

PESA – Conformity and Operational Issues : A Case Study of Orissa

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Local Government is not a new phenomenon in India. The system prevailing in the Vedic period was based on the principle of decentralization and mass participation in decision making. Sabha and Samiti were the popular institutions through which the masses had a direct say in village affairs and had direct control over “Gramini”. The village was a self dependent unit. It generated its own resources, had its own functionaries and its own functional domain. The principle of subsidiarity was followed; the State performed only those functions which the village could not perform itself. This system persisted in the ancient period under the Mauryas, Guptas and Harsabarddhan. In the early medieval period, drastic changes were made in village polity. Shershah Suri divided the Revenue Administration and Police Administration between Patwari and Muqaddam. Mughals introduced Zagirdari system which evolved the practice of middle man in Revenue Collection between Peasantry and the State. By the introduction of Zagirdari system, Mughal created new centers of power at the local level and this weakened the solidarity of Panchayat system and Village Community. This also affected the Village economy and lead to loss of financial autonomy of the Village Panchayats. Despite the emergence of new Institutions like Zagirdari, Panchayats system continued to be quite vibrant and living during Mughal era. But with the Britishers in India and their changed Revenue system, the self



sufficient village reduced to the position of dependent unit. Indigenous system of local government was replaced by the Centralized system resulting in failure on the part of Britishers to understand the role of culture and ecology and more so, over indigenous socio-economic system of Indian villages. British India ignored the principle of decentralization, accountability, people’s participation and tried to establish a local government system based on the centralization. The British Government lacked the will to empower the Indian People. Hence, they tried to follow the principle of delegation rather than devolution and decentralization. Gandhi, the ardent supporter of Rama Rajya and Gram Swaraj, had full faith on the Village and Panchayat system of ancient India. In Independent India, he visualized a federal system based on the Village as a Unit of Governance. He held the view that if

the Village perishes India will perish too. He strongly advocated that village sufficiency would lead to the decentralization of the Political power.

However, the Panchayat system was inducted in the Constitution in the Article 40 by the Special Constituent Assembly. It is specially mentioned that Balwantraji Mehta Committee suggested 3-tier Panchayati Raj Institutions to fulfill the goals of Rural Development and democratization of the Society. Many Committees namely – Ashok Mehta, GVK Rao, L M Singhvi have contributed to the growth and functionality of Panchayati Raj system in India. The 64th Amendment Bill and at last 73rd Constitutional Amendment Act of Indian Constitution provided the Constitutional status to the Panchayati Raj Institutions and they became 3-tier of the Government.

The 73rd Constitutional Amendment did not become operative to the whole of Indian Territory. According to the 73rd Amendment, the Scheduled Areas were excluded from the provisions of the Act. As per the Article 243M(4)(2), the Parliament may by law extend the provisions of Panchayat to the Scheduled Areas, subject to exceptions and modifications as may be specified in such law. It was done so to avoid conflict between the traditional institutions and statutory Panchayat. Considering the growing of discontentment among the tribals across the tribal community, the Union Government constituted a Committee headed by Sri Dilip Singh Bhuria in June, 1994 who submitted its report in January, 1994 recommending the adoption of 3-tier system in the 5th Schedule Areas. So a Bill was passed in the Parliament on 24th December, 1995 giving rise to new Act namely Provision of Panchayats (Extended to Scheduled Areas) Act (PESA), 1996 (Act No. 40). The rationale behind the Act is to bring at par the tribal population to the general population of Rural Community. The Act ensures that tribal people

will be empowered to manage their affairs according to their own culture within the purview of the Act.

PESA in Orissa

The provision of (Extension to the Scheduled Areas) Act, 1996 came into force on the 24th December, 1996. Orissa Gram Panchayat Act, 1964, Orissa Panchayat Samiti Act, 1959 and Orissa Zilla Parishad Act, 1991 have adopted the provisions of the PESA Act. It covers 7 districts i.e. Mayurbhanj, Sundargarh, Koraput, Malkangiri, Rayagada, Nowrangpur and Kandhamal in full and Keonjhar, Gajapati, Kalahandi, Balasore, Sambalpur and Ganjam in part spread over 1966 Gram Panchayats in 118 Blocks in full and 3 Blocks in part. Accordingly 24734 Wards out of 87542 Wards, 1966 office of Sarpanch out of 6234, 1965 office of Panchayat Samiti Member out of 6233 and 256 Members of Zilla Parishad out of 854 come under the Schedule Area. Elections to these offices were conducted as per the provisions of the PESA Act.

It seems that the State of Orissa had complied, though not fully, with the provisions of the Central PESA Act while modifying its PRI Acts. Mandatory provision in the Central Act ensuring tribal communities: control over natural resources, granting licenses for minor minerals and their exploitation and acquisition of land by government for development projects which proposed to be enforced through Gram Sabhas have not been complied with. Currently the Panchayat Rules of Orissa Government confirms the reservation of seats for STs in scheduled area on the proportion of their population. All the posts of Chairpersons of the PRIs at all levels are reserved for STs.

The SC and ST Development Department has made suitable amendments in its existing acts / rules and regulations within the parameter of PESA Act. The Orissa Scheduled

Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation of 1956 has been amended by Regulation of 2002 (Regulation I of 2002), which has come into effect from 4.9.2002. The Orissa Scheduled Areas Money-Lenders' Regulations, 1967 (Regulation and of 1968) is in operation since 15th November 1968 with a view to regulating and monitoring money lending activities in the scheduled areas of the State.

Further different relevant departments have devolved some powers to PRIs and they have suitably brought amendments to the existing rules. Let us appreciate the deliverables of PESA in Orissa in little details.

Minor Forest Produce: Panchayati Raj Deptt. Resolution No. 8131 dt. 26.5.2000 has given the necessary powers to Gram Sabhas based on the Forest & Env. Deptt. Resolution No. 5503 dt. 31.03.2000. The Orissa Government (Minor Forest Admn. Rules, 2002) has come into force w.e.f. 15.11.2002. Ownership and Management of 68 MFPs has been entrusted to GPs / Gram Sabhas.

Enforcement of Prohibition & Sale of Intoxicant: Revenue & Excise Department vide their Letter No. 22977/R dt. 22.04.1999 by amending the Bihar & Orissa Excise Act 1915 provides that no such license of exclusive privilege shall be granted except with the prior approval of the concerned Gram Panchayat with the concurrence of the Gram Sasan the G.P. is to give permission within 30 days.

Money Lending: The SC & ST Development Department has already taken up for amendment of the "Orissa (Scheduled Areas) Moneylenders' Regulation, 1967" to empower the GP for control over money lending & issue of license in Scheduled Areas. They have also provided that if any Panchayat gives any false information then the Sarapanch or the concerned officials shall be

punishable under the provisions of law. It is under the consideration of Law Department.

Management of Minor Irrigation Water Bodies: It is vested with ZP.

Minor Minerals: The Mines & Minerals (Development & Regulation) Act of 1957 (67 of 1957) has been amended on 31.08.04 wherein no perspective license or manning / quarry lease or its renewal or auction of source shall be granted without recommendation of the concerned GP.

Transfer of Tribal Land: The Orissa Scheduled Areas Transfer of Immovable Properties (by STs) Regulation 1956 has been amended by Regulation 1 of 2002, which has come into effect from 4.9.2002.

Control of Village Markets: Although Panchyati Raj Department has amended its Act transferring the power to Gram Panchayat but the matter is subjudice.

PESA Act – Few Challenges

The passing of the conformity Acts by the respective States is not only a pre-requisite but rather the States have to formulate the rules and regulations to give effect to that.

It is a matter of truism that the implementation of PESA in Country and especially in Orissa has not resulted in any speciality or in specific result in terms of ideals and objectives engaged in the Act. It is a fact that State laws have been amended more as routine than the real application of the spirit of the Act.

The detailed analysis of PESA in Orissa is limited to meager cosmetic change in the Panchayat Act without much devolution of powers to the Panchayats in Scheduled Areas or to the tribals to live through life in their way with their traditional dignity.

Implementation of the law has been severely hampered by the reluctance of most State

Governments to make laws and rules that conform to the spirit of the law. What is perceived as weak-kneed political will has led to bureaucratic creativity in minimalistic interpretations of the law. Bureaucratic subversion of the letter and spirit of the law has been most visible in interpretation of that provision of PESA by which Panchayats at appropriate levels and the Grama Sabhas have been vested with the ownership of minor forest produce (MFP).

The State Governments have argued that the power of Gram Sabhas can extend only to forest located within the revenue boundaries of a village. This one provision, if accepted, would nullify the law, because reserved forest in most States is not located within a revenue boundary of a village. The spirit of the law is clearly to extend ownership to the Gram Sabha of MFP from forests located in vicinity of the village of traditional access.

Another flaw is in the interpretation of the concept of “ownership” of MFP by Gram Sabha. The common view is that ownership does not provide Gram Sabha the right to take any decisions related to stewardship, management or sustainable harvesting of MFPs. Contrary to a whole body of empirical evidence from the national and international experience of JFM and community control of forests, it is claimed that the exercise of “ownership” of MFPs by Gram Sabhas in this sense would inevitably lead to a destruction of forest. Therefore, “ownership” as provided for in PESA, is reinterpreted to mean the right to net revenues from MFP, after retaining administrative expenses of the Forest Department.

These interpretations have almost killed the concept of ownership and control of local resources by the Gram Sabha. The real danger thus is that the far-reaching changes introduced in the law will remain a pipe dream unless they are translated into action and sustained by a

process of awareness and capacity building among the tribal communities.

As regards to other challenges, we come across the issue of ownership over the natural resources. It is a fact that the size of the operational holding in the tribal land is eroding due to the State led acquisition and marketization process. The sale of tribal lands to the non-tribals in the Scheduled areas is prohibited. But the transfer continues to take place and have become more perceptible in the posed liberalization period. The PESA provisions are intended to intrinsically protect the resources of the tribal communities and empower them to act against the forcible acquisition. But today, the acquisition of individual’s and community’s resources for industry in violation of these provisions is leading to conflicts in several PESA areas. This is creating conflicts leading to loss of livelihood and resource and more so over the way of life. As regards to the acquiring the mineral resources for industries, the stakes are similarly loaded against the functioning of PESA Act. If Samata Judgment (Supreme Court, 1997) could have been honored by both Union and State Governments, a model of sustainable mining which was respectful of the tribal community living in mineral rich areas would have avoided many of the current conflicts witnessed on the ground.

The Scheduled Tribes and other Traditional Forest dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was a result of the polity responding to protected struggles by tribal communities and movements to assert rights over the forest land they were traditionally dependent on. The Act turned the Government colonial policy on its head which it established the rights of the State over the Forest over traditional rights of the community. Further by recognizing the validity of Gram Sabha to give effect to these rights, this Act has great synergy with PESA provisions.

However, continuing bureaucratic control, resistant attitude of Forest Department officials to give ownership to the communities and inadequate efforts on awareness have led to slow implementation of the Act. It is evident from this that there is still poor recognition of various rights favouring the tribals clearly violating the letter and spirit of PESA as well as FRA.

Further, effort to undermine the legitimacy of tribals for the land reclamation and forest rights or against the takeover of resources or displacement still persists. In other words, tribal community's effort for self determination and self governance are to be respected. Though PESA guaranteed in letter and spirit, but at the ground level, there is inadequate attempt for democratic dialogue to resolve the conflict. There is adequate acknowledgement that across the PESA areas, people increasingly wanted more democratic spaces that allow them the life with dignity. But the current alienation is a manifestation of misgovernance and a lasting solution also lie in an honest implementation of PESA and putting people aspirations at the centre of public policies in schedule five areas.

Of late, it has been admitted among all of us that if PESA has been honestly implemented, then it would have been a different to left wing to extremism and militarization in PESA areas. The effective control over the natural resources and management of minor forest produces in true spirit of PESA would have the answer to economic development of PESA areas. The agrarian crisis and distress migrations could have been better arrested through effective market economy as envisaged under PESA. The migration as resulted from forced economic development renders impossible participation in Village Decision Making and is to the severe detriment of the inclusive and participatory governance envisaged by PESA. Further the grievance redressal

mechanism prevailing in the development administration in the tribal areas should be re-looked in the perspective of implementation of PESA. There should be a national inquest, looking into all complaints from schedule five areas, currently pending with the offices of the Governors and the National Commissions.

Panchayati Raj Institution reminds us of a central truth: *Power is not something people give away. It has to be negotiated, and sometimes wrested from the powerful. Democratic politics is, in a reality the inter play of vested interests and PRI's great achievement has to mandate a vested, and mutual interest, between tribals and institutions of governance at scheduled areas. The notion of collective rights or commons is to be re-asserted and voice and choice be given to the masses in scheduled areas by restoring and actualizing PESA.*

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