ANALYTICAL APPRAISAL OF THE PANCHAYATS

(EXTENSION TO THE SCHEDULED AREAS) ACT, 1996 *

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During the last phase of India's freedom struggle from colonial domination, considerable emphasis was laid on enlarging its social base, both as a strategic need as well as fulfilment of the moral ethos of human dignity and fraternal ties intensified by the struggle. This concern found expression in regenerating institutions of local self-government, particularly in rural areas. This endeavour, however, did not always have smooth sailing. Traditionally, Indian villages were highly stratified with higher castes dominating in almost all spheres of life and the Dalits being looked upon almost as non-persons. But Gandhiji launched a dauntless fight against this iniquitous situation; sections of Dalits also launched their own struggle, particularly under the leadership of Dr. B.R. Ambedkar. Slowly, a qualitative change began to take place in the humanscape in rural India. In the context of this emerging social ferment, the Directive Principles of State Policy in Part IX, Article 40 of the Constitution stipulated that 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".

The Directive Principles of State Policy are not on their own enforceable by law. These give direction in which the state should move. And certainly the Indian state made several significant moves by carrying out land reforms (though not to its logical end), passing laws and carrying on campaigns against untouchability, against atrocities perpetrated on the Dalits and the tribals, making provisions for empowering the marginalized sections of the society through reservations in legislatures, jobs and educational institutions, and so on. Thus, the ground for the functioning of grassroot level democracy was prepared and in 1992 the Constitution was amended (73rd and 74th Amendments), which made the setting up of panchayati raj institutions mandatory not only in the rural areas, but also in the urban areas of all States and Union Territories. It was, however, laid down that the amendment in the form as adopted by Parliament will not apply to certain areas, including areas covered by the Fifth Schedule of the Constitution. At the same time, it was indicated in the Amendment Act itself that "Parliament may, by law, extend the provisions to the Scheduled Areas and Tribal Areas subject to such exceptions and modifications as may be specified in such law". [Article 243 M4(b)]

As a follow-up of this provision in the Constitution, "the Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (No. 40, 1996)", commonly known as PESA, was enacted by Parliament on December 24, 1996. In the present paper the various provisions of PESA are presented and analyzed.

Some activists entertain a view that PESA constitutes an integral part of the 73rd Amendment; hence its contents have the mandatory status of the provisions of the Constitution. But there is also a view that while the idea of having a PESA is an integral part of the Constitution, its contents are ancillary to the same and do not enjoy the mandatory status of the different Articles of the Constitution. This debate is not merely academic in nature. The holders of the first point of view want to force the states to adopt the provisions of PESA as they are; the holders of the second, on the other hand, want the specific provisions, not PESA, to be considered on their merit for adoption or rejection or modification. It is in the context of this debate that an analytical appraisal of the provisions of PESA is being made in this paper, for the jurists to decide on the legal status of the specific provisions of PESA.

1. Scope of State Legislation

Section 4(a) of the PESA Act stipulates as follows: "A State Legislation on Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources."

Analytical Appraisal of Section 4(a)

(a) Many scheduled areas are multi-tribal; ethnographic studies all over India show that customary laws differ from tribe to tribe and sometimes even within the same tribe in different eco-cultural zones. One wonders the State Legislation will conform to the customary law of which tribe.

(b) Is there any statutorily competent authority/process, other than the long drawn judicial process, to make a legally binding statement that any particular legislation

enacted by the State Legislature is/is not in consonance with customary law, etc., of the concerned tribe/tribes? Apparently, only the Sixth Schedule of the Constitution provides for statutory authority of a sort, though in this also there is a mix of the juridical process and political process. But the Fifth Schedule does not provide for any such mechanism.

(c) Reference to traditional management practices of the resources opens up complex issues. First, of course, is the problem of authentication of traditional management practices. On this matter, two decades back an interesting case study was published by the author of this paper. The second is the problem of harmonization of traditional resource management practices of diverse people laying claims over resources in the same geographical space. Third, and perhaps the most important issue, is the problem of harmonization of traditional resource management practices with emerging non-traditional uses of the same resources. Speaking in universalistic terms in this matter, balancing/synthesizing procedural law and substantive law is involved.

In taking a decision on such controversial matters, the judicial authority takes cognizance of the travaux preparatoire**.** Perhaps the Bhuria Committee Report and the documents related to the preparation of the Report may be considered as the travaux preparatoire insofar as the PESA Act is concerned and as it is understood that the Bill was adopted without any discussion in Parliament, the documents relating to the decision that the Bill would be adopted without discussion would also constitute travaux preparatoire. Any serious discussion on the PESA Act and the State Acts (conforming or non-conforming to the provisions of the PESA Act) will require these documents to be examined.

2. Definition of Village — PESA Contradicts Itself

Section 4(b) defines a village as follows: "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 tradition and customs".

Analytical Appraisal of Section 4(b)

(a) As in the case of section 4(a), here also one faces the problem of authentication of tradition and customs.

(b) In this sub-section, the term "community" seems to have been used in a micro-territorial sense, but in section 4(g) the term "community" has been used in an ethnic sense. Thus, there has been code-switching in the Act from one meaning of the term to another, creating confusion thereby.

(c) While in section 4(a) it has been stipulated that the State Legislation shall be in consonance with customary law, etc., by analogy it is expected that the PESA Act would also be governed by the same spirit and approach. In many parts of India, the tribal habitats consist of a core ethnic entity or a segment of it (for example, a lineage) and a small number of households belonging to other distinct ethnic entities rendering specialized functions and services. The core ethnic entities have trans-territorial linkages for safeguarding their interest vis-à-vis the apparatuses of the state and against increasingly large numbers of non-state agencies. Small ethnic entities, which earlier had symbiotic relations of varying degrees of intensity with the core entity in proximity, maintain trans-territorial ethnic linkages to safeguard their interest vis-à-vis the core dominant ethnos as well as new existential challenges from external sources. Thus, different tribal predominant areas have multi-faceted ground realities. In this context, the attempt to impose a definition of "village" in a uniform manner (and with internal semantic inconsistencies) cannot claim to be in consonance with tribal customary law.

(d) Available ethnographic literature shows that most of the tribal villages are existing in their current habitats with their territorial jurisdiction from the hoary past. This does not mean that status-quo must be maintained in all cases. But rather than creating new territorial entities through legal instruments, the best course would be to recognize the existing villages and village boundaries, and leave it to the people as a whole to formally pass a resolution indicating, with reasons, the changes they want in their spatial jurisdiction. It is quite likely that there will be a conflict in this matter among adjoining villages. In such cases, intermediate level panchayats, rather than the state bureaucracy, may be vested with the power of arbitration and reconciliation.

3. Gram Sabha: Village Moral Community

Section 4(c) stipulates, "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".

Analytical Appraisal of Section 4(c)

Without opposing this provision, one may ask whether it is always in consonance with tribal traditions and customs. In many tribal villages, a few non-tribal households and establishments are found to exist for quite some time, with varying degrees of concentration of economic, social and political power. Though they are residents of the tribal villages, they are not considered to be members of village moral community and they are not expected to participate in the tribal village meetings convened through their traditional channels to settle their own affairs. Their enfranchisement may expand the participation of the territorial population, but may erode the authority of the tribal moral community. Though on the face of it, this looks like an intractable problem, to one acquainted with different systems of tribal self-rule, reconciliation of the two principles, namely, functioning of universal territorial citizenship and functioning of historical ecology rooted moral community may not appear beyond human ingenuity. But before addressing this problem, some of the incongruities embedded in the PESA Act require to be cleared first. The problem of reconciliation of the two principles will be dealt with in the latter part of this paper. In the meantime, it may be asked that if some State governments deviate from section 4(c) of the PESA Act on the ground that it is not in consonance with the customs and traditions of hardly any tribal people, then can the concerned State Government be forced to fall in line by taking recourse to the specious logic advanced by some enthusiastic campaigners of the PESA Act that it is an integral part of the Constitution?

4. Competence of Gram Sabha to Preserve Tradition

Section 4(d) to the effect that "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" reads like a proclamatory statement. Anyone acquainted with the tribal communities, not as an administrator, but as a systematic researcher, knows that there is hardly any tribe, which lives in isolation from its compeers inhabiting more than one habitat. Otherwise, continuous inbreeding within a single habitat would lead to genetic aberrations and ultimate extinction. There are hierarchies of behavioural norms, which are regulated at different levels. There are

behavioural norms which are decided at the household level; there are norms which are decided at lineage level; norms enforced at territorial-community level, and norms amplified, reinterpreted, redefined and enforced at a much larger community level. It is a continuous process. In the context of the proclamatory nature of the stipulation in the Act, one wonders, it is addressed to whom? Is it addressed to the state functionaries and/or non-state vested interests prowling around to siphon off the resources under custodial jurisdiction of the tribal people? In that case, they will be only too happy to deal with each territorial unit separately, which will be unviable to collectively resist any exploitative intrusion or any undemocratic, obscurantist imposition. Or is it addressed to the tribal habitats in isolation, to sunder their collectivist ties so that they become pliable entities at the mercy of external infringing agencies? Or is it addressed to the inter-habitat larger tribal organizations, which after moribund existence for sometime, are showing signs of revitalization of organizational structure, reinvigoration of their functional relevance by creative engagement with the challenges of contemporary life situation and by focusing on the dialectical relations between customs and traditions? [Customs are contingent behaviour related to specific situations; traditions have an ethical aura rooted in the conviviality orientation of human nature.] If the proclamatory statement in section 4(d) is not to be considered as antinomous to the humanist resurgence of the tribal people through their collective dialogue with the age old externalities, the only ground on which the doubt can be kept in abeyance is recognition of the ignorance of the formulators of this proclamatory statement about the dynamics of tribal life process and about the conviviality oriented ferment taking place among the tribal and indigenous people, at all levels, all over the world.

5. Role of Gram Sabha in Planned Development

Section 4(e) inter alia provides that "Every Gram Sabha shall (i) approve 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; and (ii) be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes."

Analytical Appraisal of Section 4(e)

a) It is assumed that the right to approve plans, programmes and projects also implies the right not to approve plans, programmes, etc., though this right is not clearly stated in the Act. What, however, is significant is that the Act does not recognize

the right of the gram sabha to generate its own plan for social and economic development as it perceives to be relevant not only for it, but for the larger society. One finds in this a logical discontinuity in the structure of the Act. As already mentioned, this Act considers "gram" as a spatial expression on a self-managing community in accordance with its traditions and customs. The 'gram sabha' is only a legally structured expression of 'gram samaj' (village community). Logically, therefore, the core activity of the gram sabha should be preparing and implementing the plan, programme and strategy, drawing primarily on its traditional system of resource mobilization and utilization; externally sponsored other activities should be ancillary to its core activity. In the absence of any mention of its traditional resource management related core activity, section 4(e) seems to have no function other than mere linguistic ornamentation.

b) Section 4(e) reveals a mind-set not committed to tribal freedom of action but to tribal bondage. It speaks of the "responsibility" of the gram sabha (not the right of the gram sabha) for identification and selection of persons as 'beneficiaries' (not active participants) in "poverty alleviation" and other programmes. Here, the language used is the language of patrimonialism, not of partnership. One certainly is entitled to ask whether this approach in the Central Act is in consonance with the "customary law, social and religious practices and traditional management" according to which State Legislatures are to enact their respective laws.

c) Here, it is necessary to mention that the internal inconsistencies in the linguistic structure of the Act are not just to prick holes, they have a more substantive purpose. Available information indicates that there is a very high concentration of productive resources in ancestral domains and current tribal predominant areas of the country. If, in spite of this, the percentage of tribal people below the poverty line is almost double the national average, it is because of the pursuit of aberrant policy decisions in planning. The wrong policy decision in their turn seems to be related primarily to the technocratic approach to planning, without adequate understanding of the social processes and people's resource management system on the ground. The Planning Commission had set up a Committee on India Vision 2020. The report of the Committee was published in 2003. As soon as it was published, analytical studies carried out by various agencies and public discourses,

including one on Food Security in India sponsored by the National Institute of Rural Development, showed that some of the important assumptions particularly relevant to tribal areas were wrong. Again, an analysis of the data relating to forestry, published by the Government of India in the year 2000 and then in 2004, shows that the assumptions about relative efficiency of forest management by the Forest Department and tribal communities, respectively, are not validated by hard facts, including those available through aerial survey and ground level appraisal of management structures.

d) In the light of these revelations, the passive role envisaged for the gram sabha of just selecting the 'so-called' beneficiaries and of monitoring the implementation of pre-fabricated plans and programmes is a mockery of tribal self-rule.

But the gram sabha in isolation cannot make much dent on the national planning policy. Interlinkages of tribal organizations of different levels, and networking not only among the organizations of different tribes but also involving organized forums of peoples of broadly similar socio-economic category, would be necessary. With this perspective, the other provisions of the Act would be examined and analyzed.

6. Structural Limitation of Gram Sabha

Section 4(f) provides that "Every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilization of funds by that Panchayat for the plans, programmes and projects referred to in section 4(e)".

Analytical Appraisal of Section 4(f)

a) Notwithstanding the extreme limitations of section 4(e), the provision in section 4(f) has some use, but its utility is constrained by lapses in the Act. The Act does not indicate who would be the convenor-cum-presiding officer of the gram sabha meeting and who will maintain the record of the meeting. Field investigations show that while in some States the sarpanch is the convenor-cum-presiding officer of the meeting of the gram sabhas and the Secretary of the gram panchayat prepares the proceedings of the meetings, in some other States the members of the gram panchayat (in whose constituency the concerned gram sabha is located) are the convenors-cum-presiding officers of the meetings. In all cases, however, the proceedings are prepared by the Secretary of the gram panchayat. In either case, the high possibility of the gram sabha meetings turning into a mere formality with

hardly any bearing on the substantive matters cannot be ruled out. Here, it is to be noted that while the Bhuria Committee has been almost ecstatic about the role of traditional panchayats of the tribal people, the Act, supposed to be based on the report of the Bhuria Committee, does not make any provision for interarticulation of traditional and statutory panchayati raj institutions. At least a symbolic link can be established by stipulating in the Act that the head of the traditional panchayat will be the convenor-cum-presiding officer of the gram sabha and that the traditional village hawker will communicate to the villagers the venue and time of the meeting. It may also be provided that the headmaster of the village primary school, or a teacher deputed by him, will maintain the records of the meetings.

b) While the Act requires the panchayats to obtain a fund utilization certificate from the gram sabha, it is silent about other organizations functioning within the jurisdiction of the village. For instance, in some States there are Joint Forest Management Committees functioning autonomously of the panchayats. These and similar other institutions operating within the jurisdiction of a village should submit themselves to the planning, monitoring and scanning functions of the gram sabha. And the Central Act itself should be clear on this matter.

7. Reservation of Seats in Panchayati Raj Institutions (PRIs)

Section 4(g) provides that "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 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".

Analytical Appraisal of Section 4(g)

a) As mentioned earlier, while in section 4(b) the term 'community' has been used in a micro-territorial sense, in section (g) the term has been used in an ethnic sense. It should be added that in section 4(a) the term community has been used in an ambiguous manner. It can be interpreted to mean a micro-territorial pluri-ethnic community; it can also mean an uni-ethnic community with spatial nexus.

b) There are many villages in Scheduled Areas without any tribal population or with a miniscule number of tribal persons. Again, there are many taluks and districts, only small territorial segments of which have been notified as Scheduled Areas. In such areas it is not unusual to find that the Scheduled Tribes constitute much less than 50 percent of the population. It seems that when section 4(g) of the Act was drafted, the demographic profiles of the concerned areas were not examined in quantitative terms. In the situation, as it obtains at present, implementation of section 4(g) would obviously create manifold complications.

c) It is argued by some that the problem can be skirted by redefining the village taluk and district boundaries. Such a mechanical approach to a complex problem seems to ignore that most villages, and many taluks and districts, do not mean dead space to those who have inhabited them for generations. These are replete with histories, sacred memories, and fond whispers of the ancestors. Techno-bureaucrats may disfigure them with pencil marks on the maps, but many will look upon this as administrative vandalism.

d) There are, however, more mundane considerations as well. Carving out new administrative entities, particularly at the taluk and district level only on considerations of ethnic homogeneity will, while in many cases promote ethno-regionalism, retard rationalization, or interdependent functional differentiations of different orders. There is a fundamental difference between regionalism and regionalisation. Regionalism is an exclusivist subjective attitude over-focused on a limited number of traits in a selective manner; regionalisation on the other hand is a process of creating functional interdependence of economies and services of different levels of specialization. Given the fact that in most of the tribal predominant areas infrastructure for services and marketing are inadequate, and the percentage of tribal population with effective education (School Final and above) and with vocational education is also generally low, the predominantly tribal taluks and districts may be rich in natural resources but for extraction of the same in a viable manner and processing the same for the market either they will have to induct non-tribal labour force on a massive scale, or they would have to export unprocessed resources to areas outside their administrative jurisdiction, thus risking social tension or debilitating the economy. It is not known whether

those who advocate large-scale reorganization of administrative units have given enough thought to this problem.

e) There is another mundane problem, which also must be kept in view. Carving out a large number of taluks and districts from the existing ones, to create homogenous predominantly tribal entities, will create a large number of government posts, particularly at the higher level. While techno-bureaucrats will be happy at this prospect, the cost of governance will go up and, rather than self-rule, the prospect of the tribal peoples being under more intensive techno-bureaucratic control would become a distinct possibility.

8. Nomination of Unrepresented Tribes

Section 4(h) provides that "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 the panchayat".

Analytical Appraisal of Section 4(h)

Nomination of members from unrepresented communities will open up the floodgates of political manipulation by State level politician-bureaucratic caucus. It smacks of a divide and rule strategy. Rather, the system of cooption by elected tribal members from the concerned tribal communities should be adopted. It is likely to cement solidarity among the tribal peoples.

9. Consultation with Gram Sabha before Land Acquisition

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

Analytical Appraisal of Section 4(i)

This is a very weak framework of tribal self-rule. It requires the gram sabha or panchayats at the appropriate level to be only consulted before making acquisition of

their land. It does not require the approval or consent of the gram sabha or the panchayat at the appropriate level. To add insult to the injury, it makes a vague stipulation that the actual planning and implementation of the projects shall be coordinated at the State level. It does not make it clear the coordination at the State level will be done among whom and through what mechanism. There is no indication as to whether in planning and coordination the panchayat bodies at appropriate level would be involved. While hair-splitting controversies are carried on about how to legitimize or delegitimize the status of the tribal villages, which are there for ages, it is strange that hardly any critical position has been taken by those who are campaigning for the PESA Act in its present form to be accepted by all States having Scheduled Areas within their jurisdiction, almost as a sacred testament of tribal self-rule, on this matter involving the life-support resource base of the tribal peoples.

10. Planning and Management of Water Bodies

Section 4(j) provides that "Planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level".

Analytical Appraisal of Section 4(j)

a) One would like to know planning and management of minor water bodies in the Scheduled Areas would be entrusted with the panchayats by whom? Earlier it has been noted that section 4(b) of the Act speaks of village as the spatial base of a community managing its affairs in accordance with traditions and customs. Section 4(a) stipulates that the State Legislation should be in consonance with the traditional management practices of community resources.

   One wonders whether the foregoing stipulations hold good only for State Legislation or whether they hold good for Central Legislation also. Any rational person would say that stipulation at 4(a) and the descriptive enunciation at 4(b), whatever may be its worth, hold good for Central Legislation also.

b) One would now like to ask: how do those who are responsible for the PESA Act, 1996 know that the provision at section 4(j) is in consonance with "traditional management practices of community resources"? Ethnographers know that among many tribes water body management is a dimension of village moral economy and the entire community is involved in the decision-making process in this matter. But the PESA Act constricts this process.

c) In the context of the foregoing fact, "entrusting" the management of minor water bodies would have two alternative implications: (a) the State takes away from the village community the right of managing water bodies and vests this right with the panchayat, or (b) the village community surrenders its traditional right of the water resources management to the panchayat, which is a creation of the State through the legislative process.

Certainly, this is not a paragon of tribal self-rule. Besides, this is an infringement of the moral economy of the tribal peoples.

[Moral economy implies non-implementation of fixed rules, but a process of continuous adjustment in resource allocation and utilization harmonizing with culturally embedded ethical principles.]

11. Grant of Prospecting or Mining Lease

Section 4(k) lays down that "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".

Analytical Appraisal of Section 4(k)

a) The language of this section is ambiguous. It may mean (i) recommendation for undertaking prospecting, or (ii) recommendation in the matter of selection of the prospecting license of leaseholder.

b) One would like to know whether prospecting for minerals would be held back if the gram sabha or panchayat does not recommend prospecting for minor minerals within its jurisdiction.

c) The word 'recommendation' in this section seems to be inappropriate. The appropriate word should be 'consent'.

12. Exploitation of Minor Minerals by Auction

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

Analytical Appraisal of Section 4(l)

(a) As in the case of section 4(k), this section is also marked by ambiguity. It speaks of mandatory recommendation of gram panchayat for exploitation of minor minerals according to certain procedures. It is to be examined whether in case of adoption of a different procedure, recommendation of the gram panchayat would be mandatorily required under law.

(b) As in the case of section 4(k), in this section also it seems that the appropriate word should be 'consent' and not 'recommendation'.

13. Empowering Panchayats as Institutions of Self-Government

Section 4(m) reads as follows: "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, (ii) the ownership of minor forest produce, (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, (iv) the power to manage village markets by whatever name called, (v) the power to exercise control over money-lending to the Scheduled Tribes, (vi) the power to exercise control over institutions and functionaries in all social sectors, (vii) the power to exercise control over local plans and resources for such plans including tribal sub-plans".

Analytical Appraisal of Section 4(m)

a) The powers mentioned in this section are of two categories: (a) powers which are of executive nature and can be delegated by the concerned State government, (b) law-making powers which can be exercised by various entities only by conforming to the basic structure of the Constitution as spelled out in the Keshavananda Bharati case.

b) Ownership of minor forest produce, power to manage village markets by whatever name it is called, power to exercise control over institutions and functionaries in all social sectors, power to exercise control over local plans and resources for such plans including tribal sub-plans are of executive nature

and can be delegated by the State Legislatures on other entities within their respective jurisdiction. But by endowing such powers through delegation of authority to the panchayats, the State Government will make the latter subordinate organs of the state. This is a far cry from the thrust towards tribal self-rule.

c) The power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant, the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe, the power to exercise control over money lending in Tribal Areas, to be effective, and self-regulatory will require law-making power, judicial power and power of control over the law enforcing machinery to be vested with the panchayats. In view of the famous Delhi judgment by Justice Mahajan in 1950, it is unlikely that State Legislatures can vest law-making powers on panchayat bodies. Judicial power and police power up to a certain extent can of course be conferred by the State Legislature, but it will require radical transformation of the political climate of the country. In fact, conferment of all the powers mentioned not only in section 4(m) but also in 4(k) and (l) will require radical political mobilization on a massive scale. It is doubtful whether the dominant political class in the country, irrespective of party affiliation, is ready today for such a radical political mobilization.

14. Nature of Relation among PRIs at Different Levels

Section 4(n) stipulates that "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".

Analytical Appraisal of Section 4(n)

One would like to know whether those in formulating this section of the PESA Act can vouch that it is in consonance with customary law, social and religious practices and traditional management practices of all or at least the major tribal communities of the country. Are they aware of the Pargana system of the Santal and the role of Lo Bir

among them? Or are they aware of the Parha system of the Oraon, Pir system of the Munda, Manki Munda system of the Ho, inter-village organizations of the Bhils sometimes going beyond the jurisdiction of revenue districts, mother village and ancillary village of the Abujhmaria, traditional Gond political structure, and so on? In the traditional systems almost among all the tribes of India and even outside India, powers and functions of their territorial and kinship based institutions at different levels are well defined. Functions of more elementary level are discharged by minimal level kinship and territorial institutions, and through hierarchical channels certain functions relevant for the entire tribe are discharged at the maximal level of traditional territorial and kinship entities. Without clarifying the general principle, vesting power with State organs to interfere with the tribal systems tantamount to a blatant infringement of tribal self-rule. Bureaucratic rationality has overshadowed historical normative reasoning of the concerned peoples at a time when the tribal peoples and their resource base have become vulnerable to the exploitative policies and programmes over which the authority of even the national government are being diluted. The stipulation in this section lacks perspective and understanding of the ground reality. The matter should have been left to the tribal peoples themselves to determine the patterns of relations among the panchayati raj structures at different levels according to their own customs, traditions and emerging need perception.

15. Adoption of Sixth Schedule Model at District Level

Section 4(o) provides that "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 the district levels in the Scheduled Areas".

Analytical Appraisal of Section 4(o)

One wonders whether those responsible for the insertion of this section in the PESA Act are aware that there are no uniform administrative arrangements in the tribal areas covered by the Sixth Schedule. If they are aware of any particular pattern they have in mind, the same should have been spelt out in the PESA Act itself.

16. Politics of Continued Transition

Section 5 of the Act is a transitional arrangement, but in some States the transition has continued for too long. It should not be considered as a mere technical legal lapse; it should be looked upon as a political problem and its implication should be analyzed from the political perspective, and not merely from the legal administrative perspective.

Reconciling Territorial Citizenship and Moral Community

Mention was made earlier of reconciling the principles of territorial citizenship and historical ecology rooted moral community. One of the ways of doing it is by introducing a system of functional differentiation of gram sabha in two categories, namely, (a) civil and traditional, and (b) ethno-social. For dealing with matters of common civic interest, the membership of the gram sabha should be open to all residents of the village. For dealing with matters of ethno-social and customary nature, the gram sabha will recognize a core unit - the membership of which would be confined to tribal peoples of the village. This is a minimalist approach, combining the procedural aspect and substantive aspect of the law. What is needed is the "will" to find a solution.

There should be other solutions as well, by highlighting more the substantive aspects. But as the basic structure not only of the PESA Act, but also of the 73rd and 74th Amendments and even of the Bhuria Committee Report (which is supposed to have provided the frame of the PESA Act), are by and large informed by the Austinian paradigm of command law with loosely fitted sprinkling of Roscoe Pound's paradigm of sociological law, greater emphasis on substantive law moving towards the social solidarity function of the law, as envisaged by Duguit, will require the PESA Act to be discarded and even the 73rd and 74th Amendments of the Constitution to be further amended.

Tribal self-governance is not merely a matter of conformity to certain procedural rules, but also of active engagement in a wide array of substantive issues. In the latter aspect, the Act is extremely narrow in focus. Space will not allow to further elaborate the point in this paper.

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