommendations relating to Land Acquisition and Rehabilitation & Resettlement

- Acquisition of land has emerged as the single largest cause of involuntary displacement of tribals and turning them landless. Indiscriminate land acquisition should be stopped and land acquisition for public purpose should be confined to public welfare activities and matters of national security. The proposal of amendments contained in the Land Acquisition (Amendment Bill, 2007) however, fail to achieve this objective. These proposals need to be further revised to minimize displacement and secure the rights of affected displaced persons.

- 'Public purpose' as defined in the amended Land Acquisition Act (amendment currently with Parliament) should be revised further and restricted to projects taken up for national security and public welfare implemented directly by the government. 'Public purpose' should not be stretched to acquisition for companies, cooperative and registered societies. The definition of 'person interested' should include occupants of government and Panchayat land eligible for regularization under state policy, and informal tenants and share croppers etc. There should be mandatory provision for rehabilitation and resettlement of persons whose lands are procured by companies or other private interests. Acquired land remaining un-utilised should be restored to erstwhile land owners. The definition of land should be amplified so as to include government, public, forest, panchayat land and community property resources, so that loss of use rights can be compensated. The determination of compensation should be based on replacement value based on market value.

- Responsibility shall lie on acquiring authorities to ensure free and informed consent of the Gram Sabha in the acquisition of land. The consent of the Gram Sabha obtained through misinformation, misinterpretation, fraud or force should be deemed to be void and should attract criminal action against the perpetrators.

- Government of India has already notified the National Rehabilitation and Resettlement Policy, 2007 to guide the rehabilitation and resettlement processes where large areas of land are acquired and people are involuntarily displaced. While implementing positive aspects of the policy, the serious inadequacies should be addressed. Social impact assessment should be strictly done in all cases to ensure that the impact of the project on the affected families is assessed in holistic anticipatory and transparent manner and ameliorative measures built into the rehabilitation plan. Loss of livelihood must be compensated along with loss of land. There should be no restriction relating to the size of displacement for applicability of rehabilitation and resettlement benefits. The policy should be applied to all displaced persons not rehabilitated in the past. Also there should be clear and assured provision of either land or employment. For tribal displaced persons land allotment should be mandatory.

- One of the main causes of rural poverty identified in the report was disappearance of Common Property Resources (CPRs) through which poverty stricken households used to supplement their livelihood and incomes. The Planning Commission should consider devising a programme for restoration of CPRs for the purpose of sustenance of the poverty groups.

- Panchayats have to be empowered for effective management of CPRs with requisite autonomy, legal backing, adequate resources, provision of expertise and capacity building. A model legislation may be drafted incorporating above and other relevant aspects of CPR management which can be suitably adapted by states for their purpose. Incorporate within the law a provision for summary eviction of ineligible encroachers of CPRs.

Recommendations on Livelihood Security

- NREG should be implemented in a "mission mode" to do away with the dilatory and restrictive procedures of the secretariat.

- Given that most of the rural poor, SCs and STs are dependent upon agriculture, the focus on agriculture in the 11th Plan is appropriate. This requires strengthening subsidiary and supportive activities in animal husbandry, fisheries, horticulture, sericulture and poultry through establishment of quality infrastructure, supportive technical services and efficient market linkages at the village or a cluster of village level. It also requires establishing sub-systems essential for intensive agriculture, such as (a) the research system, (b) extension system, (c) seed/feed/sapling supply system, (d) credit system and (e) marketing system.

Recommendation on administration of Programmes

- There are a half dozen programmes relating to Rural Development Division for alleviation of poverty. The Ministry of Rural Development (MORD) administers them from the Centre. At the field level there is often a large disconnect among these programmes, though they have the same objective, namely to mitigate poverty of people. But it is evident that, excluding ideological goal of capturing State power through violence, the basic programmes of the Extremists relate to elimination of poverty, deprivation and alienation of the poor and the landless. The Government of India in the Ministry of Home Affairs have identified 460 police stations spread over 12 States covering roughly 125 districts as 'Naxal-affected'. Basically, these districts suffer from lack of proper governance and appropriate implementation of poverty amelioration programmes. To reduce the anger of the people, it is necessary that they should feel that they are a part of the mainstream of Indian society and not an external element to be looked down upon by others. What is necessary is to saturate these districts with the proper implementation of the existing programmes.

- Currently, there are two major programmes of the Planning Commission, namely Backward Region Grant Fund (BRGF) and National Rural Employment Guarantee Programme (NREGP). All the 'Naxalite affected' districts, are included in BRGF and NREGP. The BRGF is being administered by the Ministry of Panchayati Raj and NREGP by the Ministry of Rural Development (MORD). Though at the ground level Gram Panchayat/Block are involved in implementation, because of the verticality of these programmes, they do not often converge at the implementation level. As a result of such non-convergence their beneficial impact does not have the criticality they deserve. Hence, it is recommended that for these districts, both these programmes should be merged into one single programme and with two focii should be administered by one Ministry through the instrumentality of three tier Panchayat system. In fact, attempts should be made to have deep penetration of such un-reached areas so that the potential beneficiaries do not feel isolated, alienated or being left out.

- One of the major causes of rural poverty identified in the report was disappearance of Common Property Resources (CPR), through which poverty stricken households used to supplement their livelihood and income. Overtime these CPRs got 'privatized' by the land grab mafia of the area. The Planning Commission should consider devising a programme for restoration of CPRs for the purpose of sustenance by the poverty groups. The programme could include protective measures to prevent the upgraded CPRs being grabbed again by powerful people in those areas. Restoration of upgraded CPRs for common use by the poor may help in reducing their anger against the authorities.

- The new legislation i.e. the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2007 conferring forest rights on the Scheduled Tribes and other Non-Tribal Forest Dwellers is a step in the right direction and will serve to reverse the 'historical injustice', and thus reduce the disaffection of millions of forest dwellers. Apart from this, a large part of the land termed as forest consists of degraded land.

Recommendations for Universalisation of Basic Social Services to Standards

- The area affected by extremist movement in central India has concentration of tribal population, hilly topography and undulating terrain. The area has much less density of population than the plains. The failure to provide infrastructure and services as per national norms is one of the many discriminatory manifestations of Governance here. These disparities therefore result in non-available/poorly provided services. Universalisation of basic services to standards among the people in this area should be given top priority to remove this disparity.

- Disparities in availability of physical, developmental and social infrastructure should be removed by speedy creation of infrastructure in Naxal-affected districts as per national norms within the XI plan for which adequate allocations have to be provided for. Existing infrastructure should be rejuvenated and modernized with provision of adequate funds for their maintenance and upgradation.

- Existing 'ashram' schools should be upgraded to standards. 'Eklavya' schools should be established in each block in these districts. Thus a structure of the following kind would emerge: 'ashram' and vocational schools in a cluster; 'Eklavya' schools in a block, and navodaya schools in a district.

- There is need for a universal public health and nutrition system that is functional at the primary level of care. A first requirement in this task is to discontinue commercial vending of liquor and other intoxicants in terms of the excise policy for tribal areas (1974) and institutionalize control of the Gram Sabh over the preparation and use of traditional drinks.

- The districts where naxalite movement is active are located in states which have the worst social infrastructure in general, and SC and ST hamlets tend to get excluded when location for such social infrastructure is being decided. The 11th Plan allocations should be used for filling this gap.

Recommendations on PESA

- A comprehensive regulation should be made to the effect that no law having a bearing on the provisions of PESA, read with the Fifth Schedule and other provisions of the Constitution concerning tribal people, shall extend to the Scheduled Area, until it is approved for extension there in full or with such exceptions and modifications as may be notified by the Governor, in consultation with the Tribes Advisory Council of the State.

- The Annual Report of the Governor to the President about the Administration of the Scheduled Areas under Para 3 of the Fifth Schedule should be comprehensive, and cover all aspects of governance, especially the provisions of PESA. A high-powered small group may be established under the Union Cabinet with mandate for continuous review of the state of administration in the Scheduled Areas.

- In view of the fact that governance in the Scheduled Areas with regard to many a vital aspect of tribal life is without any authority of law, the concerned Governors should issue a notification under Para 5(1) of the Fifth Schedule (to be referred hereafter in brief 'Para 5(1) Notification') to the effect that 'Notwithstanding any thing in the Constitution, the Panchayat Act or relevant Acts of the Parliament or the Legislature of the State for the time being in force, the provisions of PESA shall prevail.' This is necessary to ensure that there is no ambivalence or contradictions in the frame of governance at the village level as a result of diverse legal provisions made from time to time and extended to the Scheduled Areas in routine.

- The definition of 'village' in PESA is in terms of its natural community-centric character. It is at variance with the general definitions of 'village' in vogue in different laws that are essentially administrative. It must be ensured that all Panchayat Raj Acts of States having Scheduled Areas adopt the PESA definition of 'village' with no change there in of any description whatsoever.

- The scope of the clause 'resolution of disputes' in section 4(d) of PESA should mean Nyaya Panchayats are constituted for Fifth Schedule area. Each State law should clearly indicate the types of disputes (civil, criminal, social marriages, etc). which Nyaya Panchayats should deal with.

- The PESA authorises Gram Sabha to restore all unlawfully alienated land to the rightful owners. However, in none of the States the original jurisdiction of GS under PESA to exercise this important power has been conferred on them. In case of non compliance of the orders of GS, the support of revenue authorities to implement the orders has not been clarified. Only when this is done will this power of GS become operational. This would go a long way in mitigating land related discontent in tribal areas.

- It should be made obligatory for all concerned with management and working of forests to consult the Gram Sabha resulting in consent before taking up any operation in the geographical boundary of the village as defined above.

- It shall be the duty of the State to ensure that the full value of the minor forest produce is made available to the primary collector with out any cuts of any description whatsoever. The entire marketing and transportation cost from the collection centers, which shall not be beyond half-a-day march from the Gram Sabha, shall be borne by the State as a charge on the welfare activities in the Scheduled Areas.

- The residents of habitations located on the periphery of a reservoir shall have full rights to use the water body for fish-culture and for fishing for the common good of the entire community, subject to honouring the livelihood rights of those traditionally engaged in fishing. This collective right, however, shall be exercised through a cooperative or other instrumentality that is exclusively and wholly answerable to the concerned GSs, in accordance with a scheme that may be adopted by the concerned GSs.

- Displacement of tribals in areas notified under the Fifth Schedule should be avoided, as it tends to deprive the tribals of the rights conferred on them under the Fifth Schedule. If the setting up of a project in these areas is

considered to be in the national interest, even then, the prior consent of the tribal Gram Sabhas should be made mandatory. The Government should evolve a suitable institutional mechanism to ensure that the tribals retain their ownership rights in respect of the land and resources associated with it.

- The Mineral Rules should be amended transferring all quarries with annual lease value up to Rupees 10 lakhs to the Gram Sabha and Panchayats at different levels. This dispensation should cover all minor minerals.

- Consent of concerned Gram Sabha before awarding a lease to be made mandatory as per the directions of the Ministry of Mines and Minerals dated 26th December 1997.

- Discontinuance of the practice of outright purchase of mineral bearing land by the Mining Companies as the Mining Act envisages only a lease. All the deals of any description whatsoever should be converted in the form of leases for which Governor may provide through 'Para 5(1) Notification'.

- A condition for restoration of the leased lands, as far as possible, to their original status as a part of consultation with the Gram Sabhas.

- Making good all damage to the ecology etc on account of the neglect of the State and the concerned parties according to a time bound programme, and provision of special funds to the concerned Gram Sabhas.

- A clear and categorical provision should be made in the Panchayati Raj Act or the Excise Law through 'Para 5(1) Notification' under Fifth Schedule to empower the Gram Sabha in all aspects mentioned in Section 4(m)(i) of PESA in respect of intoxicants and State Government should not intervene.

- It is unfortunate that despite powers defined in Section 4(m) of PESA, several States have not issued the notification under para 5 (1) under Fifth Schedule. To facilitate the state governments, Government of India should prepare model provisions for endowing these powers which will make provisions of PESA real and operational.

- Any plan or programme of the state government or any parastatal organization should require that the GS be consulted before it is taken up in its area.

- All Utilisation Certificates pertaining to all projects should be validated by GS.

- In many states the provisions under Section 4 (i) of (PESA requiring GSs or the panchayats at the appropriate level be consulted before land acquisition or rehabilitation under such projects) are not being followed, or there are several instances of coercion from higher authorities in seeking this consent. The consultation under this provision should include concurrence with them, as provided for consultation with the Supreme Court.

Recommendations on State Response

- The public policy perspective on the naxalite movement is overwhelmingly preoccupied with the incidents of violence that take place in these areas and its ideological underpinnings. Though it does concede that the area suffers from deficient development and people have unaddressed grievances, it views the movement as the greatest internal security threat to the country. Accordingly, the attention of the Government is concentrated on curbing violence and maintaining public order to achieve normalcy. While area development is also being speeded up, the security-centric view of the movement accords primacy to security operations. The contextualization of this violence is missing from this perspective. The scale, intensity and approach of security operations cause considerable collateral damage leading to greater alienation of common people. The strategy of security forces to curb violence has also encouraged formation of tribal squads to fight naxalites, with a view to reducing the security force's own task and risk. This has promoted a fratricidal war in which tribals face the brunt of mortality and injury. Those tribals who are unattached to either the naxalites or those opposing them, become victims of violence by all agencies – Naxalites, squads formed to fight them and the security forces. This approach to the movement is devastating the local tribals and causing hopelessness and despair. A change in policy perspective and strategy to deal with the movement is essential to create a positive image of the Government in the local people, remove their sense of alienation and wean them away from its influence.

- Encouragement of vigilante groups such as Salwa Judum and herding of hapless tribals in make-shift camps with dismal living conditions, removed from their habitat and deprived of livelihood as a strategy to counter the influence of the radical left is not desirable. It delegitimizes politics, dehumanizes people, degenerates those engaged in their 'security', and above all represents abdication of the State itself. It should be undone immediately and be replaced by a strategy which positions an empowered task force of specially picked up responsive officials to execute all

protection and development programmes for their benefit and redress people's grievances. This is the best strategy to eliminate the influence of radical left groups.

- Authorities should encourage civil society groups, having knowledge of, and sympathy with, local tribals in assisting this task force for wider participation of people in implementation of the strategy outlined above.

- There are reports of civil society groups on the numerous human rights violations by authorities. The government should take cognizance of these reports and enquiries into these episodes should be constituted so as to inspire confidence in victims and faith of the public in the rule of law.

- It is not desirable to insulate the area and people from civil society groups, media, and political organizations and penalize those who seek to establish contact with affected people to gather information about the action of naxalites and state agencies, and speak or write about their observations. Besides being undemocratic, it is counter-productive as well. Reverse this trend. Rather, seek cooperation of civil society organizations with good track record in providing credible information on the impact of the movement and of state action on the affected people, which may help in critical appraisal of the policy pursued by the state.

- Mobilising the support of the people is also absolutely essential to weaken the support base of the Naxals. The political parties are not playing their role in this regard. The representatives of major political parties have virtually abdicated their responsibility.

- A strategy of constructive management of conflict requires two key measures. At its present stage, priority should be accorded to search out creative policies that bridge gaps between state interests and those of tribal communities. Tribes are not opposed to development. All that they want is to control its pace and influence, its pattern and direction so that they are enabled to prevent its damaging effects and enjoy some of its benefits. The autonomy and control over natural resources which tribal communities seek is consistent with national development. It requires dedicated interlocutors to work out its parameters in consultation with communities. PESA has made a beginning in this direction and provided a broad frame work.

- Ensuring a life of respect and dignity for the dalits, adivasis, women, and the poor in general, is not a task that can be left to the working out of a few laws. A concerted effort through the education system and the cultural media needs to be taken up. But the first pre-requisite at the level of the administration is that the administrators should be sensitised to these realities and their unacceptability. Government personnel exhibiting an attitude of indifference towards this issue must be deemed to have committed misconduct and proceeded against accordingly.

- Mere provision of reservations for the SCs, STs, OBCs and women in the local bodies does not amount to empowerment. Consequential steps need to be taken to ensure that they are actually able to exercise the responsibilities placed upon them, and that their powers are not appropriated by the dominant sections. In situations where the elected representatives from these communities are threatened or subjected to violence they should be ensured full and adequate protection by the administration. It should be the responsibility of the Panchayat Officer at the District level to ensure that the police do provide such protection. Cooperation of the administrative personnel in the exercise of the authority of such elected representatives should also be mandatorily ensured.

- While condemning occasional bursts of wanton violence by the extremist groups, a government constituted by law and mandated to maintain rule of law can not commit any illegal act in countering rural extremism. Government should strictly prohibit extra judicial killings by its security forces. Such acts of illegality by the authorities tend to legitimize extremist violence in the eyes of millions of non-committed on-lookers.

- Security forces should undergo rigorous training not only on humane tactics of controlling rural violence but also on the constitutional obligations of the state to protect the Fundamental Rights, including human rights, of Indian citizens and implications and implementation of progressive laws in favour of the poor. Excepting casualties suffered by both sides in actual fire fights, there should be no killings, either by the security forces or any vigilante groups, covertly or overtly sponsored and supported by the Government. Every such killing should be followed by a judicial enquiry to reinforce the faith of the ordinary masses in the rule of law.

- There is a distinct feeling both within government institutions and outside that reports of National Commissions for SCs/STs do not carry any weight. Parliament finds no time to discuss them. Government has shown little seriousness in making meaningful use of them and initiating corrective measures. The commissions are also not being effectively used as instruments for grievance investigation and redressal mechanism where official agencies have failed or faulted. However, the commissions have considerable potential in bringing to the notice of

government the simmering discontent of the communities, and giving them a voice where bureaucratic and political structures have failed to respond. But they need to be restructured and strengthened to command attention from official agencies for discharging this responsibility. Appropriate measures may be worked out by the government.

- The law enforcement machinery in the affected areas would need to be strengthened. Some of the suggested measures could be: additional police stations/outposts in the affected areas; filling up the police vacancies and improving the police-people ratio; sophisticated weapons for the police; personnel to be given training in counter-insurgency including protection of fundamental rights and human rights; incentive allowance for staff posted in affected areas; and leadership of a high order for the forces deployed and ban on extrajudicial killing and “encounter” killing.

- Both the central and the state governments should have an open mind about having peace talks with Naxalites without any prior conditionality.

Recommendations on Strengthening the Planning System

- The original power of panchayats at each tier is in the preparation of plans for economic development and social justice (Article 243 G of the Constitution). Sub clause vii of clause M of section 4 of the PESA-1996 empowers Panchayats in the Fifth Scheduled areas to have control over local plans and resources for such plans, including Tribal Sub-Plan. Thus there are adequate legal provisions for democratic decentralized planning process. Unfortunately the District Planning Committees under Article 243 ZD has not been properly activated and not created in line with the provisions of PESA. As a result what we have as state plans are nothing but aggregated departmental plans, with hardly any linkage with District Plans or the plans prepared under the PESA. All the central and state schemes should build in enough flexibility to allow panchayat bodies to reshape them to suit their objective conditions. The State Plans should clearly reflect how much of the district plans have been incorporated in it. Preferably up to 40% of the money allocated should go to district plans.

- Panchayats at three tiers should have powers and authority to hold officials accountable for the subjects devolved to panchayats. Similarly, they should have powers to review performance and working of all departments in their areas. It raises the main issue of state’s unwillingness to part with power and functions and to share them with panchayats. The fact that writs of the state do not run in as many as 125 districts in the extremism-affected areas makes it clear that the State bureaucracy had abjectly failed in delivering good governance in these areas. Hence empowerment of the panchayats would be practically the only way out for effective governance of these areas. Therefore Panchayats should have authority to hold officers of the state working there accountable for their acts of omission and commission. That apart, strong financial and social audit systems be placed on the ground to prevent leakages of funds.

- National Commissions for Scheduled Castes/Scheduled Tribes /National Commission for Women /National Human Rights Commission should be provided with some powers and authority for generating greater accountability in official agencies operating in these areas. A massive awareness programme should be taken up (on the pattern of rural labour camps of the 1970s and 1980s) to build up pressure from affected communities for improved performance of official agencies. Individuals and NGOs should be encouraged and supported to take up RTI as a campaign among SCs/STs for enhancing transparency of governance.

- Mechanical monitoring on the basis of physical targets achieved or funds spent should be upgraded for impact assessment by independent research institutions, universities and other academic institutions. People at the ground should also feel that activities around them are being watched instantly by political masters. This would mean demonstration of political will for the uplift of these communities and areas. Institutional arrangements should be made at state capitals as well as at the centre to involve the chief ministers and the Prime Minister in this process.

Recommendations on Governance Issues

- The areas in Central India where unrest is prevailing covers several States (like Andhra Pradesh, Orissa, Chhatisgarh, Madhya Pradesh, Jharkhand and part of Maharashtra) are minimally administered. State interventions both for development and for law and order had been fairly low. In fact there is a kind of vacuum of administration in these areas which is being exploited by the armed movement, giving some illusory protection and justice to the local population. The basic steps required in this direction include establishment of credibility and confidence of government; keeping a continuous vigil for fulfilment of people’s vision; effective protection, peace and good governance; rejuvenating tribal economy including social services; sustainable development with equity in tribal areas; holistic planning from below in scheduled areas; and negotiating crises by focussing on ending of confrontation.

- The area affected by extremist movement is the region of central India with concentration of tribal population, hilly topography and undulating terrain. The area has much less density of population than the plains. The failure to provide infrastructure and services as per national norms is one of the many discriminatory manifestations of Governance here. These disparities result in non-available/poorly provided services. The removal of these disparities should be among the top priorities to convince people living in these areas that they are equal citizens and that they matter in national life.
- Reorganisation of the administrative arrangement should aim at supplanting the current non-accessible bureaucracy by the three tier panchayats bodies, with level to level correspondence with the current administrative structure. Bureaucracy at each level should be directly accountable to the corresponding tier of elected panchayat bodies. The Gram Sabha will have the right to question the functioning of any officer or staff about their performance and activity. These panchayats bodies should have the power to clear schemes and projects up to a certain financial limit. The district panchayat will have no such limit in respect of schemes, projects and programmes earmarked for the districts.
- Panchayats at each tier should be strengthened by posting of appropriate level of general service and technical service officers. Regulatory functions like revenue, police, forest and labour should be directly accountable to PRIs for their actions and performance.
- One major deficiency of existing administrative arrangements is the absence of a Justice Administration system in rural areas. The current system is expensive, dilatory and complicated. Barely 20% of the population is able to access it. SCs/STs get involved in the system as accused and defendants rather than seekers of their rights and entitlements. Even in cases of atrocities where the state takes up their case, the experience has been depressing. The situation is no better in cases relating to social welfare, labour and land related laws. A system of justice and grievance redressal which is simple, inexpensive, responsive to their needs and within easy reach of these sections should be an integral part of governance, but it has never received the priority and attention it deserved. A beginning can be made in this direction by quickly enacting the Nyaya Panchayat Law by the Centre with enabling provisions for the states to adopt. A model of dispute settlement mechanism and justice administration consistent with PESA, 1996 in Fifth Schedule areas should be worked out. In the scheduled areas gram sabha should act as Nyaya Panchayat in matters relating to customary law prevalent in the community.
- The procedures for receiving applications under RTI Act from the members belonging to the weaker sections should be simplified and summary processes of disposal of applications and adjudication of appeals should be institutionalised.
- A mechanism should be set up at the state level to periodically review cases in which SCs/STs are involved, recommend withdrawal of cases in petty offences, release of undertrials on bail where they are unable to find a bailer, arrange effective legal aid to defend them in other cases, and issue directions for speedy trial in cases pending for long.
- The Government of India must start forthwith an annual review of the state of administration in the Scheduled Areas in terms of its responsibility under the first proviso to Article 275(1), with a clear goal to raise it to the level obtaining in the rest of the State within a period of five years.
- The issue of public resource management for equitable development in this context has two aspects. One concerns distribution of available public resources proportionate to the needs of the area and the communities. The other relates to the efficient utilization of whatever resources are allocated. The existing financial arrangements have neglected them in both ways. SCs have the lowest human development status as per national norms; STs are worse than SCs in this regard. Not only this, the gap between them and the rest of the population is large and is, in fact, widening. Instead of monitoring expenditure indicators to monitor outcomes should be devised to ensure that tangible benefits flow from regulatory and development programmes initiated for SCs/STs. The gap in socio-economic conditions of SCs/STs with the rest of the population should be bridged by the end of the 11th plan. Special Component Plans for Scheduled Castes and Tribal Sub-Plans for Scheduled Tribes should be prepared with an outlay of not less than the population proportion of SCs/STs to overall plan outlays, as an integral part of the State Plans. These resource allocations should be made non-divertible and non-lapsable. Intensive review and monitoring of these Plans should be provided for at the district level to ensure their effective implementation. Under utilization, diversion and misuse of resources under TSP and SCP should be avoided with provision for result based financial management. States fulfilling mandated tasks in the unrest affected areas and meeting entitlements of people located therein should get some financial incentive.

- There are seven National Commissions for different segments of disadvantaged marginalized sections of the community. Similarly, there are the same set of Commissions at the State level. There is no co-relation among them either at the Centre or at the State. Nor do they have any mandatory authority to enforce their recommendations. It is time that a Rights Commission with appropriate divisions should be set up at the Central level with legal power to enforce its decisions arrived at through due process. Any one aggrieved with decisions of the Rights Commission would have right to go to the Supreme Court. Similar Rights Commissions should be set up at the State level with the right of the aggrieved to approach the State High Court. Till this is done the Centre should devise an effective institutional mechanism for bringing about coordination among all these National Commissions and take administrative steps to give effect to their recommendations.

Capacity Building for Conflict Resolution- 7th Report of 2nd Administrative Reforms Commission

The 2nd Administrative Reforms Commission set up by the GoI and chaired by Shri Veerapa Moily the Union Minister for Law and Justice devoted its 7th Report on strengthening and reforming the Panchayati Raj institutions under the caption 'Capacity Building for Conflict Resolution'. This Report inter alia made several recommendations for proper operationalisation of PESA Act 1996, which are worth recapitulating.

- Performance of the States in amending their Panchayati Raj Acts and other regulations to bring them in line with the provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA) and in implementing these provisions may be monitored and incentivised by the Union Ministry of Panchayati Raj.

- While all States in the Fifth Schedule Area have enacted compliance legislations vis-à-vis PESA, their provisions have been diluted by giving the power of the Gram Sabha to other bodies. Subject matter laws and rules in respect of money lending, forest, mining and excise have not also been amended. This needs to be done. In case of default, Government of India would need to issue specific directions under Proviso 3 of Part A of the Fifth Schedule, to establish a forum at the central level to look at violations and apply correctives. The Commission would like to reiterate the importance of the Annual Reports of the Governors under the Fifth Schedule of the Constitution.

- Awareness campaigns should be organised in order to make the tribal population aware of the provisions of PESA and the 73rd amendment to the Constitution so as to demand accountability in cases in which the final decisions are contrary to the decisions of the Gram Sabha or Panchayat.

- There should be a complete overhaul and systematic re-organisation of existing land records with free access to information about land holdings.

- There is need to harmonise the various legislations and government policies being implemented in tribal areas with the provisions of PESA. The laws that require harmonization are the Land Acquisition Act, 1894, Mines and Minerals (Development and Regulation) Act, 1957, the Indian Forest Act, 1927, the Forest Conservation Act, 1980, and the Indian Registration Act. National policies such as the National Water Policy 2002, National Minerals Policy 2003, National Forest Policy 1988, Wildlife Conservation Strategy 2002 and National Draft Environment Policy 2004 would also require harmonisation with PESA.

- Mining laws applicable to Scheduled Tribal Areas should be in conformity with the principles of the Fifth and Sixth Schedules of the Constitution.

- Government should select such police, revenue and forest officials who have the training and zeal to work in tribal areas and understand as well as empathise with the population they serve.

- A national plan of action for comprehensive development which would serve as a road map for the welfare of the tribals should be prepared and implemented.

- There should be convergence of regulatory and development programmes in the tribal areas. For the purpose, a decadal development plan should be prepared and implemented in a mission mode with appropriate mechanism for resolution of conflicts and adjustments.

- The authorities involved in determining the inclusion and exclusion of tribes in the list of Scheduled Tribes should adopt a mechanism of consultation with the major States and those with tribal populations, on the basis of which a comprehensive methodology with clearly defined parameters is arrived at.

IRMA Report on PESA, Left-Wing Extremism and Governance in Tribal Districts

The Ministry of Panchayati Raj, Govt of India had commissioned the Institute of Rural Management, Anand to make a study on the state of Panchayati Raj in the country. The Report of the said Study authored by Ajay Dandekar & Chitrangada Choudhury from Institute of Rural Management, Anand was submitted to the Government of India in 2010. It had contained a Chapter dealing with the subject 'PESA, Left-Wing Extremism and Governance: Concerns and Challenges in India's Tribal Districts'. Though the findings of the study were based upon the primary data collected through interviews and eye-witness accounts, its straightforward presentation in the Report was found to be too tough for its acceptance by the official think-tank and that is why the Government while releasing the Report to the public had expunged the above Chapter from its original text. However, the said Chapter is worth perusing so far as it brings to light so many stark facts on mis-governance in Scheduled Areas and malfunctioning of PESA.

About the thematic arrangement of the controversial Chapter, the Report says, this analysis starts by sketching a brief background to PESA, and outlining how the act intended to improve the lives of some of India's most beleaguered sections, when it was passed in 1996. It then analyses the key challenges to the effective functioning of PESA today. The second section then analyses in detail the unfinished legislative agenda regarding the PESA. . . The third section moves to the ground in order to put a human face to the neglect of the act through selected case studies. It thus attempts to capture some of the big themes that currently militate against PESA, as expressed by people, for whom life is increasingly a quest for survival. Placing at the centre stage, peoples' experiences of PESA and governance might make the analysis appear skewed, or even one-sided. But recognizing the fact that such voices from the ground are poorly heard in policy making and implementation- for a complex of reasons, from the community's entrenched marginalisation to the absence of written traditions for communication- these hence need to be given primacy. It looks at the failure of PESA and the 'alternate mobilisation' that has happened. Though not included in this report, the larger research elsewhere also outlines the complex intersection of what would be justifiably called governance failure and alienation, and its coterminous relationship with the phenomenon of left-wing extremism, i.e. the currently banned Communist Party of India – Maoist. . . The experience of fieldwork, which even entailed physical dangers, suggests that there is a veritable crisis in several PESA areas, with despair, insecurity and a breakdown of the rule of law, and access to justice within the constitutional framework. A final section lists some ideas, which would help institutionalize and actualize PESA in letter and spirit.

Dwelling on the unique significance of PESA, the Study points out, "Thus PESA is a unique legislation, often described as a Constitution within the Constitution, which attempts to bring together in a single frame two totally different worlds - the simple system of tribal communities governed by their respective customs and traditions, and the formal system of the State governed exclusively by laws. The second important aspect of PESA is that it spells out a general frame of reference for governance in the Scheduled Areas. It envisages a number of options that may be exercised in each case by the concerned authorities depending on the local situation. It is presumed that the alternative chosen will not violate the general spirit of PESA. In the words of a key figure involved in the grassroots movement for the passing of the legislation, 'PESA moved from development delivery to empowerment; from implementation to planning; from circumscribed involvement to conscious participation'".

Then the Study goes on to point out, "However, in the decade-and-a half since it was passed, the experience of PESA has been tragically stilted. The legislative and executive work, which state governments were meant to undertake, still remains incomplete. . . . PESA envisaged a radical shift in the balance of power - from the state apparatus and from economic and political elites, to the community. However, a community can exercise this wide range of powers meaningfully only when they have access to adequate information and capabilities, in alliance with other arms of the state. . . This does not seem to have happened. On the contrary legal and administrative subterfuge has kept the provisions of PESA as a set of aspirations and the agenda of self governance remains postponed".

PESA: The Unfinished Legislative Agenda

The Study pointed out that when passed in 1996, the PESA Act envisaged that the nine states with Schedule Five areas would enact their own legislations devolving power to their respective tribal communities, as well as amend pre-existing laws to bring them in harmony with PESA within a year.

As the table below indicates, "states have varyingly adopted PESA provisions in their state panchayat acts with Madhya Pradesh and Chhattisgarh having undertaken the most work on this". To begin with, since PESA is founded on a 'self governed village community' component it is paramount that the unit of self-governance is an actual self-governing village community itself. Participatory democracy, the second component, inheres in the praxis of a face-to-face self-governing community, like two sides of a coin. While some states have reworked the definition of a village in their panchayat legislations, on the ground administrations continue to practice their earlier revenue

definitions of village. Thereby the village consists not just of 10-12 scattered hamlets, but several revenue villages are clubbed together to form a gram panchayat. This effectively precludes the functioning of a ‘face to face’ community as envisaged in central Act and eliminates the likelihood of a functioning gram sabha. This runs contrary to Section 4 (n) of PESA. Moreover, neither the state legislations nor the rules adequately address how communities might exercise their powers with regard to the issues of land, displacement, liquor and so on. They have also failed to put in place redressal mechanisms that communities can access, when these powers are violated. On the other hand, some state acts in fact even put barriers to a Gram Sabha’s powers under PESA.

PESA IN SELECT STATES

| The Central PESA Act’s provisions | Andhra Pradesh | Chhattisgarh | Jharkhand | Gujarat | Madhya Pradesh | Orissa |
|--|---|--|--|---|--|---|
| Section 4 (i): The Gram Sabha or the Panchayats at the appropriate level shall be consulted before acquiring land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in Scheduled Areas | The AP Act has made provisions to consult the Mandal (Block) Parishad before acquiring land in Scheduled Areas. However, planning & implementing of such projects will be coordinated at the level of the state government. | The Chhattisgarh Act has made provisions that before acquiring land for development projects, the Gram Sabha will be consulted. | The Jharkhand Act has no provision in this regard. | The Gujarat Act provides for the taluka panchayats to be consulted before acquiring any under the Land Acquisition Act, for developmental projects, and before resettling or rehabilitating persons affected by such projects | The MP Act has made provisions that before acquiring land for development projects, the Gram Sabha will be consulted. | The Orissa Act said the District Panchayat shall be consulted before acquiring land. The Revenue department has issued instructions to Collectors to obtain the Gram Sabha’s recommendation during land acquisition. The law also ensures bureaucratic control over the Gram: ‘The Collector or such other officer or person specially authorised on the behalf of the State Government shall exercise general powers of inspection supervision and control over the exercise of powers, discharge of duties and performance of functions by the Gram Panchayat |
| Section 4 (j): Planning & management of Minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level; | The AP Act has assigned this power to either of the three tiers of Panchayats as the case may be. | The Chhattisgarh Act has assigned powers to the Gram Sabha. Intermediate and District Panchayats also have powers to plan, own and manage minor water bodies | The Jharkhand Act has assigned this power to the Gram Panchayat. | The Gujarat Act entrusts this power to the Gram Panchayat | The MP Act has assigned functions to the Gram Sabha to plan, own and manage bodies situated within its territorial jurisdiction. | The Orissa Act has assigned this power to the District Panchayats. |
| Section 4 (k): The recommendations of the Gram Sabha or the | Recommendations of the Gram Panchayat shall be considered prior to grant | Prior recommendation of the Gram Sabha is mandatory | The Jharkhand Act has no provision in this regard | The Gujarat Mines & Minerals (Regulation & Development) Act provides that prior to | Prior recommendation of the Gram Sabha is mandatory | The Orissa Act has assigned this power to District Panchayats |

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| Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals by auction; | of prospecting licenses. | | | granting the quarry lease and quarry permit, recommendations of the Gram Panchayat shall be obtained. | | |
| Section 4 (l): The prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be mandatory for grant of concession for the exploitation of minor minerals by auction; | The AP Act has provided that prior recommendations of Gram Panchayats shall be considered | The Chhattisgarh Act has no provision in this regard | The Jharkhand Act has no provision in this regard | The Gujarat Mines & Minerals Act provides that prior to granting the quarry lease and quarry permit, recommendations of the Gram Panchayat shall be obtained | Prior recommendation of the Gram Sabha is Mandatory. Auctions are done by the state government and royalties must be paid to the gram sabhas/panchayats | The Orissa Act has assigned this power to the District Panchayat |
| Section 4 (m)(i): The power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant; | The AP Act has assigned this function either to the Gram Panchayat or the Gram Sabha. | The Chhattisgarh Act has assigned this power to the Gram Sabha. | The Jharkhand Act has Assigned this power to the Gram Panchayat | The Gujarat Act has no provision as prohibition extends to the whole state. | The MP Act says the Gram Sabha has the requisite powers to brew liquor under certain conditions | The Orissa Act has assigned powers to the Gram Panchayat to be exercised under the direct supervision of the Gram Sabha. |
| Section 4 (m)(ii): The ownership of Minor Forest Produce; | The AP Act says that Gram Panchayat or Gram Sabha as the case may be, shall exercise powers in this matter, as may be prescribed. | The Chhattisgarh State Federation of Minor Forest Produce is empowered to control trade, and must distribute dividend and bonus to the share holders. | The Jharkhand Act has assigned these powers to three tiers of Panchayat | The Gujarat Act has given the right to ownership of MFP to Gram Panchayat. Sale proceeds shall be paid into & form part of the village fund | The 'Madhya Pradesh Laghu Van Upaj (Gram Sabha Ko Swamitwa Ka Sandan) Vidheyak 2000' submitted by the Forest Department. of MP is under revision to include issues like 'Ownership of Minor Forest Produce'. 'Jurisdictional | The Orissa Act has assigned powers to the Gram Panchayat to be exercised under the direct supervision of the Gram Sabha. |

| | | | | | Issues; etc. | |
|---|---|--|---|--|--|--|
| Section 4 (m)(iii): The power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe; | The AP Act says that the Gram Panchayat or the Gram Sabha shall perform such functions | The Act says that the Gram Sabha is endowed with such powers. | The Jharkhand Act has assigned this power to District Panchayats. | The Gujarat Act has assigned this power to the District Panchayat. | The Act says that the Gram Sabha is endowed with such powers. | The Orissa Act has assigned powers to the Gram Panchayat to be exercised under the direct supervision of the Gram Sabha. |
| Section 4 (m)(iv): The power to manage village markets by whatever name called; | The AP Act has assigned powers to the Gram Panchayat or the Gram Sabha as the case may be | The Chhattisgarh Act provides that the Gram Sabha shall have powers to manage village markets and melas through the Gram Panchayat | The Jharkhand Act has assigned this power to all three tiers of Panchayats. | The Gujarat Act has assigned this power to Gram Panchayats. | The MP Act provides that the Gram Sabha shall have powers to manage village markets and melas through the Gram Panchayat | The Orissa Act has assigned powers to the Gram Panchayat to be exercised under the direct supervision of the Gram Sabha. |
| Section 4 (m)(v): The power to exercise control over money lending to the Scheduled Tribes; | The AP Act states that either the Gram Panchayat or the Gram Sabha shall perform such functions | Chhattisgarh Act has amended its laws preventing moneylending in PESA areas, and giving preventive powers to the Gram Sabha. | The Jharkhand Act has assigned this power to the District Panchayat. | The Gujarat Act has assigned this power to the Gram Panchayat. | The Gram Sabha is endowed with such powers. | The Orissa Act has assigned powers to the Gram Panchayat to be exercised under the direct supervision of the Gram Sabha. |

So far the issue of **control over community resources** is concerned States have dealt with this in different ways. Madhya Pradesh has proceeded with accepting the provisions of PESA unequivocally as constitutional provisions. Accordingly, the management of natural resources, under section 129c (iii) of the Madhya Pradesh Panchayat and Gram Swaraj Act, is envisaged to be ‘in accordance with its tradition and in harmony with the provisions of the constitution.’ Thus nothing in the tradition of the community can be invoked that may be against the basic tenets of the constitution. In so far as the ordinary laws on the subject are concerned, the said provision of the Madhya Pradesh Act envisages ‘due regard to the spirit of other relevant laws for the time being in force’.

Chhattisgarh has also followed this approach. Jharkhand has also gone by the same precedent. The tenor in Orissa’s law is different. The competence of the grama sasan under section 5(6) of the Orissa gram panchayat act is qualified by the clause ‘consistent with the relevant laws in force and in harmony with basic tenets of the constitution’. A plain reading of this clause would suggest that the relevant laws are superior, and accordingly PESA should be adapted suitably. In most states, the enabling rules for the gram sabha’s control over prospecting of minor minerals, planning and management of water bodies, control and management of minor forest produce, dissent to land acquisition are not yet in place, suggesting reluctance by the state governments to honour the mandate of PESA. In states like Andhra Pradesh and Gujarat the rules are yet to be framed for PESA. In Andhra Pradesh, draft rules were prepared in 2007, but they have still not been notified because they have to be put for approval before the state Tribal Advisory Council. Without the rules, the operation of PESA on the ground becomes null and void. As one analyst pointed out, ‘In such situations, panchayats work as extensions of bureaucracy, rather than representatives of the people.’

So far the PESA’s mandate on **land related issues** was concerned, the power envisaged for the gram sabha in respect of ‘prevention of land alienation as also restoration of illegally alienated land’ is unequivocal. However suitable provisions in the Panchayati Raj Acts or the relevant land regulations have not been made. The only exception to that is the state of Madhya Pradesh and now Chhattisgarh. A clear and categorical provision has been added in the Madhya Pradesh Land Revenue Code after the enactment of PESA, which empowers the gram sabha to

restore the unlawfully alienated lands to the tribal landowners. A unique feature of this law is that in case the gram sabha is unable to restore such lands it has been empowered to direct the sub-divisional officer in this regard who shall restore the possession within 3 months. This radical provision has remained virtually unimplemented for the simple reason that no rules have been framed in this regard. Further, to ensure actual devolution, a state's pre-existing laws had to be amended in line with the provisions of PESA. In all the states barring Madhya Pradesh and Chhattisgarh, land acquisition acts have not been amended in line with the provisions of PESA. The process of consultation before acquisition of land, as envisaged under section 4(i) of PESA, has not been formalized in most of the states. The state of Madhya Pradesh (including Chattisgarh), however, has made elaborate rules in the year 2000 about consultation with concerned gram sabhas before acquisition of land. These rules envisage 'consultation with gram sabha before issuing notification under Section 4 of the Land Acquisition Act.' A detailed procedure has been prescribed so that consultation is transparent and informed. The objective is to enable the people to come to a rational decision based on facts. The collector and a representative of company are mandated under rule 3(vi) to attend the final meeting of the gram sabha before it formally adopts a resolution for or against the acquisition. Thus, theoretically there is a paradigm shift in a crucial aspect of governance concerning acquisition of land in favour of the people. The proceedings in the open assembly of the gram sabha precede the proceeding in the court of the collector. The collector is expected to satisfy the people in the natural familiar setting of the gram sabha, where the people feel empowered, before he starts the formal process of land acquisition. It is, however, a matter of deep regret that these rules are not being followed in their true spirit. There are cases where the formal resolutions of gram sabha expressing dissent have been destroyed and substituted by forged documents.⁴ What is worse, no action has been taken by the state against concerned officials even after the facts got established. The message is clear and ominous. There is collusion in these deals at numerous levels. Even in these two states, which have done the most extensive work among the PESA states on their legislations, the gram sabhas are only given the power of consultation and not consent, thus diluting the principle of self-governance. Further the gram sabhas are being convened at a level much larger than a habitation. The progressive edge of PESA gets diluted further as the term consultation is not defined properly nor have state governments outlined the ways of recognizing a negative response from the community towards acquisition.

In respect of **mining and minerals** the Sub-sections 4(k) and 4(l) of PESA envisage prior consultation with gram sabhas before grant of leases etc, of minor minerals. Despite the directions issued by the Ministry of Mines and Minerals the action in respect of consultation, before lease of minor minerals is granted, has been rather poor. A comparative analysis suggests that the legislations in the States of Madhya Pradesh and Chattisgarh are nearest to the original provisions of PESA. Other states have significant legislative work left to undertake to actualise the Act. However, all the states are faring poorly on implementing these provisions meaningfully on the ground.

There seems to be no explanation for the widespread indifference in the State bureaucracies other than the fact that PESA is low on the political and executive agenda. Efforts to honour it do not extend beyond inter-department communications. One official in the Panchayats Department of the Orissa state government said, 'We write to the other line departments from time to time reminding them to amend their laws. But they have not done it yet'. In December 2009, the Ministry of Panchayati Raj sent the nine state governments a set of draft PESA rules as a potential template, but this was not accompanied by a timeframe for action. Further, while these draft rules are laid out mandating the devolution of power to the community, the draft document does not list any punitive measures for violation of rules. In the light of the PESA experience of the past 15 years, it is unlikely that these rules, unless accompanied by well thought-out punitive measures or redressal mechanisms, will have their intended effect of empowering the community.

As regards the **Governor's Role** in ensuring enforcement of PESA, the Study pointed out that the Constitution entrusts the Governor the task of ensuring 'peace and good governance' in Schedule Five areas, with absolute powers over the state government towards this end. Governors were also required to submit an annual report to the Parliament, which was meant to be an independent assessment on administration in Schedule Five areas. But a Planning Commission-appointed Committee (2008) commented thus on Governor's failure: 'It is a pity that no Governor has ever cared to keep a watch over the legislative activity of the state or the centre with reference to the responsibility implicit in the powers vested by Paragraph 5(1) of the Fifth Schedule.'

On the ground, communities and organisations express the feeling of being let down by the Governor's office. They point out that the Governors have not responded in a single instance to their petitions for intervention in crises that threaten them, such as deepening clashes over land, mining or police excesses. As required by Paragraph 3 of Schedule Five, Governors are required to submit a report annually, which is their independent assessment of the quality of governance in PESA areas. An analysis of annual reports submitted by the Governor to the Centre in the past years shows that these are hardly objective assessments as required by law, but largely a laundry list statement of physical targets and financial allocations under various schemes as reported by the departments of the state

government. None of the reports had analysed or even touched upon the themes of displacement, alienation, poor governance and insurgency, which are the dominant facts of life in many PESA areas.

Responding to a RTI request asking for these reports, one official in the central government stated, 'These are not public documents', revealing the extent to which the exercise has become unaccountable and opaque, and has lost touch with its intended meaning of being responsive to one of India's most vulnerable sections.

The Study listed out the following basic problems that characterized the mis-governance of PESA in Scheduled Areas-

1. There is a lack of appreciation about the place of the Fifth Schedule read with PESA in various organs of the state.
2. The formal responsibility of (a) implementation of PESA that stands for total transformation of the paradigm of governance in the Scheduled Areas and (b) dealing with tribal affairs in general is vested with two different ministries in the Union Government, namely, the Ministry of Panchayati Raj and the Ministry of Tribal Affairs respectively. The two are virtually functioning in isolation.
3. There is lack of information and understanding about PESA in general and its radical character in particular amongst the political executive and even concerned administrators.
4. There is virtually no effort to convey and disseminate the message of PESA.

As a senior politician has argued, '... the Act has been passed pursuant to a constitutional imperative, the failure to implement the (PESA) Act in Fifth Schedule areas amounts to noncompliance with constitutional provisions. The union government must take all necessary steps, including resort, if necessary, to litigation, to ensure compliance.' A tribal rights advocate contrarily argued that the delays by the state that keep PESA ineffectual are only to be expected: 'PESA will always entail a struggle for communities because it is a process that shifts power from the state and the elites to them. The process has its own momentum, setbacks, and will take time. But it is a process that is possible.'

PESA: Challenges on the ground

There is a veritable crisis in several PESA areas of the country today – a damaging mix of misgovernance, alienation, violent insurgency, and counter-violence by the state as well as non-state actors, such as the Salwa Judum in South Chhattisgarh. Official studies have pointed out that the size of the operational holding in the tribal lands is eroding due to the state led acquisition and marketisation process. This process is most pronounced in the states of Orissa, Chhattisgarh and Jharkhand. The report notes elsewhere that the existing framework of law is formidable on paper but is operated to the disadvantage of the tribals.

The sale of tribal lands to non-tribals in the Schedule Five areas is prohibited in all these states. However, transfers continue to take place and have become more perceptible in the post liberalization era. The principal reasons are-transfer through fraudulent means, unrecorded transfers on the basis of oral transactions, transfers by misrepresentation of facts and misstating the purpose, forcible occupation of tribal lands, transfer through illegal marriages, collusive title suites, incorrect recording at the time of the survey, land acquisition process, eviction of encroachments and in the name of exploitation of timber and forest produce and even on the pretext of development of welfarism. The BN Yugandhar Committee (2002-3) has referred to the process of enclavement, whereby the tribal retreats into the interior areas on the incursion of the non-tribals leaving his home and hearth behind, as a major factor of alienation.

PESA provisions are intended to intrinsically protect the resources of the tribal communities, and empower them to act against forcible acquisition. But today, acquisition of the individual's and the community's natural resources for (mostly private) industry in violation of these provisions is the leading flashpoint in several PESA areas. This is creating conflicts, which tribal communities are tragically ill equipped to navigate, even though in several sites, communities are taking on suffering to engage in a difficult movement to resist the loss of their livelihoods and resources, and way of life. Despite their efforts, the current resource clash is shifting an already skewed balance of power from the people to the state and the moneyed. The state is also emerging as a principal violator of the very laws it is meant to uphold e.g. ignoring a gram sabha's opposition under PESA to land acquisition, and calling village assemblies under heavy police presence to push through land acquisition plans.

The central Land Acquisition Act of 1894 has till date not been amended to bring it in line with the provisions of PESA and to recognize the gram sabha, while a newer bill meant to replace it is yet to be tabled in parliament. At the

moment, this colonial-era law is being widely misused on the ground to forcibly acquire individual and community land for private industry. In several cases, the practice of the state government is to sign high profile MOUs with corporate houses and then proceed to deploy the Acquisition Act to ostensibly acquire the land for the state industrial corporation. This body then simply leases the land to the private corporation - a complete travesty of the term 'acquisition for a public purpose', as sanctioned by the act. In some cases, administrations run through the motions of a PESA consultation, but in no instance has the opposition expressed by tribal communities to acquisition of their land resulted in a plan for industry being halted, suggesting the disempowerment of the gram sabha. One official currently engaged in such a process of acquisition said, "Once I declare anyone's land for acquisition under the (1894) act, it becomes the government's."

There is inadequate sensitivity to the fact that tribal communities often cannot take advantage of specialised employment opportunities in the new industry because of their low literacy levels, and face the prospect of being reduced to informal, casual labour. Nor is there a recognition that sometimes communities might simply not want to part with their land, no matter how attractive the compensation, because it will be disruptive of their way of life. When it comes to acquiring mineral resources for industry, the stakes are similarly loaded against the functioning of the PESA Act. The past decade has witnessed a boom in mining, and the sector is exhorted by the government to grow at an annual rate of 10% a year. Yet, there is still no legal framework in place for communities to dissent to such activity in their area if they so desire, or to secure a direct stake in the earnings, through instruments such as jobs or debentures. Successive governments have systematically ignored the Samatha judgment (Supreme Court, 1997), to the severe detriment of tribal communities. The order's highlights are worth reiterating here to indicate how the country could have adopted a model of sustainable mining, which was respectful of the tribal communities living in mineral-rich areas, and thus avoided many of the current conflicts witnessed on the ground today:

Highlights of Samatha Judgement (1997)

1. 'every Gram Sabha shall be competent to safeguard.....Under clause (m) (ii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawful alienation of land of a scheduled tribe.'
2. Minerals to be exploited by tribals themselves, either individually or through cooperative societies with the financial assistance of the state.
3. In the absence of total prohibition, the court laid down certain duties and obligations to the lessee, as part of the project expenditure: at least 20% of net profits as permanent fund for development needs, apart from reforestation and maintenance of ecology.
4. Transfer of land in Scheduled Areas by way of lease to non-tribals, corporation aggregate, etc stands prohibited to prevent their exploitation in any form.
5. Transfer of mining lease to non-tribals, company, corporation aggregate or partnership firm, etc is unconstitutional, void and inoperative. State instrumentalities like APMDC (Andhra Pradesh Mineral Development Corporation) stand excluded from prohibition.
6. Renewal of lease is a fresh grant of lease and therefore, any such renewal stands prohibited.
7. In States where there are no acts which provide for total prohibition of mining leases of land in Scheduled Areas, Committee of Secretaries and State Cabinet Sub Committees should be constituted and a decision taken.
8. Conference of all Chief Ministers, Ministers holding the Ministry concerned, and Prime Minister and Central Ministers concerned should take a policy decision for a consistent scheme throughout the country in respect of tribal lands.

However, during the great boom in mining in the past years, companies paid a royalty to the state only to the tune of Rs 26 per tonne of iron ore, selling it for over 100 times that, or at an average of Rs 3,000 per tonne, which meant huge profits running into the coffers of private companies. Thus there appeared a great financial incentive to ignore the PESA law and the Samatha judgment, or alternatively to ensure that they do not get in the way. A former Chief Minister explained the deliberate neglect of PESA thus: 'Its implementation would put an end to mining projects'. Communities had to bear the brunt of this violent mining/ industrialization process. And the immense profitability from mining skewed the political and administrative agenda in favour of industry, and away from protective laws like PESA.

Instance of Narayanapatana, a PESA area in Koraput, ORISSA

PESA empowers the gram sabha to prevent the alienation of tribal land by non-tribals. The Orissa Scheduled Areas Transfer of Immovable Property Act 1956 (Regulation-2) reinforces this principle. But these laws are non-functional on the ground, as acknowledged at the time of its amendment in 2002. In Narayanpatna, a successful grassroots movement for land reclamation has resulted in polarization on the ground, widespread arrests, and deployment of security forces, leading up to the death of two tribal men during a police firing on a protest march in November 2009.

Over the past five years, the Narayanpatna and Bandhugaon blocks of Koraput district in Western Orissa have been the site of a tribal movement of agricultural labourers called the Chasi Mulia Adivasi Sangh (CMAS). Over the last three years, the movement has gained strength and spread to the neighbouring blocks of Laxmipur and Similiguda. It has evolved around the issue of alienation of tribal land. It has a three-decade-long history, when these communities lost their lands to hydropower projects and industries, and had to endure displacement. The situation worsened over the years as moneylenders and traders forced the tribals into debt traps, took advantage of their inability to read or write or access land revenue records, and took over many of their land holdings.

In June 2009, the agitation under the banner of the CMAS gained momentum as it took back and ploughed more than 2000 acres of reclaimed land, and declared that it would release Mali Parbat (a mountain range, with rich mineral deposits) from the bauxite mining companies. The other main site of action was the closure of liquor trade in the area, pointing to the deep links between alcoholism, tribal exploitation, land alienation and debt. Remarkably, they managed to get all the liquor shops boycotted in the blocks, leading to a fall in business for the liquor and Money-lender lobbies.

In October 2009 the CMAS grew more assertive and carried out a rally and demonstration in Bhubaneswar and declared that their movement would continue their struggle to get land back to the tribals, and expand to other areas of the state. Their slogan was, 'The land, the water, the forests, the wind...everything is ours.' The struggle started getting violent overtones, as a counter organisation of urban elites called the *Shanti Committee* (akin to the Salwa Judum in Bastar) came into existence. Violence and counter violence created a tense and complex situation. In August 2009 the Collector attempted dialogue with the agitating tribals, asking them to not break the law, and assuring that their land grievances would be settled under revenue laws and due procedures. The dialogue continued, and no forcible occupation of land was taken up subsequently according to government accounts.

Criminal cases were lodged against different leaders of the CMAS, and combing operations began, and the CMAS held protest rallies against alleged police atrocities. The action by the security forces only appears to have increased, as the harvesting time drew near. Reportedly they have ostensibly sought to prevent harvest of crops on lands forcibly occupied by the CMAS. Local accounts indicate that the tensions were further aggravated on the 18th and 19th of November as people were warned by the security forces in several villages that they should leave their homes immediately, to avoid dire consequences. There has been an increasing presence of the security forces in the areas now.

On 20th November, CMAS members went to the Narayanpatna Police Station again to protest against the combing operations and the high-handedness of security forces in the villages. During the protests, the police opened fire on the crowd, and killed CMAS members Kendruka Singanna and Nachika Andru, and injured several people. Police claim the firings were necessary for self-defence. On the other hand, independent observers term it a needless and preplanned killing, pointing in particular to evidence such as bullet wounds at the back, shot from close range. Since these deaths, there has been little effort on the part of the government to inquire into the matter, to initiate a peace-building process, or to bring about justice to the aggrieved. The polarization and conflict levels have increased manifold following the firing incident. The village wore a ghost appearance, with ill-nourished children milling around. Few villagers who remained said villagers preferred to hide in the forests because of the police and paramilitary forces that come in big numbers and with arms.

A testimony summed up how the current conflict was rooted in a legacy of tribal exploitation and misgovernance. The young man in his twenties, said he had first been arrested in 2001, when he tried to cultivate a piece of land, which a local moneylender ("with 14 acres of land, and two guns"), has wrested from his father. He said, "The police did not listen to our complaint of how our land has been seized. Instead they backed moneylenders, put us in jail and threatened us to not create trouble. Nobody was interested in our problems till the CMAS was formed."

When asked how the earlier peace would return to the area, an activist said, "The truth is things were not good earlier for us. If they were, why would we need to start the CMAS? There was no peace. We used to be exploited a lot. The police would only listen to the complaints of those who have money. We toil night and day, and have been

toiling since our father's time, and our grandfather's time. Yet, why don't we have a piece of land to call our own? Why do we have to go hungry despite working so hard? Why did my father die after drinking alcohol? That is how the CMAS began - to oppose the liquor business and indebtedness, to restore lands to the cultivator, and to resist police harassment. We prefer to die rather than give up our lands or our organisation." Men in the village spoke articulately and calmly about their rights and their actions, and denied having or wanting links with the Maoists. They said, "We have no arms. We only have our agricultural implements. The police is trying to end the CMAS. If the organization ends, alcohol will return to the area. The police will again become oppressive. We will again be exploited."

At Narayanpatna, an administrative perspective was sought from the Block Development Officer. The officer was reticent, but said he was trying to undertake development works in the area, and restore normalcy. He said that he had been the only officer who had stayed on after the conflict, and made efforts to win the confidence of the villagers. A school close by is now home to over a hundred paramilitary forces. A senior security official said 73 villagers have been arrested since the Nov 20 firing on various charges, including old and new cases. Some are minors, but only because they are also involved in the activities, they also carry bows and arrows." He said it was not possible to end combing operations or file charge sheets against the arrested villagers in the slated 120 days. He added that an additional company of CRPF troops had been sent to the area in the wake of the November 20 firing. He however admitted that police control would not be able to end the conflict. He said it was important to address the root cause of the problem, namely violation of land rights.

Poor recognition of Forest Rights

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (or simply Forest Rights Act) was a result of the polity responding to protracted struggles by tribal communities and movements to assert rights over the forestlands they were traditionally dependent on. The Act turned colonial forest policy on its head, which had established the rights of the state over the forests over the traditional rights of the community. Further, by recognizing the validity of the gram sabha to give effect to these rights, this Act has great synergy with PESA's provisions. However continuing bureaucratic control, resistant attitudes of the forest department officials to give ownership to communities, and inadequate efforts at awareness have led to the slow implementation of the Act. The law lays down a clear three stage process for recognition of people's rights. It also defines what constitutes admissible evidence. The Forest Department has a role at the district and sub-divisional levels, but only as one of the parties involved. But the department has made every effort to give itself illegal veto powers to deny rights. In most states the department is refusing to be present at the time of verification by the Forest Rights Committee, and then demanding that the claim be rejected at the screening stage as they did not attend

The Forest Rights Act requires that all rights be recognised through a transparent, public process, where the gram sabha or village assembly is central. Instead of following that process, government officers are imposing their own diktats. Gram sabhas are being deliberately called at the panchayat level or even larger units, where they are too large for adivasis and forest dwellers to have their voices heard. This is in direct violation of the Act, especially in Schedule Five areas. Even where gram sabhas have functioned and recommended claims, in Madhya Pradesh, Gujarat, Andhra Pradesh and other States, the area over which rights are being recognised is being arbitrarily reduced. People cultivating an acre of land file claims for it, have their claims duly verified, and find that the actual title is given for a tenth of the area. It is not just the process of implementation but the quality of the same that is important here, and thus the states need to make this process of implementation meaningful for the communities dwelling in the forests.

Shrinking space to resolve people's issues

A raft of peoples movements are currently underway on the ground, either to assert legitimate rights, or to resist their violation – e.g. for land reclamation and forest rights, or against the takeover of resources, corruption, or displacement. In one way, these could be seen as the community's efforts for self-determination and self-governance. These efforts are emblematic of the principles of direct and participatory democracy as was envisioned in the 73rd amendment, and then taken forward by PESA, by recognizing gram sabhas to be constitutionally valid bodies of local self-government. However, in most cases, and particularly against the backdrop of the state's efforts against left-wing extremism, they are being dubbed as Maoist.

'We protest about anything – the corruption in NREGA, the takeover of our land', and we are immediately dubbed Maoist', said a sarpanch in a village in Koraput in Western Orissa. 'Basically, if we raise our voice against something the government is doing, no matter how illegal or unfair we feel it might be to us, we become Naxals and Maoists.' Another health worker said, 'I would work among the Bonda tribe in Malkangiri, and visit villages, where no government doctor, nurse or government official would ever care to go. One day, I got a letter from the Collector saying I am working in villages that the police said are in the Maoist zone, and so I must be a Maoist, and I should

leave the district. The administration was not interested in health services to the community, but was primarily concerned about security. In a meeting called by (Chief Minister) Naveen Patnaik to discuss the Maoist problem, many of us advised him, the amount of funds you are spending on weapons and security personnel, spend a quarter of that instead on raising a force that has the power to detect and bring out corruption in government programs. That will automatically end the alienation that Maoists are using. But the suggestion was never taken seriously’.

Such criminalizing of the assertion of one’s constitutional rights as a citizen is a short-sighted approach towards dealing with discontent, besides being a violation of landmark laws like PESA and FRA, and is having the effect of pushing people towards extremism. Essentially, the district administration’s approach is geared towards forcefully maintaining the veneer of law and order. But this ignores the root causes of alienation, which continue to seethe beneath. This might help us partly understand why the Naxal movement still continues four decades after it began, when police brutality towards adivasis provided the first spark.

There are also inadequate attempts for democratic dialogue to resolve conflicts, with the government acting as an honest broker to build mutual understanding, say between an industry and the community, or between elites and the adivasi labourers. One tribal rights advocate asked, ‘The government might not be interested in talking to the Maoists without certain pre-conditions. But what stops it from talking to its own people and understanding their pain?’ Nor is there adequate acknowledgement that across PESA areas, people increasingly want the democratic spaces that allow them a life of dignity. To that extent, the current alienation is a manifestation of misgovernance, and a lasting solution to it would also lie in an honest implementation of PESA, and putting people’s aspirations at the centre of public policies in Schedule Five areas.

Anti-PESA Liquor Policy: Experience of MANDIBISI in RAYAGADA, ORISSA

PESA confers power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant. However excise officials are reluctant to cede authority to an assertive village community. The administration backs country liquor shops, which have the requisite money power and a vested interest in alcoholism since it engenders debt and the community’s dependence on the moneylender.

In Mandibisi village in Rayagada district, villagers led by women have been at the forefront of an effort to establish control over the sale of liquor in their village by a country liquor shop. While PESA guarantees the gram sabha the right to determine such trade, the community has to work a lot to secure this right in practice. The Orissa government’s policy provides for licenses to country liquor shops in every village, and also sometimes leases land for the shop to them on government owned land. On the ground, the people’s experience has been that the administration supports liquor trade because of excise earnings, and because local elite interests have deep links with alcoholism, family debt and money lending.

In Mandibisi, the country liquor shop was established 7 years ago, with the brewer and seller from the neighboring state of Bihar, who set up residence in the village, when he came to start the liquor trade. Over the years, alcoholism grew and men began borrowing money in order to finance their drinking needs, with women facing the adverse consequences. According to one woman in the village, “As drinking increased, our debts grew and men would not even do their work, and so our work on the farms also increased. They would even beat us up when drunk. Further, the breweries would buy the mahua flower (an ingredient in the liquor) from families at Rs 7 per kilogram, which is half the government mandated rate of Rs 15 per kg.” But we began getting most worried when young boys also began taking to buying alcohol from the shop when returning from school. That is when we decided to act.” They picketed in front of the liquor shop, and asked it to close down, but the shop owner said he was paying Rs3000 in excise earnings to the administration every month and he would not move from that village.

The gram Sabha then passed a resolution that the village will not allow the sale of liquor in the village. The women went in a group to the Collector, and met local officials, who tried to explain to them that the shop liquor was good as opposed to the liquor that is brewed at home. “We did not agree and we met the Collector, Krishnachandra Mahapatra, who assured us that the shop will be shut in a month when its lease ends. But nothing happened”, said Sushma Majhi, Secretary of a women’s collective in the village called Our Collective (Aama Sangathana).

When the liquor shop was still not shut down, the villagers passed another resolution, and decided to demonstrate again in front of the Collector’s office in Rayagada, over 80 km away. Such protests had to be organized eight times in the course of the struggle to get the shop closed. Even arranging such protests entails much hardship for the individual women and the village as a whole. One lady said, “We collected money, hired a truck for Rs 2000, took puffed rice in a sack as ration and went to the Collectorate. We would eat very little, so that the ration lasts for all of us”. The women finally broke a part of the shop. In response the police came to arrest them, and they fled into the forests surrounding the village. According to Fulising Naik, a young, involved and educated villager, who helped

mobilize people and arrange meetings, the protests against the liquor shop led to his arrest by the police. “They put me in prison. When I told the inspector that the PESA law allows us to decide our policy on liquor trade, he shot back, “Are you trying to teach me the law? If you are so knowledgeable about the law, why are you living here in the village and the forest? Go and speak in the Orissa assembly!”” Naik was also offered a bribe by the liquor mafia to stop the villagers from protesting against the shop, but he resisted taking it. He was released after villagers went in a group and demonstrated in front of the Collectorate and a local civil society group drew attention to his arrest. The villagers refused to stop their dharna till they had received an assurance in writing from the Collectorate that the shop would be closed down. The shop was finally closed this July (2010), after almost two years of struggle, though the shop still continues to stand at the same location, and the liquor seller still lives in the village. At the time of writing this, villagers however had just received another letter from the district administration saying that if it does not receive any opposition to the proposal for a liquor shop in the village within 30 working days, its functioning will be cleared. So Mandibisi’s struggle for a basic right guaranteed by PESA is still not over. In the words of the villagers, “Can such actions of the administration only be countered by violent and aggressive Maoists dalams , or will we, who wish to secure our constitutional rights in a peaceful manner, be allowed the space to function?”

Left-wing extremism and militarisation in PESA areas

Of the 76 left-wing extremist-affected districts in the country today, 32 are PESA districts, according to official estimates. Drawing on a four-decade-old movement of militant left politics, the CPI (Maoist) was formed in September 2004, by merging the Communist Party of India (Marxist Leninist) and the Maoist Communist Centre. Its spread currently extends across significant parts of Bihar, Jharkhand, Orissa, Chhattisgarh and Andhra Pradesh, leading to the term, ‘The Red Corridor’. However, some analysts pertinently argue that the analogy of ‘The Speckled Band’ more aptly describes the Maoists’ area of influence, given they have control over some selected forested pockets in the districts stretching across the heart of central India. This includes the epicenter of the banned party’s base in the Dandakaranya region, a vast forested area on the borders of Andhra Pradesh, Chhattisgarh, and Orissa. While the senior leadership of the party is mostly drawn from non-tribal communities, much of the rank and file comes from local villages, and has built on their grievances emanating from the non-implementation of PESA. In the words of a former party member, ‘In several villages of Chhattisgarh and Jharkhand, where the party’s grassroots network is strong, households have one or more members as a cadre.’ Some analysts read the resurgence and spread of left-wing extremism as a phenomenon of tribal self-assertion. They point to the co-incidence in the rise of economic reforms and the deepening of the Maoist movement in India’s polity, the latter being a retort to the exclusionary nature of these policies. According to one senior politician, ‘If the state is neglectful and oppressive, as it has been, it provides the water in which the guerilla fish swim.’²² Another senior politician seconded, ‘PESA has not yet been honestly implemented in a single district yet. If it is, we will solve the Naxal problem.’

Some the people’s struggles nurtured by the Maoist party speak directly to the problems of tribal communities on the ground, which have intensified because of the systemic neglect of PESA. These include issues of access to lands and forests, fair wages, the distress of farmers and weavers, awareness of basic rights, as guaranteed by the Constitution. The Maoists further argue that in the light of the state’s insensitivity towards the problems of the weaker sections, only their party’s ideology and methods can resolve the exploitation faced by the tribals. Government analyses second the development deficit roots in the left-wing extremism- affected districts:

- i) More than 3/4th of the people living in these districts have a low standard of living index. (The low standard of living index was a composite index worked out as a part of District Level Household Survey Phase-III).
- ii) Female literacy for most districts is below the national average.
- iii) Less than 1/4th of the population lives in pucca houses.
- iv) Less than 1/3rd have an electricity connection.

The Maoist party proclamations and the evidence of poor development and governance support the hypothesis of economic liberalization fuelling socio-economic disparities on one hand and resulting in political extremism on the other.

So the Maoists today have a dual effect on the ground in PESA areas. By virtue of the gun they wield, they are able to evoke some fear in the administration at the village/ block/ district level. On the one hand they may be fighting for the powerless villagers by way of issuing warning to a corrupt Forest Official demanding bribes, or stand against a trader who might be paying a paltry sum for forest produce, or against a contractor who is violating the minimum wage. The party has also done an immense amount of rural development work, such as mobilizing community labour for farm ponds, rainwater harvesting and land conservation works in the Dandakaranya region, which villagers testified, had improved their crops and improved their food security situation. On the other hand, the party ideology is brutal and cynical. It attacks the perceived class opponents, and even carries out political assassinations, e.g. panchayat members from rival political parties, who might have proximity to the administration, and are seen as

exploiters of the people, or a political threat. Further, the party's violence is now resulting in an armed response from the state with the nebulous aim of ending Maoist influence on the ground. As a result of all this, there is increasingly no middle ground in PESA areas, and communities here face violence and displacement.

Further, the conditions of civil war and the extra-constitutional Salwa Judum's scorched earth policy have also induced displacement, which current policies are not adequately responsive to. For example, this has affected over 600 villages in South Chhattisgarh, whose residents have been forced to flee to villages in Andhra Pradesh and Orissa, and eking a living on the margins of existence. Though the areas they have fled to- e.g. Khammam in Andhra Pradesh or Malkangiri in Orissa- are also Schedule Five areas, these displaced communities are treated as non-citizens at best, or Maoist supporters at worst. No entitlements (for example under the Public Distribution System or the National Rural Employment Guarantee Act) are being extended to them, with the justification that they do not originally belong to that state. One former panchayat member whose village was burnt down in the reprisals, and who has been leading a displaced life since the past five years said, "The Salwa Judum burnt our village and said it will finish the Naxals in 3 months. But the Naxals are there. The security forces are there. Our lives have been crushed."

What is the effect of all this on PESA's implementation? Such conditions of tumult have disrupted normal life, rendering PESA meaningless on the ground. While security personnel do not have a direct role in the implementation of PESA, the effect of the current militarization means they must concentrate power in their hands in order to win the armed conflict. How do personnel on the ground go about the difficult and dangerous task of ascertaining who is a Maoist/Naxal and who is not? What is punishable, and how does the state establish criminality?

There are no straight answers to these questions, and the socio-cultural gap between officials in positions of authority, and tribal communities on the ground only widens the rift. Fear and distrust of the state is disturbingly high among tribal communities, and this anger is currently going unacknowledged and unaddressed. PESA did not envisage this extreme scenario, and so its provisions are not geared to address such challenges.

Therefore it is necessary for policymakers to ask if and how the state's security aims can be reconciled on the ground with respect towards a law like PESA, which emphasizes devolution of power to people.

Distress Migration

The severe crisis in rain-fed agriculture, widespread leakages in social security nets like NREGA, and high levels of distress migration mean that some of the most vulnerable sections of a village community are away from their homes for 5-6 months of the year in a desperate search for work. This is particularly true of tribal communities in Madhya Pradesh, Chhattisgarh, Orissa, and Jharkhand. The migration renders impossible participation in village decision-making, and is to the severe detriment of the inclusive and participatory governance envisioned by laws like PESA.

An added damage suffered by PESA as an effect of this is that as migrant workers, tribal communities can assert few rights and often have to resign themselves to working in exploitative conditions of work for a below-minimum wage, for lack of better choices. The Inter-State Migrant Worker's Act, legislated by Parliament in the 1970s in a bid to end the "various abuses" of migrants from the tribal communities of western Orissa, could provide a modicum of social security. But a labour advocate said: "The law is roundly flouted because few workers can read or write and are too vulnerable economically to demand for its provisions, while officials entrusted with monitoring the Act are hand-in-glove with the contractors." Spending half of the year in such abusive conditions adversely affects the individual and the community's social confidence and self-assertion - qualities that are critical to the competencies that the PESA law takes for granted.

As the above analysis suggests, PESA areas are witnessing a coalescing of livelihood crises, the absence of fundamental entitlements guaranteed under the Constitution, mis-governance, alienation, violent insurgency and a breakdown of the rule of law. There is a steady militarization currently underway on the ground. But the benefits of such an approach to solve the complex challenges facing these areas are far from straightforward. In a recent speech to the meeting of Chief Ministers from the affected states, Prime Minister Manmohan Singh (2010) struck such a cautionary note, while also emphasizing the need for better governance in these areas: "...our response to Left-Wing extremism must be calibrated to avoid alienating our people, especially those in the tribal areas. It must also go hand in hand with social and economic development of areas affected by Left-Wing extremism, bringing them into the mainstream of national progress. Tribal communities in particular, should get full benefit of our development schemes and development programmes. This is only possible by improving service delivery in tribal dominated

areas.’ However, our attempts for better governance and improved delivery of public services will be inadequate, if they do not acknowledge the centrality of PESA.

Enabling Conditions for Restoring and Actualising PESA

Before recommending the concrete actionable points to activate PESA, the Anand Study suggested the creation of necessary enabling conditions that would go a long way in creating an atmosphere that we think is critical for the restoration of PESA. Such enabling conditions are as follows:

(i). Displacement, as well as loss of access to forest and water resources because of mining and industry, are urgent threats not just to local livelihoods, but also to notions of democratic and fair governance in PESA areas. The Land Acquisition Bill is currently in Parliament. There were demands by people’s organisations that a white paper on displacement, particularly in Schedule Five areas be placed before holding a discussion on the said Bill. A moratorium on acquisition and involuntary displacement in PESA areas be declared, till there is an analysis of the costs and benefits that have acquired to tribal communities through the process of industrialization. Till such exercises happen, the efforts should be to make the processes of change participatory, rather than violative. The Memorandum of Understandings signed by the state governments with industrial houses, including mining companies should be re-examined in a public exercise, with gram sabhas at the centre of this enquiry.

(ii). The Environmental Impact Assessment (EIA) stage of a proposed industrial or mining project is critical in the fate of a tribal community given the possible consequences of such projects - from complete displacement to irreversible ecological damage. But the manner of doing EIA as is, runs contrary to the provisions of PESA read together with the Scheduled Tribes and Other Forest Dwellers Recognition of Forest Rights Act. Both are Acts of the Indian Parliament and the former is meant to supersede any legislation that is not in consonance with it. Each state with PESA areas should set up a panel of environmental experts whose services should be available to the gram Sabhas in the process of giving consent or dissent to a project. Details of the panel members should be widely publicized and made known to all gram Sabhas, especially in the PESA areas.

(iii). Democratic Space: The retrieval of the democratic space through the operation of the institutional mechanisms mandated by PESA is an absolute necessity for other developmental implications of PESA to find fuller expression. Given the alternative mobilisation’s roots in tribal communities, a nuanced approach is needed to help neutralize their effects. The state should be accommodating of all political viewpoints and people’s movements within the constitutional framework - even those that fundamentally question its policies and conduct. In the words of one analyst, ‘Viewed one way, we could argue that the adivasi cadres in the villages represent some of the best citizens of that strata of society – politically aware, engaged and willing to struggle for the dignity and rights of their community. We should instead engage them in our collective efforts to build a more inclusive and humane society’ (IRMA conference on PESA, February 2010)

(iv). Community-centric governance: Through the past year, some sections of government have stated that the PESA areas will see ‘an injection of speedy and aggressive development’, or that ‘these areas will be saturated with development.’ However, this approach suggests continuing bureaucratic control and ignores the principles of self-governance and community control over resources, as enshrined in PESA. In the current context of the people’s mistrust of the state, the term ‘aggressive development’ needs to be abandoned, and if not, then clearly defined for the consent of the community. Through financial and juridical devolution to gram sabhas, a model of participatory and community-centric development should be nurtured, as opposed to ‘aggressive development’ from above. In the words of one analyst, ‘welfare schemes are important, but taken alone they do not complete our transformation from subjects to citizens. There is no way of having genuinely inclusive governance in rural India without strengthening panchayat institutions’.

(v). Grievance Redressal Mechanism: There is a complete absence of a functioning grievance redressal mechanism at the moment to address a routine violation of rights of a villager from the tribal community. This furthers the community’s sense of alienation. Opinion on the ground is widespread that functionaries of the state and other powerful interests currently are unaccountable for their non-implementation or violation of PESA, and so there should be a punitive mechanism. (This is also a blind spot in the draft rules currently being circulated by the Ministry of Panchayati Raj to the PESA state governments). Appeals to institutions like the Governor or Commission for Scheduled Tribes and the National Human Rights Commission go unacknowledged, or are caught up in interminable procedures and delays. In the disturbed areas, there is a need to respond to this situation and set up a mechanism on the lines of a redressal commission to do a National Inquest of all the past violations of PESA. The government at the highest level is best placed to imagine the contours of this mechanism. Once this begins to take effect PESA provisions especially those relating to the competence and centrality of gram sabhas should get implemented so as to make the changes irreversible in the greater interest of democracy and justice.

(vi). **National Citizens' Panel on PESA:** Section IV of the Right to Information Act, mandating *suo moto* disclosures should be strictly implemented in Schedule Five villages, with Information Commissioners being asked to monitor any violation of this. Social audit rules should be issued for all government programs in Schedule Five areas. On the lines of the Citizen's Panel for NREGA constituted last year by the Ministry of Rural Development, the Ministry of Panchayati Raj should constitute a National Citizen's Panel for PESA. Eminent citizens should be empanelled for each of the PESA districts, and biannual meetings held for updates chronicling the status of the law's implementation or violations on the ground.

(vii). There should be a **National Inquest**, looking into all complaints from Schedule Five areas, currently pending with the offices of the Governors and the national commissions. This inquest may be carried out under a Commission with clear terms of reference. There should be a time-bound process of penalizing violations ascertained by this commission's findings, and policies formulated or directives issued in the light of the insights gained through this exercise to prevent further abuse. Such an effort by the state will help address the alienation of the people, as well as create a much-needed sense of justice.

Actionable Measures recommended by IRMA Committee

1. PESA-incongruent laws and orders to lapse instantly:

PESA unambiguously states (Section 5) that any provision of a law 'which is inconsistent with the provisions of PESA shall continue to be in force until amended or repealed by a competent legislature or other competent authority or until the expiry of one year from the date on which this Act receives the assent of the President'. As that time limit expired on 23rd of December 1997 a due cognizance of the Act would entail that all provisions in the laws of the concerned States and the Centre that are inconsistent with the basic features outlined in Section 4 of PESA would be deemed to have lapsed. In particular, it should be notified that Section 4 of PESA should be deemed to comprise the basic frame of administration for the Scheduled Areas under the Fifth Schedule and any other rule or act or an executive or a legislative order or an overture contrary to the above be deemed as null and void and ultra vires the Constitution of India.

2. Samatha Judgement to be enforced: The letter and spirit of the 'Samata Judgement' should be enforced in respect of all acquisitions of tribal land for private companies.

3. Prior Informed Consent of Gram Sabha: Consultation of the Gram Sabha should be held as 'Prior Informed Consent' as provided in the Forest Rights Act and strictly enforced.

4. Land for Land must be a fundamental requirement for acquisition of tribal lands.

5. Restoration of Unlawfully Acquired Tribal Land: A clear and categorical provision should be made in the Panchayati Raj Act or the Revenue Law through a notification under Para 5(1) of the Fifth Schedule to empower the Gram Sabha to restore the unlawfully alienated land to its lawful owner.

6. Transfer of cases involving illegal alienation of tribal land: All pending cases in any Court of Law in which the land of a tribal is alleged to have been illegally transferred or occupied by any person, real or juridical, on the date of the above notification shall stand transferred to the Gram Sabha, in whose jurisdiction the land is situate, for disposal in accordance with the provisions of Section 4(m) (iii) of PESA as recommended by the B.D Sharma Committee Report.

7. Land Records to be placed before Gram Sabha: The record of land maintained by the revenue officials at the village level should be placed annually before the Gram Sabha, for information, so that people become aware about it's contents and take suitable legal measures for rectification of wrong entries;

8. Penalty against violation: Any dereliction by any person with regard to the above provisions shall be a penal offence.

B.D Sharma Committee report on mining and minerals in PESA areas

The Anand Study fully endorsed the following measures suggested by B.D.Sharma Committee on the Role of Gram Sabha in respect of mining and minerals in the Scheduled Areas.

1. The mineral rules should be amended on the pattern of Madhya Pradesh transferring all quarries with annual lease value up to rupees 10 lakh to the Gram Sabha and Panchayats at different levels. This dispensation should cover all minor minerals;
2. Consent of concerned Gram Sabha before awarding a lease should be made mandatory as per the directions of the Ministry of Mines and Minerals dated 26th December 1997;
3. The practice of outright purchase of mineral bearing land by the mining companies should be stopped forthwith for the simple reason that the mining act envisages only a lease in these cases. All the deals of any description whatsoever should be converted in the form of leases for which a provision may be made in notification under Para 5 of Fifth Schedule;
4. The term 'public purpose' should be defined so as to convey that the concerns of the people likely to be affected and their perception about their place in the new system are given a major weightage compared to the arithmetic of the other side, the former being accepted as non-negotiable;
5. The provisions about restoration of the leased lands, as far as possible, to their original status should be formally placed before the gram sabhas at the time of seeking their permission to enable them to incorporate suitable conditions therein and the follow-up action.

Anand Committee's Concluding Observations:

The Anand Study concludes its Chapter on 'PESA, Left-Wing Extremism and Governance: Concerns and Challenges in India's Tribal Districts' by saying that the presently visible revival of official interest in PESA has however, been forced by the need to end the perceived threat of spreading left-wing extremism. The current focus on PESA represents an opportunity to reverse the past neglect and to end further violations. Supplemented with the Forest Rights Act of 2006, PESA provides a powerful legal framework to address the issues of rights, with fullest regard to historical facts and traditions of these communities.

Communities in Schedule Five areas today are living through intense hardship, conflict, dispossession, and cultural turmoil. As one analyst has argued, 'Social oppression, discrimination, bias, poverty and neglect faced by...the tribals have created in large parts of the country a social environment unknown to most Indians with higher social status and income. Indian society is deeply implicated in this. Our institutions created it, our system maintains it, and our society condones it'. But PESA—if honestly honoured -might help us as a democracy, to begin rewriting this tragic story. Incidentally, this may be the last opportunity that the State may have to retrieve PESA. The alternative is too horrific even to contemplate for the Tribal Areas.

National Commission to Review the Working of the Constitution (2002)

The Govt of India had set up the National Commission to Review the Working of the Constitution to assess the role and impact of the constitutional provisions and authorities in respect of nation building during the half century since the Constitution was proclaimed on 26th January 1950. The Commission chaired by former Chief Justice of Supreme Court Shri Venkatchalia submitted its Report in 2002 to the Prime Minister. The Vol.1 of the Report contained its principal text, while Vol.2 consisted of Consultation Papers and Working Papers on various themes covered by the Commission. The Vol.1 had 10 thematic Chapters along with the Chapter-11 that presented a summary of the recommendations put forward by the Commission.

Though the Report of the Commission didn't deal with PESA Act 1996 as such or refer to it anywhere in its text, it put forward certain recommendations which are in line with the letter and spirit of PESA. Below are mentioned the deliberations and recommendations of the Commission relevant to the PESA context.

To start with, while admitting the failure of the Constitutional machinery in delivering the intended results to the underprivileged sections of the society, the Commission observed, "The Constitution of India was shaped by the guiding hand and genius of Dr.Babasaheb Ambedkar with the goodwill of Pt. Nehru, Sardar Patel and Dr.Rajendra Prasad and other stalwarts of the Constituent Assembly under the inspiration of Mahatma Gandhi and contains distinct provisions for the protection and promotion of the interests of Scheduled Castes and Scheduled Tribes, Backward classes, women, minorities and other weaker sections so that an egalitarian society could be built up. If these provisions had been implemented in the right spirit, the problems bedevilling the masses of the people and country as a whole should have disappeared by now. (*vide Para 10.10*)

Echoing the spirit that informed Section 4(d) of PESA Act 1996, the Commission boldly recognized the fact that the tribal communities did also possess rich wealth of knowledge and culture, which required to be preserved and safeguarded in the interest of upholding the tribal identity. It observed, “The tribal communities are repositories of myriad cultural traditions –tribal lore, the arts and crafts, music, dance, and design, textiles, metallurgy and eco-friendly technology. There is a tremendous range of attainment in all these different aspects of their heritage. Knowledge of flora and fauna, herbal medicine and therapies, time-reckoning, animal husbandry, veterinary practices etc. represent additional areas of specialized knowledge in tribal societies in different parts of the country. It is of crucial importance that these variegated elements of tribal cultural heritage are protected from being overrun or expropriated. The Commission recommends that special safeguards should be provided to protect the wholesome traditions of the cultural heritage and of the intellectual property rights of the tribal people. This is no less important for the tribal identity than the effort to prevent alienation of land and land-related institutional rights of tribal people”. (*vide Para 10.7.3*)

As is well known, the Section 4(o) of PESA Act enjoined upon the concerned State legislature to “endeavor to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district levels in the Scheduled Areas”. The following recommendation of NCRWC bears a similar resonance- “As a means of improving the administration of the areas inhabited by the Scheduled Tribes and promoting local autonomy, the Commission recommends that all areas governed by the Fifth Schedule of the Constitution should be forthwith transferred to the Sixth Schedule extending the applicability of the Sixth Schedule to tribal areas other than the North Eastern States to which alone the Sixth Schedule now applies, and all tribal areas which are neither in the Fifth Schedule nor in the Sixth Schedule should also be brought forthwith under the Sixth Schedule. Special programmes of training and orientation for the elected representatives of the Sixth Schedule bodies and related officials should be undertaken and conducted regularly in order to secure the full potential of local developmental and administrative autonomy envisaged under the Sixth Schedule. (*vide Para 10.7.4*).