

**Web of ‘Legal Pluralism’ ‘Administrative Control’ and ‘Benign State’: Some
Ethnographic Notes on the fate of PESA**

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Abstract

Panchayat (Extension to Scheduled Areas) Act [PESA] 1996 has been term as a progressive legislation because many grassroots tribal organizations fought for it and it gives some crucial rights to Scheduled Tribes in Scheduled V areas. It accepts the basic idea that these communities have constitutional rights to live an autonomous life according to their culture and customs and to use and manage their natural resources. The PESA, however, has not been implemented properly in the most part of the country and many hurdles have been created by the State authorities in its implementation and at many places, administrative apparatus (for example Forest Department) also used different other laws to curb the impact of the PESA. At many occasions the State has shown it benign face and tried to underline its seriousness for the better implementation of this law, though it has simultaneously tried to push the ‘development agenda of ‘corporate’ capital in adivasi areas.

This paper seeks to probe that whether the PESA has been able ensure some autonomy for ST communities to live their autonomous life in the Schedule V areas or work as façade to justify more repressive or arbitrary policies by Indian State? Through tracing the historical developments related to the implementation of this law, this paper wants analyze the basic hurdles in the proper implementation of this law. This paper seeks to understand the experiences of the PESA in last two decades and probe the fate of PESA and examines some of the crucial issues related to it. Though it covers a range of issues emerged in different parts of Schedule V areas, but particularly focuses on the experience of Rajasthan.

The *Panchayat (Extension to Scheduled Areas) Act*, (PESA) 1996 is one of those significant laws of post-colonial India, which has been debated enormously since its inception. This law, enacted in the post-liberalization India, has been described as a key legislation because it defines all natural habitations such as hamlet or *Para* in the Scheduled Areas (SAs) or the Fifth Schedule areas of the Indian Constitution as one

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community based unit (or village) and gives them the right to take decisions regarding their community life (Government of India, 1996). For globalized private corporate capital and the advocates of latest modern technology based development and maximum exploitation of natural resources, this law has been an stumbling block on the way of their desired ends because it gives significant rights to the Gram Sabha regarding mining, land acquisition etc. Due to this the provisions of the PESA have been widely avoided/violated in the case of most of the 'development' works in SAs (Sharma, 2010; Sundar, 2011). This paper aims to probe how far the PESA, as a law, having emerged from peoples movement, has been successful to achieve the goal driving the movement for its enactment i.e. the establishment of 'Gaon Gandrajya' (village republic) and whether in the process it makes the tribals active citizens? Alternatively, considering the continuous and day-to-day violence in large parts of the SAs, the exploitation of forest resources, and growing influence of corporate capital would it be right to say that the PESA has been an unsuccessful and failed legislation, which has helped the State to engage the tribals in a futile legal discourse as a façade to create an environment conducive for the march of corporate capital, or, has it been able to generate a democratic consciousness in tribal people about their rights, and it has in this sense, made the roots of democracy deeper?

PESA as a framework for 'Gaon Gandrajya' and it's Systematic Violations

The provision for the extension of the Panchayati Raj in the SAs was part of the 73rd amendment of the Indian Constitution, which clearly mentioned that the Parliament could extend the provisions of Panchayati Raj in the SAs and Tribal Areas (TAs) by enacting a law for the purpose. This provision was based on the understanding that since Schedule V gave some special rights to the SAs, a new law for the Panchayati Raj must respect their traditional systems and distinct institutions [Article 243 (M)(b), Constitution of India (2008), p.126].

Indeed the provisions of Schedule V have never been seriously implemented and they remained as showpieces in the Constitution. For example, Para 5(1) of the Schedule V gives the Governors of the states with SAs the rights to prohibit the implementation of any law passed by the Parliament or state legislatures in the SAs, or direct that can be implemented in these areas only after necessary amendments [see, Para 5(1), Constitution of India (2008), p. 254-255]. In the history of independent India, however, no Governor ever used this constitutional provision (Sharma, 2010). On the

one hand, this has resulted in the imposition of all kinds of laws in the SAs too, and on the other, the Indian state has exploited the resources of these areas for 'development' purpose, which has created serious problems of displacement and dispossession of rights for the tribals of SAs. Since 1970s, however, the discontent against the imposed centralized development by Indian State emerged in the form of many grassroots movements. Undeniably, in the many parts of central India the Maoist movement also played a critical role in making local communities aware about their rights. The Chipko Movement, Narmada Bachao Andolan (Save Narmada Movement) and many other comparatively small and local level movements expressed demands regarding the ownership of resources by the local communities. Apparently, these demands were beyond the framework of Schedule V and underlined the need to give concrete power to the local communities to manage their land and resources in SAs. In this context demand for a law surfaced, which could give more powers to the Gram Sabha and local communities.

Though the Constitution clearly mentioned the need for a separate law for the extension of the provisions of 73rd Constitutional Amendment neither the Central nor any State Government initiated the process to follow this constitutional provision. Many states with SAs, however, started the process of the election of Panchayats without considering the actual constitutional mechanism. The Bharat Jan Andolan (BJA), an organization formed by B. D. Sharma on 2nd November 1991, tirelessly worked for the cause of a separate Panchayat extension law for the SAs. It played a central role in the formation of National Front for the Adivasi Self-Rule (NFASR) in 1994, constituted by many grassroots tribal organization. Due to continuous pressures from the BJA and other local tribal organizations the Government of India formed a committee in June 1994 to consider the different aspects for a law to extend the Panchayati Raj in the SAs. Headed by Dilip Singh Bhuria, with the BJA leader B. D. Sharma as one of its members, the Committee, submitted its report in January 1995.¹ Many states, however, were conducting elections in SAs on the basis of their respective Panchayati Raj Acts. The BJA and other organizations challenged it in the Court and after the submission of Bhuria Committee Report the Hyderabad High Court postponed the Panchayat elections in the SAs of Andhra Pradesh. The Patna High Court too accepted that such a routine extension would violate the Constitution and underlined that the parliament would need to enact a special law for the SAs (Sundar, 2009 p. 201). The NFASR

intensified its movement for the enactment of a separate law for the extension of Panchayati Raj in the SAs. It organized many rallies in different parts of Madhya Pradesh (present day Chhattisgarh) and Bihar (present day Jharkhand) and activists also sat on indefinite hunger strike in Delhi for the enactment of the PESA. Ultimately, due to immense pressure of people's movement the PESA was passed by the Parliament on 24th December 1996, which was primarily based on the recommendations of the Bhuria Committee. It incorporated the demands of many grassroots tribal organizations related to the rights of village communities over their land and resources. This law was termed 'Hamara Kanoon' (Our Law) by the tribals in many parts of the SAs (Choubey, 2013).

The PESA presents a framework of 'Gaon Gandrajaya' (Village Republic/Self-rule) for the SAs and it has often been described as a 'Constitution within Constitution'. The uniqueness of this law is that it attempts to bring together in a single frame two entirely different worlds- one is a simple system of tribal communities governed by their respective customs and traditions, and another is the formal system of the state governed exclusively by law (Bijoy, 2012 p. 15; Dandekar and Choudhury, 2010, p. 5). In this sense, it establishes different sources of authority and systems of legitimating for the customary laws of the tribal communities (the constitution and a statute, respectively) putting in place rules of recognition which supersede any other prior authority that the tribal people may claim as the source of their customary laws and rights. The PESA is more crucial than the provisions of Schedule V because it accepts Gram Sabha as the core unit of all kinds of deliberations and implementation of the law.

The PESA envisages the Gram Sabha as the basic unit of the community life of adivasis, which is defined as a habitation or a group of habitations or a hamlet comprising a community, managing its affairs in accordance with traditions and customs and all adult people are members of a Gram Shabha [Section 4(b)(c), Government of India, (1996)]. It directs the State Government that the Panchayat Act for SAs shall be in consonance with customary laws, social and religious practices and traditional management practices of resources [Section 4(a), Ibid]. The PESA makes the role of Gram Sabhas very extensive: it is competent to preserve the traditions, customs, cultural identity and community resources and the traditional mode of dispute resolution [Section 4(d), Ibid]; its approval is necessary to implement various social and economic development plans taken up by the Panchayat for the implementation at village level

and it has the right to identify or select the persons for the poverty alleviation programmes [Section 4(e),(f), Ibid]; the Gram Sabha or Panchayat at the appropriate level would be consulted before land acquisition; Its prior recommendation would be necessary for any grant of mining of minor minerals and it has power to prevent the alienation of the land in SAs and take appropriate action to restore any unlawfully alienated land to a ST; The Gram Sabha or Panchayat at the appropriate level has ownership over Minor Forest Produce (MFP); power to enforce prohibition, or to regulate or restrict the sale and consumption of any intoxicant; control over money lending and institutions and functionaries in all social sectors [Section 4 (i)(j)(k)(l)(m), Ibid). It gives reservation to all groups mentioned in the Constitution according to their proportion in the Panchayat but also underlined that the reservation for the STs would not be less than one half of the total seats and all seats of Chairpersons at all level would be reserved for the STs [Section 4(g), Ibid]. According to the PESA, all laws which are inconsistent with its provisions would be void within one year of its assent by the President (Section 5, Ibid). Several grassroots tribal organizations, which mobilized people and struggled for the enactment of PESA, termed it a historic legislation and claimed that it was the 'most radical law of the twentieth century' and the 'Magna Carta of Village India' (Sharma, 2010, pp. 68-69). Many scholars, however, criticized the PESA for romanticizing the role of Gram Sabhas. For instance, according to Nandini Sundar, the concept of Adivasi society which PESA embodies is essentially a static one, of a society that has somehow survived colonialism and capitalism and retains strong community ties at hamlet level (Sundar, 2009b, p. 201).

Since Panchayati Raj is a subject in the State List of the Constitution, the different states with SAs had to enact their own PESA acts on the basis of the larger framework prepared by the Central PESA Act. A period of one year was fixed by the PESA itself for the enactment and amendment of different laws to bring them in consonance with the provisions of the PESA. While most of the States with SAs did not take the one year period seriously, many states adopted the provisions of the Central PESA Act in a slack and capricious manner. Due to this many rights of the Gram Sabhas have been made less influential by the existing State PESA Acts.

If one compares and contrast some of the State PESA Acts of different states and Central PESA Act, it would be clear that different states adopted the same provision in different ways. For example, according to the section 4(i) of the Central PESA act, the

Gram Sabha or Panchayat at the appropriate level shall be consulted before acquiring land for development projects and before resettlement or rehabilitation of affected persons in SAs. The Andhra Pradesh Act, however, has made the provisions to consult the Mandal (Block) Parishad, the Jharkhand Act has no provision in this regard, the Gujarat Act provides that Taluka panchayats to be consulted and the Odhisa Act said the District Panchayat shall be consulted before acquiring land. Only Chhattisgarh and Madhya Pradesh have made provisions that before acquiring land for development projects the Gram Sabha will be consulted.² Apart from these variations, many states delayed the process of rule making related to PESA, another equally important point is that most States are yet to amend the subject laws and rules, such as those relating to money lending, forest, mining and excise to bring them in harmony with PESA (Bijoy, 2012, p. 30).

The experience of the implementation of the PESA has been very gloomy. In some states elections were conducted on the basis of the provisions of the PESA and STs got representation at Panchayat level. However, its more crucial provisions have been avoided or rampantly violated. In this context three significant points can be underlined: first, the provision of the PESA regarding the consultation with Gram Sabha on the issue of land acquisition and rehabilitation has proved to be a great obstacle for the corporate houses because most of the time tribals, through the Gram Sabhas, refused to give their lands for 'development' work. At those places where the Gram Sabhas were opposing land acquisition, the corporate houses, with the active help of the administration, tried to create a façade regarding the whole process of consultation (Sundar, 2011, pp. 429-32; Dandekar and Choudhury, 2010, pp. 6-8).

Second, the PESA has been indiscriminately violated in the name of the military campaign against Left Wing Extremism (LWE). One crucial example of this is the Salwa Judum campaign in Chhattisgarh, where in the name of controlling the Maoists, the Chhattisgarh Government armed one section of the tribal people and compelled the tribals of more than 640 villages to shift in camps. Due to the terror of Salwa Judum thousands of people ran away into the forests or Andhra Pradesh (Sundar 2006). In this process, no state authorities ever tried to know the wishes of the Gram Sabha, which was a clear violation of the PESA. In those LWE affected areas where villages were lucky enough not to have faced forced displacement, the Police and the CRPF regularly visit the villages, and the tribals are compelled to live in an environment of suspicion

and fear. This situation is a far cry from the conception of Gaon Gandrajya envisaged by the PESA. In Bastar and other tribal areas militarization affected the lives of tribals and led to the criminalization of tribal communities (Sundar and Singh 2010; Dandekar and Choudhury, 2010). In many Fifth Schedule areas the Para-military forces used the land to establish their camps and in most of the cases these camps became permanent (Navlakha, 2012, pp. 3-4).

Third, the PESA was not just violated on the issues related to land acquisition or to control the Maoist movement, its many other aspects have also been regularly violated which impinge upon the powers of local administration. For example, the PESA gives the ownership rights over MFPs to the Gram Sabha. During my field study in many villages of Surguja district of Chhattisgarh I found that Panchayats elections were held according to the provisions of the PESA and in SAs all seats of Sarpanchs were reserved for STs. The elected tribal representatives, however, were not able to use their powers effectively. While they were facing opposition from the dominant non-tribal castes in the region, government officials too were not giving any importance to the Gram Sabha or elected representatives. Though PESA gives rights to local communities to collect the MFPs, tribals were totally dependent on the whims of the Forest Department (FD) even for the MFPs of daily use like fuel wood. Similarly, the PESA gives power to every Gram Sabha to approve the plans of social and economic development before their implementation, but in the villages where I did my field work I found that no Government official ever bothered to consult the elected representatives or the Gram Sabha.³

II

Struggle for Livelihood and the Experience of PESA in Rajasthan

This section of the paper focuses on the study of the PESA in Rajasthan and deals with the struggle and conundrums related to the enactment of a state level PESA Act and its public life in the tribal areas of this state. Public life of the PESA primarily denotes the understanding and use of this law by the tribal people of the state, which goes beyond the actual legal realities. Apart from giving a background of SAs of Rajasthan and current situation of the PESA's implementation, this section also investigates its experiences in these areas.⁴

According to the census of 2011 the total population of STs in Rajasthan is 92,38,534 and they constitute 13.5 percent of the total population of Rajasthan.⁵ Two

districts of Rajasthan, Banswada and Dungarpur and Pratabgarh Block of Chittorgarh, Abu Road Block of Sirohi district and many Panchayats of the Udaipur district are part of SAs.⁶ The areas coming under SAs are placed in 'Tribal Areas Development Authorities' (TADA), and the Government allocates separate finances for them. There are, however, many other areas where large numbers of tribal population exist but they are not part of SAs. During Sixth Five Year Plan these areas were placed under 'Marginalized Areas Development Authorities' (MADA). There are many scattered areas, where tribal communities are living and they are classified as 'tribal pockets'.⁷ One tribe of Rajasthan, Sahariya is included in the list of 'Primitive Tribal Groups' (PTGs) and there are special provisions and programmes for the development and livelihood protection of this tribe.⁸

Three years after the enactment of Central PESA Act by the Parliament in 1996, a state PESA act was passed in Rajasthan, as result of the pressure created by some Rajasthan based organizations, which were working in tribal areas. Of course, apart from some mobilization, there was no intense movement at the grassroots level for this purpose, but since the issue was related to an Act passed by the Parliament and there was excellent co-ordination between Rajasthan based organizations and the leadership of the BJA, they successfully created pressure on the Rajasthan Government to enact a state level PESA act.

It is important to note that Astha, a non-government organization formed in 1986, played a key role in increasing the consciousness regarding the idea of village self-rule in the tribal areas of Rajasthan. It played key role in the development of many tribal grassroots organizations. One such organization 'Jungle Zameen Jan Anodolan' (JZJA) was formed in 1995. The basic idea behind it was to raise awareness and mobilization on the issues related to land and livelihood. Interestingly, activists like B. D. Sharma of BJA and Pradip Prabhu of Shetkari Sanghthna had contacts with the activists of Astha and they started to visit these areas from the beginning of 1990s. Through extensive discussions and debate they educated and inspired local activists (many of whom were tribals) to mobilize themselves on the issues related to forests and 'swaraj' (self-rule) in the villages. Many activists from Rajasthan also participated in the dharna and demonstration in Delhi, organized for the enactment of a separate law for the extension of the 73rd and 74th Constitutional Amendments in the SAs. There was, however, no strong movement at the local level in Rajasthan, the JZJA was in the

process of formation and tribal groups were not sufficiently mobilized and primarily engaged with their day-to-day struggle with the FD officials. The tribal people and even local activists started to relate themselves with the PESA after its enactment in December 1996. The JZJA, with the cooperation of the BJA at national level, played a crucial role in making people aware about this law.⁹ The reports and booklets prepared by B. D. Sharma played a pivotal role in educating the activists at local level regarding the different issues related to the forests and tribals of the other parts of the country. With the help of the BJA and efforts of Astha and JZJA pushed the demand for the implementation of the PESA. Though there was no intense movement for this purpose, JZJA organized Dharna in Jaipur in favor of this demand and B. D. Sharma and other activists from outside Rajasthan also participated in it.¹⁰ Finally, a Rajasthan PESA Act was passed in 1999. The full title of the Act is, *Rajasthan Panchayati (Modifications of Provisions in their Applications to the Scheduled Areas) Act 1999* (Government of Rajasthan, 1999).

Though most of the provisions of Central PESA Act have been retained in the Rajasthan PESA Act, there are certain limitations in it, which pose a serious question mark on its transformative possibilities. First, this Act does not accept the definition of the village given in the Central PESA Act. On the contrary it provides that 'a village for the purpose of this Act shall mean a village specified as such by the Governor, by notification in the Official Gazette' [Section 2(a), Ibid]. Second, it leaves many aspects uncertain and makes a provision that the State Government may make rules, by notification in the Official Gazette, to carry out generally the purposes of this Act [Section 4(1), Ibid]. The State Government, however, put this Act in the cold storage and did not prepare any rules for a long time (till 2011). Interestingly during this period, in Rajasthan there was Government of both the key players in the state politics i.e. the BJP and the Congress. Incidentally, after 2004 the tribal organizations of Rajasthan and other places focused on the movement for Forest Rights Act (FRA), so there was almost no pressure on the State Government to make rules for PESA and start its actual implementation.¹¹

Though formal implementation of the PESA did not start even after the enactment of Rajasthan PESA Act, it affected the lives of many tribal villages at another level. Indeed, after its enactment organizations like JZJA started a process to educate people about the various implications of this legislation and develop a consciousness

about the significance of the idea of 'Gaon Gandrajya'. This process started with the visits of B. D. Sharma in the tribal areas of Rajasthan, where he gave example of the 'Nate Na Raj' movement of Bastar area of Chhattisgarh (then Madhya Pradesh) and argued that villagers should focus on their understanding of the term 'village', and emphasized the relevance of the slogan of Mavalibhata Movement, 'Mava Nate Mava Raj' (our rule in our village). He also underlined that activists should not wait for the initiatives of the State Government and strive to make people aware about the meaning of 'Gaon Gandrajya' and establish 'Shilalekh' in the villages and declare the rights given by the PESA on it.¹² On his suggestion the activists of JZJA started the process of making people conscious about the idea of 'Gaon Gandrajya' embedded in the provisions of the PESA. This motivated many tribals to establish 'Shilalekh' in their village and declare it a 'Gaon Gandrajya'. This was a dialogical process, where activists, most of whom were local tribals, tried to educate villagers about the positive aspects of the PESA and the village self-rule. The villagers, however, had to take a final call regarding declaring their village a 'Gaon Gandrajya' and whether they want to set up a 'Shilalekh' or not. In March 1997 Taliya village of the Dungerpur district was declared first 'Gaon Gandrajya' and a public meeting was organized and a 'Shilalekh' established in the village. The date of the enactment of the PESA and the eleven important points related to the powers of the Gram Sabha were inscribed on the 'Shilalekh'. The eleven points mentioned on a 'Shilalekh' are a simple version of the rights of the Gram Sabha mentioned in the Central PESA Act. Each 'Shilalekh' inscribed the following points: 1. liquor prohibition and ban or regulation on the marketing of intoxicant; 2. control of encroachment and right of ownership to those land, which were taken through illegal method; 3. right to be consulted before land acquisition; 4. full ownership of MFPS; 5. planning and management of small water resources; 6. control over mining activities in the village area; 7. right to manage village market; 8. control over money lending; 9. control over all plans related to development, right to identify and select beneficiaries; consultation before rehabilitation of displaced people; 10. total control over the finances related to local planning; 11. control over institution and functionaries in all social sectors (Gaon Gandrajya Diary, 2005). The basic purpose behind this process has been to develop a consciousness in the mind of tribal people about the significance of this legislation.¹³ Indeed during my fieldwork in some of the villages of Udaipur district, who

had declared themselves as 'Gaon Gandrajya', I found that tribals have very sound understanding of the provisions of the PESA and the rights of the Gram Sabha.

After Taliya village of Dungerpur district the Shilalekh was established in many other villages and the same process was followed. The villagers were also told to ascertain the traditional boundaries of their villages, and discuss the eleven points regarding the powers of the Gram Sabha and decide on how many points they could follow. In the beginning Astha and JZJA decided that villagers should try to follow at least four points. It was up to them to decide which four points they wanted to follow, for instance they could decide that they would regulate intoxicant in the village, try to resolve their problems at the Gram Sabha level, establish ownership of Gram Sabha over MFPs, and look after the implementation of different projects in the village etc. A village could follow more than four points but at least they had to follow four points in the beginning.¹⁴

After Taliya many other villagers started the process of declaring themselves 'Gaon Gandrajya' and when they established 'Shilalekh' in their villages they invited the Member of Parliament (MP) and the Member of Legislative Assembly (MLA) of their area and they also sent letters to all crucial Government Offices like the District Magistrate, Police, Forest Department etc. In their letters they made it clear that they were going to declare their village a 'Gaon Gandrajya' and after that they would follow the provisions of the PESA to manage the diverse affairs of their community lives. Many villages sent such letters to the Governor and in some cases he/she replied congratulating villagers for declaring their village a 'Gaon Gandrajya'. The purpose behind sending such letters to the Government offices was to convey the decision of adopting the provisions of the Central PESA Act. It was also expected that the officials of many Government Departments should take the permission before doing any activity within the boundaries of the village. Indeed, it was the substantial form of village 'autonomy', which the villagers tried to claim on the basis of the PESA. For example, during my study in one such village, Biliyan-Dang, which is part of Dang Pnachayat of Udaipur district, the villagers informed me that they established 'Shilalekh' in 2001. Though Biliyan and Dang are two different hamlets but the villagers decided to declare the Biliyan-Dang village 'Gaon Gandrajya' on the basis of the boundaries of the revenue village, because in both the hamlets people of same the tribe i.e. Gerasiya were residing and wanted to decide together about the community life of their village.¹⁵ On

that occasion the senior activists of the Astha organization were also present. Like other villages, the tribals of the Biliyan-Dang too informed the several Government Offices, including the Police and the FD about their decisions. However, they objected to the decision of declaring the village as 'Gaon Gandrajya' and termed it illegal, but the tribals of the Biliyan-Dang showed them the PESA Act and emphatically asserted that the Parliament of the country had given them right to manage their community life through the Gram Sabha.¹⁶

Since 1997 the 'Shilalekh' has been established in almost 350 villages of the Udaipur and Dungarpur districts. The process still persists and before Rajasthan Assembly Election of 2013 Phulwari village of Kotra block declared itself a 'Gaon Gandrajya'.¹⁷ The process of setting up a 'Shilalekh' is not just a ritual to connect the idea of village self-rule with the traditions of villagers, but it also educates them about their rights and mobilizes them to resist the arbitrary behavior of the Government officials. In these villages a committee of eleven people has been formed to decide about some urgent issues or the date and time of the meeting of the Gram Sabha. Many such villages have done tremendous work in water management and the implementation of the many government schemes like MNREGA etc. They also claimed their ownership over MFPs, which created a situation of tussle between villagers and the FD. For example, in Biliyan-Dang tribals asserted that they had ownership over the MFPs and when the FD officials tried to get the MFPs to sell they blocked the road. Finally, after five days of struggle the local FD officials agreed to give a share of the profit to the Gram Sabha of the Biliyan-Dang. Also, earlier tribals were facing many troubles in getting MFPs of their daily use from the forest. However, after the declaration of Gram Gandrajya they collectively and strongly stressed their rights over the MFPs and the FD officials stopped to demand money for the MFPs of daily use, like fire wood etc. In many places they collectively started to manage village schools and ensured the prohibition on the selling of liquor and other intoxicants. It should be noted that the implementation of the Forest Rights Act (FRA) was started in 2008 and in many villages tribals have tried to assert their rights over forest land and its resources through the Gram Sabha, which work as a site of legal education for them. Many tribals, though not able to express all provisions of the FRA, accepted that through their discussion in the Gram Sabha they knew that this law would give them ownership rights over forest land and the right to manage the forests. Even in some villages tribals inscribed the

community rights given by the FRA on the opposite side of the 'Shilalekh'. Indeed, many villages have successfully established the framework of autonomous 'Gaon Gandrajya', though they are not using all the powers given by the PESA to the Gram Sabha because of less mobilization and the insistence of other state offices (like Police etc.) to assert their dominance in the matters related to their jurisdiction.

As mentioned earlier the successive Rajasthan Governments did not show any interest in the rule making of Rajasthan PESA Act. In 2007 Astha filed a case in the Rajasthan High Court against this attitude of the Government and urged the High Court to direct the Government to prepare rules and start the process of implementation of the PESA in Rajasthan. The Rajasthan Government filed an affidavit in the High Court in 2010 that it would soon make the rules. The Astha prepared model rules and sent it to the Government, but it was not accepted. Finally, the State Government prepared and notified the rules in 2011, but there are many drawbacks in them. They do not accept the definition of a village given in Central PESA Act [Section 2(1)(ii), 3, Government of Rajasthan (2011)]. Obviously it does not define the Gram Sabha at hamlet/Para level and recognizes revenue village. It gives very limited rights to Gram Sabhas over MFPs (Section 25, Ibid) and gives upper hand to the Government Departments in the process of consultation with Gram Sabha for land acquisition (Section 18, Ibid). Numerous tribal organizations objected and criticized these limitations on the powers of the Gram Sabhas and Astha filed a case against these rules in the Rajasthan High Court. At the time of writing this paper no final decision regarding this petition has been made.

It is evident from the above portrayal that in Rajasthan the proper process of implementation of the PESA has not started. In many villages, however, tribal people, with the inspiration and help of the organization like Astha and JZJA, have tried to implement the provisions of the PESA in their villages: they declared their villages as 'Gaon Gandrajaya', established 'shilalekh' and also tried to resist the arbitrary and whimsical behavior of many Government Departments, particularly the FD. Undoubtedly, the 'Shilalekh' has created a sense of autonomy within tribals and they have tried to assert their rights over those natural resources, which come within the traditional boundary of their villages. This process, however, has some inherent limitations: first, since the implementation of the PESA has not started in Rajasthan, these activities have no legal sanctions, and at many places the FD officials refused to accept the claims of the tribals on this basis. Second, the declaration of 'Gaon

Gandrajya' and establishing 'Shilalekh' is a very attractive and educative idea, but it has been limited to few hundred villages. Third, those villages which declared themselves 'Gaon Gandrajya' and adopted the PESA, have not exercised all the powers given by the Act. Most of them are trying to follow four or five points mentioned in the Act. Fourth, it is also important that after 2002 the struggle for the FRA became the central concern of most of the grassroots tribal organizations.¹⁸ Due to this PESA and its implementation did not get much attention. Indeed, no strong mobilization in favour of the PESA has been one of the reasons of the neglect of this law by the State Government. Though the FRA also gives power to local communities over forest land and its resources and in this sense both the laws are complementary to each other, the PESA presents a more extensive framework for an autonomous village republic.

The non-implementation of the PESA has created many problems for the tribal people. Undoubtedly, these problems are related to low representation in Panchayati Raj system, but more than that state is not giving them their constitutional right to village self-rule. Nevertheless, apart from Rajasthan, in scores of villages of Jharkhand, Maharashtra, Andhra Pradesh etc. tribal activists have followed this process to create awareness about the idea of village self-rule. For example, in Jharkhand the BJA did 'Pathargadi' in many areas. But it did not happen in those places, where this organization was not present. However, an NGO JOHAR tried to motivate people in 800 villages to organize Gram Sabha (Sundar 2009b, pp.207-08).¹⁹

III

An Unfinished Agenda for PESA

A Bill for the amendment in *Panchayat (Extension to Scheduled Areas) Act 1996* was released for the public discussion by Ministry of Panchayati Raj (MoPR) on 2nd December 2013 and the title of the Bill is 'Panchayat (Extension to Scheduled Areas) Bill, 2013. This Bill was formulated on the basis of the exhaustive recommendations for amendments in the PESA Act by the Sonia Gandhi led National Advisory Council (NAC) in December 2012. However, for many months the Government did not initiate any concrete measure to implement these recommendations and only six months before election the MoPR released the Bill for the public discussion. The crucial point is that after the formation of Narendra Modi led Government at the centre, the Bill is still there on the MoPR website and it asks people to give their comment on the Bill. However, due to euphoria of General Election 2014 the Bill was not discussed properly in the

media and civil society. It is pertinent to ask that whether the provisions of this amendment Bill would be able to rectify the shortcomings of the PESA Act? Is there any possibility to imagine the future of this Bill in the Narendra Modi led NDA Government?

This Bill proposed many important changes in the Act. Some of the vital changes are as follows.

First, it proposes a change in the section 4(i) of the Principal Act (i.e. exiting law) and renumbered it as 4(i) (i). According to the provision of Principal Act Gram Sabha or Pnachayat shall be consulted before land acquisition in Scheduled Areas; however the Bill proposes that 'prior informed consent' of Gram Sabha or Panchayt should be taken before land acquisition. It also makes this mandatory regarding the rehabilitation and sustainable livelihood plan for the persons affected by projects in the Scheduled Areas. However, the Bill gives rights to states to determine the processes of taking 'prior and informed consent'.

Second, section 4(k) of the Principal Act provides that the recommendations of the Gram Sabha and Panchayats at the appropriate level shall be made mandatory prior to 'grant of prospecting license or mining lease for minor minerals' [section 4(k)] and 'for grant of concession for exploitation of minor minerals by auctions' [section 4(l)] in Scheduled Areas. However, according to the Bill the word prior informed consent' would substitute the word 'recommendations' and major minerals would also be included in the purview of the PESA [See, section 4(k) and 4(l) of the Bill].

Third, the Bill also intends to insert two new sections (section 5 and 6) in the PESA Act. Section 5 of the Bill proposes that both the Central Government and the State Governments have the powers to notify the rules for the implementation of the Act. However, 'no provisions of the State Governments rule shall be in contravention of the Central Government Rules' [Section 5 of the Bill]. Section 6 of the Bill gives power to Central Government to issue general or special directions to the State Governments for the effective implementation of this Act and its Rules. Both the changes are necessary for making PESA an effective law.

Fourth, The Bill repeals the section 5 of the Principal Act, which is related to making all the laws related to the Panchayats in Scheduled Areas, which are inconsistent with the provision of this Act should be amended or repealed by legislative assembly of the states within the one year from the date on which this Act receives the assent of the President. (Section 5 of the Act). However, the Bill proposes another section (section 7)

in lieu of existing section 5, which says that any Union or State subject Acts dealing with subjects covered under this amendment Act shall be null and void to the extent that they contravene this Act, unless brought conformity within one year of this amendment taking place (section 7 of the Bill).

Obviously, the Bill tries to rectify many drawbacks and criticisms of the existing PESA law and it gives more power to the Central Government to avoid arbitrary behavior of many states. Indeed in the matters of land acquisition it proposes to give more certain power to Gram Sabhas, and proposes to make the 'prior inform consent' necessary for any mining or land acquisition.

Inherent limitations of the Bill

First, it should be noted that the Bill is not making any provision to secure the rights of minority groups in the villages of Schedule V areas. It would lead to a situation of the dominance of the numerically strong groups and increase the marginalization of small STs and non-STs groups. Second, It is also desired, due to the experience of the PESA in last 16 years, that there must be an autonomous body to monitor the implementation of this Act because it has been fervently violated by the Government officials and centralization of power is not a solution, as proposed by the Bill. Instead there must be some check on the Government officials from the outside. Third, there are demands from many new areas for extension of Schedule V. For instance, Dr. Vinayan who played an important role in the enactment of the PESA demanded that Kaimur area, which included many districts of Uttar Pradesh, Bihar and Jharkhand, should be included in Schedule V. After his death *All India Union for Forest Working People (AIUFWP)* has included this demand in their charter. Indeed, there are many areas in the Kerala, West Bengal, Karnatka, Rajasthan and other states, which are tribal dominated, but they are not part of Scheduled Areas. The Bill, however, is silent on these crucial issues. Fourth, as mentioned that Bhuria Committee presented another report which was related to the urban areas of Schedule V. Interestingly a bill was introduced in the Parliament in 2001 in this regard and it was given to the standing committee of urban development, which submitted its report in July 2003 and recommended the enactment of this Bill. However, after that session this Bill was enlisted for debate in every session, till 2010, but could not passed or debated by the Parliament. Though NAC also recommended to enact a separate law for the urban areas of Schedule V, the Bill released for the discussion is silent on this aspect.

IV

Transformation through Law and its Limitations: Politics of ‘Marginal Society’

The most serious crisis with the PESA is none or partial implementation. Indeed from the beginning the State machinery has been trying to undermine this law. Though it gives several powers to the Gram Sabha, it has not been able to emerge as an influential or autonomous body. One can underline three reasons for overlooking/violating the PESA: first, in post-liberalization India the State has been working as a facilitator for the corporate houses in the extraction of natural resources and land acquisition, which made the violation of laws like PESA inevitable. For example, there has been great boom in mining sector- in the past 5-6 years, companies paid a royalty to the state of Rs 26 per tonne of iron ore, selling it for over 100 times that amount to an average of Rs 3,000, which clearly means their profits run into crores of rupees. So, there is great financial incentive to ignore the PESA or the Samtha judgment, or ensure that they do not get in the way (Dandekar and Choudhury, 2010, p. 17); second, the dominance of the many colonial and post-colonial laws also created obstacles in the proper implementation of the PESA. For example, there is conflict between PESA and *Indian Forest Act, 1927*, or *Wildlife (Protection) Act, 1972*, or *Forest (Conservation) Act, 1980* or many other Central or State laws. In many cases the officials of different Government Departments denied the supremacy of the PESA and invoked other laws for their guidance. Nandini Sundar has used the word ‘legal pluralism’ to describe this situation (Sundar, 2009a, pp. 14-15); third, organizations that fought for the enactment of the PESA, became less enthusiastic about its implementation. Obviously, many organizations like the BJA, Ashta etc. have been trying to create awareness about the PESA. Nevertheless it is also true that the priorities of several other organizations changed in many areas, for example after 2002 the movement for the enactment and implementation of the FRA became the primary concern for various organizations.²⁰

I, however, wish to argue, that in the study of different facets of the implementation of PESA one can underline the emergence of ‘marginal society’ in the tribal areas. The basic argument regarding the conception of the marginal society is that it is related to the those marginalized tribal groups, who are using law to ensure an autonomous space and ownership over their land and natural resources (Choubey, 2014a; 2014b). In this context I accept the differentiation presented by Partha

Chatterjee between civil society and political society. Chatterjee argues that though the Indian Constitution gives constitutional rights to all of its citizens, there is only a small group which uses these rights in the actual sense, and there is a larger group, for whom search for livelihood generally becomes part of 'illegal' activities. The latter constitute political society groups, which put their claims on governmentality and the state gives them some 'concessions' on the basis of their mobilization (Chatterjee, 2004; 2011; 2012). I want to underline that like political society the activities of the marginal society for livelihood have also been generally termed as 'illegal', however it is distinct from the political society for the following reasons: first, activists, who can be easily placed in the category of 'civil society' play an important role in the mobilization of a marginal society. This is true about the leaders of the organizations like the BJA, Astha and many others. Indeed a lot of tribal and non-tribal educated activists, with comparatively better economic status have played vital role in mobilizing people and creating awareness about their rights. It has created a kind of 'insurgent citizenship'²¹ in these areas, where tribals have been asserting their rights over livelihood sources and attempting to create an autonomous space for themselves. Second, the marginal society is inseparable with the emergence of 'legalism from below', tribal people have started demand for better laws and they use these laws to assert their rights over natural resources and to create an autonomous space for themselves, which is crystal clear from the above study of the experiences of the PESA in Rajasthan. Moreover, it is true that most of the tribal people do not understand each and every provision of laws like PESA, however they do know some its significant provisions and particularly about PESA they claim that it is 'hamara kanoon' (our law). In this sense the 'public life' of the law is also imperative because many times it goes beyond the actual aim, provisions and actual implementation realities of a particular law. For example, though the implementation process of PESA was not started in the Rajasthan, many tribal communities used it as a tool to assert autonomy and declared their villages as 'Gaon Gandrajya'. Obviously, it leads to the deepening of democracy in these areas because instead of accepting centralized administrative measures local communities have started to assert their autonomy in the matters related to villages and their rights over forest produces. Elsewhere, I have argued that the 'legalism from below' has been increased in tribal areas, which resulted as the enactment of the FRA (Choubey, 2014a; 2014b). Third, like political society, in the case of marginal society too, the state responds to its demands on the basis of their

mobilizations. In the case of the marginal society, however, the focus is not always on getting some concessions for day-to-day life, rather it is related to the tribals notion of 'good life', in which they want to create an autonomous space for themselves. In this sense, marginal society is a particular space used by forest dwelling communities, who are largely dependent on forests for their livelihood and cultural identity; these communities coexists with institutionalized domain of politics, use it to fulfill their certain demands, but are not entirely dependent on it. Interestingly, Veena Das in her study of the urban poor in India also questioned the binary presented by Partha Chatterjee of those of govern and the governed, legal and illegal, governmentality produced population and moral community, civil society and political society. According to her these 'concepts bleed into each other and produce the capacity to make claims on the State as a way of claiming citizenship', which inform poor about the notion of rights in the sense of 'Haq' (Das, 2011, p. 320).

I want to emphasize that though the PESA has not been implemented in most of the SAs, it has created a consciousness within tribal population of these areas. Though Maoist and any other violent movement is not existed in the SAs of Rajasthan, one cannot deny that in post-liberalization era the conflict between tribals and the Indian State and the influence of the Maoists has increased in many parts of the SAs. It should be remembered that where tribals could not save their land and common resources due to clear violation of the PESA, they took the help of armed struggle or Maoists. There is, however, no doubt that in the different parts of SAs, PESA has created an understanding about the importance of 'better' or 'progressive' laws and local communities are using this to demand better laws (like FRA) or to ascertain their rights over forest resources.

V

Conclusion

It is evident from the above discussion that though the implementation of the PESA has been dismal, the process of its enactment, and more than that the struggle for its implementation has disseminated the message that self-rule is the natural and constitutional right of the village communities. In many places tribals have realized the significance of the Gram Sabha and started to assert their rights given in the PESA. Moreover, a sense of denial has been engendered in the minds of tribals due to clear violation of this legislation, which forced people to make alliance and seek redress with

what the state dubs as extremists (Government of India, 2008; Sharma, 2010). There is no doubt that it has got a 'public life' and became part of the tribals psyche in the SAs. By establishing 'Shilalekh' and putting into practice some of the powers given by it to the Gram Sabha, they have tried to ensure an autonomous space for themselves and assert their rights over village and other natural resources. In this sense the public life of the PESA has questioned the centralized administration of SAs and enhanced the process of democratization of administration in these areas. Indeed, the struggle for the enactment and implementation of this legislation played a crucial role in the political awareness and 'legalism from below' in these societies, which led to the movement for the enactment of the FRA too. Apart from many struggles for the proper implementation of the PESA, there have been demands in many areas for the extension of the Fifth Schedule and the amendment in the PESA. A Bill to this effect was also prepared and circulated by the United Progressive Alliance (UPA) Government in December 2013, but it could not be introduced in the Parliament (Choubey, 2015, pp. 21-23). At many places, however, tribals have been using both the PESA and FRA to fight against the imposed 'development' projects (Choubey, 2014).

Notes

¹ It should be noted the Bhuria Committee had prepared another report for the extension of municipalities in Schedule V areas. But this second report could not take the form of a legislation due to many reasons, primarily because tribal organization felt that Panchayat extension legislation was more important for the life and livelihood of tribals in these areas (See, Choubey, 2013).

² For a comparative study between different provisions about the powers of Gram Sabha at the Central PESA Act and the PESA Acts of six states (Andhra Pradesh, Chhattisgarh, Jharkhand, Gujarat, Madhya Pradesh and Odisha) (Dandekar and Choudhury, 2010, pp. 6-8)

³ I did my field work in this area in 2007-08 during my Ph. D to study the various aspects related to the 'encroachment' on forest land. At that time Surajpur district was part of Surguja district. I focused on the PESA to understand the relationship between local communities and the FD. For the understanding of the phenomenon of 'encroachment' and my study to these villages see Choubey (2014b); For the analysis of the overall experience of the PESA, See, (Government of India, 2008, pp. 31-42)

⁴ I did my fieldwork in the two villages of Udaipur district and also interviewed many local activists, and tribal villagers to understand different facets related to understanding of this law.

⁵ Tribal Profile in a Glance. (n.d.). Retrieved 12 May 2013, from <http://tribal.nic.in/WriteReadData/CMS/Documents/201306061001146927823STProfileataGlance.pdf>

⁶ For detail see, Scheduled Areas in Rajasthan (2014, March 29). Ministry of Tribal Affairs, Government of India. Retrieved October 2, 2014, from <http://www.tribal.nic.in/Content/ScheduledAreasinRajasthanSSAreas.aspx>

⁷ The numbers of MADA and Tribal Pockets in Rajasthan are 44 and 11 respectively. See, 'List of ITDAs MADA Pockets Clusters PTGs' (n.d). Retrieved October 9, 2014, from <http://tribal.nic.in/Content/List%20of%20ITDA%20MADA%20Pockets%20Clusters%20PTGs.aspx>

⁸ Ibid.

⁹ Personal Interaction with Bhanwar Singh, Date: 10th April 2014, Place: Udaipur.

¹⁰ Ibid. Interestingly, the MADA areas and tribal pockets are not part of Schedule V. Local tribal organizations, however, are raising this demand of inclusion of these areas in Schedule V, but till now there is no strong movement at local level or in these areas.

¹¹ Personal Interaction with Bhanwar Singh, Date: 10th April 2014, Place: Udaipur.

¹² Ibid; for the understanding of 'Nate Na Raj' movement see Sharma (2010).

¹³ A senior activist of the Astha, R. D. Vyas informed me that in tribal society there has been a tradition of 'Pathwari', which has been known from different names in different areas. In this tribal people inscribe important events (like pilgrimage etc) of their family or ancestors on a stone as a symbol/remembrance for their family. In the process of 'Shilalekh' this tradition has been followed. Personal Interact with R. D. Vyas, place: Udaipur, Date: 15.04.2014.

¹⁴ Personal Interaction with Bhanwar Singh, Date: 10th April 2014, Place: Udaipur; the villagers of the Biliyan also told the same thing about the process of declaring their villages a 'Gaon Gandrajya'.

¹⁵ Personal interaction with villagers of Biliya. Date: 16th and 17th April.

¹⁶ Ibid.

¹⁷ Personal Interaction with R. D. Vyas, place: Udaipur, Date: 15.04.2014.

¹⁸ Astha and JZJA are important part of the CSD and they played an important role in the movements for the enactment of the FRA. During my field study in the different villages I found that both local organization and tribal people were focused on the implementation of FRA and their central focus was to get title for their 'forest' land.

¹⁹ In other states too there has been a campaign for 'Pathargadhi' (or establishing 'Shilalekh' or stone slab) or declaration of the working Gram Sabha (See, Richard Mohapatra et al 2002).

²⁰ Interview with Bhanwar Singh, Date 10th April 2014, Udaipur, Rajasthan.

²¹ I take the term 'insurgent citizenship' from James Holston, who used it in his book *Insurgent Citizenship*, in which he has presented a study of the activities of the rural poor of the Brazil. He has argued that landless urban people fought to build their houses and other citizenship rights, which made the citizenship of rights more egalitarian. See, Holston (2008).

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