

2012



*Empowered lives.
Resilient nations.*

[https://www.academia.edu/6171954/
Policy_brief_on_Panchayat_Raj_Extension_to_Scheduled_Areas_Act_of_1996](https://www.academia.edu/6171954/Policy_brief_on_Panchayat_Raj_Extension_to_Scheduled_Areas_Act_of_1996)

[PANCHAYAT RAJ (EXTENSION TO SCHEDULED AREAS) ACT OF 1996: POLICY BRIEF]

**Policy brief on
Panchayat Raj (Extension to Scheduled
Areas) Act of 1996**

By C.R Bijoy

LIST CONTENTS

List of Tables	3
Acronyms and Abbreviations	4
Executive Summary	5
1 Introduction and Brief History	6
1.1 Local Self-Governance	6
1.2 Scheduled Areas	8
1.3 Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA)	11
1.3.1 Key provisions	15
2 Status of Panchayat Raj	23
2.1 Current Status of the Panchayats in Non-Scheduled Areas	23
2.2 Current Status of PESA	29
2.3 Left Wing Effectuated Districts and Scheduled Area	38
3 Key issues relating to implementation of PESA	39
3.1 Strengthening PESA and Governance in Scheduled Area	41
3.1.1 At the level of central government	41
3.1.2 At the level of States	44

LIST OF TABLES

Table 1: Status of devolution of departments/subjects with funds, functions and functionaries to the Panchayati Raj Institutions in States with Scheduled Area

Table 2: Status of Devolution of Departments/Subjects with Funds, Functions and Functionaries to Panchayati Raj Institutions in PESA States

Table 3: Performance of PESA States on cumulative and incremental Devolution Index (DI) which measures the extent to which States have devolved funds, functions and functionaries to Panchayats, for 2011-2012

Table 4: Panchayat Empowerment & Accountability Incentive Scheme (PEAIS) 2010-11

Table 5: Provision of the Panchayat (Extension to the Scheduled Areas) Act, 1996 - Functional Devolution on Panchayats

Table 6: PESA and State Panchayati Raj Acts and Subject laws

Table 7: Subject List Relevant to PESA 1996

ACRONYMS AND ABBREVIATIONS

ADC	Autonomous District Council
EAD	Extremist Affected Districts
GP	Gram Panchayat
GS	Gram Sabha
MFP	Minor Forest Produce
MoPR	Ministry of Panchayat Raj
NIRD	National Institute of Rural Development
PEAIS	Panchayat Empowerment & Accountability Incentive Scheme
PRI	Panchayat Raj Institution
PESA	Panchayat (Extension to the Scheduled Areas) Act, 1996
ST	Scheduled Tribe
TAC	Tribes Advisory Councils

EXECUTIVE SUMMARY

Local self-governance, interpreted as devolution of powers and functions of the government departments by the creation of Panchayat Raj institutions (PRIs) as a national framework of governance commenced with the passage of 73rd Amendment to the Constitution. The States made suitable amendments to existing Panchayat laws where they existed or enacted legislations in accordance with the 73rd Amendment where they did not exist. The devolution of the powers and responsibilities to the PRIs were neither uniform nor at the same pace, but progressed steadily. The Scheduled Areas were exempted from the application of the 73rd Amendment for which the Parliament enacted a separate law, Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA). PESA provisions were incorporated through amendments to the State Panchayat laws and amendments to the subject laws. A decade and a half of PESA in the 9 States with Scheduled Areas has been dismal and failed to usher in the expected far-reaching turn around in what was seen as governance deficit and misgovernance in the Scheduled Areas. PESA continued to be hailed as a fundamental departure to local self-governance that would usher in participatory democracy and genuine empowerment of the people. The reasons why PESA failed to deliver has been a result of lack of clarity, legal infirmity, bureaucratic apathy, lack of political will, resistance to change in power hierarchy and non-realisation of its real long term worth. Issues of basic nature are identified along with certain concrete propositions to address the gaps in the governance frame along with the available instruments that can be effectively used.

1 INTRODUCTION AND BRIEF HISTORY

1.1 Local Self-Governance

India has a long history and strong traditions of 'democratic' institutions from ancient times. Grounded the social and political organization of the local habitations, over time these institutions have transformed but nevertheless socially and politically recognised as central to governance despite their shortcomings in terms of a variety of discriminations such as caste and gender. A classic instance of such recording is by Metcalfe who records that "The village communities are little republics, having nearly everything that can want within themselves...Dynasty after dynasty tumbles down, revolution succeeds revolution, but the village community remains the same.This union of the village communities, each one forming a separate little state in itself, has contributed more than any other cause to the preservation of the peoples of Indian... and the enjoyment of....freedom and independence."¹ These sabhas (assemblies) evolved into 'panchayats' (an assembly of five respected elders) which then became the centre of authority for dispensation of justice and resolution of local disputes. They interfaced with the higher authorities, local chieftains to maharajas, separated in power and authority. Villages functioned as self-governing village republics. This continued till major changes and restructuring of the administrative hierarchy began with British colonialism.

The Government of India Act of 1919 introduced local self-governing institutions with popular mandate and control over local affairs. As a result a number of provinces and princely states enacted laws: Village Panchayat Acts in Madras, Bombay, Central Provinces and Berar and Uttar Pradesh in 1920; Self-Government Act in Bengal in 1919, in Bihar in 1920 and in Assam in 1925; and the Panchayat Act in Punjab in 1922.² Later the Government of India Act of 1935 introduced provincial autonomy and elected governments. Panchayat Raj did not find a place in the draft constitution. The debate whether the village was 'a sink of localism, a den of ignorance, narrow mindedness and communalism' (Dr.B.R Ambedkar) or whether "Indian independence must begin at the bottom' ensuring that 'every village has to be self-sustained and capable of managing its affairs'³ resulted in the formulation of Article 40 in the Directive Principles of State Policy of the Constitution which was not enforceable: "The state shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government." Over the decades since the decadent feudal landlordism with its oppressive exploitation began crumbling, both these viewpoints seems to be have progressively moved upfront to finally converge with Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA) where relatively the formal structures were yet to penetrate or were weak, the feudal structures were at its weak and self-governance in an egalitarian tradition continued to persist .

During the decades since independence the issue of effective rural governance was continuously examined by official committees. The Balawantrao Mehta Committee constituted to evaluate the

¹ Metcalfe, Charles. Report of the Select Committee of House of Commons, Vol.III in Radhakumud Mukerji, Local Government in Ancient India, Motilal Banarsidas, Delhi, 1958, pp. 2-3.

² Mathew, George (Ed.). Status of Panchayat Raj in the States of India, 1994, Institute of Social Sciences, New Delhi, 1995, p.3.

³ Singh, Sitha Ram. Panchayat Raj for Faster Rural Uplift, Yojana, 15 December 1985, p.21.

Community Development and National Extension Service Programmes in their report of 24th November 1957 recommended the transfer of decision making powers from the state to the village panchayats and establishment of statutory elected local bodies and devolution of all necessary powers, authority and resources to them.⁴ The National Development Council on 12th January 1958 approved this proposal to extend democracy to the grassroots and peoples participation in all governmental processes and development. Rajasthan and Andhra Pradesh took the lead in creating a new three-tier system in 1959. Most other states passed laws in the late 1950s and early 1960s. However, the formal Panchayat Raj Institutions (PRIs) went on to get neglected or derailed except in Gujarat and Maharashtra. A fresh lease of life was brought by the West Bengal Panchayat Raj Act of 1973.

The Ashok Mehta Committee reviewed the existing system in the states and union territories in 1977. They proposed the substitution of the three-tier structure with a two-tier system consisting of Mandal Panchayat and Zilla Parishads with the District Collector exercising regulatory functions⁵ and bringing suitable constitutional amendment. The Zilla Parishads were to be the power centre below the state. West Bengal in 1978 followed by Andhra Pradesh, Karnataka and Kerala adopted this model. However, regular Panchayat elections were conducted only in Maharashtra and Gujarat (since early 1960s) and later West Bengal (since 1978).

The G.V.K Rao committee (1985) recommended a three-tier structure and the appointment of a District Development Commissioner as the Chief Executive of the Zilla Parishad. The L.M Singhvi Committee (1986) favoured a constitutional sanction for the PRIs by introducing a new chapter in the Constitution. This resulted in the Constitution (64th Amendment) Bill of 1989 proposing insertion of Article 243 in the Constitution making the three-tier structure mandatory in all states. However, this and the 65th Amendment Bill to endow urban local bodies passed in the Lok Sabha on 13th October 1989 could not get through the Rajya Sabha.⁶ A combined Bill introduced in 1990 as the Constitution 74th Amendment Bill could not get through as the government changed. Finally the 73rd (Panchayat Raj) and 74th (Nagarpalika) constitutional Amendment Acts were passed on 22nd and 23rd December 1992 respectively. This was ratified by all the serving State Assemblies except West Bengal.⁷ The Acts were notified on 24th April 1993 and 1st June 1993 respectively. Two new parts were added to the Constitution, namely, Part IX titled “The Panchayats” and Part IXA titled “The Municipalities.” The Acts transferred 29 subjects to the Panchayats⁸ and 18 to the Municipalities. Within a year of the Act coming into force, the States were to make suitable modifications to their laws to be in conformity with the amendments.

⁴ Rajput, R.S and D.R Meghe (EDs). Panchayat Raj in India: Democracy at Grassroots, Deepa and Deep Publications, New Delhi, 1984, p.29.

⁵ Shara, P. Modern Public Administration, Meenakshi Prakashan, New Delhi, 1978, p.305.

⁶ The entire opposition boycotted and resigned because of the scandal over the Bofor’s defence equipment deal.

⁷ Article 73 and 162 requires that half the total serving Assemblies ratify the Amendment as these had a bearing on the executive power of the union and the states.

⁸ A new schedule called the Eleventh Schedule comprising 29 items has been added to the constitution consisting of (1) Agriculture, including agricultural extension, (2) Land improvement, implementation of land reforms, land consolidation and soil conservation (3) Minor irrigation, water management and watershed development (4) Animal husbandry, dairying and poultry (5) Fisheries (6) Social forestry and farm forestry (7) Minor forest produce (8) Small forest produce (9) Small scale industries, including food processing industries (10) Rural housing (11) Drinking water (12) Fuel and fodder (13) Roads, culverts, bridges, ferries, waterways and other means of Communication (14) Rural electrification, including distribution of electricity (15) Non-conventional energy sources (16) Poverty alleviation programme (17) Education, including primary and secondary schools (18) Technical training and vocational education (19) Adult and non-formal education (20) Libraries (21) Cultural activities (22) Markets and fairs (23) Health and sanitation, including hospitals, primary health centers and dispensaries (24) Family welfare (25) Women and child development (26) Social welfare, including welfare of the handicapped and mentally retarded (27) Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes (28) Public distribution system and (29) Maintenance of community assets.

However the 73rd Amendment had clear injunctions to exclude the Fifth and Sixth Schedules areas, besides the states of Nagaland, Meghalaya and Mizoram, the hill areas of Manipur and the Gorkha Hill Council Area, for which the parliament was to make separate enactments. These exemptions were to be in consonance with Article 243 M⁹ of the Constitution. For the tribal dominated States that do not fall under the Fifth and Sixth Schedules, there were special Constitutional protection with greater autonomy¹⁰ in the States of Nagaland (Articles 371A) and Mizoram (Article 371G). The national frame was adopted for Arunachal Pradesh, Sikkim, Manipur excluding hill areas (Article 371C provides for a special committee of the Manipur assembly to consider matters related to the hill areas), the non-Council areas in Assam and Tripura as well as the areas falling outside the Scheduled Areas in the states having Scheduled Areas. The same was also the case of the remaining states which did not come under any of these constitutional provisions, namely Kerala, Karnataka, Tamilnadu, West Bengal, Uttar Pradesh, Uttaranchal, and Goa as well as the island regions of Andaman and Nicobar, and Lakshadweep.

Fifth Schedule Areas and the Sixth Schedule areas were also explicitly exempted from the application of 74th Amendment for which the Parliament may enact separate laws extending its provisions (Sec.3(m) of the Amendment).

1.2 Scheduled Areas

Tribal communities live in about 15% of the country's land area.¹¹ Prior to British colonization of the Adivasi inhabited regions were self-governing even though part of various kingdoms. The rule of the kingdom did not extend in most cases to these Adivasi regions. Any intrusions were resisted by the Adivasis. The invasions of the British to their homelands, particularly the forested region, gave rise to relentless revolts. The hostile terrain, limited economic interests and failure to subdue and control the people led to enactment of special laws to these areas.¹² The Adivasi area was treated as a class in the Scheduled Districts Act, 1874 with some offers of protection. The area was divided into excluded and partially excluded areas. Operation of ordinary laws could be excluded by the Governor of the respective Provinces. The Government of India Act,

⁹ 243M. Part not to apply to certain areas.-

(1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

(2) Nothing in this Part shall apply to-

(a) the States of Nagaland, Meghalaya and Mizoram;

(b) the hill areas in the State of Manipur for which District Councils exist under any law for the time being in force.

(3) Nothing in this Part-

(a) relating to Panchayats at the district level shall apply to the hill areas of the District of Darjeeling in the State of West Bengal for which Darjeeling Gorkha Hill Council exists under any law for the time being in force;

(b) shall be construed to affect the functions and powers of the Darjeeling Gorkha Hill Council constituted under such law.

(4) Notwithstanding anything in this Constitution,-

(a) the Legislature of a State referred to in sub-clause (a) of clause

(2) may, by law, extend this Part to that State, except the areas, if any, referred to in clause (1), if the Legislative Assembly of that State passes a resolution to that effect by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting;

(b) Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

¹⁰ No Act of Parliament concerning religious or social practices of the concerned communities; customary law and procedure of the concerned communities; administration of civil and criminal justice in areas covered by customary law; and ownership and transfer of land and its resources will apply to these two States only if the concerned State legislature passes a resolution to that effect.

¹¹ Ministry of Tribal Affairs, Government of India. Annual Report 2008-2009, p.24 available at <http://tribal.gov.in/writereaddata/mainlinkFile/File784.pdf>

¹² For instance, Regulation XIII of 1833 declared the central Indian region of Chotanagpur a non-regulated area.

1919 divided the area into ‘wholly excluded and partially excluded areas from the scope of reform’ with the former coming under the purview of the centre and the latter under the joint purview of the Governor and the Governor General-in-Council. The Simon Commission Report of 1930 reported the total area under this administrative provision to be 120,000 sq miles with a population of about 11 million. The Government of India Act of 1935 brought the excluded and partially excluded areas directly under the governance of the Governor of the Province. The reports of the three sub-committees constituted by the advisory committee on fundamental rights and minorities of the Constituent Assembly on 27th February 1947 led to the formulation of Article 244 in the Constitution.

The British Crown's dominions in India consisted of four principal political arrangements:

1. the Presidency Areas where the Crown was supreme,
2. the Residency Areas where the British Crown was present through the Resident and the Ruler of the realm was subservient to the Crown,
3. the Agency (Tribal) areas or the partially excluded areas where the Agent governed in the name of the Crown, but left the local self-governing institutions untouched, and
4. the Excluded Areas (north-east) where the representatives of the Crown were a figure head.

The Union of India was constituted around the Presidency Areas. The rulers of the Residency Areas signed the ‘Deed of Accession’ on behalf of the ruled and were given Privy Purse¹³ in exchange. The inclusion of partially excluded and excluded areas in the Indian union was taken for granted despite stiff resistance in some areas that led to armed conflict as with the Nagas (1947 to the present) and Mizos (1966 to 1986).¹⁴

The former colonial arrangement of governance was in effect carried over into the Indian Constitution through Article 244 – the Fifth Schedule and Sixth Schedule (see Annexure 1). By and large the Fifth Schedule Areas covered the partially excluded areas while the excluded areas were mostly brought under Sixth Schedule. The Constitution also defined the term ‘Scheduled Tribes’¹⁵ conferring certain special privileges, protection and benefits.

Article 244 (1) provides for Fifth Schedule¹⁶ which shall apply to the administration and control of Scheduled Areas and Scheduled Tribes (STs) in any state other than the states of Assam, Meghalaya, Tripura and Mizoram. ‘Scheduled Area’ was those areas that the President declares to be Scheduled Areas. Under Clause (2) of para 6 the President may at any time (a) direct that the whole or any specified part of the scheduled area shall cease to be a scheduled area or a part of such an area; (b) increase the area of any Scheduled Area in a State, after consultation with the Governor of that State; (c) alter, but only by way of rectification of boundaries in any Scheduled Area; (d) on any alteration of the boundaries of the State or on admission into a union or the

¹³ A payment made to the royal families of erstwhile princely states as part of their agreements to first integrate with India in 1947, and later to merge their states in 1949 whereby they lost all ruling rights.

¹⁴ Bijoy, C.R, Shankar Gopalakrishnan and Shomona Khanna, India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous peoples, Published by: Asia Indigenous Peoples Pact (AIPP), Thailand and International Labour Organisation, Geneva, 2010, p.18.

¹⁵ Article 366 (25) of the Constitution of India defines Scheduled Tribes as ‘such tribes or tribal communities or parts of, or groups within such tribes, or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution’.

¹⁶ Fifth Schedule [Article 244(1)]. Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes available at <http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%F202Pg.Rom8Fsss%2833%29.pdf>

establishment of a new State, declare any territory not previously included in any State to be or to form part of a Scheduled Area; and (e) rescind, in relation to any State or States, any order or orders made and in consultation with the Governor of the States concerned, make fresh orders refining the areas which are to be Scheduled Areas. The Governor of each of the State with Scheduled Area had the special duty to report to the president on the administration of Scheduled Area. They could also give directions to the State on the administration of the Scheduled Area of the State. The Governor could also make regulations for the peace and good government of Scheduled area under Para 5 (2) to prohibit or restrict the transfer of land by or among members of the STs (sub-clause (a)) and to regulate the allotment of land to members of STs in such area (sub-clause (b)) and to regulate the business of money lending to the members of Scheduled Tribes (sub-clause (c)).¹⁷

The Governor has the power to repeal or amend any Act of Parliament or of the Legislature of the State, which is applicable to the area in question, while making such regulations through public notification. The Governor was also to submit a report to the President regarding the administration of the Scheduled Areas in that State annually or whenever so required by the President of India. The Union Government under Proviso 3 can also give directions to the State government as to the administration of the said area. Tribes Advisory Councils (TAC) are to be established in States having Scheduled Areas. The President of India can also issue a direction to constitute a TAC in any State not having Scheduled Areas but having Scheduled Tribes. The TAC is to consist of not more than twenty members of whom three-fourth are to be from the representatives of STs in the Legislative Assembly of the State. The role of TAC is to advise the State Government on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State.¹⁸ An official committee summarized that ‘The Governors, on their part, remained oblivious about the state of the tribal people. Even the mandatory annual Reports by the Governors to the President regarding the administration of Scheduled Areas under Para 3 of the Fifth Schedule are irregular. They comprise largely stale narrative of departmental programmes without even an allusion to the crucial issues in administration, the main thrust of the Fifth Schedule.’¹⁹

Though no criteria was stipulated under the law for declaring any area as a ‘Scheduled Area’ under the Fifth Schedule, scheduling an area was on the basis of (a) preponderance of tribal population, (b) compactness and reasonable size of the area, (c) a viable administrative entity such as a district, block or taluk/tehasil, and (d) economic backwardness of the area as compared to the neighboring areas. The fundamental unit of a Scheduled Area is the ‘village’ interpreted in Panchayat (Extension to the Scheduled Areas) Act, 1996 as “a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs” [Sec.4(b)].

The President of India²⁰ issued the Scheduled Areas (Part ‘A’ States) Order, 1950 declaring specified areas to be scheduled areas within the states specified in Part ‘A’ of the First Schedule

¹⁷ Bijoy, C.R. Adivasis Betrayed: Adivasi Land Rights in Kerala, Economic and Political Weekly, Vol. XXXIV, No.22, May 29 - June 4, 1999, pp.1329-35.

¹⁸ Bijoy, C.R et al. (2010), Op Cit., p.43.

¹⁹ Report of MPs and Experts to make recommendations on the salient features of the law for extending provisions of the Constitution (73rd Amendment Act, 1992 to scheduled areas, 1994, p.14. Accessible at http://www.odi.org.uk/projects/00-03-livelihood-options/forum/sched-areas/about/bhuria_report.htm.

²⁰ Ministry of Tribal Affairs, Government of Indian. (2008-9), Op. Cit. p34.35.

(The States and Union Territories) to the Constitution of India. Subsequently, the President issued the Scheduled Areas (Part B States) Order, 1950, the Scheduled Areas (Himachal Pradesh) Order, 1975 and the Scheduled Areas (States of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977, the Scheduled Areas (State of Rajasthan) Order, 1981, The Scheduled Areas (Maharashtra) Maharashtra Order, 1985 and the Scheduled Areas (States of Chhattisgarh, Jharkhand and Madhya Pradesh) Order , 2003²¹ and The Scheduled Areas (State of Jharkhand Jharkhand) Order, 2007.²²

Article 244(2) provides for the Sixth Schedule²³ to the Constitution and applies to the administration of certain 'tribal areas' in the States of Assam, Meghalaya, Tripura and Mizoram. These areas are governed by District Councils, Autonomous Councils and Regional Councils constituted for Autonomous Districts and Autonomous Regions. They have wide ranging legislative, judicial and executive powers with power to make rules with the approval of the Governor. Their powers cover matters such as primary schools, markets, dispensaries, ferries, cattle ponds, roads, fisheries, road transport and water-ways etc. Additional powers to make laws with respect to other matters like secondary education, agriculture, social security and social insurance, public health and sanitation, minor irrigation etc were granted to the Autonomous Councils of the North Cachar Hills and Karbi Anglong in Assam. Powers under the Civil Procedure Code and Criminal Procedure Code for trial of certain suits and offences, the powers of a revenue authority for their area for collection of revenue and taxes, and powers for the regulation and management of natural resources have been conferred on the Councils (excepting in Bodoland and Tripura). However, certain subjects such as reserved forests and acquisition of land by the State government are specifically excluded from the purview of the Sixth Schedule.

Tribal habitations in the states of Kerala, Tamil Nadu, Karnataka, West Bengal, Uttar Pradesh and Jammu & Kashmir have not been brought under the Fifth or Sixth Schedule. States having Scheduled Areas have tribal habitations that are left out which are yet to be notified as Scheduled Area. Various Government-appointed Committees had recommended including the remaining Tribal Sub-Plan and Modified Area Development Approach (MADA) areas and similar pockets under the Scheduled Areas which are yet to be complied with fully²⁴.

1.3 Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA)

The Panchayat Raj Act envisaged the Gram Sabha to be the key to self-governance, the space for direct democracy to manifest, to discuss, criticise, approve or reject the proposals of the Gram Panchayat as well as assessing its performance.

²¹ The States of Madhya Pradesh and Bihar were reorganised vide the Madhya Pradesh Reorganisation Act, 2000 and Bihar Reorganisation Act, 2000 respectively. Consequently, a portion of Scheduled Areas of the composite State of Madhya Pradesh stood transferred to the newly formed State of Chhattisgarh and the whole of such areas stood transferred to Jharkhand from the parent State of Bihar. The President's promulgated this Constitutional to accommodate these changes.

²² This order redefined the Scheduled Areas within the State of Jharkhand.

²³ Sixth Schedule[Articles 244(2) and 275(1)] Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram available at <http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%20Pg.Rom8Fsss%2834%29.pdf>

²⁴ See for instance the Report of MPs and Experts to make recommendations on the salient features of the law for extending provisions of the Constitution (73rd) Amendment Act, 1992 to scheduled areas, 1994, Op. Cit.

The Mungekar Committee²⁵ (2009) pointed out that:

"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' through the Government of India Act, 1919. Later, however, the British succeeded in penetrating these areas also surreptitiously by entering into some agreements with them and extending the British-made laws to these areas. These areas were then called 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. 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."

The results according to the committee were that:

- i. There was no place for the tribal community and its system of self-governance in this frame.
- ii. 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;
- iii. 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;
- iv. 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;
- v. 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;
- vi. The symbiotic relationship between the people and their habitat including land, water and forest was disrupted.
- vii. 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 in pursuance of the provisions of relevant laws, or even otherwise, depending on the situation in each case.
- viii. 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.
- ix. It has rendered tribal people resourceless, vulnerable and virtually defenseless.
- x. 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.
- xi. Unfortunately all concerned, including the Governors, having full powers to adapt laws, remained virtually unaware about this tragic transformation.
- xii. 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.
- xiii. The situation has been worsening incessantly.

²⁵ Raising Standards of Administration in Tribal Areas, Third Report of the Standing Committee on Inter-Sectoral Issues relating to Tribal Development, (headed by Dr. Bhalchandra Mungekar, Member, Planning Commission, with Secretaries of some key Ministries concerned with tribal development as Members), 2009.

The Committee further observed that:

“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 in some cases. The community was greatly handicapped in facing the new situation that had resulted in serious unrest throughout tribal India.”

The 73rd and 74th amendments were not extended to the Scheduled Areas, significantly the first time ever that the Parliament did not extend a law in a routine manner to cover the Scheduled Area. They had the clear injunctions to exclude the Fifth and Sixth Schedule areas from its purview. The Parliament was to make separate enactments. In pursuance to this, the Ministry of Rural Development, Government of India, appointed a 22 member committee in 1994 comprising select Members of Parliament and Experts headed by Dilip Singh Bhuria to recommend exceptions and modifications in Part IX of the Constitution in its application to the Scheduled Areas. The Committee submitted two Reports in 1995, one for Panchayats and the other for Municipalities. The Bhuria Committee²⁶ concluded that:

‘Tribal life and economy, in the not too distant past, bore a harmonious relationship with nature and its endowment. It was an example of sustainable development. But with the influx of outside population, it suffered grievous blows. The colonial system was established on the basis of expropriation of the natural and economic resources of tribal and other areas in the country. Although, theoretically, there has been difference in the approach after the departure of the colonial masters from tribal areas, in practice, the principles enunciated in Article 39 and other Directive Principles of State Policy have to be followed more rigorously. On account of their simplicity and ignorance, over the decades the tribals have been dispossessed of their natural and economic resources like Land, Forest, Water, Air etc. The dispossession has not been confined to that through private parties. For the purpose of promotion of general economic development projects, the State also has been depriving them of the basic means of livelihood. These processes have been operative since a long time causing human misery and socio-economic damage. No reliable picture is yet available, for instance, we are not seized of the total quantum of land alienated from the tribals both on private and state account, nor the number of families, clans or tribes involved. This has compelled some to perceive development as an agent of destruction. But since planned development has been an article of faith with us, it has to be ensured that implementation of the policies and programmes drawn up in tribal interest are implemented in tribal interest. Since, by and large, the politico-bureaucratic apparatus has failed in its endeavour, powers should be devolved on the people so that they can formulate programmes which suit them and implement them for their own benefits.’ (Emphasis added)

The Committee spelt out certain basic premise as important:

²⁶ Available at http://www.odi.org.uk/work/projects/00-03-livelihood-options/forum/sched-areas/about/bhuria_report.htm

- i. The scheme should pre-eminently be related to participative democracy, particularly at the grass-root and district levels should bear a living relationship with the self-management practices which have been in vogue in tribal areas. The autonomy should be non-manipulable.
- ii. The Gaon Sabha or the Gram Sabha at the hamlet/village level should exercise the different functions as traditionally prescribed. More specifically, management of Land, Forest, Water, Air etc. resources should be vested in it. This right should be deemed as axiomatic in the functioning of Gram Panchayat, the intermediate panchayat and the district councils, and also where necessary to be woven into de jure dicta, regulations, laws etc. We would like to emphasise harmonious inter-play of forces at the different tiers.
- iii. Many of the present day administrative boundaries were determined during colonial times, based on colonial compulsions. There have been some changes thereafter. But, by and large, the earlier boundaries have stayed with the resulting situation that tribal people are located on borders, be it state, district or block, marginalising them in every way and fragmenting larger communities and areas. States should consider, say within a period of two years, reorganisation of the boundaries based on ethnic, demographic and geographic considerations. We feel that these parameters will lead to more rational delimitation.
- iv. In the context to tribal grievances and aspirations, there have been insurgencies, agitations, movements as in North-East, Jharkhand region, Bodoland. We are presently a witness to agitation for Uttarakhand. We feel that tribal aspirations can be satisfied if tribal regions are conferred sub-state status. It may be recalled that Meghalaya had received a sub-state status in 1971. Further, we regard the autonomous district council status for districts in central Indian tribal tracts as in the nature of sub-federalism.
- v. The Land Acquisition Act which enables the State to take over any land for "a public purpose", being based on the principle of individual land ownership, does not take cognizance of the customary regulation of common property resources in tribal areas. Among many tribal communities, land and such other natural resources are owned jointly by the community and its use by individuals is sanctioned by the community. In not recognising this basic principle in tribal areas, the Land Acquisition Act is premised on unrealistic ground. The basic lacunae in the Act have to be removed. The consent of the local village community should be obligatory. The rehabilitation package should be operated with the consent of the local village community. Viable and acceptable package of livelihood should be offered as a means of rehabilitation to the affected families. In other words, land should be acquired with the consent of the Gram Sabha, making provision for alternative livelihood for the concerned families acceptable to them.
- vi. It has been observed that the lower functionaries of departments like police, excise, forest, revenue have generally, been acting against tribal interests and have even become repressive and exploitative. The Committee felt that in the tribal areas, the role of these functionaries is minimal, whereas, they tend to over-bear on the tribal and village communities. To eliminate undue interference, the role of police should be minimal and confined to law and order and heinous crimes. The view was expressed that the police should function under the control of ADCs. However, the Home Ministry was of the view that this was not in keeping with the arrangement prevailing in the country. Government servants posted in the autonomous districts should be under the control of the district councils.

- vii. Tribal areas are rich in Mineral, Forest, Hydel, Water etc. resources, as a result of which they have been becoming the hub of growth of industries. However, the tribal people have been marginalised in the process of industrialisation and urbanisation, leading to strong resentment among them. It has been our stand that the tribal community should be regarded as in command of the economic resources. In this view of the matter, in a resource-based industry, the partnership of the village community and the outside capitalist-financiers should be recognised. The district and other councils charged with the responsibility will, no doubt, make appropriate laws for regulation of land and other resources for industries.

The Government of India generally accepted these premises and recommendations under political pressure²⁷. PESA (see Annexure 2)²⁸ was enacted on 24th December 1996 to extend Part IX of the Constitution to the Fifth Schedule Areas. Being an extension to the 73rd Amendment to the Constitution, it has been argued that it indeed is an integral part of the Constitution and hence to be incorporated into the Constitution²⁹. The nine States having Fifth Schedule Areas, namely Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Maharashtra, Madhya Pradesh, Orissa and Rajasthan, were to enact suitable laws within one year of the coming into force of PESA.

But the draft Bill, the 'Provisions of the Municipalities (Extension to the Scheduled Areas) Act 2001'³⁰, for governance in the urban enclaves in the Scheduled Areas continues to be without the sanction of law despite over a decade of its existence. Part IXA has not been extended to the Scheduled Areas till date. The Bill is yet to be passed by the Parliament. The result is that the Panchayat areas within the Scheduled Areas are being upgraded into Municipal Areas and taken out of the purview of PESA provisions in the state legislations, but without any alternative protection in the absence of the law for municipal areas in Scheduled Areas. These areas are now governed by the Municipal Laws in operation in the non-Scheduled Areas in violation of the 74th Amendment to the Constitution.

1.3.1 Key provisions

PESA marks a departure from colonial laws of governance that pervades the administration of the people and the natural resources promoting people-centric governance. '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.'³¹ It provides a central role to the village recognizing a habitation to be a natural unit of the community (defined as a habitation or group of habitation, the natural village as against the administratively defined unit based on population) and its Gram Sabha (as against

²⁷ Brought by the mobilizations and protests by the National Front for Tribal Self-Rule, a coalition of struggle based mass organizations at the national level, see In black and white, but..... Down To Earth, 14 October 1996 available at <http://www.indiaenvironmentportal.org.in/feature-article/black-and-white>

²⁸ Available at <http://tribal.nic.in/writereaddata/linkimages/pesa6636533023.pdf>

²⁹ See 'Legal Status of PESA: Clearing the Decks' in Report of The Sub Committee appointed by The Ministry of Panchayati Raj to draft Model Guidelines to vest Gram Sabhas with powers as envisaged in PESA, p.7 available at <http://www.downtoearth.org.in/dte/userfiles/images/bdsharma-guidelines.pdf>

³⁰ Available at http://www.prsindia.org/uploads/media/1190951016/1190951016_Provisions.pdf

³¹ Dandekar, Ajay and Chitragada Choudhury. PESA, Left-Wing Extremism and Governance: Concerns and Challenges in India's Tribal Districts, Institute of Rural Management, Anand, Commissioned by Ministry of Panchayati Raj, Government of India, New Delhi 2010, p.5.

the elected Gram Panchayat as in the Panchayat Raj Acts of the states) to be pre-eminent. The Gram Sabha was recognized as being competent to act on a range of powers.

Sec.4(a): a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;

The PESA provisions are to be incorporated into the State Panchayat Raj legislations and that such incorporations shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources. This implies that the state law should have enabling provisions for the tribal peoples and communities to redress their grievances or objections to any provision in any law applicable to Scheduled Areas that are seen as not being in consonance with the customary law, social and religious practices and traditional management practices of community resources.

Sec.4(b): 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;

The 'village' in PESA is the fundamental unit of governance. It can be habitation, a group of habitation or a hamlet or a group of hamlets. This marks a distinct and most important departure from the existing manner in which village is defined and notified in the State legislations. The village for the purpose of Panchayat raj is the notified village for which there exists a Gram Panchayat which is constituted with a number of revenue villages which in turn consists of a number of habitations. Compared to this definition, the PESA definition of village is normally smaller than the revenue village which may, in few instances, be equal to a revenue village. In other words, the 'village' as defined in PESA is not the 'village' under the State Panchayat raj laws but the habitation.

Sec.4(c): every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level;

Those who are enrolled in the electoral rolls normally residing in the 'village' as defined in Sec.4(b) shall be the Gram Sabha of the said village. In other words, this Gram Sabha is not the Gram Panchayat Gram Sabha. This is to make sure that the Gram Sabha is a manageable assembly of people for it to carry out the core functions in PESA that is entrusted to it. This Gram Sabha is compact and small, a face to face community. In contrast, the Gram Panchayat Gram Sabha is spread over a vast area in various revenue villages and numerous habitations making it unviable for frequent meetings and regular functioning.

Sec.4(d): every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution;

PESA recognizes unequivocally that this Gram Sabha is 'competent' to carry out the above functions. Therefore, the law by explicitly recognizing this competency of the Gram Sabha confers the Gram Sabha the power to make suitable regulations or rules on their own as it deems fit in these subject matters which shall have the strength of law. "Any representative body including the Parliament cannot endow powers of Gram Sabha which is self-created and self-empowered. The PESA corrects this gross anomaly of the Indian Constitution. That is the reason

PESA acknowledges the 'competence' of Gram Sabhas to manage all their affairs, including community resources and dispute resolution, in accordance with their customs and traditions.³²

Sec. 4(e) every Gram Sabha shall

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

This requires that all the plans, programmes and projects for social and economic development falling within the purview of the 29 subjects items listed in the Eleventh Schedule to the Constitution by the 73rd Amendment which are to be transferred to and implemented by the Panchayat (Gram Panchayat, Panchayat Samiti and the Zilla Parishad) are to be approved by the concerned Gram Sabha. Conversely it also means that the Panchayat is to obtain the approval of the Gram Sabha and in case such approvals are not granted by the Gram Sabha, then the said plan, programme or project shall not be implemented in the village. The term approval in practice would mean prior informed consent.

Sec. 4(e) every Gram Sabha shall

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

Beneficiaries under poverty alleviation and other programmes which may include old age pension, IAY, MNREGA and such others are to be identified or selected only by the concerned Gram Sabha and not by any others. This does not mean obtaining approval of a list of beneficiaries identified or selected by any others, be it the PRIs or government departments, from the Gram Sabha. Instead this role is clearly assigned to be the preserve of the Gram Sabha.

Sec.4(f): every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilisation of funds by that Panchayat for the plans, programmes and projects referred to in clause(e);

The Gram Sabha is to issue the certification of utilization of funds by the concerned Panchayat for all the plans, programmes and projects carried out by the Panchayat for social and economic development and the multitude of beneficiary schemes as referred under Sec.4(e)(i) and (ii). Such utilization certificates from the Gram Sabha become mandatory for passing of accounts of expenditure.

Sec.(g): the reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution;

Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats;

Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes;

Reservation of seats at every Panchayat in the Scheduled Area is to be as per the proportion of their population in that Panchayat and shall fulfill two other conditions. The first condition is that of the total number of seats, at least half the number of seats shall be reserved for STs and the second being the reservation of seats of Chairpersons of Panchayats for STs. In other words, half

³² Third Report of the Standing Committee on Inter-Sectoral Issues relating to Tribal Development, Op Cit.

the seats in the Gram Panchayat, Panchayat Samiti and Zilla Parishad shall be constituted with at least half with STs and with STs as Chairpersons provided they fall within the Scheduled Area. It thereby implies that this provision does not apply to those panchayats that falls partially outside the Scheduled Area. This is an anomaly that requires rectification.

Sec.(h): the State Government may nominate persons belonging to such Scheduled Tribes as have no representation in the Panchayat at the intermediate level or the Panchayat at the district level:

Provided that such nomination shall not exceed one-tenth of the total members to be elected in that Panchayat;

If any ST community or communities is/are not represented through election to the Panchayat Samiti or the Zilla Parishad, then the State government is to nominate a representative to either the Panchayat Samiti or the Zilla Parishad. This is subject to the provision that the total number of such nominated persons shall not exceed ten percent of the elected members in that Panchayat. This is to ensure that STs who are minorities or dispersed or who are not able to represent through the democratic process of elections should also be represented. This is to by-pass the weakness of these communities by virtue of their minority status or social or political marginalization.

Sec.(i): the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling 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;

Consultation with the Gram Sabha becomes mandatory for any acquisition of land for development projects and before resettlement or rehabilitation of project affected people in the Scheduled Area. This not only implies provision of all relevant information related to the projects requiring land acquisition, and the plan for land acquisition as well as resettlement or rehabilitation but actual consultation which is meaningful in that the people consulted are now fully aware so that they can take an informed decision on the matter in protection of their interest. Further, those who are to consult the Gram Sabha also become aware of their decisions which are then to be the basis of their decisions. This simply means obtaining their consent in practice. Therefore, the Gram Sabhas of all concerned villages being affected by a proposal for land acquisition and whose inhabitants are being considered for resettlement/rehabilitation and the places where they are to be resettled should not only be consulted in the matter but the decisions by the competent authority should be in consonance with the wishes of the Gram Sabhas. Such of these projects when being implemented shall be coordinated by the State ensuring that the outcomes of such consultations are adhered to.

Sec.4(j): planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;

Read together with Sec.4(d), i.e the power of Gram Sabha to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution, this provision is to be interpreted to be that the planning and management of the minor water bodies which is a 'community resources', are the responsibility of the concerned Gram Sabha/s and the panchayats at appropriate level depending

upon the geographical spread of the minor water body. If the geographical spread is restricted to a PESA village then the Gram Sabha shall be entrusted with this responsibility which the panchayats is to facilitate. If the spread is more than one PESA village or revenue village or Gram Panchayat, then a suitable mechanism involving the concerned structures are to be envisioned and operationalised.

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

Sec.(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;

No prospecting licence or mining lease or grant of concession by auction for exploitation of minor minerals is permissible without the recommendation of the Gram Sabha or Panchayats at the appropriate level (Gram Panchayat or Panchayat Samiti or Zilla Parishad). This provision is also to be read with Sec.4(d), i.e the power of Gram Sabha to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. Therefore, this provision is to be interpreted as falling within the purview of the Gram Sabha and panchayats at appropriate level. Therefore the recommendation of the Gram Sabha and panchayats at appropriate level is mandatory. As a result the power to grant prospecting licence/mining lease should be entrusted to the appropriate body based on the geographical extent of the area sought for the purpose, i.e Gram Sabha if the land for mining falls within the jurisdiction of a Gram Sabha; if not the concerned Gram Sabhas and the relevant higher Panchayat bodies.

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant;

The power to prohibit or regulate or restrict both sale and consumption of any intoxicant is vested equally in the concerned Gram Sabha and the panchayats at appropriate level. This is irrespective of any law or policies that the concerned State may have. In other words, the State government shall abide by the decisions of the Gram Sabha and the panchayats. Seen in the letter and spirit of PESA of empowering the Gram Sabha, the decision of the Gram Sabha should prevail.

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(ii) the ownership of minor forest produce;

This provision read together with the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 and in letter and spirit of PESA, is to be interpreted to be that the ownership of minor forest produce is vested in the Gram Sabha. Further this would

include 'right of ownership access to collect, use, and dispose of minor forest produce'³³ which has been traditionally collected within or outside village boundaries' [Sec.3(1) (c) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006]

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(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;

This provision is to ensure protection of the land resource of individuals, communities and habitations of Scheduled Tribes in Scheduled Areas. Alienation of land of a Scheduled Tribe would mean dispossession of land by any means to any one, whether a tribe or a non-tribe. The objective of this provision is to ensure protection of rights to land of every tribal persons as indicated by the usage of the term 'a Scheduled Tribe'. Further read with Sec.4(d), i.e the power of Gram Sabha to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution, right to land would also include both individual and collective rights to land conferred by traditions and customs which may be unrecognized by the formal system. Both the Gram Sabha and Panchayats at appropriate level is bestowed the power to prevent land alienation and to take action to restore illegally alienated land. This could take the form of resolution through the customary mode of dispute resolution or the formal systems of redressal as the case may be.

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(iv) the power to manage village markets by whatever name called;

Management of village markets could encompass regulating all aspects of market operations such as designating the place, establishment of shops, sales, quality of goods, price, levy of fees etc. applicable to local village markets of any nature, temporary or regular. This power is vested on both the Gram Sabha as well as the Panchayats at the appropriate level.

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(v) the power to exercise control over money lending to the Scheduled Tribes;

Money lending would cover all those who are involved in extending loan, whether government, private persons, or banks. Control over money lending would cover terms with which loan is

³³ Here 'minor forest produce' is now defined under the Forest Rights Act in Sec.2(i): "minor forest produce" includes all non-timber forest produce of plant origin including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers and the like;

provided and its repayment. The Gram Sabha and panchayats at appropriate level has the regulatory power which determines who can offer the loan and on what terms. It would also mean the power to take action against violations of the terms and conditions set by these regulating bodies, the Gram Sabha and the Panchayat.

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(vi) the power to exercise control over institutions and functionaries in all social sectors; Institutions in social sectors would include those who are involved in health care, education, rural housing, public distribution, sanitation, drinking water, rural development, food storage and warehousing, welfare schemes, social service etc whether implemented by the public or private sector, government or non-government. The Gram Sabha and the panchayats at appropriate levels are to control and regulate these institutions and functionaries in the institutions in order to ensure that the intended benefit to the community is appropriate, and relevant, and the service provided are timely and efficient. In other words, these institutions are accountable to the Gram Sabha and panchayats at appropriate level. Further, the Gram Sabhas shall have control over functionaries and institutions whose jurisdiction are entirely confined to the village.

Sec.4(m): while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(vii) the power to control over local plans and resources for such plans including tribal sub-plans; This provision would encompass the right of Gram Sabha and panchayats at appropriate level to develop plans, approve plans prepared by others with or without modifications, or even reject inappropriate or irrelevant plans. It would also mean that the Gram Sabha and the panchayats have the power of control over resources allocated for these plans, and in monitoring and supervision of their implementation.

Sec.(n): the State Legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions of self-government shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha;

This provision unambiguously instructs that the State to legislate the powers and authority as per the various provisions under PESA in such a manner as to ensure that there is no ambiguity in the powers and authority defined and exercised by the Gram Sabha, the Gram Panchayat, the Panchayat Samiti and the Zilla Parishad; that the structure above shall not encroach into or subsume or in any way prevent the lower bodies from exercising their power. In other words, it shall be illegal for the panchayats at the higher level to enter or encroach into the domain of the powers and authority of the panchayats at the lower level or the Gram Sabha.

Sec.(o) the State Legislature shall endeavour 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 administrative arrangement at the district level shall be on the pattern of the powers³⁴ (legislative, judicial and executive powers) and structure of the District Councils. This also means the reorganization of the administrative divisions into districts so as to ensure that all the habitations in the Scheduled Area is organized into districts as far as possible. It would also require the transfer of powers as provided in Sixth Schedule to the Constitution to the District Councils in Fifth Schedule Area. In other words PESA envisages that the Fifth Schedule Areas adopt the Sixth Schedule pattern in addition for an autonomous existence.

Continuance of existing laws on panchayats:

Sec.5. Notwithstanding anything in Part IX of the Constitution with exceptions and modifications made by this Act, any provision of any law relating to Panchayats in force in the Scheduled Areas, immediately before the date on which this Act receives the assent of the President, which is inconsistent with the provisions of Part IX with such exceptions and modifications shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from the date on which this Act receives the assent of the President;

Provided that all the Panchayats existing immediately before such date shall continue till the expiration of their duration unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having Legislative Council, by each House of the Legislature of that State.

This provision requires that all the States having Scheduled Area shall adopt PESA within a year of it coming into force; if not adopted within a year, all provisions in the State legislations that are inconsistent with the provisions of PESA shall stand null and void; and all the Panchayats that exist at the time of the lapse of one year or at the time of suitable state legislations incorporating the provisions of PESA coming into force, may either be dissolved or allowed to complete its term after which the new provisions shall come into force and operation.

PESA makes the much neglected Directive Principle of State Policy about establishment of a virtual 'Village Republic' as envisaged in Article 40 to become mandatory for Scheduled Areas. The tribal peoples, unfamiliar with the formal system, who were forced under law to approach some authority or the other of an alien 'outside' their world, with PESA makes the familiar setting of the open assembly of the village formally specified as Gram Sabha to become the centre of governance.

³⁴ Their powers cover matters such as primary schools, markets, dispensaries, ferries, cattle ponds, roads, fisheries, road transport and water-ways etc.

STATUS OF PANCHAYAT RAJ

2.1 Current Status of the Panchayats in Non-Scheduled Areas

The provisions of PESA were incorporated within a year by all the 9 States having Fifth Schedule through amendments to their respective State Panchayat laws. Therefore, understanding the status of the Panchayat Raj itself becomes important to contextualize incorporation of PESA into the Panchayat system as prevailing in the concerned States and the interplay of PESA provisions within the Panchayat Raj framework of the States.

The key features of the 73rd Amendment were:

- Establishment of a uniform three-tier Panchayat structure.
- State legislatures to confer on the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self governance.
- Constitution of a Gram Sabha in each village to exercise such powers and performing such functions at the village level as the State legislature may provide by law.
- Direct election of Panchayat members.
- Provision of uniform five-year term to the Panchayats.
- The election of the chairperson at the intermediate and district level is through indirect elections and the mode of election of the chairperson of the village Panchayat is left to the respective States.
- Not less than one-third of seats to be reserved for women among members and the posts are on a rotational basis.
- Seats are reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs) at all level according to their population at each level.
- Mandatory holding of elections within six months of the date of dissolution in case of dissolution or supersession.
- Mandatory constitution of a State Election Commission to ensure free, fair and time bound elections to the Panchayats.
- Mandatory constitution of a State Finance Commission to strengthen PRIs financially.

The Planning Commission in its approach paper to the Twelfth Five Year Plan stated that:

“The 73rd Constitution Amendment Act has, therefore, given adequate discretionary powers to State Legislatures to make suitable provisions in its Acts on the subjects. All states have either enacted new laws or modified the existing laws to incorporate Constitutional amendments vis-a-vis the provisions on reservations. As Panchayati Raj is included in the State list of the Seventh Schedule of the Constitution, the States are responsible for devolution of powers to the Panchayats and thus need to take steps for effective devolution of powers and authority as envisaged under Article 243G read with the Eleventh Schedule of the Constitution. States have taken up activity mapping based of the principle of subsidiarity, but the pattern of assignment of subjects and the coverage of subjects differs widely among the States. Barring those development programmes/schemes, which expressly require the involvement of Panchayats, most others are implemented by the functionaries of the line departments concerned. However, there has been an

increase in the allocation of funds to Panchayats due to the Union Finance Commission Awards and State Finance Commission Awards.³⁵ (Emphasis added)

The Ministry of Panchayat Raj³⁶ observed that: “Over all, the mandatory provisions specified in the Constitution have been implemented in the last decade and a half. All Part IX States (elections in Jharkhand held up till recently due to a court case) held regular elections through the State Election Commissions. All the States have implemented, reservation for women, Scheduled Castes (SCs) and Scheduled Tribes (STs) bringing almost 1.6 million representatives from these groups into elected positions in the Panchayats, making the Panchayats the nursery of future leadership. State Finance Commissions (SFCs) have been constituted and in many States, their recommendations have been acted upon. All the States (excluding Uttarakhand and Jharkhand) have constituted District Planning Committees and most have initiated decentralised planning processes.”

“However, implementation of the Constitutional provisions—which were left to the discretion of the States—varies greatly. The most important aspect in strengthening of the Panchayats is the devolution of 3Fs (i.e. functions, funds and functionaries) related to the matters listed in the Eleventh Schedule of the Constitution. Another is their enablement for preparing and implementing bottom-up participatory plans for economic development and social justice. The States vary a great deal in both these respects. While some States have forged new paths, others are still to catch up. Of course, many States are trying out new approaches and mechanisms, and making corrections/improvements along the way.”

“Rajasthan, which has devolved the functions of primary health, education, agriculture, social justice and empowerment and women and child development, along with funds and functionaries was adjudged the best performer. Kerala, Maharashtra, Karnataka and Haryana were ranked after Rajasthan on the Incremental Devolution Index (based on 3 dimensions, i.e. the extent to which the initiatives led to: (i) institutional strengthening, (ii) process improvement; and (iii) improved delivery of services.)

Lack of adequate devolution: Many States have not taken adequate steps to devolve 3Fs to the PRIs to enable them to discharge their constitutionally stipulated functions.

Excessive control by bureaucracy: In some States, the GPs have been placed in a position of subordination: GP Sarpanches have to spend extraordinary amount of time visiting Block Offices for funds and/or technical approval. These interactions with the Block staff office distort the role of a Sarpanch as elected representative.

Tied nature of funds: This has two implications. The activities stated under a certain scheme are not always appropriate for all parts of the district GPs. This results in unsuitable activities being promoted or an under-spend of the funds.

Overwhelming dependency on government funding: Statistics show the overwhelming dependence of Panchayats on government funding. When Panchayats do not raise own resources and instead receive funds from outside, people are less likely to request a social audit and the Panchayats less accountable.

³⁵ Faster, Sustainable and More Inclusive Growth. An Approach to the Twelfth Five Year Plan, Planning Commission, Government of India, October 2011, p.66.

³⁶ Ministry of Panchayati Raj, Government of India. Roadmap for the Panchayati Raj (2011-17): An All India Perspective, 2011, pp.7-12 available at <http://www.indiaenvironmentportal.org.in/files/panchayat%20Roadmap.pdf>

Reluctance to use fiscal powers: The Panchayats have the right to levy tax on property, business, markets, fairs and also for services provided, like street lighting or public toilets etc. Very few Panchayats use their fiscal power to levy and collect taxes. The argument pushed by Panchayat heads is that it is difficult to levy tax on your own constituency, especially when you live in the community.

Non-harmonisation: There is lack of harmony of State Acts and Rules, central legislations and programmes with the 73rd Amendment.

Status of the GS: Empowerment of GSs can be a powerful weapon for transparency, accountability, inclusive growth and social audit. This can be and is being done in two ways. In the guidelines of different Ministries for Central Schemes, specific functions for GS are being proposed by MoPR. Some States have also provided for specific functions of the GS and Ward Sabha under their Panchayat Laws. The Ministry will take up with the other States, which have not made such provisions, to include the same in the Panchayat Laws.”

A number of official initiatives have been taken by the Ministry of Panchayat Raj (MoPR) to improve the functioning of the Gram Sabha. This includes:

- Circulating a Model Panchayat and Gram Swaraj Act on 27 April 2009³⁷
- Issuing detailed guidelines as for instance on 2 October 2009³⁸ and again on 8 December 2011 (see Annexure 3).
- Implementing the Panchayat Empowerment & Accountability Incentive Scheme (PEAIS) since 2005-06. This was to (i) incentivize the States to empower Panchayats through devolution of funds, functions and functionaries; and (ii) incentivizing PRIs to put in place accountability systems to make their functions transparent and efficient. A two stage assessment was followed since 2008-09. The first stage is the Framework Criteria³⁹ consisting of (1) Establishment of State Election Commission, (2) Holding of elections to the PRIs, (3) Setting up State Finance Commission, and (4) Constitution of the District Planning Committees (DPCs). Those States which qualify are then measured for performance under a Devolution Index (DI) which is the state of devolution of functions⁴⁰, finances⁴¹, and functionaries⁴² by the respective States to the PRIs.

³⁷ Model Panchayat and Gram Swaraj Act available at <http://panchayat.gov.in/mopr/data/1243577194344~Draft%20Model%20Panchayat%20Act%20-%20dt%20-27-4-08-Model%20Panchayat%20and%20gram%20swaraj%20Act..pdf>

³⁸ Guidelines for the effective functioning of the Gram Sabha available at <http://panchayat.gov.in/mopr/data/1256548054738~Guidelines%20for%20Gram%20Sabha%20Final.pdf>

³⁹ Consisting of

- State Election Commission (Art. 243 J)
- Holding regular Panchayats elections (Art. 243 E)
 - Gap, bye-elections and dissolution
- State Finance Commission (Art. 243 I)
 - Qualification of members in the Act?
 - Constitution at regular interval?
 - Acceptance of recommendations?
 - Timeliness of actions thereon?
 - Fiscal transfers to panchayats on account of SFC?
- District Planning Committees and their working (Art. 243 ZD)
 - Regular Meeting
 - Regular submission of plans
 - Consolidation of plans and its integration with State plan
- Autonomy of Panchayats (Art 243F)
- Reservation of Seats for SC/ST and Women prescribed in the Conformity Acts (Art. 243D)

⁴⁰ Consisting of

- Functions Assigned to Panchayats (Art. 243G)
 - Involvement Status of Panchayats

Despite legal provisions, the Gram Sabhas were dysfunctional both in its functioning and in its relationship with the Panchayats; cynicism abound on the efficacy of Gram Sabha meetings. Even after more than a decade and a half the lack of adequate devolution of funds, functions and functionaries to the PRIs in the states resulted in the continued hold of the command and control line department of the bureaucracy and officialdom over the democratic governance structure. (See table below for the situation in the States with Scheduled Area). Moreover, the devolution of powers with regard to the subjects and departments in terms of funds, functions and functionaries have neither been adequate nor uniform in the States as seen in the table below. Since PESA provisions are embedded into the existing PRIs compounded with the non-adoption of the Sixth Schedule pattern, PESA got circumscribed within and subject to the limited extent of such devolution under Panchayat Raj Acts of these States. The set of tables 1 to 4 indicates that the devolution process in all the 9 states has not been uniform and that each has its own specificities in both the laws governing PRIs and its implementation. Therefore, the implications of PESA provisions in the State laws too are varied despite the generality that PESA, by and far, has not been able to make the intended vital step forward to inaugurate a new democratic governance model in the Scheduled Areas.

Table 1: Status of devolution of departments/subjects with Funds, Functions and Functionaries to the Panchayati Raj Institutions in States with Scheduled Area

S.No.	No. and names of the Departments/subjects Transferred to Panchayats with respect to			
	State	Funds	Functions	Functionaries
1.	Andhra Pradesh	Only Gram Panchayats (GPs) are empowered to collect taxes. Governments Orders (GOs) issued for	22 GOs issued during 1997-2002. Further, 10 line departments have devolved certain powers to PRIs.	Functionaries are under the administrative control of their respective line departments but they are partially accountable to PRIs.

- Involvement Status of Panchayats in Important Schemes
- Functioning of Gram Sabha (Art. 243A)
 - Number and minutes of meetings,
 - Approval of plans, budget, UCs and beneficiary lists
- Transparency in Panchayats
 - Mechanism to deal with RTI and corruptions
- Initiatives undertaken since April 2009⁴¹ Consisting of
 - Empowerment of Panchayats to impose and collect revenue (Art. 243H)
 - Share of own revenue of Panchayat in State own revenue
 - Fund availability with Panchayats (last two years)
 - Operation of Panchayat Nidhi/Fund (receipt & expenditure)
 - Release of National Finance Commission grants to the Panchayats
 - Set of criteria, weight to allocate fund to the Panchayats
 - System of fiscal management, monitoring and evaluation
- Initiatives undertaken since April 2009⁴² Consisting of
 - Accountability of functionaries to Panchayats
 - Appointment
 - Transfer
 - Disciplinary matter
 - Panchayat own officials
 - Capacity building of elected representatives
 - Capacity building of official functionaries
 - Infrastructure for efficient & effective management of Panchayats
- Initiatives undertaken since April 2009

		devolving funds of 10 departments.		
2.	Chhattisgarh	GP is authorized to collect various types of taxes. Funds for 12 departments have been devolved.	Activity Mapping of 27 matters has been undertaken. GOs not issued.	Panchayat make recruitments for 9 departments.
3.	Gujarat	8 major taxes are collected by PRIs. In 2008-09, 13 departments allocated funds to PRIs.	14 functions have been completely devolved and 5 are partially devolved.	GOs have been issued for devolution of functionaries for 14 functions.
4.	Himachal Pradesh	Only GP is empowered to levy taxes. Funds have not been transferred.	27 out of 29 subjects have been devolved to PRIs.	Functionaries have not been transferred to PRIs.
5.	Jharkhand	Elections to PRIs were held in November- December 2010 for the first time since 73 rd CAA came into force.	Activity Mapping has not been done so far.	
6.	Madhya Pradesh	GPs are empowered to collect taxes. Funds for 13 departments covering 19 matters are released to PRIs.	GOs containing the Activity Mapping in respect of 25 matters pertaining to 22 departments have been issued.	Functionaries for 13 departments have been transferred to the PRIs. There is a State Panchayat Service.
7.	Maharashtra	ZP and GP collect taxes. Grants for 11 departments are transferred to PRIs.	11 subjects have been fully devolved. For 18 subjects, schemes are implemented by PRIs.	Class III and Class IV employees at all levels are Zilla Parishad employees.
8.	Orissa	PRIs collect 6 types of taxes. There is no clear devolution of untied funds.	11 departments have devolved 21 subjects.	Officials of 11 departments are accountable to PRIs.
9.	Rajasthan	5 departments have issued GOs transferring funds to PRIs up to district level. 10% untied fund to PRIs.	Five Departments have transferred all functions up to district level to PRIs. Fresh Activity Mapping of above 5 Departments has been done.	5 departments have transferred all functionaries up to district level to PRIs.

Source: Extracted from Road Map for Panchayati Raj, Press Information Bureau, Government of India, 07-June, 2012 available at <http://pib.nic.in/newsite/erelease.aspx?relid=84752>

Table 2: Status of Devolution of Departments/Subjects with Funds, Functions and Functionaries to Panchayati Raj Institutions in PESA States

States/UTs	No. of Departments/Subjects Transferred to Panchayats with			No. of Departments/Subjects Yet to be Transferred to Panchayats with		
	Fund	Function	Functionary	Fund	Function	Functionary
Andhra Pradesh	05	13 (17)	02	24	16 (12)	27
Jharkhand	-	-	-	29	29	29
Gujarat	- (15)	- (15)	- (15)	29 (14)	29 (14)	29 (14)
Himachal Pradesh	15 (02)	15 (26)	15 (*)	14 (27)	14 (3)	14 (22)
Madhya Pradesh	10	23	09	19	06	20
Chhattisgarh	10	23 (29)	09	19	06 (-)	20
Maharashtra	18	18	18	11	11	11
Orissa	05	25	03 (21)	24	04	26 (8)
Rajasthan	-	29	-	29	-	29

Source: Report of Working Group on Decentralised Planning and Panchayat Raj Institutions for the Tenth Five Year Plan (2002-2007), Government of India, Planning Commission, November 2001

Note: The figure in parenthesis is as on 20.05.2003 taken from 1st Meeting of the Empowered Sub-Committee on Financial and Administrative Empowerment of Panchayat Raj Institutions held on 26.6.2003, Ministry of Rural Development, Department of Rural Development.⁴³

* No functionary has been transferred. However, Gram Panchayats and Intermediate Panchayats have been made the appointing authorities with regard to 9 functions on contract basis.

Table 3: Performance of PESA States on cumulative and incremental Devolution Index (DI) which measures the extent to which States have devolved funds, functions and functionaries to Panchayats, for 2011-2012

State/UT	Rank on Cumulative DI	Rank on Incremental DI
Madhya Pradesh	4	7
Himachal Pradesh	12	8
Chhattisgarh	9	5
Andhra Pradesh	-	-
Maharashtra	3	1
Rajasthan	6	3
Orissa	13	-
Gujarat	10	-
Jharkhand	21	-

Source: Extracted from Road Map for Panchayati Raj, Press Information Bureau, Government of India, 07-June, 2012 available at <http://pib.nic.in/newsite/erelease.aspx?relid=84752>

⁴³ Quoted from Palanithurai. G (Ed). Dynamics of New Panchayati Raj, Vol.V Panchayati Raj and Multi-Level Planning, Concept Publishing Company, 2006,p.7

Table 4: Panchayat Empowerment & Accountability Incentive Scheme (PEAIS) 2010-11

State/UT's	Overall rank	Framework	Functions	Finances	Functionaries	DI overall	Incremental Panchayat Devolution Index
1. Rajasthan	4	52.07	70.00	52.31	45.86	53.89	1
2. Maharashtra	5	48.15	64.67	49.97	52.83	53.58	3
3. Madhya Pradesh	7	74.50	71.19	35.14	56.65	52.74	6
4. Gujarat	8	45.22	73.54	41.35	40.04	47.78	11
6. Andhra Pradesh	9	50.41	63.64	43.80	41.33	47.69	13
7. Chhattisgarh	10	51.61	54.56	41.76	49.60	47.66	13
5. Himachal Pradesh	12	45.06	53.79	41.80	29.50	40.83	11
8. Odisha	13	63.22	40.35	18.35	61.01	40.03	16
9. Jharkhand	19	35.00	12.00	2.00	16.67	11.70	20
National average		51.32	50.55	37.67	34.67	42.38	

Note: Extracted and compiled from Panchayat Empowerment & Accountability Incentive Scheme (PEAIS) 2010-11⁴⁴

In the Scheduled Areas, PESA attempts to modify such PRIs by empowering Gram Sabhas which ironically is the weakest structure of the PRIs. Recognizing the vast potential that the PESA frame of governance provides in actual empowering of the Gram Sabha and considering the status of PRIs, and particularly the plight of Gram Sabha in the Non-Scheduled Area, MoPR formulated far reaching fundamental amendment to Article 243 in 2010 proposing incorporation of elements from PESA and Sixth Schedule and proposing a new Schedule to the Constitution, 13th Schedule listing the subjects under the purview of the Gram Sabha and Ward namely which are largely the powers outlined in PESA (see Annexure 4). In addition, MoPR had formulated amendments for the Sixth Schedule essentially incorporating the PESA provisions to the Sixth Schedule. These were circulated to the concerned states (see Annexure 5).

2.2 Current Status of the PESA

Ministry of Rural Development is the nodal agency for overseeing the implementation. The Ministry of Tribal Affairs constituted in 1999 is yet to be mandated with the responsibility of also monitoring the implementation of PESA. However, MoPR has been active in monitoring PESA as part of its general mandate on Panchayat raj.

Reviewing the implementation of PESA, a Planning Commission Working Group Report⁴⁵ categorically states that:

⁴⁴ Implemented since 2005-06 by Ministry of Panchayat Raj; see Ministry of Panchayati Raj, Government of India. No.N-39011/52/2009-PEAIS/Pol.II, Panchayat Empowerment & Accountability Incentive Scheme (PEAIS)-Assessment of the States for 2010-11 available at <http://panchayat.gov.in/mopr/data/1308546367561~New%20Press%20note.pdf>

“All States have enacted requisite compliance legislations by amending the respective Panchayati Raj Acts. Certain gaps continue to exist. Most States are also yet to amend the subject laws and rules, such as those relating to money lending, forest, mining and excise to harmonise with PESA. Though the provisions in such laws are legally invalid after December 12, 1997, they continue to be followed by departments and their functionaries for want of clear instructions and guidelines. Powers statutorily devolved upon the Gram Sabha and Panchayats are not matched by the concomitant transfer of funds and functionaries resulting in the non-exercise of such powers. States have, over the years, been repeatedly urged to expedite this process, but progress has been slow and often, only symbolic, with no real intention to operationalise the provisions in spirit”.

Ministry of Panchayat Raj adds that:

“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.”⁴⁶

Implementation of PESA has been examined by a number of official bodies and experts. The Seventh Report of the Second Administrative Reforms Commission, ‘Capacity Building for Conflict Resolution: Friction to Fusion,’⁴⁷ amongst others, recommends:

“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 re-iterate the importance of the Annual Reports of the Governors under the Fifth Schedule of the Constitution....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 harmonisation are the Land Acquisition Act, 1894,

⁴⁵ Ministry of Panchayati Raj, Chapter 7, Reviewing the Implementation of PESA in States with Schedule V areas, Report of the Working Group on Democratic Decentralisation & PRIs, Planning Commission, , November 2006.

⁴⁶ D.O. No.N-11012//3/2010-PESA, Amendment to the Panchayats (Extension to Scheduled Areas) Act, 1996, Ministry of Panchayat Raj, Government of India, 31st March 2010.

⁴⁷ The Seventh Report of the Second Administrative Reforms Commission, ‘Capacity Building for Conflict Resolution: Friction to Fusion,’ February 2008, p.105 and 210 Available at http://arc.gov.in/arc_7th_report/ARC_7thReport_con_sum_rec.pdf

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.”

The Report of the Expert group of the Planning Commission on ‘Development Challenges in Extremist Affected Areas’ (2008)⁴⁸ observed that:

“The areas in Central India where unrest is prevailing covers several States (like Andhra Pradesh, Orissa, Chhattisgarh, 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 Report goes on to recommend:

“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 anything 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 Sixth Report of the Second Administrative Reforms Commission (2007) entitled ‘Local Governance: An Inspiring Journey into the Future’ concludes that:

“Technically under Section 5 of the PESA Act all such laws have automatically become invalid after December 12, 1997. But in practice these laws are being still followed by the State Government machinery.” This Report also goes on to recommends that: The Union and State legislations that impinge on provisions of PESA should be immediately modified so as to bring them in conformity with the Act. If any State exhibits reluctance in implementing the provisions of PESA, Government of India may consider issuing specific directions to it in accordance with the powers given to it under Proviso 3 of Part A of the Fifth Schedule. 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.”⁴⁹

A number of initiatives to examine various important issues coming within the ambit of PESA have been undertaken, for instance,

- A.K. Sharma Committee report on ‘Issues relating to Minor Forest Produce in PESA States’ February 2007⁵⁰ by MoPR;

⁴⁸ Report of the Expert group constituted by the Planning Commission on Development Challenges in Extremist Affected Areas, 2008, p.80 available at http://planningcommission.gov.in/reports/publications/rep_dce.pdf

⁴⁹ The Sixth Report, Second Administrative Reforms Commission, Local Governance: An Inspiring Journey into the Future, October 2007, p.193-4 available at <http://arc.gov.in/6-2.pdf>

⁵⁰ Available at <http://www.downtoearth.org.in/dte/userfiles/images/AKSharmaReport.pdf>

- Dr. T. Haque headed ‘Report of the Sub-Group on NTFP and Their Sustainable Management in the 12th 5 Year Plan Submitted under ‘Planning Commission’s Working Group on Forests & Natural Resource Management’⁵¹;
- Report of the Committee on Ownership, Price Fixation, Value Addition and Marketing of Minor Forest Produce, May 2011⁵² by MoPR;
- Raghav Chandra Report on ‘Land Alienation, Displacement, Rehabilitation and Resettlement’ in the light of land and mineral provisions in PESA⁵³ by MoPR;
- Commissioning National Institute of Rural Development (NIRD) to prepare training modules and materials on PESA and also training State level officials.
- Report of the Sub Committee appointed by the Ministry of Panchayati Raj to draft Model Guide-lines to vest Gram Sabhas with powers as envisaged in PESA” led by Dr. B.D. Sharma⁵⁴;
- “Model Rules for PESA 1996” in 2009 (see Annexure 6)
- “Model Guidelines to Vest Gram Sabhas with Powers as Envisaged in PESA”⁵⁵ to the PESA States.
- Advisory “Effective implementation of PESA particularly in the context of prevailing Extremism” on 21 May 2010 (see Annexure 7). There were a series of visits and consultations to bring clarity on issues of implementation. Review of actual implementation was also conducted. States were requested to amend laws in compliance with PESA (see Table 1 for State wise conformity of PESA with Panchayat Raj and subject laws), formulate appropriate rules, undertake capacity building of Gram Sabhas, Panchayats and officials etc. MoPR had urged the States as well as the Central Ministries to amend subject laws relating to forests, excise, mining, land acquisition etc to make them PESA compliant.
- An advisory, ‘Effective implementation of PESA particularly in the context of prevailing extremism’, dated 21st May, 2010 from the Union Secretary, MoPR⁵⁶

Despite these, the response from the States and the Centre are inadequate. Most States have not framed rules for implementation of PESA provisions in the states so far.⁵⁷ Some recent developments include framing of rules in Andhra Pradesh and Himachal Pradesh, and preparation of training resources in Madhya Pradesh, Andhra Pradesh and Chhattisgarh. The States are reluctant to amend Panchayat and subject laws as per PESA. Many of the issues, such as control of Gram Sabhas over Minor Forest Produce, consultation before land acquisition, right of Gram Sabha to preserve community resources etc. are extremely touchy. Internal conflicts between the line departments such as Forest, Mining, Excise etc and State Panchayati Raj departments are inevitable. The important capacity building of Gram Sabhas and Panchayats has not been forthcoming.

⁵¹ Available at http://planningcommission.nic.in/aboutus/committee/wrkgrp12/enf/wg_subntfp.pdf

⁵² Available at http://panchayat.gov.in/mopr/data/1306908789084~MFP_%20Final%20Report.pdf

⁵³ Available at <http://panchayat.gov.in/mopr/viewMore.do?method=viewMoreContent&ptlid=4036&cToken=938785950>

⁵⁴ Available at <http://www.downtoearth.org.in/dte/userfiles/images/bdsharma-guidelines.pdf>

⁵⁵ Available at <http://www.downtoearth.org.in/dte/userfiles/images/bdsharma-guidelines.pdf>

⁵⁶ Available at <http://panchayat.gov.in/data/1275889034154~PESA-Guidelines21-05-2010.pdf>

⁵⁷ Faster, Sustainable and More Inclusive Growth. An Approach to the Twelfth Five Year Plan, Planning Commission, Government of India, October 2011, p.66.

Table 5: Provision of the Panchayat (Extension to the Scheduled Areas) Act, 1996 - Functional Devolution on Panchayats

S. No.	Components	Mandatory Provision	Status
1.	Definition of Village	A village consists 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	All States adopted this definition except Maharashtra, which is silent on this subject.
2.	Status and Functions of Gram Sabha	Every village will have a Gram Sabha which will be competent to safeguard and preserve the traditions and customs of the people, their cultural identity.	All State Acts follow the Central Act. However, regarding customary mode of disputes resolution Andhra Pradesh Act puts a condition that it will be subject to 'without detriment to any law for the time being in force. The Orissa Act adds that it should be consistent with the relevant laws in force and in harmony with the tenants of the Constitution and Human Rights.
3.	Constitution of Panchayat	Panchayats will be constituted at village level with reservations for Scheduled Tribes in the manner prescribed in Part IX of the Constitution	Andhra Pradesh and Himachal Pradesh Acts have extended the reservation of elective seats and Chairpersons to both Gram Panchayats and Mandal/intermediate Panchayats. The Maharashtra Act does not mention it.
4.	Acquisition of land for development projects and resettlement of displaced persons	Prior consultation with Gram Sabha or Panchayats at the appropriate level shall be made mandatory	In Andhra Pradesh, Gram Sabhas have no role. Gujarat assigned this power to Taluka Panchayat, however, no provision relating to coordination of such projects at State level. Orissa assigned the power to Zilla Panchayat with no role for the Gram Sabha/Gram Panchayat
5.	Planning and Management of Minor Water Bodies	Entrusted to Panchayats at the appropriate level	Maharashtra Act does not make any mention of it. Orissa assigned power to Zilla Parishad instead of Gram Sabha/Gram Panchayat
5	Grant of Prospecting licence or mining lease for minor minerals	Prior recommendations of Gram Sabha or the Panchayats at the appropriate level shall be made mandatory.	Andhra Pradesh-gives primacy to Gram Panchayat in place of Gram Sabha. Gujarat-does not make mention of it. Himachal Pradesh-retained primacy of Gram Sabha but term 'shall be made mandatory' has been replaced by 'shall be taken into consideration'. Madhya Pradesh – No mention in the Madhya Pradesh Panchayat Act but the relevant Subject Act Mines and Minerals (Regulation and Development Act) 1987 amended to assign powers to Gram Sabha and Panchayats at appropriate level. Maharashtra-assign powers to Gram Panchayat. Gram Sabha has no role in the matter. Orissa - give powers to Zilla Parishad.

6.	Grant of concession for Exploitation of minor minerals by auction.	Prior recommendation of Gram Sabha or Panchayats at appropriate level shall be made mandatory.	Andhra Pradesh and Maharashtra assigned the function to Gram Panchayat in place of Gram Sabha, Gujarat-No mention of it. Madhya Pradesh-Madhya Pradesh Panchayat Act does not make mention of it but the Subject Act Mines and Minerals (Regulation and Development) Act, 1987 amended to assign the power to Panchayat at appropriate level. Orissa- assigned the power to Zilla Parishad.
7.	Enforce prohibition/ regulate or restrict sale & consumption of any intoxicant	Panchayats at the appropriate level and the Gram Sabha to be endowed with the powers.	All State Acts followed the Central Act except Madhya Pradesh which does not make provision for it in its PR Amendment Act. However, the Subject Act - Madhya Pradesh Excise Act 1915 has been amended to give powers to Gram Sabha.
8.	Ownership of Minor Forest Produce (MFP)	Panchayats at the appropriate level and the Gram Sabha endowed with the powers of ownership	All State Acts follow Central Act by assigning this power either to Gram Sabha or to the Gram Panchayats
9.	Prevention & Restoration of Tribal Alienated Land	Panchayats at appropriate level and the Gram Sabha to be endowed with this power.	Gujarat, Himachal Pradesh, Madhya Pradesh Panchayati Raj Amendment Act do not make provision for this. However, in case of Madhya Pradesh, the Madhya Pradesh Land Revenue Code,1959 has been amended to give power to Gram Sabha.
10.	Manage Village Markets	Panchayats at appropriate level and the Gram Sabha to be endowed with this power.	Gujarat and Maharashtra Amendment Acts are silent on this matter.
11.	Money lending to The Scheduled Tribes	Panchayats at appropriate level and the Gram Sabha to be endowed with this power.	Madhya Pradesh Amendment Act does not make a mention of this subject.
12.	Exercise control over institutions and functionaries in all social sectors.	Panchayats at appropriate level and the Gram Sabha to be endowed with this power.	All State Acts except Madhya Pradesh assign this power either to Gram Panchayat or Panchayat Samiti/Mandal Parishad. The Madhya Pradesh Amendment Act has given this power to the Gram Sabha and the Janpad Panchayat or the Zilla Parishad.
13	Control over Local Plans and Resources including Tribal Sub Plans	Panchayats at appropriate level and the Gram Sabha to be endowed with this power.	State Acts of Andhra Pradesh, Gujarat, Himachal Pradesh, Orissa have assigned the power to panchayat Samiti/Taluka Panchayat/Mandal Parishad while the Madhya Pradesh and Maharashtra Acts assign this power to Gram Sabha.

Source: Report of the Task Force on Panchayat Raj Institutions (PRIs), Planning Commission, New Delhi, December 2001, p.98-100⁵⁸.

The status at first glance (Table 4 and 5) would indicate further discordance when all the State legislations on Panchayat and the numerous subject laws are examined and compared.

⁵⁸ Available at http://planningcommission.nic.in/aboutus/taskforce/tsk_pri.pdf

Table 6: PESA and State Panchayati Raj Acts and Subject laws

States	Comments Received on Report	Conformity of State Panchayati Raj Acts and Subject laws with PESA																					
		Minor Forest Produce	Gram Sabha	Land Alienation	State Panchayati Raj Act whether compliant with (Section 4 of PESA)												Compliance of Important Subject Laws with PESA						
					d	e	f	h	i	j	k	l	m						Land Acquisition	Excise	Forest Produce	Mines & Minerals	Ag. Produce & Market
												i	ii	iii	iv	v	vi						
Andhra Pradesh	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	NIC	NIC	NIC	Y	NIC	NIC
Chhattisgarh	N	N	Y	Y	Y	Y	Y	Y		NIC	NIC	Y	NIC	Y	Y		Y	Y	Y	NIC	NA	Y	Y
Gujarat	N	N	N	Y	Y	Y	Y	Y		NIC	NIC	NIC	Y	NIC	Y	Y		NIC	NIC	NA	NA	NIC	NIC
Himachal Pradesh	Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y		NIC	Y	Y	Y	NIC	NIC	NIC	NA	NIC	NIC
Jharkhand	N	N	N	Y	Y	Y	Y		NIC	NIC	NIC	NIC	NIC	NIC	N	Y		NIC	NIC	NIC	NIC	NIC	NIC
Orissa	Y	N	Y	Y	Y	Y	Y			NIC		Y	Y	Y	Y	Y	Y	NIC	Y	Y		NIC	Y
Maharashtra	N	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	N	Y	Y	NIC	NA	NIC	NA	NIC	NIC
Madhya Pradesh	N	N	N	Y	Y	Y	Y	Y	Y	Y		NIC	NIC	NIC	Y		Y	Y	Y	NIC	Y	Y	NIC
Rajasthan	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	NIC	NIC	NA	Y	NIC	Y

Y – Yes, N-No, NIC-Not in consonance, NA-Not applicable as it was not taken for review by ILL

Source: Extracted from D.O. No.N-11012//3/2010-PESA, Amendment to the Panchayats (Extension to Scheduled Areas) Act, 1996, Ministry of Panchayat Raj, Government of India, 31st March 2010

The assessment of the States for 2010-11 (see Table 4 above) under the Panchayat Empowerment & Accountability Incentive Scheme (PEAIS) ranks Rajasthan at the top and Jharkhand at the bottom at 19 amongst all states (not including north-east states). Six of the nine PESA states are above the national average. The relevant question to be examined is how far this has a bearing on the implementation of PESA in the concerned states. While this would have a direct relevance in the manner in which PRIs function in general it does not seem to have a direct bearing on the extent of compliance of state laws with PESA (see Table 5 above) but more on how PESA provisions in the states get translated into practice through the general PRI structure and functions.

Recognizing that PESA itself need to be further strengthened a Cabinet Note for amending PESA Act was circulated to 9 PESA States and Central Ministries in March 2010 (See Annexure 7) to remove infirmities and strengthen implementation. A number of official reports, as quoted above, have already captured the lacunae in the incorporation of the provisions under PESA in the states.⁵⁹ For instance, non-compliance by States was justified by them that they were perfectly within their legal competence when the non-compliance in the state law was pointed out. The argument that PESA being the extension to a constitutional amendment is therefore a part of the Constitution is still debated and unsettled within the concerned ministries. The States empowered the Panchayats at higher level instead of the Gram Sabha disregarding the letter and spirit of PESA taking advantage of the the flexible provisions of 'the Gram Sabha or the Panchayats at appropriate level" in PESA except in the case of Madhya Pradesh⁶⁰ where the Panchayats were assigned a supportive role to the Gram Sabha. The Gram Sabhas function under coercion when it came to particularly land acquisition or were neglected with regard to others powers.

The 7th Report of the Second Administrative Reforms Commission 'Capacity Building for Conflict Resolution' recommended⁶¹ that:

- a. 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.
- b. 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

⁵⁹ For instance, The 7th Report of the Second Administrative Reforms Commission 'Capacity Building for Conflict Resolution', February 2008; Report of the Working Group on Democratic Decentralisation & PRIs, Planning Commission and Ministry of Panchayati Raj, November 2006 available at http://planningcommission.gov.in/aboutus/committee/wrgrp11/wg11_demo.pdf; Planning at the Grassroots Level. An Action Programme for the Eleventh Five Year Plan. Report of the Expert Group, March 2006, New Delhi available at http://planningcommission.nic.in/plans/stateplan/sp_scy2stat.pdf

⁶⁰ For instance, 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 vale of Rs ten lakhs; 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.

⁶¹ See 7.10 Recommendations of The Standing Committee on Inter Sectoral Issues relating to Tribal Development, Op. Cit.

accountability in cases in which the final decisions are contrary to the decisions of the Gram Sabha or Panchayat.

- c. There should be a complete overhaul and systematic re-organisation of existing land records with free access to information about land holdings.
- d. 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 harmonisation 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.
- e. Mining laws applicable to Scheduled Tribal Areas should be in conformity with the principles of the Fifth and Sixth Schedules of the Constitution.
- f. 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.
- g. 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.
- h. 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.

MoPR⁶² pointed out that: “In spite of the critical importance of implementing PESA in the Schedule V areas and the efforts made by MoPR, there have been problems and gaps. These include:

- a. The PESA Act does not specify rule making powers or provide a time period by which the States have to frame rules. States have generally not framed appropriate rules under PESA, and therefore the official system has not operationalized PESA. While draft model rules for PESA have been framed by MoPR and circulated to the States, the response is yet to come forth.
- b. State and Central subject laws relating to mines and minerals, forests, land acquisition etc. are not PESA compliant. In spite of repeated urging by MoPR, appropriate action in this regard has not been taken.
- c. The wordings of some sections of the PESA Act have been interpreted against the spirit of the Act. Particularly, as the Mungekar Committee has observed (Para 4.22), the States in many cases have taken advantage of the flexible provision of ‘Gram Sabha or Panchayats at the appropriate level’ in PESA and used the discretion in favour of Panchayats, which goes against the basic tenets of PESA.
- d. There is no provision for appeal against the decision of the Gram Sabha, which is not in conformity with the democratic process and introduces an element of absolute power, rather than checks and balances on power of institutions.”

The result has been that despite PESA being in force for more than 15 years, tribal people continue to be deprived of their rights including their right to self-governance as recognised in PESA, and from their life sustaining natural resources in the Fifth Schedule Areas. Dislocation of the communities and their disaffection and distrust of the government has further increased.

⁶² Ministry of Panchayati Raj, (31st March, 2010), Op. Cit.

Several official reports and studies too inform us the failure of PESA implementation⁶³. Identifying the obstacles and impediments that this Act faces, both in law and practice, is required to hasten the process of revitalizing the law and governance structures created by the law.

2.3 Left Wing Effected Districts and Scheduled Area

Of the 9 States considered to be Left Wing Effected (LWE) States⁶⁴, 6 are States with Scheduled Districts. These States are Andhra Pradesh, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra and Odisha. Of the total of 78 LWE Districts 49 districts (63%) have Scheduled Areas⁶⁵. 7 out of 8 districts in Andhra Pradesh, 9 out of 10 in Chhattisgarh, 12 out of 17 in Jharkhand, all the 8 districts in Madhya Pradesh, 1 out of 2 in Maharashtra and 12 out of 18 in Odisha considered to be LWE districts have Scheduled Areas. The Scheduled Area in these States has overwhelmingly become conflict zones making it a target for security operations with dire consequences. Development aggression resulting in severe deprivation and destruction of the rich natural resources - the livelihood resources of the tribal peoples; displacement; development deficit; mis-governance; suppression of democratic rights; non-recognition and deprivation of traditional rights to land, water and forest; land alienation; indebtedness; incursion and exploitation of outsiders; liquor etc are at the root cause of disaffection of the people. Despite these aggressions and resultant violence and insecurity, the communities continue to manage their lives relying on their own traditions, collective resilience and traditional governance which are neither recognized by the formal system nor have official support. Even this is increasingly disrupted.

PESA is recognised as the single most important law to address all these infirmities and to rectify the governance deficit. In fact, official reports⁶⁶ correctly recognize PESA as the very vehicle to redeem the fast deteriorating situation in the LWE districts precisely as its scope encompasses almost all aspects of life of the tribal peoples. These reports also strongly decry the essentially security blinded law and order approach that the governments have hitherto primarily adopted buttressed by special sanctions and programmes that fail to reach out anyway for want of an effective vehicle for delivery. The primary reliance on a security approach to left wing extremism has only fuelled disaffection and violence, rather than usher in peace and development. Therefore what is suggested is the immediate cessation of State aggression using its armed wings to that of effective policing followed by an effective and uncompromising implementation of PESA firstly by the affirmation of the habitation and its people, and secondly, their progressive control over the State structure to aid and strengthen the governance by the people along with . This self-determining power, it is reckoned, will be the best arbiter to maintain peace and development in the long term.

⁶³ See Section 2 .

⁶⁴ For details see http://indiawater.gov.in/imisreports/Reports/BasicInformation/rpt_RWS_StatewiseLWEDistrict_S.aspx?Rep=0

⁶⁵ Adilabad, East Godavari, Khammam, Srikakulam, Visakhapatnam, Vizianagaram, and Warangal of Andhra Pradesh; Bastar, Bijapur, Dantewada, Jashpur, Kanker, Koriya, Narayanpur, Rajnandagon, and Surguja of Chhattisgarh; Garhwa, Gumla, Khunti, Latehar, Lohardaga, Palamu, Paschim Singhbhum, Purbi Singhbhum, Ramgarh, Ranchi, Sareikela and Kharsawan and Simdega of Jharkhand; Anuppur, Balaghat, Dindori, Mandla, Seoni, Shahdol, Sidhi and Umaria of Madhya Pradesh; Gadchiroli of Maharashtra; and Gajapati, Ganjam, Kalahandi, Kandhamal, Kendujhar, Koraput, Malkangiri, Mayurbhanj, Nabarangapur, Rayagada, Sambalpur, Sonapur and Sundargarh of Odisha

⁶⁶ See for instance Report of the Expert Group to the Planning Commission on Development Challenges in Extremist Affected Areas, April 2008 available at http://planningcommission.nic.in/reports/publications/rep_dce.pdf and Hussain, Wasbir and H.K Deka. Social, Economic and Political Dynamics in Extremist Affected Areas, Bureau of Police Research and Development, Ministry of Home Affairs, New Delhi and Centre for Development and Peace Studies, Assam, 2011 available at <http://bprd.nic.in/writereaddata/mainlinkFile/File587.pdf>

KEY ISSUES RELATING TO IMPLEMENTATION OF PESA

PESA in its application in the legal space as applicable in the States requires the examination of which central and state laws that this would impinge on and to what extent these have been harmonized. Needless to say, PESA provisions does not have an independent existence as it is embedded within the subject laws under the union list, concurrent list, the State Panchayat Raj laws and the subject laws under the State list⁶⁷.

Table 7: Subject List Relevant to PESA 1996

List - I of the Seventh Schedule of the Constitution of India, which form the exclusive domain of the Central Government of the Union of India excluding all the states and the union territories.	List - II of the Seventh Schedule of the Constitution of India, which form the exclusive domain of each one of the State Governments within India, and thus effectively ousting the domain of the Central (Union) Government in framing laws under these subjects.	List - III of the Seventh Schedule of the Constitution of India, which form the joint domain of both the State Governments and the Union territories of India as well as the Central Government of India
54. Regulation of mines and	1. Public order (but not including [the	6. Transfer of property other than

⁶⁷ For instance, in Maharashtra and Odisha, a preliminary check yields a number of laws that may have to be amended to ensure compliance to PESA. Some have been amended but most not amended. These are as below:

Maharashtra:-

- (a) Maharashtra Industrial Development Act, 1961;
- (b) Maharashtra Housing and Area Development Act 1976;
- (c) Maharashtra Irrigation Act 1976;
- (d) Maharashtra Project Affected Persons Rehabilitation Act, 1999;
- (e) Maharashtra Groundwater (Regulation for Drinking Water Purposes) Act, 1993;
- (f) Maharashtra Management of irrigation System by Farmers Act, 2005;
- (g) Bombay Prohibition Act, 1949;
- (h) Maharashtra Land Revenue Code 1966;
- (i) Bombay Money-Lenders Act, 1946
- (j) Maharashtra Transfer of Ownership of Minor Forest Produce in the Scheduled Areas and the Maharashtra Minor Forest Produce (Regulation of Trade) Amendment Act 1997
- (k) Maharashtra Forest Produce (Regulation of Trade) Act, 1969
- (l) Maharashtra Land Revenue (Extraction and Removal of Minor Minerals) Rules 1968
- (m) Maharashtra Restoration of Lands to Scheduled Tribes Act 1974
- (n) Maharashtra Land Revenue (Transfer of Occupancy by Tribals to Non-tribals) Rules, 1975
- (o) Maharashtra Land Revenue Restoration of Occupancy (Unauthorisedly Transferred by Occupants belonging to Scheduled Tribes) Rule 1969

Odisha:-

- (a) Bihar & Orissa Excise Act 1915,
- (b) the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956,
- (c) the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Rules, 1959,
- (d) Orissa Panchayat Samiti Accounting Procedures Rule, 2002,
- (e) the Orissa Resettlement and Rehabilitation Policy 2006,
- (f) the Orissa Grama Panchayats (Minor Forest Produce Administration) Rules. 2002,
- (g) the Orissa Timber and Other Forest Produce Transit Rules 1980,
- (i) the Orissa Forest Produce (Control of Trade) Act 1981
- (j) The Orissa Money-lenders' Act, 1939
- (k) the Orissa (Scheduled Areas) Money-Lenders' Regulations, 1967
- (l) The Orissa (Scheduled Areas) Money-lenders' Rules, 1970
- (m) The Orissa Pani Panchayat Act, 2002
- (o) The Orissa Minor Mineral Concession Rules, 1990 and
- (p) Orissa Minor Mineral Concession Rules 2004

mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest

use of any naval, military or air force or any other armed force or the Union or of any other force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power).

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation; hospitals and dispensaries.

7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, transport, purchase and sale of intoxicating liquors.

9. Relief for the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

16. Ponds and the prevention of cattle trespass.

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

21. Fisheries.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

24. Industries subject to the provisions of [Entries 7 and 52] of List I.

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.

28. Markets and fairs.

30. Money-lending and money-lenders; relief of agricultural indebtedness.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

50. Taxes on mineral rights subject to

agricultural land; registration of deeds and documents.

11. Administrators-general and official trustees.

15. Vagrancy; nomadic and migratory tribes.

17-A. Forests.

18. Adulteration of foodstuffs and other goods.

20. Economic and social planning.

23. Social security and social insurance; employment and unemployment.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

33. Trade and commerce in, and the production, supply and distribution of,-

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products

(b) foodstuffs including edible oilseeds and oils

(c) cattle fodder, including oilcakes and other concentrates

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute.

36. Factories.

42. Acquisition and requisitioning of property.

any limitations imposed by Parliament by law relating to mineral development.
64. Offences against laws with respect to any of the matters in this list.

Extracts from Article 246, Seventh Schedule, Constitution of India⁶⁸

3.1 Strengthening PESA and Governance in Scheduled Area

3.1.1 At the level of central government:

1. Defining the role of Ministry of Tribal Affairs (which is yet to be mandated with a role), reviewing the role of Ministry of Rural Development (the nodal agency) and the Ministry of Panchayat Raj and ways to ensure inter-ministerial coordination with regard to PESA and its implementation.
2. Formulating amendments to the Act itself for instance by:
 - Clarifying a number of terms⁶⁹ used in PESA by expanding the list of definitions in Sec.2 This should enable better interpretation of the provisions of PESA. This would enable better formulation of amendments to be brought in the subject laws as well as the State Panchayat laws. This would also avoid multiplicity of interpretation by bringing uniformity in interpretation and remove the ambiguity due to absence of definition;
 - A contentious issue is what ‘consultation’ with or ‘recommendations’ of the Gram Sabha mean and require. This term may either be defined or replaced with the more internationally acceptable term ‘free and prior informed consent’;
 - ‘Village’ is defined, what constitutes the jurisdiction of the ‘village’ could be added;
 - The modalities of identifying and notifying the ‘village’ could be introduced into the law. This will put at an end to the ambiguity of which are the ‘villages’ as per PESA;
 - Explicit provision that the Gram Sabha shall oversee and control Gram Panchayats and any committees that it may create for any purpose;
 - Introduction of provision for appeal against the decision of the Gram Sabha or grievance redressal to ensure the principles of checks and balance;
 - Provision for conduct of social audits by Gram Sabhas of all programmes implemented within its jurisdiction;
 - Clarification that all laws and rules inconsistent with PESA are null and void;
 - Role of Governor to rectify any anomalies in the state laws and rules;
 - Provision of the power of the union government to formulate rules to PESA which at present it does not have and its adoption in case the State governments fail to formulate rules within a time period;

⁶⁸ Available at http://india.gov.in/govt/documents/english/coi-eng-schedules_1-12.pdf

⁶⁹ Some of the terms that could be defined are Alienation of land, Community resources, Cultural identity, Customary law, Customary mode of dispute resolution, Minor forest produce, Minor minerals, Minor water bodies, Money lending, Panchayat at appropriate level, Social and religious practices, Traditional management practices, Traditions and customs etc

3. Strengthening PESA by reexamining the Draft Model Rules for PESA of MoPR in the light of the above changes in PESA with particular reference to
 - Determination of villages and its geographical jurisdiction;
 - Conduct of Gram Sabha meetings;
 - Land acquisition, resettlement and rehabilitation in Scheduled Areas;
 - Protection from land alienation and restoration of illegally alienated land;
 - Gram Sabha to ensure that State legislation is in keeping with customary law, social, religious and traditional management practices of community;
 - Role of Gram Sabha in dispute resolution;
 - Gram Sabha to safeguard natural resources
 - Management of minor water bodies;
 - Prospecting licence or mining lease and grant of concession for the exploitation for minor minerals in the Scheduled Areas;
 - Approval of plans, programmes and projects for social and economic development and identification or selection of beneficiaries in Scheduled Areas;
 - Certification of utilisation of funds by that Panchayat in the Scheduled Areas;
 - Management of village markets in the Scheduled Areas;
 - Exercising control over institutions and functionaries in all social sectors in the Scheduled Areas;
 - Review of Social Sector;
 - Control over local plans and resources for such plans including tribal sub-plans in the Scheduled Areas;
 - Enforcement of prohibition and regulation/restriction of the sale and consumption of any intoxicant in the Scheduled Areas;
 - Control over money lending to the Scheduled Tribes in the Scheduled Areas;

4. Issue directions to the States under Proviso 3 of the Fifth Schedule⁷⁰ and Article 339(2)⁷¹ on a variety of critical issues which do not fall within the purview of PESA but are related to PESA and Scheduled Area
 - Ensuring autonomy of Gram Sabha and panchayats at the lower level and that the structures above do not encroach into the powers of the structures below;
 - Inclusion of tribal habitations not included or left under the Fifth Schedule
 - Reorganization of Scheduled Area into districts wholly constituted with Scheduled Area for rationalization of Scheduled Area

5. Issue notification under Para 5(1) of the Fifth Schedule on issues such as:
 - Empowering the Gram Sabha to restore the unlawfully alienated tribal land or to direct the Sub-Divisional Officer to restoration alienated land;
 - Transfer of cases pending in the court to the Gram Sabha

⁷⁰ Article 244(1) Fifth Schedule Sec.3. Report by the Governor to the President regarding the administration of Scheduled Areas.—The Governor of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

⁷¹ Article 339. Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes

(2) The executive power of the Union shall extend to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State

- Prohibiting transfer of non-tribal lands to another non-tribal (as under Regulation 1/70 of Andhra Pradesh) and instead transfer to the concerned Gram Sabha with compensation paid by the government;
- All land in Scheduled Area to serve the interest of Scheduled Tribes;
- All upgradation of panchayats to municipalities in Scheduled Areas as null and void and suspending all further upgradation till the law for extending the 74th Amendment to the Scheduled Areas is enacted;

6. Constituting a task force to determine

- Structures above the Gram Sabha at district level in Scheduled Area and the powers of the District Council on the pattern of Sixth Schedule through a draft central law and/or model State law as amendments to PESA and State Panchayat laws
- Amendments to be brought to the central Acts such as 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 and national policies such as the National Water Policy, 2002, National Minerals Policy, 2003, National Forest Policy, 1988, and Wildlife Conservation Strategy, 2002 PESA compliant
- Ways to incentivise the State governments of PESA States to harmonise State laws including subject laws with PESA
- Understanding PESA as a new paradigm for governance, a programme for perspective building

Action points for UNDP:

➤ **Policy Planning:**

Collaborate with the Ministry of Rural Development, Ministry of Panchayat Raj, Ministry of Tribal Affairs, Ministry of Law and Justice, Planning Commission, National Advisory Council and subject experts by facilitating a workshop/consultation on status of PESA in law and practice to draw the issues. This could form the basis for a joint programme to draw out the tasks to be undertaken for which the terms of reference, and activities and the mechanism to carry them could be developed with reference to formulation of (a) amendments to PESA and its Model Rules, and relevant central subject laws, (b) the role of various Ministries in ensuring implementation of PESA, (c) formulation of the contents of the subject matters to be used through the constitutional provisions such as Proviso 3 of the Fifth Schedule, Article 339(2), the powers of the President, the concerned Governors and the Union Government in relationship to Scheduled Area; the workshop/consultation could also identify follow up programme of UNDP with the mandate of the participants.

➤ **Knowledge Building:**

Organise a consultation with relevant state and central ministries and functionaries, Planning Commission, experts, relevant elected representatives from the regions in Scheduled Areas with municipalities etc to examine the impact of non-extension of the provisions of 74th amendment to the Scheduled Area, to identify the bottlenecks in its extension and find ways of overcoming them.

➤ **Capacity Building:**

Perspective development for administrators of the central Ministries of Rural Development, Panchayat Raj, Tribal Affairs, Law and Justice together with the elected representatives from the Scheduled Areas, policy makers etc on PESA and its implementation Status

3.1.2 At the level of States

There are a number of tasks required to be carried out at the State level. They include:

- Identification of the ‘villages’ as defined under PESA and demarcating the geographical jurisdiction of the ‘villages’
- Identification of villages left out from Scheduling in the PESA States and working out a proposal for its notification by the President
- Rationalize Schedule V areas: Reorganizing administrative units within the Scheduled Area as required such as the Gram Panchayat, and/or tahsils/talukas to ensure that these are redrawn into compact districts to the extent possible. This is to ensure that the PRIs do not require implementing laws, one for the Scheduled Area and another for the Non-Scheduled Area within the same administrative unit at the same time through the same structure and functionaries, which are often not coterminous or are contradictory. Most tribal inhabited area are contiguous but are divided by administrative boundaries leading to fragmentation and peripheralisation leading to their marginalization.
- Critical examination of the provisions in the State Panchayat laws and subject laws for inconsistencies or non-compliance with the provisions of PESA and their reformulation/formulation
- Determining the nature of administrative support for empowering Gram Sabhas to function as centre of self-governance, envisioning the mechanism to deliver this support, conceptualizing capacity building programmes for the facilitating mechanism and developing strategy for mobilizing change process
- Understanding PESA as a new paradigm for governance, a programme for perspective building

Action points for UNDP:

➤ **Policy Planning:**

Enabling the State governments to identify and rationalize the ‘villages’ as in PESA in Scheduled Area, examining the suitability of their reorganization into suitable administrative unit if necessary and the need for inclusion of the left out areas of the State in the Scheduled Area;

➤ **Knowledge Building:**

- Facilitating State specific studies to examine provisions in the State Panchayat laws and subject laws and to work towards formulation through suitable studies through collaboration with identified institutions; follow up with consultations on the outcomes of the studies with the concerned State Ministries/Departments elected representatives to the legislative assembly and the panchayats from Scheduled Areas, policy makers etc

- Developing State specific strategy and programme for administrative support for Gram Sabha in collaboration with the relevant Ministries and Departments, PRIs and institutions.
- **Capacity Building:**
 - Perspective development for administrators of the relevant State Ministries, elected representatives to the legislative assembly and the panchayats from Scheduled Areas, policy makers etc on PESA and its implementation Status in the respective state;
 - Capacity building by developing and using training modules for administrative support for Gram Sabha in collaboration with the relevant Ministries and Departments, PRIs and institutions.

LIST OF REFERENCES

- Article 244 V and VI Schedule
- PESA 1996
- Effective Gram Sabha implementation Guidelines- MoPR
- MoPR Amendments to Article 243 of the Constitution for Strengthening the Local Governance
- MoPR Amendments in the Sixth Schedule
- MoPR Model Rules for PESA
- MoPR PESA Guidelines 21 May 2010
- MoPR Amendments to PESA



*Empowered lives.
Resilient nations.*

United Nations Development Programme

55 Lodi Estate, P.O. Box 3059

New Delhi 110003, India

Tel: +91-11-46532333; Fax: +91-11-24627612

www.in.undp.org

Email: info.in@undp.org
