

Draft Paper

A critical inquiry of the rule of PESA in Jharkhand

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Jharkhand conducted its panchayat election after 32 years. It is a predominantly a tribal populated region and hence, the provisions of PESA has to be applied in this region. However, in most of the areas PESA is not functioning due to the political apathy, internal conflict of maoism and lack of knowledge of people. Taking these issues at the backdrop, this paper addresses the issue of governance and implementation of PESA in Jharkhand. It focuses on the critical query of why PESA is not functioning in Jharkhand. What are the barriers which is impeding the process and what are factors which are becoming barriers in the implementing process. It seeks to identify the actors, causes and the plausible reasons for the lack of PESA in this area.

Introduction: Provisions of the Panchayats (Extension to the Scheduled Areas) (PESA) proclaims to establish self-governance, participatory democracy and empowerment of the local community. Despite being hailed as ‘progressive’ and ‘empowering’, PESA has not been implemented in many states. Even where it has been implemented, the true spirits of PESA has not been kept. This paper gives a critical perspective of PESA with referring the case of Jharkhand. The first section of the paper highlights the significant points of PESA. The second section discusses the case of Jharkhand, by referring to the PESA Act and Jharkhand Panchayati Act (2001).

PESA has been a revolutionary act, keeping in mind the protective attitude of the colonial and post-colonial Indian State towards the tribals. Jawarahlal Nehru proclaimed to safeguard the cultural and religious distinctiveness of the tribals and it has been clearly enunciated in the panchsheel programme declared by him. PESA does reiterate the key ideas of panchsheel that tribals should develop along the lines of their own genius and their rights in land and forests should be protected.

Key features of PESA: For the purpose of this paper, I am highlighting only those points which are dealing with land, development and customary law. The aim of PESA is to extend the provisions of Part IX of the constitution relating to the *panchayats* to the Scheduled areas. Clause 2 of this bill says that unless the context otherwise requires, “Scheduled Areas” are those which are under the Fifth Schedule (Art 244(1)), where the tribal populations are predominant.

Customary law and practices: Nehru’s panchsheel¹ also declared that the tribal areas should be administered through their own social and cultural institutions. And this is reflected in the PESA act too. Clause 4(a) explains that *a state legislation on the panchayats that may be made shall be in consonance with the customary law, social religious practices and traditional management practices of community resources*. PESA endows gram sabha with the *duty to safeguard and preserve their traditions and customs, their cultural identity, community resources and the customary mode of dispute resolution*. This provision is to ensure that the people living in scheduled areas are administered through their customary law. It recognizes their customary law, practices and resources. However, the point to ponder upon is does mere recognition of customary law and practices enough to safeguard the interests of the tribals, their culture and livelihood. I will deal it with details in the second section of the paper.

Development projects and plans: Clause (e) declares that *every gram sabha² shall approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level*. This provision entails that gram sabha is the nodal authority to decide and approve a project or plan. Hence, we can argue that it refers to build in a full consensus of the village people and thereby, approve and implement any programme. It reflects a progressive democratic principle based on the idea of equality and social justice, but it is silent on how the consensus is being made, or if at all it is being made.

Land alienation: The provisions of PESA entails that before making any acquisition of any land in the Schedules areas for any development projects/ purpose, gram sabha has to be

¹ This ‘protective’ idea is reflected in the colonial idea of ‘protection’ and ‘improvement’ of the scheduled areas. Also found in the arguments of anthropologists like Verrier Elwin.

² "Gram Sabha" means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of the Gram Panchayat

consulted beforehand. Also gram sabha has to be consulted for resettling and rehabilitation of displaced people/ project affected people. The gram sabha has been bestowed with *the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe (Clause 4m (iii))*. This provision is important to safeguard the land rights of the people living in scheduled areas. Despite such provisions³, tribals are the ones who have been worst affected by land alienation and they are the ones who are affected by development related projects.

Mining and Minerals: To get licence or mining lease for minor minerals in the Scheduled Areas, it is mandatory to get recommendations of the Gram Sabha or the Panchayats at the appropriate level.

Forest rights and minor forest products: Clause 4 (m(ii)) endows ‘gram sabha’ with the *ownership of minor forest produce*. National Common Minimum Programme of the United Progressive alliance government provided specific directions for the welfare of the Scheduled Tribes. The Forest Rights Act confers 13 rights for the adivasis that include access and ownership rights in respect of minor forest produce, including *tendu patta*, reconciliation of the objectives of economic growth and environmental conservation of the target group so as to further the process of their socio-economic and political empowerment, grazing rights, habitat and habitation for primitive tribes, settlement of old habitation and the community right to intellectual and traditional knowledge relating to forest and cultural diversity. It is an attempt to recorrect the historical injustice done to the forest dwelling scheduled tribes by providing the legal basis and procedures for the recognition of adivasi rights to ancestral forest land and resources. Right holders will also be responsible for protection, conservation and regeneration of forests.

PESA has been criticized for not curbing the monopolization of the collection and trade of most of the high value MFP by the Forest Department of the States (Scheduled Tribals bill, 2005). The forest dwellers scheduled tribes are just employed by the contractors only as wage earners.

³ In case of Jharkhand there are laws pertaining to the protection of land rights of tribals (for instance CNT Act).

The fate of PESA in Jharkhand:

The secluded plateau of Chotanagpur now known as Jharkhand is the home of aboriginal and semi-aboriginal tribes. The literal meaning of Jharkhand is forest. It seems that this name was designated to the region in the Mughal period. Despite the fact that Jharkhand is widely recognized as an adivasi state, it is no longer a scheduled tribe dominated State. The adivasis who were once majority in number, have reduced. Out of the total population of 21843911 lakhs only 28 percent are scheduled tribes (Government of Jharkhand). There has been a steady decrease in the Tribal population of Jharkhand to the extent that they have become a minority in their own homeland.

The region is known for its rich natural and mineral resources. Around 40 percent of the total minerals of the country are available here. Mining is an important activity in Jharkhand. There are about 367 mines spread over different districts of Jharkhand and the primary mining is done on coal, iron ore, bauxite, limestone, copper ores, mica, kainite and china clay. The State is the sole producer of cooking coal, uranium and pyrite. The total value of mineral production is amounted to over Rs. 3000 crores. Even with its rich mineral resources the average per capita income is as low as Rs. 4161 per annum, compared to Rs. 8393 the National average of per capita income.

In 2001 the Jharkhand Panchayati Act was enacted and the panchayat elections were held in 2011 after a gap of 32 years. Jharkhand has a history of immense struggle and movement for the formation of PESA. However, despite such movements, PESA has been not implemented. The demand for Jharkhand as a separate statehood has always been centered on their rights in land and forest. They aimed at the total restructuring of the primitive system, which was breaking down under the impact of the colonial economy. I am trying to understand the fate of PESA in Jharkhand under the context of customary rights of tribals over land and forest and the impact on their lives and livelihood due to development.

Each state has made its own panchayati act in accordance with the PESA. However, it is pertinent to notice that there are lots of discrepancies in PESA and Jharkhand Panchayati Act. The next section shall discuss these divergences and its impact on the tribal life and livelihood.

Customary Law and Land Rights in Jharkhand: The Jharkhand Panchayati Act is in agreement with PESA in terms of recognition of customary rights, cultural and traditional systems of tribals. *It shall protect and preserve the traditions and customs of people their cultural identity and community resource means (Sarna, Masna, Jaher-Than etc.) and their customary manners of redressal of disputes, which are not inconsistent with constitution view point* (Clause 5: Jharkhand Panchayati Act, 2001). However, it does not talk about the power of gram sabha to prevent alienation of land of people living in Scheduled areas. It does mentions about the prevention of alienation of grazing lands, but is silent about alienation of land due to mining and development projects.

In the traditional tribal world all forms of land ownership was followed through lineage/*khunkatti*. Tribal customary law allowed for community ownership and utilization of the land and natural resources. The boundaries of the village were marked by the paterfamilias and within these bounds all the land, arable as well as waste, all the hills, jungles and streams –everything above ground and underground became the common property of the village family. Some sections of jungle were specifically reserved for all village spirits or *bongas* and called them as *sarnas* (sacred groves). The owners of the land enjoyed equal status and no one had superior proprietary rights. As a group they were the owners of the area within the village boundaries. Since there was no landlord system, they did not pay any rent. The communal/community ownership started decaying after the inclusion of *dikus* (non-tribals) in the Chotanagpur.

PESA recognizes and reiterates for the practice of community ownership of land. But mere recognition cannot save the decaying of tribal system. The *dikus* and the land alienation since ages have already destroyed the traditional customary practices of the tribals. Secondly, it is important to mention that though PESA announces for the protection of customary rights, it is not reiterated in the Jharkhand Panchayati Act (2001) and hence, it fails to protect and preserve the customary practices of tribals.

Land Alienation and Development-induced-Displacement: Under the Chota Nagpur Tenancy Act, 1908 and Santhal Parganas Tenancy Act (1949) land alienation is not possible. However there are other acts like Land Acquisition Act, 1894 (amended in 1984), Coal Bearing Areas (Acquisition and Development) Act, 1957 which have made possible to acquire any land even in scheduled area. In the name of the ‘public purpose’ and ‘national

interest' its resources have been harnessed by the government. The total land acquired for development projects in Jharkhand during 1951-90 is 1495947.04 acres (Ekka and Asif: 2000).

The development projects have not only exploited the resources but also the simple tribals. They are not given proper/appropriate compensation and there is no proper rehabilitation scheme for the displaced people. A study done by Ekka and Asif reveals that tribals have lost almost 15.5 lakhs of land for various projects. According to their estimation of all total land which has been acquired 55.10 percent was private land, 22.6 percent common and 22.3 percent forests (Ekka and Asif: 2000). In the Industrial policy of Jharkhand Government (2001), the thrust is given on the industrialization and exploitation of the natural and mineral resources at the cost of tribals. Three Industrial Area Development Authorities with headquarters at Adityapur, Bokaro and Ranchi are responsible for acquisition of land, development of infrastructure facilities like road, drainage, park, water supply, public utilities, etc. within their jurisdiction (5.1 of Industrial Policy, GoJ).

As discussed above the PESA act gives power to gram sabha to control land alienation and gives its power to plan, approve and implement development projects. However, the Jharkhand Panchayati Act merely endows gram sabha and gram panchayat with '*identification*' and '*planning*' and '*implementation*' of any programme (refer: Jharkhand Panchayati Act (2001) Section 10(i): *Identification of economic developmental schemes for the village and formulation of criteria for fixing their priorities.* (Section 10(ii): *Approval of schemes for social and economic development including all the annual schemes pertaining to the Gram Panchayat, before implementation of programmes and projects*).

Thus, we see discontinuity with the PESA act and hence it is not keeping with the spirit of self-governance. One of the primary causes of it may be political unwillingness and indolent bureaucracy. The reason being the self-governance institution seems to be a myth and gram sabha's position is reduced to an implementer. Instead of actively participating and voicing their opinions, they become passive actors and just become an appendage of bureaucracy by merely carrying out the duties and orders. It clearly fails the very idea of PESA.

Forest Rights: Wherever the local communities have taken the responsibility of protection and preservation of the natural resources there the forests are regenerating and have yielded

sustainable development. The deteriorating condition of the forest under the state control gave an alarming call to the policy makers and government. In the early policies the power and right of forest management were not given to local people because it was assumed that they will destroy the resources. The chain of command and decision was with the forest department and government. However the shrinking of the forest in the hands of government control proved this assumption wrong.

For better maintenance of the forest government are delegating more functions down the chain of command. Decentralization is being considered as a means to achieve sustainable development and to protect forest values. They are only authorized users, which mean they will only have the right of access and withdrawal. They don't have the right of management, exclusion and alienation. In Jharkhand the villagers claim the forests as their own ancestral property. The protection and management of forests by the local communities' '*gram sabha*' is outside the domain of legal framework. The village managed forest committee is illegal in the sense that it has got no government recognition. However it has got the backing of historical struggle and the customary practices of the tribals.

Heterogeneity and cultural fractures: The cultural differences among various tribals groups have also been another reason for non-implementation of PESA. Clause 4 (a) acknowledges the customary and socio-religious practices of tribals, but unfortunately it considers 'tribals' as a homogeneous entity. Jharkhand has many tribal groups who have been staying together for centuries. In the region, where Mundari system has existed, there Munda Manki However, it does not take into consideration the cultural heterogeneity of various tribals groups staying in the region.
