

**BHUBANESHWAR DECLARATION ON  
DEMYSTIFYING PESA**

**[PANCHAYATS (EXTENSION TO THE  
SCHEDULED AREAS) ACT, 1996] \***

***B.K. ROY BURMAN***

***\* Workshop organized by  
Institute of Socio-Economic Development,  
Bhubaneswar on 18-20 May, 2006***

The participants of the workshop on “**Demystifying PESA**” held in Bhubaneswar during 18-20 May 2006 thank the Institute of Socio-Economic Development, Bhubaneswar for taking the initiative of getting a threadbare analysis made of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996.

Further, the participants thank Prof. B.K. Roy Burman, an eminent anthropologist and policy analyst of the country (and former Member, Central Advisory Board for Scheduled Tribes Development and also the Central Advisory Board for Scheduled Caste Development), and Prof. L.K. Mahapatra, an eminent anthropologist and former Vice-Chancellor of Utkal University (Bhubaneswar) and Sambalpur University (he was also Member of the Central Advisory Board for Scheduled Tribes Development), for serving as resource persons of the workshop.

The workshop records its profound thanks to Shri Chaitanya Prasad Majhi, Hon’ble Minister, ST and SC Development, Orissa for actively participating in the deliberations of the workshop and hearing the views of the tribal leaders and headmen from almost all Schedule-V districts of Orissa. The workshop also expresses deep appreciation to Dr. Giridhar Gomang, M.P. (who was former Chief Minister of the state) for his valuable contribution during the deliberations of the workshop.

The workshop, after taking into consideration the grassroot level experiences of the participants and detailed discussions with the resource persons, hereby proclaims that the PESA suffers from the following infirmities:

- (a) Whereas the PESA requires the State legislations to conform to tribal customs and practices, and as on the other hand most of the Scheduled areas are multi-tribal, it is not

clear as to whether the state legislation will conform to the customs and practices of which tribe.

(b) As there is no statutorily competent authority to make a legally binding pronouncement that any particular legislation enacted by the State Legislatures is/is not harmonious with the customs and practices, etc., of the concerned tribes, the provisions in the PESA in this regard are nothing more than a pious sentiment.

(c) (i) Whereas according to section 4(b) of the PESA, a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs, it is not clear as to who will authenticate the tradition and custom, and how.

(ii) Besides, whereas in section 4(b) the term ‘community’ has been used in micro-territorial sense, in section 4(g) it has been used in the sense of ethnic segment, thus revealing inconsistency in respect of a core concept of the PESA.

(iii) Whereas, either in the sense of a micro-territory or in the sense of ethnic segment, the PESA has equated physical space with social space, in real life the nature of resource management entity differs from tribe to tribe and region to region.

Whereas, by ignoring these ground realities and by defining ‘village’ in a uniform manner, the PESA as a Central Act, has violated the spirit of the edict it has prescribed for the State legislation. The workshop expresses its considered view that rather than creating new territorial entities through legal instruments, the appropriate course would be to recognize the existing village boundaries, leaving to the concerned people to pass a resolution indicating with reason the changes that they want in their spatial jurisdiction.

(d) Whereas by requiring in section 4(c) that every village shall have a Gram Sabha (GS) consisting of persons whose names are included in electoral rolls for the panchayat at the village level, the PESA has failed to recognize that in many villages in the Scheduled Areas there are tribal peoples generally constituting moral communities at the level of ethos and non-tribal population claiming inalienable rights of civic democracy, and thus has failed to address the problem of reconciling the roles of these two categories of social entities. In this context, the workshop takes note of the fact that in some states attempts

have been made to reconcile the two roles by providing that the head of the traditional council of the major tribe of the village would serve as the chairperson of the GS, which would consist of all adult persons of the village - whether tribal or non-tribal. There are also other ways of reconciling the two roles, but the simplest one is being suggested for the scheduled areas. The workshop is of the view that this should be incorporated in the statute, by an amendment of the PESA.

- (e) Section 4(d) stipulates to the effect that every GS shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of conflict resolution. Whereas the stipulation in this section is of the nature of a proclamation, one would like to know to whom is it addressed. If it is addressed to state functionaries and/or non-state interests prowling around to siphon off resources under custodial jurisdiction of the tribal peoples, it does not require much intelligence to appreciate that the concerned segments of the bureaucracy and the vested interest would be too happy to deal with each territorial unit separately (as this will be unviable to collectively resist undemocratic and obscurantist imposition of any exploitative intention). If on the other hand, the proclamatory assertion in this section is addressed to the tribal habitats in isolation, to cut off their collectivist ties, it is to be considered whether in their isolated action they will not become pliable entities at the mercy of external agencies.

Leaving aside the ambiguity and misplaced emphasis on competence of tribal communities in functioning in isolation at the village level to safeguard and preserve their tradition, custom, etc., the workshop is of the view that the proclamatory statement in section 4(d) is factually incorrect. Most tribal peoples have their inter-village social organizations, through which they decide the modality of safeguarding and preserving their traditions, customs, etc. The workshop takes note with disfavour of this proclamatory statement and looks upon it as a crude attempt to intervene with the system of self-management of the tribal peoples.

- (f) (i) Whereas section 4(e) vests every GS with the power to approve the plans, programmes and projects for social and economic development at the village level, the participants in

the workshop note with dismay that the Act does not recognize the right of the GS to generate its own plan for social and economic development.

The workshop further emphasizes that whereas logically the core activities of the GS should be preparation and implementation of the plan, programme and strategy for development, drawing primarily on its traditional systems of recognition, identification, mobilization and utilization of resources, in the absence of any mention of its traditional resource management system-related core activity, section 4(e) of PESA seems to have no function other than verbal ornamentation.

- (ii) Whereas section 4(e) also speaks of the responsibility (not right) of GS for identification and selection of beneficiaries (not active participants) the language used is language of patrimonialism. In other words, the participants in the workshop view the passive role envisaged for the GS of just selecting the so-called beneficiaries and monitoring the implementation of the prefabricated plans and programmes as a mockery of tribal self-rule. It is a journey to bondage, not to freedom.
- (g) Whereas section 4(f) provides that every panchayat at the village level shall be required to obtain from the GS a certificate for utilization of funds by that panchayat for the plans, programmes and projects mentioned at 4(e), and whereas the workshop is of the view that notwithstanding the extreme limitation of section 4(e), the provision of section 4(f) has some use; it is noted that the usefulness is circumscribed by several lapses in the Act, to which the Act does not indicate who would be the convenor-cum-presiding officer of the GS meeting and who will maintain the minutes of the meeting. Besides, while the Act requires panchayats to obtain a fund utilization certificate from the GS, it is silent about the requirement of other functioning authorities within the jurisdiction of the village, to do the same.
- (h) Whereas section 4(g) provides that 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.

The workshop noted that the foregoing provisions do not conform to the demographic realities. It notes that out of 236 districts in 9 states having Scheduled Areas, only the case of 17 districts as a whole has been scheduled. Of these 17 districts, in two districts STs are in the minority. Again, out of the 52 partially scheduled districts as in 1991, in 5 districts STs constitute less than 5 per cent of the population. In the case of districts with a very small percentage of ST population, reservation of seats in the manner indicated would cause unnecessary conflict and tension.

- (i) Whereas section 4(h) provides that the State Government may nominate persons belonging to such STs as have no representation in the panchayat at the intermediate and district levels, the workshop notes that this provision may open up floodgates of political manipulation by state level political bureaucratic nexus. The workshop suggests that if the system of cooption by the elected tribal members from the concerned tribal community is adopted, it is likely to cement solidarity among the tribal peoples.
- (j) Whereas section 4(i) provides that the GS or the panchayats at the appropriate level shall be consulted before making the acquisition of land in Scheduled Areas for development projects and before resettling persons affected by such projects in the Scheduled Areas, the workshop considered this as a very weak framework of tribal self-rule. It requires the GS or panchayat at the appropriate level to be consulted only before making acquisition at the respective level; it does not require the approval or consent of the GS or the panchayat at the appropriate level. To add insult to injury, it makes a vague stipulation that actual planning and implementation of the project would be coordinated at the state level; it does not clearly demarcate that the coordination at the state level will be done among whom and through what mechanism.
- (k) Whereas section 4(j) provides that planning and management of minor water bodies in the Scheduled Areas shall be entrusted to the panchayats at the appropriate level, the workshop wonders, the act of entrustment would be done by whom and under what

authority? Besides, does the OBC foregoing stipulation hold good only for state projects or for central projects also?

- (l) Whereas section 4(k) lays down that the recommendations of the GS or the panchayats at the appropriate level shall be made mandatory prior to grant of license or mining lease for minerals in Scheduled Areas, the workshop is of the view that the language of the section is ambiguous. It may mean recommendation for undertaking prospecting or leaseholding. Also, it is not clear whether prospecting for minerals would be held back if the GS or panchayat does not recommend prospecting for minor minerals within its jurisdiction. Besides, the word 'recommendation' is inappropriate; it should be replaced by 'consent'.
- (m) Whereas section 4(l) requires that the prior recommendation of the GS or the panchayats at the appropriate level shall be made mandatory for grant of concession for the exploration of minor minerals by auctioning. The workshop is of the view that as in case of section 4(k), this section is also marked by ambiguity.
- (n) Whereas 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 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, and (vii) the power to exercise control over local plans and resources for such plans including tribal sub-plans".

The powers envisaged are dual in nature, namely: (i) executive and judicial power, and (ii) legislative power. As the State Legislature is competent to confer the panchayat bodies with powers of executive and judicial nature, without invoking the authority of the Fifth Schedule

of any central act, it is not clear as to why such conferment of power should be confined to Scheduled Areas and not all such areas in the State where the STs are found in sizeable numbers. On the face of it, the PESA seems to be an exclusionary device rather than an encompassing device to empower the STs all over the country.

As regards the legislative power, in view of the famous Delhi Judgment of 1950 delivered by Justice Mahajan in the Supreme Court, it is obvious that the State Legislature cannot confer such power to panchayat bodies notwithstanding whatever has been stipulated by PESA. The only way legislative power can be conferred on statutory bodies below the State Legislature is by introducing the Sixth Schedule of the Constitution.

In view of the restrictive character of the Fifth Schedule, which the 7<sup>th</sup> Plan Working Group for the STs has dubbed as paternalistic in thrust, and in view of the recommendation of the PESA of conferring power of legislative nature on the panchayat bodies, the workshop recommends that the Sixth Schedule, which the 7<sup>th</sup> Plan Working Group has recognized as having the grains of self-management of the Constitution, should be introduced in all ST predominant areas.

Self-management provision for the ST peoples through the institutional arrangement of the Sixth Schedule will not, however, serve its purpose; it may rather backfire unless the strategic entities of the nation recognize and respect the dignity of the ST peoples and their life-ways - particularly their creative engagement with the endowments of nature.

Unfortunately, the role of the most important strategic entity, the Tribal Affairs Ministry, Government of India, seems to be negative in this regard. In their website, the Ministry has put the following indicators for identification of the Scheduled Tribes (a) primitive traits

(without specifying what they are), (b) economic backwardness, (c) shy of contact with society at large, (d) isolation, and (e) distinct culture.

Various authorities have suggested various other criteria, but the Ministry, for reasons unknown, selectively adopted the foregoing criteria. While distinct culture is unexceptionable, others are either a-historical or non-fact and biased. This, in its turn, has set in motion another unfortunate trend. Of late, many communities are trying to get recognized as STs and to support their claims they selectively put forward, or sometimes even concoct traits, supportive of the presence of the foregoing traits among them. Thus, a trend of self-denigration, for the sake of some benefits of concessions, is surfacing.

The workshop is firmly of the view that the root must be stemmed. The Workshop calls upon the social scientists to develop a set of criteria more reflective of current thinking about the significance of tribal people's life-ways, particularly about their sharing with and caring for persons in the same social orbit, their extension of self in the surroundings, their veneration of the endowments of nature and their internal self-regulation rather than over-dependence on state machinery.

The workshop strongly discourages some sections of the tribal population from being stigmatized as primitive tribes, because of alleged primitiveness, pre-agricultural economic pursuit and stagnation in population growth. As already noted, all tribal peoples are claimed by the state to be identified by possession of so-called primitive traits, without indicating what the primitive traits are. If it is not bad enough, the problem is further compounded by ascribing that the 'Primitive' tribe also possess primitive traits. Then at the conceptual level they are primitive of primitives. This is negatively running amok. As regards stagnation of growth, it is found among many highly sophisticated people in the West. In India, the past also shows stagnation of growth. As regards pre-agricultural stage of economy, there is hardly any person anywhere in the world who does not have at least a symbiotic relation with agricultural or post-agricultural production system. There are, however, people among the

STs who are more vulnerable than others, to economic, cultural and social onslaughts. The workshop strongly suggests that the term ‘primitive tribe’ may be replaced by the term ‘Vulnerable Tribe’. Also, the workshop strongly suggests that the term ‘de-notified tribe’ should be replaced by the term “Vulnerable Tribe”, as use of the term ‘de-notified’ inevitably rakes up the unpleasant memory, that rightly or wrongly, the concerned peoples had sometime been notified as ‘criminal tribe.’

### **Post Script**

Prof. Mahapatra suggested that in those cases in which State legislations fall short of the positive elements of the central law, the latter will prevail. This was accepted.

Sri Giridhar Gomang, M.P. (former Chief Minister of Orissa) who attended the session, moved an amendment to the effect that the State Government may be requested to enact a legislation taking care of the infirmities of the PESA, incorporation of all the positive provisions of PESA, and also providing that the scope of the same Act should be extended to all MADA (Mining Area Determined Annually) and tribal cluster areas. The amendment was unanimously accepted.

\* \* \* \*