TRIBAL ADMINISTRATION POST INDEPENDENCE

In acknowledgement of the marginality of tribal communities, a number of Committees and Commissions have been constituted over the years by the government to look into the issues facing tribal communities, apart from numerous other bodies which have examined the status of tribes as part of broader thematic investigations. One of the first committees set up in this regard post-1947 was the Elwin Committee which was to examine the functioning of Multi-Purpose Development Blocks, the basic administrative unit for all tribal development programmes. This was followed by the U.N. Dhebar Commission, constituted in 1960 to address the overall situation of tribal groups, including the issue of land alienation in tribal areas. The Lokur committee, set up in 1965, looked at matters relating to the scheduling of groups as Scheduled Tribes. It was this committee which delineated the criteria for scheduling, which continues to operate to this day. The Shilu Ao committee, 1966, like the Elwin committee, addressed the issue of tribal development and welfare.

The 1970s, too, saw the constitution of several committees to address tribal problems and it was on the basis of the recommendations of some of these committees that the Tribal Sub-Plan approach of the government emerged. The committees constituted in the more recent years have been the Bhuria Committee (1991) and the Bhuria Commission (2002-2004). The Bhuria Committee recommendations paved the way for the enactment of the PESA Act, 1996, while the Bhuria Commission focused on a wide range of issues from the Fifth Schedule to tribal land and forests, health and education, the working of Panchayats and the status of tribal women. The most recent committees have been the Bandopadhyay Committee, which looked at development and governance in Left-Wing Extremist areas, and the Mungekar Committee, which examined issues of administration and governance.

The issues that the above-mentioned Committees have dealt with fall broadly into two categories: development and protection. And yet, on both these issues, the outcome for tribal communities has been mixed. Through the last six decades, the State has emphasized development while doing little to enhance the protections provided in the Constitution through the everyday practice of statecraft. Rather, the protective measures have been violated by the very State which is supposed to ensure the enforcement of these protections. It is this which largely explains the marginal status of tribal communities.

The substantive issue of the socio-economic, educational and health status of tribal communities are an integral part of the development agenda that the State has been pursuing for its citizens. With respect to tribal development, there were two prominent colonial discourses which have continued into the postcolonial period. In one of the discourses, the overall condition of tribal people, including their poverty, is attributed to their social and geographical isolation. Correspondingly, the whole thrust of the approach to tribal development in independent India was to be centred on the integration of tribes into the larger Indian society. In fact, their integration was seen as the solution to tribal 'backwardness'. There was, however, also a dramatically contrasting explanation for their poverty. The main architect of this view was Verrier Elwin who attributed their deplorable and impoverished condition to their contact with the outside world, which had led to indebtedness and loss of control over their land and forests. The nationalist leadership recognized both of these dimensions and addressed them. The provisions enshrined for Scheduled Tribes in the Indian Constitution are a testimony to this dual approach. It provides for development as well as for safeguarding and protection of their interests.

However, it was development (of a particular kind) that became the primary thrust of the State's agenda, with minimal regard for protections and safeguards. What the State is actually pursuing in tribal areas – apart from Northeast India – is assimilation rather than integration, contrary to what is claimed. A policy of integration would provide space for protections and safeguards for their distinct identity, as enshrined in the Constitution. However, these provisions are precisely what are under

threat of erosion through the process of cultural domination and more importantly, the prevailing development paradigm.

Moreover, the view that lack of development of the tribal population was caused by their isolation took precedence. This is often followed with the argument of inadequate resource allocation for tribal development. However, even with an increase in resource allocations since the Fifth Five Year Plan beginning in 1974, the condition of tribals has failed to improve proportionally. There is no doubt that isolation is an important constraint to development. However, to put the blame squarely on isolation is a gross distortion of the development problem of the tribal population.

Poor implementation of programmes is offered as another explanation for the issue of lack of social development among tribals. In this view, the solution lies in effective implementation of State-sponsored development programmes and schemes, whether these pertain to livelihood and income-generation activities, education, health, or communication facilities. However, the problem of ineffective implementation in tribal areas remains inadequately addressed.

The third set of arguments regarding poor development of the tribal populations is built around the issue of the traditional socio-cultural aspects of tribal life. If tribals suffer from low income, poor educational and health status, and various kinds of diseases, this is because of their traditions and lifestyle.

However, this may not be due as much to their social structure but to overall cultural and value framework of State-led development. The framework of development is alien to the tribes. For example, education in the regional language is usually familiar to the general population, including the Scheduled Castes, but this is not the case in the tribal context (although Scheduled Castes suffer from several other forms of discrimination). Hence, social development processes may not operate as smoothly as in 'mainstream' society. Thus, there is a need to re-orient development in tune with the tribal culture and to adopt a more humane approach to tribal development. However, one can probe the issue of tribal development beyond concerns of inadequate resource allocation, ineffective implementation, or tribal traditions to engage with the larger question of national and regional development. The appropriation of tribal land and forests began during colonial rule and has continued to the present. Since tribal-inhabited regions are rich in mineral, forest and water resources, large-scale development projects invariably came to be located in tribal areas.

No region in India illustrates this better than the States of Jharkhand and Odisha, which have considerable natural resources, but also the highest percentages of tribal people living below the poverty line. In 2004–05, the proportion of tribal people living below poverty line stood at 54.2 per cent in Jharkhand while the percentage was as high as 75.6 per cent in Odisha in the same year. Overcoming tribal 'isolation' through large-scale mining, industrial and infrastructure projects, as these States have witnessed, has clearly not resolved the problem of poor development indicators. Rather, these have led to further impoverishment and vulnerability.

Over the last two decades, there has been a massive push to this development agenda, which has coincided with economic liberalisation and the entry of private corporations into tribal areas. This has been met with considerable resistance by tribal communities. This is often interpreted as evidence that tribes are 'anti-development', which is far from the truth. What tribes have been questioning is the model of development that is being imposed on them. Laws and rules that provide protection to tribes are being routinely manipulated and subverted to accommodate corporate interests. Tribal protests are being met with violence by the State's paramilitary forces and the private security staff of corporations involved.

CONSTITUTIONAL PROVISIONS FOR PROTECTION AND DEVELOPMENT OF SCHEDULED TRIBES

Article 366 (25) 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".

Article 342 of the Constitution of India defines as to who would be Scheduled Tribes with respect to any State or Union Territory. The relevant provisions are reproduced below:
(i) Article 342(1): "The President may with respect to any State or Union Territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purpose of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be."

(ii) Article 342 (2): "Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause
(1) any tribe or tribal community or part of or group within any tribe or tribal community but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."
Recently, Rajya Sabha passed The Constitution (Scheduled Tribes) Order (Second Amendment) Bill, 2019 by a voice vote. The Bill seeks to include the Taliwara, Parivara and Siddi tribal communities in the Scheduled Tribes (ST) list, which will ensure that they get reservation and other benefits provided by the government in Karnataka.

Developmental and Protective Safeguards:

Several safeguards have been provided in the Constitution of India for social, economic, and educational development of Scheduled Tribes. These safeguards are being enforced either through legislative provisions or executive instructions.

Social Safeguards

The Constitutional provisions have been made to provide social safeguards to the Scheduled Castes and Scheduled Tribes people in the country so that they may live with dignity and make progress in all walks of life. The provisions made under the Constitution for educational and cultural development and protection of the Scheduled Castes and Scheduled Tribes are given below:

(i) **Article 15 (1)** provides that "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

(ii**) Article 15(2)** provides that "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction, or condition with regard to: -

- access to shops, public restaurants, hotels, and places of public entertainment.
- the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public".

(iii**) Article 17** provides that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law. To give effect to this Article, Parliament made an enactment viz. Untouchability (Offences) Act, 1955. To make the provisions of this Act more stringent, the Act was amended in 1976 and was also renamed as the Protection of Civil Rights (PCR) Act, 1977. As provided under the Act, Government of India also notified the Rules, viz., the PCR Rules, 1977, to carry out the provisions of

this Act. As cases of atrocities on STs were not covered under the provisions of PCR Act, 1977, Parliament passed another important Act in 1989 for taking specific measures to prevent the atrocities on Scheduled Castes and Scheduled Tribes. This Act known as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, became effective from 30 January 1990.

(iv) **Article 23** prohibits traffic in human beings and begar (forced labour) and other similar forms of forced labour and provide that any contravention of this provision shall be an offence punishable in accordance with law. It does not specifically mention STs but since sizeable number of bonded labour comes from STs, this Article has a special significance for members of Scheduled Tribes. In pursuance of this Article, Parliament has enacted the Bonded Labour System (Abolition) Act, 1976.

(v) Article 24 provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. There are Central and State laws to prevent child labour. This Article too is significant for Scheduled Tribes as a substantial portion of child labour engaged in hazardous employment belongs to STs.

(vi) Article 25(2) (b) provides those Hindu religious institutions of a public character shall be thrown open to all classes and sections of the Hindus. This provision is relevant as some sects of the Hindus used to claim that only members of the concerned sects had a right to enter their temples.

Economic Safeguards

The provisions of Articles 23 and 24 mentioned above also form part of the economic safeguards. The safeguards, which specifically provide for the economic uplift of the Scheduled Tribes, are as mentioned below:

(i) **Clause (1) of Article 244** provides that the provisions of the **Fifth Schedule** shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Mizoram, and Tripura. According to **Clause (2**), the provisions of the **Sixth Schedule** shall apply to the administration of the tribal areas in the States of Assam, Meghalaya, Mizoram, and Tripura.

(ii) **Article 275 (1)** of the Constitution of India guarantees grants from the Consolidated Fund of India each year for promoting the welfare of STs. In pursuance of this Constitutional obligation, the Ministry of Tribal Affairs provides funds through a Central Sector Scheme called "Grants under Article 275(1) of the Constitution" for promotion of welfare of STs and administration of Scheduled Areas.

(iii) Fifth Schedule contains provisions regarding the administration and control of the Scheduled Areas and Scheduled Tribes. There are nine States having Scheduled Areas, viz., Andhara Pradesh, Chattisgarh, Gujarat, Jharkhand, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa, and Rajasthan. The Governors of these States have special responsibilities and powers. These States have Tribal Advisory Councils. Tamil Nadu and West Bengal, which do not have any Scheduled Areas but have Scheduled Tribe population also have Tribal Advisory Councils. The Governors of the nine Scheduled Areas states have powers to make regulations for the peace and good governance of any Scheduled Area, particularly to: (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area; (b) regulate the allotment of land to members of the Scheduled Tribes in such area; and; (c) regulate the carrying on of business as moneylender by persons who lend money to members of the Scheduled Tribes in such area.

(iv) The Sixth Schedule of the Constitution of India under Article 244 (2) makes provisions for the administration of the tribal areas in the States of Assam, Meghalaya, Mizoram and Tripura through Autonomous District/Regional Councils. Areas where provisions of Sixth Schedule are applicable are

known as Tribal Areas. In relation to the Tribal Areas, Autonomous District/Regional Councils, each having not more than 30 members have been set up. These Councils are elected bodies and have powers of legislation, administration of justice apart from executive developmental and financial responsibilities. These Councils are empowered to make rules with the approval of the Governor with regard to matters like establishment, construction or management of primary schools, dispensaries, markets, cattle ponds, ferries, fisheries, roads and water- ways. They also have powers to make laws on a variety of subjects, e.g., land, forest, shifting cultivation, village or town administration including village or town police and public health and sanitation, inheritance or property, marriage and divorce and social customs.

These Councils have also been conferred powers under Civil Procedure Code and Criminal Procedure Code for trial of certain suits and offences, as also the powers of a revenue authority for their area for collection of revenue and taxes and other powers for the regulation and management of natural resources.

Educational and Cultural Safeguards

(i) **Article 15(4**) empowers the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes. This provision was added to the Constitution through the Constitution (First Amendment) Act, 1951, which amended several articles. This provision has enabled the State to reserve seats for SCs & STs in educational institutions including technical, engineering, and medical colleges and in scientific & specialized courses.

(ii) **Article 29(1)** provides that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script, or culture of its own shall have the right to conserve the same. This Article further provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. This Article has special significance for the Scheduled Tribes. Santhals have a script of their own, viz., Olchiki.

(iii) Article 350 A provides that it shall be the endeavor of every State and of every local authority within the State to provide adequate facilities for instructions in the mother tongue at the primary stage of education to children belonging to linguistic minority groups. It further provides that the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities. Most of the tribal communities have their own languages or dialects, which usually belong to a different family of languages from the one to which the State's official language belongs. This provision, however, should not be misunderstood to mean that education to tribals should be imparted only in their language, thereby making them isolated and alienated. Tribals should be educated in the language of the State as well as the national Language so as to expose them to the outside world.

Political Safeguards

The political safeguards available to the members of Scheduled Tribes in the Constitution include the following:-

(i) **Article 164(1)** provides that in the States of Chattisgarh, Jharkhand, Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of Tribal Welfare who may, in addition, be in charge of the welfare of the Scheduled Castes and backward classes or any other such work.

(ii) **Article 330** This relates to reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. It, inter-alia, provides that seats shall be reserved in the House of the People for (a) the Scheduled Castes; (b) the Scheduled Tribes

(iii) **Article 332** This provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. This Article, inter-alia, provides that:- (a) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, in the Legislative Assembly of every State.

iv) Article 371: Special provisions for state of Nagaland, Assam, Manipur, Mizoram.

v) **Article 339** This Article relates to control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes. This Article provides that: (a) The President may at any time and shall, at the expiration of ten years from the commencement of the Constitution of India by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States.

Institutional Safeguards:

i) **Article 338A:** As in the mentioned in the preceding paragraphs, with a view to provide protection against the exploitation of SCs & STs and to promote their social, educational, economic and cultural interests, special provisions have been made in the Constitution under different Articles. For effective implementation of these safeguards and various other protective measures, the founding father of the Constitution provided for an inbuilt mechanism in the Constitution itself for watching the implementation of safeguards provided for SCs & STs and to this effect, arrangements for appointment of a Special Officer were made under Article 338 of the Constitution.

This Article was again amended by Constitution (Eighty-ninth Amendment) Act, 2003 and the National Commission for Scheduled Castes and Scheduled Tribes was replaced by (i) National Commission for Scheduled Castes (NCSC), and (ii) National Commission for Scheduled Tribes (NCST) by amending Article 338 and adding a new Article 338A.

SCHEDULED AREAS

In the wake of tribal rebellions in the nineteenth century, the British became convinced of the vulnerability of tribal populations in the form of various 'outsiders' and assumed the role of paternalist protectors of tribals against the non-tribal exploiters. This brand of protectionism, however, worked to justify British presence in tribal areas as the guardian of their interests. Indeed, British policy toward tribals followed a contradictory path: on the one hand, it advocated protection of these areas through exclusion from the operation of general laws and on the other hand, it facilitated assimilation with the larger social structures through the market.

Even prior to the development of a delineation of the characteristic features of a tribe, there existed a separate system of governance for predominantly tribal areas marked by special legal provisions and the non-applicability of general laws in these areas. Thus, the creation of distinctive tribal spaces in legal-administrative terms preceded the classification of specific groups as tribes based on established criteria. These areas are referred as Scheduled Areas in the post-Independence period.

In the Singhbhum area, for example, the British introduced a system of administration, similar to that already in place in Ramgarh and Jungle Mahals through **Regulation XIII of 1833**. Wilkinson's Rules meant the withdrawal of regulations in force in other parts of British India and the assignment of all governance in the district to the Political Agent to the Governor-General. These areas came to be known as **Non-Regulation Provinces** and were to be **governed by special rules for civil and criminal justice, collection of land revenue**, and so on.

In 1874, another law was passed which **renamed the non-regulation tracts as Scheduled Districts** and defined their geographical boundaries. In the Northeast region, in addition, the British put in force the **Inner Line Regulation in 1873**, as **the point beyond which general laws for the colony would not be applicable** and entry of subjects living outside the area was strictly prohibited.

The separation of these areas continued with the **Government of India Act, 1919** which renamed the Scheduled Tracts **as 'Backward Tract**s' and also distinguished between '**really backward tracts'** wherein the **Governor General was exclusively responsible** for law and administration and the **'backward tracts'** wherein the **Governor General could act through local officials**.

This nomenclature was **altered to 'wholly excluded areas' and 'partially excluded areas'** respectively by **the Simon Commission** according to the level of backwardness. The Government of India Act, 1935 followed from this, stating that the Governor could determine policy directly or through his agents in the tribal areas and prohibited legislative Council members from asking any questions about the administration of the excluded areas. Functionaries of the colonial government were, therefore, singularly responsible for about 15 million people in the sub-continent.

The **role of the Agent of the Governor-General** in these areas was two-fold: **to protect the tribal from the non-tribal populations** and **to exert a civilizing influence on them** through programmes of reform. The policy of exclusion came from the belief of the colonial government that their government would be best for the tribals and that the Indian government would only impose dominant cultural values on them. **Thus, a special class of areas with tribal-majority populations was created, within which a distinctive legal framework would operate with the following characteristics: rule by district officers under the governor, simple procedures in dispute settlement, restriction of entry of non-tribals, the exclusion of these areas from the operation of ordinary laws**.

One of the primary features of the Partially Excluded areas was that no general laws would apply to these areas, unless the Governor saw it fit to apply these legislations. In the post-1947 period, however, this feature was altered vis-à-vis the Fifth Schedule areas since now all Central and State laws

would automatically apply to tribal areas unless the Governor took the decision to prevent application or modify/amend the legislation in keeping with the circumstances of the Scheduled Areas. Rarely do Governors invoke this power leading to a situation where in all legislations, irrespective of their suitability in Scheduled Areas, are operational without any amendment or alteration.

At the same time, one of the assumptions behind the creation of these spaces was the idea that the tribes could not cope with the complexity of representative institutions. The Montagu-Chelmsford Report which was to later form the basis of the Government of India Act, 1919 even noted that "there was no political material on which to found political institutions" in these areas.

The demand for political autonomy by tribals was overlooked, despite several ongoing agitations for political rights. Further, this view neatly separated the related issues of social and economic well-being and political power. The resultant policies were based on the economic integration of tribals through development programmes while attempting to ensure that the cultural aspects of their society such as language and customs were left untouched. This understanding of the tribal question continued into the post-colonial period. The Constitution of India continued with this system of governance through the separate, but inter-linked categories of Scheduled Tribes and Scheduled Areas.

Similar to Scheduled Tribes, the definition for **Scheduled Areas** (under the Fifth Schedule of the Constitution) is "**such areas as the President may by order declare to be Scheduled Areas".** The **criterion for the declaration of an area as a Scheduled Area was identified by the first Scheduled Areas and Scheduled Tribes Commission** (**Dhebar Commission**).

The features of such an area were:
a) the preponderance of tribal population,
b) compactness and reasonable size of the area,
c) under-developed nature of the area, and
d) marked disparity in the economic standard of the people.

Several orders relating to Scheduled Areas have been passed by the President over the years. The present Scheduled Areas follows the pattern of the erstwhile Partially Excluded Areas, although more orders regarding Scheduled Areas have been passed by the President in the post-Independence period. Since 1976, there have been efforts to ensure that the Scheduled Areas coincide with the Tribal Sub-Plan areas through several orders, although this task is still not complete.

It is important to reiterate that there are several tribal-populated and tribal-dominant areas across the country which are not Scheduled Areas and therefore, are not covered by the protections offered under the Fifth Schedule. These include tribals living in the nine States of India which have Scheduled Areas as well as those living outside of these States – for example, in West Bengal, Bihar, Uttar Pradesh, Uttarakhand, Goa, Tamil Nadu, Kerala, and Karnataka and the Union Territories of Daman and Diu, Dadra and Nagar Haveli, Lakshadweep, and the Andaman and Nicobar Islands.

For example, the southern region comprising Karnataka, Kerala and Tamil Nadu comprise over five per cent of the total Scheduled Tribe population. Karnataka alone has 50 recognised tribal groups within its State boundaries while Tamil Nadu has 37 Scheduled Tribes and Kerala has 36 Scheduled Tribes. A large proportion of the tribal population of South India belongs to the Nilgiri hills region, covering all these three States. Although, a survey by the British in 1847 apparently revealed that about 78 per cent of the people in the Nilgiri plateau region were tribal hunter-gatherers, pastoralists and shifting cultivators, these areas were never scheduled, possibly due to British economic interests in the emerging plantation economy. Tribals in this region face serious problems of landlessness, land alienation, malnutrition, bonded labour, eviction from National Parks and Sanctuaries, as well as displacement due to mines and hydroelectric projects. However, by and large, discussions around

tribal rights tend to focus on Fifth and Sixth Schedule Areas to the neglect of other nonScheduled regions with substantial tribal populations.

On the question of Scheduled Areas, the Bhuria Commission (2002-2004) requested the governments in the various States with sizeable tribal populations to comment on the existing criteria for scheduling of areas through an assessment of their validity within the contemporary context and through recommendations that could make the given criteria more specific and precise. For example, it remains unclear what exactly 'preponderance' of tribals means in terms of percentages of the population. There is also the question of the size of the administrative unit within which 'preponderance' is necessary – at the level of the district or the block or the village. This is an especially important question given that there has been considerable in-migration of non-tribals to Scheduled Areas as well as non-Scheduled areas with large tribal populations. This influx has changed the relative population of tribal and non-tribal communities in the area, often worsening the disparity between the two groups.

The parameters for further inclusion of non-Scheduled Areas within the ambit of the Fifth Schedule must be debated by the central and State Governments and action must be taken in this regard immediately. The situation wherein a substantial number of Scheduled Tribes reside outside of the Scheduled Areas needs to be addressed to ensure that tribes are not denied the protections offered by the Constitution and other legislations pertaining to Scheduled Areas. Given the onslaught of global market forces on tribal lands, the extension of such provisions is of the utmost importance and urgency.

THE FIFTH SCHEDULE:

The basis of the Fifth Schedule of the Constitution can be traced back to the laws of the British colonial government designating certain parts of the sub-continent 'backward tracts' and 'partially excluded areas'. The latter term was incorporated into the Constitution and it is within these tracts labelled Scheduled Areas (wherein a large number of Scheduled Tribes reside, alongside other relevant criteria) that the Fifth Schedule is applicable. The debate around the Fifth Schedule, its relevance and its efficacy vis-à-vis the intentions of the Constitution makers are as contentious today as they were during the debates of the Constituent Assembly

The belief that tribal areas required special laws led to the setting up of the Advisory Committee on Fundamental Rights and Minorities by the Constituent Assembly, 1947. This body appointed three sub-committees in 1947 to look into specific tribal areas and make suggestions for their administration and functioning. The first was authorized to look into the excluded and partially excluded areas 'other than Assam' and was headed by Shri. **A.V. Thakkar**, the second to examine tribal areas within undivided Assam chaired by Shri. **Gopinath Bardoloi**, and the third was to analyse the situation of tribes in the North Western Frontier Province. The proposals of the first two committees were later incorporated as the Fifth and Sixth Schedules of the Indian Constitution.

The report of the Joint Sub-Committee described tribal society as "lacking in such civilizing facilities as roads, schools, dispensaries and water supply". Tribal people are described as "extremely simple people who can be and are exploited with ease by plainsfolk". Hence, a policy of protectionism would be necessary since "sudden disruption of the tribal customs and ways by exposure to the impact of a more complicated and sophisticated manner of life is capable of doing great harm" At the same time, it was argued that isolationism was not the solution since only a continuous process of assimilation into mainstream Indian (and Hindu) society would lead to their 'development'. The debate on the tribal question took place on 5th and 6th September, 1949 and the main focus remained on this issue - "reconciling the diversity of custom with the 'national life of the country".

The Fifth Schedule under Article 244(1) of Constitution defines "Scheduled Areas" as such areas as the President may by Order declare to be Scheduled Areas after consultation with the Governor of that State.

The criteria for declaring any area as a "Scheduled Area" under the Fifth Schedule are:-
(i) Preponderance of tribal population,
(ii) Compactness and reasonable size of the area,
(iii) A viable administrative entity such as a district, block or taluk, and,
(iv) Economic backwardness of the area as compared to neighbouring areas.

The specification of "Scheduled Areas" in relation to a State is done by a notified Order of the President, after consultation with State Government concerned. The same applies for altering, increasing, decreasing, incorporating new areas, or rescinding any Orders relating to "Scheduled Areas".

State	Areas
Andhra Pradesh	Visakhapatnam, East Godavari, West Godavari, Adilabad, Srikakulam, Vizianagaram, Mahboobnagar, Prakasam (only some mandals/villages are scheduled mandals)
Jharkhand	Dumka, Godda, Devgarh, Sahabgunj, Pakur, Ranchi, Singhbhum (East&West), Gumla, Simdega, Lohardaga, Palamu, Garwa, (some districts are only partly tribal blocks)
Chhattisgarh	Sarbhuja, Bastar, Raigad, Raipur, Rajnandgaon, Durg, Bilaspur, Sehdol, Chindwada, Kanker
Himachal Pradesh	Lahaul and Spiti districts, Kinnaur, Pangi tehsil and Bharmour sub-tehsil in Chamba district
Madhya Pradesh	Jhabua, Mandla, Dhar, Khargone, East Nimar (khandwa), Sailana tehsil in Ratlam district, Betul, Seoni, Balaghat, Morena
Gujarat	Surat, Bharauch, Dangs, Valsad, Panchmahl, Sadodara, Sabarkanta (parts of these districts only)
Maharashtra	Thane, Nasik, Dhule, Ahmednagar, Pune, Nanded, Amravati, Yavatmal, Gadchiroli, Chandrapur (parts of these districts only)
Odisha	Mayurbhanj, Sundargarh, Koraput, Malkangiri, Rayagada, Narayanpur (full), Raigada, Keonjhar, Sambalpur,Kondmals, Ganjam, Kalahandi, Bolangir, Balasor (some blocks)
Rajasthan	Banswara, Dungarpur (fully tribal districts), Udaipur, Chittaurgarh, Siroi (some areas)

The purpose and advantages of an area being declared as Scheduled Areas are as follows:-

(i) The Governor of a State, which has Scheduled Areas, is empowered to make regulations in respect of the following:-

- Prohibit or restrict transfer of land from tribals;
- Regulate the allotment of land to members of Scheduled Tribes in such area;
- Regulate the business of money lending to the members of Scheduled Tribes by persons who lend money to members of Scheduled Tribes in such areas.

(ii) In making any such regulation, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State, which is applicable to the area in question.

(iii) The Governor may, by public notification, direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to such area subject to such exceptions and modifications as he may specify.

(iv) The Governor of a State having Scheduled Areas therein, shall annually, or whenever so required by the President of India, 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 area.

(v) Tribes Advisory Council (TAC) shall be established in States having Scheduled Areas. The TAC may also be established in any State having Scheduled Tribes but not Scheduled Areas on the direction of the President of India. The TAC consists of not more than twenty members of whom, as nearly as may be, three fourth are from the representatives of Scheduled Tribes 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 as may be referred to it by the Governor.

(vi) The Panchayats (Extension to Scheduled Areas) Act, 1996, vide which the provisions relating to Panchayats, contained in Part IX of the Constitution, were extended to Scheduled Areas, also contains special provisions for the benefit of Scheduled Tribes.

Structural barriers in the Fifth Schedule are:

(1) Creation of **TACs without any powers**, unlike the Autonomous District Councils (ADCs), which have legislative and financial powers to some extent;

(2) Further, the members of the TAC have few powers even in terms of what can be discussed at the Council meetings. Even when issues are taken up by the TAC, it has been noted that there is rarely any sustained and consistent engagement with the matter in the form of follow-ups and field visits. As per the minutes of their meetings, none of the TACs discussed the issue of land alienation among tribals between the years 2005 and 2011.

(3) There continue to be complaints regarding the legal and actual powers of the Governor with regard to the TAC as well on the point of issues to be discussed within the Council. While the Constitution holds that the TAC can hold deliberations on matters referred to it by the Governor, experts have argued over whether the Governor as the Constitutional head of the State can make this referral on his own discretion or only on the advice of the Council of Ministers

(4) It is the State Governments rather than the Governor which have framed the rules regarding TAC functioning which has led to near complete usurpation of these bodies by the political parties in power."

(5) **No clarity on the composition of TAC**, especially the remaining one-fourth of the membership;

(6) Reduction of the **Office of Governor to a mere annual report-writing institution** to the President on the affairs of scheduled areas, rather than utilising it as the guardian of constitutional governance

(7) **Ambiguity of the discretionary role of Governor.**

Xaxa Committee Recommendations:

1) There have been laws and policies passed by the Parliament and State Legislatures such as the Forest Conservation Act, 1980, the Wildlife Protection Act, 1972, the Panchayat Acts (prior to the passing of the 73rd Amendment in 1992), and so on which have had an adverse and detrimental impact on tribal communities. Yet the Governors have not exercised their constitutional power towards the protection and welfare of the tribal communities. This opens up two possibilities:

- Laws and policies enacted by the Parliament and State Legislatures should not be automatically applied in the Fifth Schedule areas (as was the case under colonial rule or as is presently the case in the Sixth Schedule areas). Its applicability should be made contingent on the discretion of the Governor who would determine its applicability or non-applicability or applicability with modifications/amendments on the advice of Tribes Advisory Council and issue a Statement of Objectives and Reasons for decisions on both applicability and inapplicability of laws and policies.

- In case the above is untenable, the Governor should be mandated to take the advice of the Tribes Advisory Council and examine legislations and policies (particularly, though not exclusively, those pertaining to issues such as forests, land acquisition, conservation, mines and minerals, health and education) passed by the Parliament or State Legislatures and the implications of the same on tribal welfare. A mechanism for such examination and action should be clearly stated and established.

2. Actions taken by the Governor for safeguarding the interests of tribal communities should be clearly mentioned in the annual Governor's Reports submitted to the President. The Governors must be mandated to ensure the timely submission of these reports. To this end, the Governor's office must be adequately assisted by specially set up competent and dedicated team in the form of Governor's Cell for Scheduled Tribes (as has already been initiated in some States).

3. The Tribes Advisory Council is an integral part of the administrative structure of the Fifth Schedule. Currently, the TAC consists of 20 members, of which three fourths is comprised of elected members in the State Legislature belonging to the Scheduled Tribes. The rest are nominated members who generally tend to be government officials working in Ministries and Departments associated with tribal development. In this regard, it recommended that:

(i) There needs to be a radical restructuring of the composition of the TAC. Instead of two-thirds elected members from the State Legislature, this should be restricted to half the members of the TAC. Moreover, these elected representatives must come from different political parties, rather than only from the ruling party. The remaining one-half should be comprised of Chairpersons of the district Panchayat bodies (or chairpersons of the Autonomous Council, wherever established) of the Scheduled Areas on a rotational basis.

(ii) Tribes Advisory Council should be empowered, made active and responsible for the tribal affairs in the State through the following measures:

- The scope and responsibilities of TAC should be widened to transform it into the Tribes Advisory, Protective and Developmental Council. Constitutional provisions, laws, policies, and administrative matters pertaining to the Scheduled Tribes must come under its ambit.
- The tribal development plan of a State and its outlay should be approved by the TAC before it is placed before the Legislative Assembly.
- In view of the serious responsibility placed on the TAC, it should be made compulsory for the Council to meet at least four times a year.
- The Tribal Welfare Department should be made accountable to the TAC. It should present its annual plan, budget and performance report to the TAC and receive its approval for the next year.
- The agenda for the TAC meetings should be prepared through due consultation with the members.
- The Governor should be made responsible for the overall functioning of the TAC.

4. The provisions of the Sixth Schedule provide considerable space for autonomy and self-governance. Hence, there is an urgent need for extending the pattern of the Sixth Schedule in the form of Autonomous Councils in the Fifth Schedule areas as has been provided for in the Provisions of Panchayat (Extension to Scheduled Areas) Act, 1996. The specific provision notes 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 district levels in the Scheduled Areas".

5. There are a large number of States wherein tribes form a sizeable population in blocks or villages, for example, in States like West Bengal, Kerala, Tamil Nadu, Karnataka, Goa, etc. Tribal areas in these States must be brought under the ambit of Scheduled Areas.

THE SIXTH SCHEDULE:

Northeast India, home to numerous diverse ethnic groups and located strategically with borders with Bhutan, China, Myanmar and Bangladesh. Historically, tribes of this region have seen "isolationist" policies of the colonial British who labelled many hilly tribal tracts of the Northeast as "wholly excluded" areas. While the tribal dominated areas in what is commonly referred to as 'mainland' India are largely governed by the provisions of the Fifth Schedule, the States of the Northeast are covered by the Sixth Schedule of the Constitution as well as a host of other legal and administrative arrangements for the protection of tribal autonomy.

As early as 1929, the Nagas submitted a petition to the Simon Commission, asking for autonomy from the future Indian nation-state. Other tribes such as the Khasis and the Mizos called for self-governance on issues such as customary laws, control over resources and so on, while also demanding separation from the larger State of Assam. Several tribes including the Nagas, Mizos, Garos, Khasis and Karbis were (and, in some cases, still are) demanding a united homeland for all their fellow tribes people who are spread across several Indian States and even across international borders.

Some of the other demands made by tribes in this region are: protection against land alienation by settlers, continued authority of traditional Councils, and safeguards against the erosion of their cultures.

The British philosophy of maintaining status quo and isolation was replaced by policies of development and integration of the Northeast through the Sixth Schedule of the Constitution. The Schedule was drafted by a Sub-Committee of the Constituent Assembly called the Northeast Frontier (Assam) Tribal and Excluded Areas Sub-Committee headed by Assamese political leader, Shri. Gopinath Bardoloi. The subcommittee aimed to "…reconcile the aspirations of the hill people for political autonomy with the Assam government's drive to integrate them with the plains". The Sixth Schedule is entirely focused on protection of tribal areas and interests, by recognising self-governance through constitutional institutions at the district or regional level.

The Sixth Schedule (Article 244 (2) and 275 (1)) provides for administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram through Autonomous District and Regional Councils endowed with legislative, judicial, and executive powers.

The Sixth Schedule under Article 244 (2) provides for the creation of Autonomous District Councils (ADC) in an Autonomous District and Regional Councils for autonomous regions. These Councils have legislative powers on matters relating to:

- allotment, occupation, or the setting apart of land, other than reserved forests, for the purpose of agricultural or grazing or for residential or other nonagricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town (Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied for public purpose)
- management of any forest not being a Reserved Forest
- use of any canal or water course for purpose of agriculture
- regulation of the practice of jhum or any other form of shifting cultivation
- establishment of village or town committees or Councils and their powers

- any other matter relating to village or town administration, including village and town police, public health and sanitation
- appointment of succession of chiefs or headmen
- inheritance of property
- marriage and divorce
- social custom

The Council has legislative powers over matters such as primary education, dispensaries, markets, cattle pounds, ferries, fisheries, roads, road transport and waterways. The District Council can regulate money lending and trading by nonresidents or non-tribal people living in the area. It has the power to collect taxes and tolls on land, buildings and persons, professions, trades, animals, vehicles, boats, entry of goods into the local markets, goods carried on ferries, the maintenance of schools, dispensaries androids. The ADCs can issue licenses and leases for the prospecting and extraction of minerals and are entitled to get a share of royalties accruing to the State from mineral extraction.

The Sixth Schedule further provides that no Act of the State legislature shall apply to any autonomous district unless approved by the Council. The Governor of the states under the Sixth Schedule has the power to decide to either apply or not apply any Act of Parliament or the Legislature in the autonomous area of Assam, Tripura and Mizoram. Along with this provision, except in Assam, in all other Scheduled Area of the Northeast region, the President of India has the right to apply or not apply any Act of Parliament or the Legislature on any matter.

The Councils have judicial powers for trial of offences committed by members of the Scheduled Tribes in their respective areas of jurisdiction. The District and Regional Councils have been conferred powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898 for the trial of certain suits, cases and offences. There is a two-tier system for judicial administration at the district and village levels. The village Council can hear cases wherein both parties belong to Scheduled Tribes while the district courts act as a court of appeal.
A District Fund for each Autonomous District and a Regional Fund for each Region has been set up to channelize all the funds designated for these areas.

The Governor has the power to annul or suspend any act or resolution of a District or Regional Council which he finds likely to endanger the safety of India or to be prejudicial to public order. The Governor can suspend the Council and exercise all the powers vested in the Council. However the Governor has to lay such an order before the State legislature as soon as possible and the order shall, unless revoked by the legislature, continue for a period of twelve months from the date on which it was made. The Governor has the power to appoint a Commission at any point of time to examine and report on any matter relating to the administration of the autonomous districts and regions in the State or may appoint a Commission to inquire into and report on the administration of autonomous districts and autonomous regions. Further, the Governor has the power to dissolve a District or a Regional Council with the recommendation of such a Commission.

Statutory Autonomous Councils

There are also Statutory Autonomous Councils in the States of Assam and Manipur. These have been established by Acts passed in State Legislative Assembly. These can be categorised under the following heads:

1. Autonomous District Councils in Assam
2. Hill District Councils in Manipur

The administrative structure of these Councils is patterned on the Autonomous District and Regional Councils created by the Sixth Schedule. This, however, has added significant confusion in the administration. There are three authorities operating in parallel in these areas, namely, the Council, the State departments and the Panchayati Raj

Summary :

The Sixth Schedule of the Constitution provides for the administration of tribal areas in Assam, Meghalaya, Tripura and Mizoram to safeguard the rights of the tribal population in these states. This special provision is provided under **Article 244(2) and Article 275(1)** of the Constitution.

- Passed by the Constituent Assembly in 1949, the Sixth Schedule was formulated to provide the limited autonomy to the tribal regions of North-East.
- It was based on the reports of **Bardoloi Committee** formed by the Constituent Assembly.
    - The committee report stated that there was a need for a system of administration that would allow tribal areas to become developed.
    - The report also called for the protection of these tribal areas from exploitation by the people in the plains and preserving their distinct social customs.
- It gives the tribals freedom to exercise legislative and executive powers through an autonomous regional council and **autonomous district councils (ADCs)**
- The ADCs are the districts within the state to which the central government has given varying degree of autonomy within the State Legislature.

The various features of administration contained in the Sixth Schedule are as follows

- The tribal areas in the four states of Assam, Meghalaya, Tripura and Mizoram have been constituted as **autonomous districts.** But, they do not fall outside the executive authority of the state concerned.

- The governor is empowered to organise and re-organise the autonomous districts. Thus, he can increase or decrease their areas or change their names or define their boundaries and so on.
- If there are different tribes in an autonomous district, the governor can divide the district into several autonomous regions.
- Each autonomous district has a district council consisting of 30 members, of whom four are nominated by the governor and the remaining 26 are elected on the basis of adult franchise. The elected members hold office for a term of five years (unless the council is dissolved earlier) and nominated members hold office during the pleasure of the governor. Each autonomous region also has a separate regional council.
- The district and regional councils administer the areas under their jurisdiction. They can make laws on certain specified matters like land, forests, canal water, shifting cultivation, village administration, inheritance of property, marriage and divorce, social customs and so on. But all such laws require the assent of the governor.
- The district and regional councils within their territorial jurisdictions can constitute village councils or courts for trial of suits and cases between the tribes. They hear appeals from them. The jurisdiction of the high court over these suits and cases is specified by the governor.
- The district council can establish, construct or manage primary schools, dispensaries, markets, ferries, fisheries, roads and so on in the district. It can also make regulations for the control of money lending and trading by non-tribals. But, such regulations require the assent of the governor.
- The district and regional councils are empowered to assess and collect land revenue and to impose certain specified taxes.
- The **acts of Parliament** or the **state legislature do not apply** to **autonomous districts and autonomous regions** or apply with specified modifications and exceptions.
- The governor can appoint a commission to examine and report on any matter relating to the administration of the autonomous districts or regions. He may dissolve a district or regional council on the recommendation of the commission

Overall Assessment of the Autonomous District Councils under Sixth Schedule

One of the serious limitations of the Sixth Schedule has been the fact that the **powers given to the Councils to make legislation and implement development programmes have not been matched with the financial autonomy** to follow this through. As a result, ADCs often have to depend on funds from the Central and State Governments (routed through the State Government) which are often antagonistic toward the work of the ADC. Apart from government sources, the Autonomous District Councils receive a small amount from the collection of taxes and land revenue. In many States, the issue of financial resource allocation has become a major bone of contention between the State Government and the ADCs. In Meghalaya, even the salaries of primary school teachers could not be paid regularly because of non-receipt of funds. **In this case, the government claimed to have withheld the funds since the ADC in question, the Khasi Hills Autonomous District Council, was engaged in corrupt practices**

Further, there is a **large gap between the approved budget and the flow of funds from the State** Government to the Council, which adversely affects both the planning and the execution processes. This is in sharp contrast to arrangements made for Panchayats, which have been provided with their own Finance Commission which is empowered to periodically review the financial position and lay down appropriate principles of allocation of resources between the Panchayats and the State.

In Mizoram, the situation is somewhat different since the three ADCs in the State cover only 15 per cent of State's population (the dominant majority are Mizos). Thus, these Councils do not receive sufficient attention from the State Government.

Furthermore, the structure of the Sixth Schedule is such that the autonomy of the ADCs is seriously restricted in several respects. For example, in Meghalaya, the autonomy of the ADC has been curtailed through the insertion of paragraph 12 A into the Constitution which states that all legislations passed by the State Government take precedence over those passed by the Councils.

It has created **multiple power centres** instead of bringing in a genuine process of autonomy in the region. There are frequent **conflict of interests between the District Councils and the State Legislatures.** For example, in Meghalaya, despite the formation of the state, the whole of the state continues to be under sixth schedule causing frequent conflict with the state government.

Considerable powers have been handed over to the Governor even in the Sixth Schedule areas which can impede the autonomous functioning of the ADCs. The Governor has the power to decide whether laws made by the State Legislature, on matters other than those over which the ADC has legislative powers, will apply to the Autonomous Districts. The decision regarding applicability of laws made by Parliament in Sixth Schedule areas is made by the Governor in the case of Assam and the President of India in the case of other Northeastern states. Moreover, all legislation passed by the ADCs requires the assent of the Governor to become law. The Governor also has the power to dissolve the ADC.

There is also no mandatory time limit for the reconstitution of the ADC once it is dissolved, and hence election is indefinitely postponed. Constitutionally, the Autonomous District Council should have its own Autonomous Agency, similar to the Election Commission of India or the State Election Commission to conduct the elections to the Autonomous Councils. But the Rules of 1951 empowered the State Government to conduct the Council elections through the Hills Area Department of the Assam State Government, a rule which works against the proper functioning of the Sixth Schedule.

While the Seventy-Third Amendment to the Constitution provides for the reservation of one-third of all Panchayats seats at all levels for women, the Councils, unlike Panchayats, do not have any provision for such reservation. In fact, both the Fifth and Sixth Schedules have been silent on the issue of women's representation and gender justice. As a result, women are almost completely absent from the bodies and institutions created under these provisions.

Another important issue to be addressed is the question of representation of minority groups within the Councils. Even those groups which are indigenous to the region – such as smaller tribal groups – do not have any role in the ADCs, a situation which must be rectified.

Summary:
Some key constraints as pointed above are **non-transfer of departments to Autonomous Councils**, **lack of funds** available with the Council, **absence of provision for women** and **smaller tribal groups' participation** in Councils which need to be suitably addressed to ensure its more vibrant functioning.

Xaxa Committee Recommendations:

There are various impediments to the smooth and inclusive working of the Autonomous Councils in Sixth Schedule areas which must be addressed. In order to do so, it proposed the following:

- Autonomous Councils must be covered under State Finance Commission that is empowered to review periodically the financial position and lay down appropriate principles of resource

distribution between State and the Autonomous Council. Funding should not be left to arbitrary discretion of the State Governments.

- The ADC should be reconstituted within six months of its dissolution.
- There should be provision for reservation for tribal women (one-third) as well as smaller tribal groups in the ADCs and other political institutions.
- Traditional political institutions at the village/hamlet level should be formally recognized by the State.

Mungekar Committee recommendations on Scheduled Areas:

I. **All laws now cover Scheduled Areas in routine.** There is a need to stop the practice of routinely extending all laws to the Scheduled Areas without adaptation to the Tribal milieu and to consciously adapt the laws to the Scheduled Areas. There is no realisation that a great damage had been done when general laws first flooded Tribal areas in 1950 with no mechanism for their review. There is an urgent need for the Central Government and the State Governments to review these Acts.

ii **There is a need for an in depth situational analysis of the problem of unrest in the SAs** covering all its facets along with the response strategy. A knee-jerk sort of a response with police action cannot be the right approach to tackle a complex problem arising out of socio economic exclusion and the control of outsiders over natural resources.

iii. **The Office of the Governors in Scheduled Areas should have a separate, well staffed and well equipped set up to take care of the ST-related matters**.

iv. It is necessary for the Government to take, the following action in a time-bound manner with respect to the Scheduling of Left-over Areas:

- All areas already identified as Tribal majority areas should be brought under the Fifth Schedule 'within a. period of one year in pursuance of the commitment made in 1976.

v. **Administrative reorganization of these areas** within the concerned States should be taken up and completed within two years so that compact tribal areas are brought under the same administrative units at an appropriate level.

Governor's Report:

i. The Governor's Report should present an overall assessment of the Tribal conditions/situation in the State with special reference to weak spots and correcctive actions.

ii. The Ministry of Tribal Affairs must critically examine these reports and submit action points to the President. The President may consider allotting specific time in the Annual Conference of Governors for discussion on governance in the Scheduled Areas.

PANCHAYATS (EXTENSION TO THE SCHEDULED AREAS) ACT, 1996, (PESA)

Scheduled Areas, because of their richness in natural resources are historically characterized as susceptible to pressure from "unscrupulous elements indulging in illegal mining & forest felling" leading to land alienation, exploitation and "dislocation of the communities and loss of major sources of livelihood." Therefore it was vital that customs, rights and livelihoods of those living in Scheduled Areas were protected. **Accordingly, the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, (PESA), was enacted**, extending Part IX of the Constitution to the **Schedule V Areas**. In enabling the Panchayats to 'function as institutions of self-government', a state government is mandated to ensure that the Panchayats at various levels and the Gram Sabha are endowed inter alia with:

- 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
- ownership of minor forest produce
- power to enforce prohibition, or to regulate or restrict the sale and consumption of any intoxicant

- power to exercise control over money lending to the Scheduled Tribes
- power to exercise control over institutions and functionaries in all social sectors
- power to control local plans, and resources for such plans including tribal subplans
- power of prior recommendation in granting prospecting license or mining leases for minor minerals as well as for grant of concessions for the exploitation of minor minerals by auction
- right to be consulted on matters of land acquisition
- power to issue utilization certificates for government works undertaken in their village.

Article 243-M (4)(b) of the Constitution states that "Parliament may, by law extend the provisions of this Part (Part IX relating to Panchayats) to the Scheduled Areas…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…".

However, state wide incorporation of the PESA tenets has been largely absent. Forest Departments in several states continue to have control over forest produce, and deny access to the tribals. Further, Gram Sabha consultations have to be merely 'considered' by government officials when deciding land acquisition proposals. Though consideration is mandatory, the choice of words indicates that the final say rests with the Land Acquisition Officer and not the Gram Sabha. Forged and manipulated Gram Sabha resolutions, lack of consent before land acquisition and other grave issues still persist in the implementation of the PESA.

Status of Implementation in the States:

All nine states having Scheduled Areas amended their existing Panchayat Acts to comply with the provisions of PESA broadly. Even the newly formed State of Jharkhand framed their Panchayat Act in line with the major provisions laid down in the central Act. But still certain critical gaps exist.

1) **The Rules framed by state governments are not compliant with PESA**

a) **Definition of Village**
Sec 4(b) of the PESA states that "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." This is in keeping with the spirit behind the 73rd constitutional amendment and the PESA, since takes into consideration the smallest unit of democratic participation, i.e. a village. States have not respected this provision.

In Orissa for example, the Orissa Gram Panchayat Act, 1964, stipulates that the 'Grama' shall have a population of 2000-10000, which, in the case of tribal habitations, is usually not the case since they have small populations. The Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011 does not define village at all. It only states that the Gram Sabha shall consist of persons, whose names are on electoral rolls in the Gram Panchayat. All these instances violate PESA and attack its very core of empowering the Gram Sabha of the village at the habitation/hamlet or group of habitations/hamlets.

b) Traditional System of Leadership

PESA also empowers the Gram Sabha under Sec.4 (d), "to 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."

In Rajasthan, however, the meeting of the Gram Sabha is presided over by the Sarpanch of the Gram Panchayat concerned and, in his absence, by the UpSarpanch.

In Andhra Pradesh, the Sarpanch of the Gram Panchayat is to be the President of the Gram Sabha and only in his absence can the traditional village leader of the habitation preside. This is completely contrary to the PESA that preserves traditional methods of leadership.

c) Consultation on Acquisition of Land, Resettlement and Rehabilitation

Section 4(i) of the PESA states that the "Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before 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."

In Andhra Pradesh, such process is confined only to land owning displaced persons. It also states that only Mandal Parishads would be informed of such acquisition, displacement, rehabilitation, and resettlement programs. While PESA makes it mandatory for the government to follow recommendations of Gram Sabha and Gram Panchayat before granting of mining or prospective licenses and lease of exploration of minor minerals by auction, the state act instead reduces it to mere consideration of these recommendations at best and too as prescribed by the state.

d) Access to and ownership of Minor Forest Produce is not PESA compliant under various state rules

The FRA defines minor forest produce as including "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".

The PESA confers the ownership of minor forest produce on the Gram Sabha. However, a Planning Commission report acknowledges that "in absence of a comprehensive national/central policy/approach, contradictory legal provisions still prevail while differential state regimes create some of the biggest limitations which constrain a healthy growth of the Non Timber Forest Produce (NTFP) sector. Bamboo, for instance, is defined as a 'minor forest produce' in the Forest Rights Act, 2006 whereas the Indian Forest Act, 1927 treats it at par with timber. (Now changed)

PESA, 1996 gives ownership rights to local communities over MFPs whereas the regime created under Wildlife Protection Act doesn't."

Gadchiroli, Maharashtra is seen an example of how control over bamboo was vested from the Forest Department and rightly handed over to the Gram Sabha. However, in Andhra Pradesh a state-owned agency, Girijan Cooperative Corporation (GCC), has obstructed tribals from taking away their non-timber forest produce (hill brooms) from the Scheduled Areas of East Godavari district.

2) Gram Sabha consent is frequently overridden and forest land is illegally diverted:

Example 1: Essel and Mining Company Ltd case in Keonjhar district, Orissa
It appears that no recognition of rights under the FRA is taking place in the mineral rich mining areas of districts like Keonjhar (under Schedule V). Instead, the administration has been facilitating illegal diversion of forest land to mining companies by engineering fraudulent Gram Sabhas of the concerned villages. In a case concerning diversion of forest land for Essel and Mining Company Ltd., an MLA from Jharsuguda, Naba Kishore Das, wrote a complaint to the Union Tribal Affairs Secretary, MoTA. The Union Secretary called for records pertaining to the alleged Gram Sabha approval of the forest land diversion. During his visit to the area, the Secretary examined Gram Sabha records and found that Gram Sabhas were held in Jalahari, Bholbeda, Jajanga Jurudi, Banspani and Khuntpani villages coming under Joda –Badbil Tahasil on 1st Nov 2013 for obtaining their consent for the diversion of 342.602 ha

of forest land out of the total area of 456.1 ha for Essel Mining and Industries Ltd. It was found that in the same meeting it was decided that the villagers had no forest rights and that they had no objection to the diversion of the concerned forest land.

Example 2: Mahan Coal block in Singrauli district, Madhya Pradesh

The Mahan coal block was granted in-principle (Stage I) forest clearance by the MoEF on 18th October 2012, after substantial pressure from the Group of Ministers (GoM) on coal mining, after the MoEF had rejected it on environmental and ecological grounds. This approval was for the diversion of 1182.351 ha of forest land and was conditional on, among others, completion of the recognition of forest rights.

Yet not a single community forest right has been recognized in the Singrauli district where there are a large number of forest land diversions taking place for non-forest use. Several representations written by the affected parties to the authorities on the issue of non-implementation of FRA in this region have yielded no results whatsoever.

Villagers in Amelia and Suhira were not allowed to make their CFR claims at the Gram Sabha meeting held on 15th August 2012 despite the fact that 300 people attended the meeting that day. Stage- I conditional forest clearance was granted for mining of the Mahan Coal Block in Madhya Pradesh on 30th October 2012 without detailed assessments of social and ecological impacts or obtaining Gram Sabha consent required under MoEF's 2009 order.

Following this, the administration organized a special Gram Sabha on March 6, 2013 which was attended by only 184 persons. However, over 11000 signatures were forged onto the resolution which included the signatures of some dead people. Despite strong protests by the villagers, including letters written in their support by the Minister of Tribal Affairs to the Madhya Pradesh Governor and Chief Minister, MoEF granted final forest clearance for the Mahan coal block in February 2014

Example 3: Polavaram Project

The Polavaram Project has now been given national status. The Union Cabinet has approved the setting up of the Polavaram Project Authority, where the Centre will provide funds for the project and help in getting environmental and forest clearances. The Environmental Impact Assessment (EIA) of the project says 276 villages will be affected; an estimated 177,275 people live in these villages. The Polavaram Project Environmental Impact Appraisal Report of 1985 expected 150,697 people to be displaced in 226 villages. But the population of these villages according to the Census 2001 is much higher—236,834. State officials find it hard to explain the difference of 59,559 while estimating the number of people who will be displaced.

In Maredubaka village in Kukunoor Mandal, people passed resolutions against Polavaram dam and the Resettlement& Rehabilitation package offered by the Government. Resolutions were ignored, suppressed and manipulated. Some Mandal Praja Parishads (MPP) also have passed resolutions against the construction of the dam but time and again over the last one year the officials have not accepted or recorded the written resolutions sent by the MPPs as told by Kantepale Raju, Sarpanch of Maredubaka and also by the sarpanch of Amaravaram of Kukkunoor mandal

Example 4: Niyamgiri

The FRA recognizes individual, community, traditional and cultural rights of Scheduled Tribes and other Traditional Forest Dwellers. This is a definite shift away from the Indian Forest Act, 1927 and its preceding laws which kept forest dwelling and forest dependent communities on the margins of

legality. In 2006, when the FRA was enacted, the preamble to the Act acknowledged this when it said that this was "an Act to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other Traditional Forest Dwellers who have been residing in such forests for generations but whose rights could not be recorded…"

The forest laws that culminated in the Forest Act of 1927 vested control over the forests in the colonial state to assist it in its expansionist enterprise. It was with the Forest Conservation Act, 1980 that the extent to which forests were being lost to industrial and mining projects became a concern that had to be addressed urgently. Yet, the FCA 1980 only shifted the decision making from the states to the centre, even as 'Environment and Forests' was moved from the state to the Concurrent legislative list in the Seventh Schedule to the Constitution. While this may have provided pause in the decisions made to divert forests to non-forest uses, the model of development adopted, and the priorities of different governments, has made relentless demands that conservation and protection agenda be put aside and the interests of foreign direct investment, growth rate and corporate involvement in the economy be given priority. As the state has begun to enter into MoUs and agreements with corporations with promises of land, water, clearances and law and order, the concerns of local populations have been relegated to the periphery. This has also been a time when, even as laws are made to protect tribals, forest dwellers, the environment including forests, the law has been ignored and sidestepped.

The Niyamgiri experience is iconic, demonstrating a clear break from before the time that the FRA was enacted. Niyamgiri hills is inhabited by the Dongria Khond, a Particularly Vulnerable Tribal Group. Vedanta Aluminium Ltd. approached the Supreme Court asking that the company be allowed to mine bauxite in the Niyamgiri hills to feed their aluminium plant located at the foothills. The Dongria Khonds opposed the mining, After two rounds of consideration by the Supreme Court, a hearing before the National Environment Appellate Authority, and two reports on the effect the project may have on the Dongria Khonds, the Supreme Court directed, on 18th April, 2013, that the Gram Sabha needed to consider the rights that were being affected by the proposed mining

3. Dilution of role of Tribal Advisory Councils: PESA comes under the Fifth Schedule, which mandates Tribal Advisory Councils to oversee tribal affairs and also gives extrajudicial, extra constitutional powers to the Governors of each State to intervene in matters where they see tribal autonomy being compromised.

4. **Lack of coordination at Centre:** Even if one were to expect proactive intervention from the Centre, PESA would get entangled in bureaucratic shackles. Two different ministries, the Ministry of Panchayati Raj and the Ministry of Tribal Affairs, have an overlapping influence on the implementation of PESA and they function almost without any coordination.

5. **Ignoring the spirit of PESA:** The state legislations have omitted some of the fundamental principles without which the spirit of PESA can never be realised. For instance, the premise in PESA that state legislations on Panchayats shall be in consonance with customary laws and among other things traditional management practices of community resources is ignored by most of the state laws.

Xaxa Committee Recommendations:

1. The import of PESA has not been internalized into administrative practice, and government officials including Forest Departments continue to deny access to tribals to that which is their right. Bureaucracies and judicial institutions need to be introduced to the changes that PESA has brought into administration and control in Fifth Schedule areas

2. An exercise to bring rules made by state governments in conformity with PESA needs to be undertaken.

3. Government officials who were the agencies to prevent tribal loss of land are increasingly being seen to be negotiators on behalf of project authorities. This is a very disturbing trend, where the very authority who had been tasked with preventing land alienation from a tribal to non-tribals becomes an agent for effecting such alienation. This must be stopped.

4. There have been recorded cases of Gram Sabha consent being fraudulently obtained or forged; such conduct must face penalties, and projects that proceed on the basis of consent so obtained cannot be allowed to proceed. If such consequences do not flow, there will be no incentive to refrain from such actions.

5. There has been a proliferation of MoUs between states and companies that imposes responsibility on the state to facilitate various aspects of project clearances including in matters of environmental and forest clearances. Increasingly, the state undertakes to maintain law and order for the smooth execution of the project. These MoUs make the state a party to an agreement and take away the neutrality of the state. The idea such MoUs needs to be reviewed. Institutions such as the Cabinet Committee on Investment that set priorities and pursue them even where it is in direct breach of the law amounts to deliberate flouting of the law and such practices of expediency need be halted.

The Ministry constituted a Committee under the Chairmanship of **Dr. T. Haque** on August 23, 2010 to suggest appropriate measures on ownership, price fixation, value addition and marketing of minor forest produce. The Committee submitted its report in May 2011. Pursuant to the report, the Government has started a Centrally Sponsored Scheme of 'Mechanism for Marketing of Minor Forest Produce (MFP) through Minimum Support Price (MSP) and Development of value Chain for MFP'. The scheme seeks to establish a system to ensure fair monetary returns for the MFP to the collectors by fixing minimum support price

Mungekar Committee Recommendations:

i. The effectiveness of the Gram Sabhas (GS) as the institutions of self-governance as envisaged in PESA holds the key to peace and good government in the Scheduled Areas. The Gram Sabhas, therefore, must be given a top priority by all concerned irrespective of the position they may hold in the System.

ii. Devolution of powers to the nearest level in the field should be the rule. Instances of misuse should be met with a stringent action against the culprits and institutionalizing effective correctives. It should not be, however allowed to be used as a ploy for its reversal. Devolution of powers to the Gram Sabhas under PESA should be treated as sacrosanct. Any attempt to mislead or influence the Gram Sabhas and misuse the aura of their authority of any description - administrative, institutional or political - should be treated as an offence against democracy.

iii. Participatory Approach of Program Implementation should be a compulsory pre-requisite for program implementation. The community should be explained the program, and its likely impact and taken into confidence in this regard. This would inter-alia involve capacity building for the Gram Sabha. Expert institutions in the field of local self-Government and Tribal Affairs could be utilized for this purpose. The Gram Sabhas should be legally and operationally empowered to conduct social audit of Tribal development programs to enforce people's participation, transparency and accountability of the implementing agencies and officials.

Conclusion

PESA is a most powerful legislation which can play an instrumental role in recognizing the rights of the tribal population in Scheduled areas over natural resources thus transforming their quality of life. It is

almost true that due to lack of political will, their rights have been disregarded strategically. Though central government has taken several measures to implement the Act in letter and spirit, lack of initiative from concerned state government is quite evident. Central government should take appropriate action to eliminate the loopholes in the central legislation immediately followed by a strong direction from political government to abide by the constitutional mandate. State government should follow the guideline issued by the central government to incorporate changes in the state Acts proposed by state level study reports, take appropriate measures to amend state laws which are in conflict with the provisions of PESA, take initiatives to enhance the capacity of government machinery and stakeholders who play vital role in actual implementation of the Act at the ground level. Civil Society Organizations who have been fighting proactively for the issue has to play strategic role in building awareness among the stakeholders at each level and organizing the politically divided tribal communities. So, a multi-pronged strategy to address the issue from different aspect is the need of the hour.