



**PESA IMPLEMENTATION – SOME ESSENTIAL PREREQUISITES AND
SUGGESTIONS FOR THE STATE OF JHARKHAND**

DRAFT REPORT

**By
ENVIRO LEGAL DEFENCE FIRM**

MARCH 2011



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1. Some Fundamental Legal Concerns

- We need to accept that there are design flaws in the framework of PESA.
- Should this be an Extension Act? Is that the main reason for its non implementation?
 - This is a law that should not have been an extension of Panchayats to avoid confusion between the regular Panchayats and the Panchayats in scheduled areas; but a separate framework for scheduled area governance based on the constitutional mandate, under the control of the Governor and the tribes advisory council perhaps under the joint control of Panchayati Raj and Tribal Ministry. For this a clear change in Allocation of Business Rules 1961 at the prerogative of the Prime Minister must be carried out. Have the Allocation of Business Rules been changed to include the administration of scheduled areas through the framework of PESA¹?

2. Is PESA a constitutional amendment?

- Today PESA framework is a set of exceptions and modifications to Part IX of the Constitution that has to be made applicable in states which have not been adequately carried out by states either in the respective Panchayat laws or in their subject matter laws. Is this a Constitutional Amendment? ²Technically no, as it has not been carried out as an amendment to the Constitution through any constitutional amendment Act and Article 243 M(4) (b) categorically says so .

¹ We are aware that The allocation of business rules have not changed to include this and the allocation of business rules are as follows:

Ministry of tribal affairs

Entry 6

Scheduled Areas;

(c) regulations framed by the Governors of States for Scheduled Areas and for Tribal Areas specified in Part 'A' of the Table appended to paragraph 20 of the Sixth Schedule to the Constitution.

7. (a) Commission to report on the administration of Scheduled Areas and the welfare of the Scheduled Tribes; and

(b) issue of directions regarding the drawing up and execution of schemes essential for the welfare of the Scheduled Tribes in any State.

MoPR

1. All matters relating to panchayati raj and panchayati raj institutions.

² Article 243 M (4) (b) Constitution of India quite expressly says so.



- PESA as a legal instrument becomes redundant after the coming of the respective Panchayat Acts. Its only to the extent the State laws are inconsistent or repugnant, PESA may still be applicable. However this must be legally proved and perhaps challenged in court of law. Till then it's the state law, however inconsistent they may be, that is applicable as a framework of PESA implementation. This becomes more complicated where no action has been taken on behalf of the state especially for subject matter laws. In such cases, even courts have expressed inabilities in asking the state to amend their subject matter laws or to frame Rules. (e.g. Rajasthan case on PESA- the first in India)

3. *Power to make Rules or issue Directions: Where are they?*

- The power to make Rules or issue any directions in furtherance of the Act does not vest with the Centre or the State in the design of the PESA as there are no specific provisions to the same. However some states have made their allocation of powers subject to Rules and prescriptions. This may be drawing the strength from the respective Panchayat law or state legislations.
- Clear provisions regarding the same needs to be added as follows:

Nodal agency:

(1) The Ministry of the Central Government dealing with Panchayats and Scheduled areas or any officer or authority authorised by the Central Government in this behalf shall be the nodal agency for the implementation of the provisions of this Act.

Power of Central Government and the State Government to issue directions:

In the performance of duties and exercise of powers by or under this Act, every agency and organisation involved in the implementation of this Act shall be subject to such general or special directions, as the Central Government or the State Government may, from time to time, give in writing within the mandate of the Act and in accordance with the constitutional mandate.

Power of the State Government to make Rules

(1) The State Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the powers, such rules may provide for all or any of the following matters, namely:-

(a) documentation of Customary Law, traditional management of customary resources and dispute resolution mechanisms among others;

(b) the procedure of notifying village at the hamlet or group of hamlet level and for manner of constituting Gram Sabha of such village and carrying out Gram Sabha meetings including quorum ;



(c) the recognition of criteria for approval for plans, identification of beneficiaries, parameters and formats for granting utilisation certificates by the Gram Sabha;

(d) the manner in which recommendation for minor minerals including their auction shall be given and the process of consultation before land acquisition in scheduled areas and rehabilitation of displaced person due to any project in such areas;

(e) the manner in which minor water bodies shall be planned and managed;

(f) the manner in which intoxicants, minor forest produce, money lending, land alienation, village markets, institutions of social sectors, local plans including tribal sub-plans shall be regulated, controlled or owned;

(g) the manner in which disputes within Gram Sabha and amongst Gram Sabha or Panchayats be resolved;

(h) any other matter is required to be, or may be, prescribed for the purposes of the Act.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before the State Legislature, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, the State Legislature agree in making any modification in the rule or it agrees that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

4. Panchayat law and customary law, social and religious practices and traditional management of community resources

- PESA mandates that the state Panchayat Act must be made to ensure that they are in consonance with customary law, social and religious practices and traditional management practices of community resources (Section 4(a)):
 - Is there a clear understanding of customary law in scheduled areas? Have they been documented? If not they need to be done as early as possible and clear provision to this effect need to be added in state Panchayat law in a formulation as below: [See Box:]

Every Gram Sabha shall document the customary law in their respective jurisdiction and such customary law shall have precedence over other practices as long as they are within the constitutional mandate on similar practice.

- Are the social and religious practices prohibited in any manner in scheduled areas? Are they required to be documented? If yes, then a clear provision to this effect is required in the respective Panchayat law. Two clear examples



could be thought of in this regard: a) use of intoxicants b) hunting. While one has been inserted in the PESA, the other is missing (although covered in FRA) Further, hunting is prohibited³ as per provisions of the Wildlife (Protection) Act, 1972 with certain exceptions⁴ that are provided within the act. A sample formulation is pasted below which can be used by State Panchayat law.

Every Gram Sabha shall document the social and religious practices in their respective jurisdiction and such social and religious practices shall have precedence over other practices as long as they are within the constitutional mandate on similar practice.

- What are the traditional management practices of community resources? And what constitute community resources? A clear provision to document these in the Panchayat law. Further a clear definition (perhaps an inclusive definition of what includes community resource is required). Two sample formulations are given below:

Every Gram Sabha shall document the traditional management practices of community resources in their respective jurisdiction and such traditional management shall have precedence over other practices as long as they are within the constitutional mandate on similar management practice.

Community resources means and include common lands such as grazing lands, gothans, khalihans, burial grounds, skinning grounds, cattle pounds, thrashing grounds and other such areas of common usage; water commons such as ponds, lakes, water bodies, wetlands; and forest resources such as panchayat forests, village forests, adjoining reserved, protected forests and such traditional forests by whatever name called.

5. Definition of Village and its Gram Sabha:

- Central PESA states “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 affair in accordance with traditions and customs”(Section 4(b))

The definition of village has a generic tone of “ordinarily” consisting of habitation or group of habitation or a hamlet or a group of hamlet as if there is a possibility of not ordinarily too! The fact has also been that most state legislation while it copies the Central PESA does not delineate the next legal or operational steps of reconstituting the village as per PESA.

³ Section 9 Wildlife (Protection) Act, 1972

⁴ Section 11 Wildlife (Protection) Act, 1972



Three legal measures are important here:

i) the definition of village should be more definitive with a “shall” clause deleting “ordinarily” to give a clear message to the states in the Central PESA.

ii) the Governor need to notify such villages at the hamlet or group of hamlet level in consultation with the respective hamlets whether they are comfortable with such an arrangement. Here the role of the Collector becomes important to carry out the administrative and legal responsibility. Infact in most scheduled districts such information is already available for the village level. A simple appellate mechanism or provision of filing objections to such a reconstitution in a time bound manner may be added to make it a fair process.

The Governor shall notify each hamlet or group of hamlets as a “village” in scheduled areas. Provided that the hamlet or the group of hamlets which are managing their affairs in accordance with traditions and customs so submits through a resolution to the Collector who shall then forward it to the State Government for such notification. Provided further that the Collector may also give an opportunity to any hamlet or group of hamlets to object to any such formation within sixty days of such submission”.

iii) Further the use of the word “community” (Section 4(b)) without a clear definition gives conflicting signals whether such community includes all the members of the Gram Sabha or particular tribe or clan in such areas. This should be avoided and a clear provision may be added by replacing the word community and with adding “all the members of the Gram Sabha or particular tribe(s) in that village who are managing their affairs in accordance with tradition and customs.

The phrase “a village shallgroup of hamlets comprising a “community” and managing its affair in accordance with traditions and customs” should be replaced by the phrase “ comprising the majority tribal members within such village who manage their affairs in accordance with traditions and customs”

Lets now examine how the state of Jharkhand has formulated the definition of village and the changes required (if any):

In the Jharkhand Panchayati Raj Act,2001 states: "Village" means a village specified by the State Government, by notification in the official gazette to be a village for the purposes of this Act, and includes a village or a group of villages/ Tolas so specified. The word "village" includes a revenue village; but in the scheduled area, a 'village' means any such village in the scheduled area in which there will ordinarily be a residence or a group of residences, or a tola or a group of tolas, comprising such community as manages its activities according to its customs and usages; (emphasis supplied) (Section 2 (ii))



Insert in section 2(ii)

Every such hamlet or group of hamlets constituting a village shall be notified by the Governor.

Provided that the hamlet or the group of hamlets which are managing their affairs in accordance with traditions and customs so submits through a resolution to the Collector who shall then forward it to the State Government for such notification.

Before the resolution is forwarded to the state government the Collector shall cause public notice of the substance of such a resolution to be affixed at convenient places in the hamlet or group of hamlets to be so notified and at office of the District Collector.

Provided further that the Collector may also give an opportunity to any hamlet or group of hamlets to object to any such formation within sixty days of such submission

- The terms “Gram Sabha” and “Village” used throughout in the Act must make a clear reference to the village as defined in the Act by using words such as follows:

Section 4(c) of Central PESA should read as follows: ***Every “such village shall have a Gram Sabha and “recognised as such by the concerned Panchayats within which such Village Gram Sabha exists” ...***

Let us examine how JPRA has responded to this provision:

Jharkhand PRA: Gram Sabha in a scheduled area:-

“Ordinarily there shall be one Gram Sabha for a village but if members of a Gram Sabha in a scheduled area so desired more than one Gram Sabha may be constituted in the manner to be prescribed, and in the area of each such Gram Sabha there shall be a residence or a group of residences or group of small villages or villages/tolas comprising communities which shall manage their activities according to customs and usages”. (Section 3 (iii))

Section 3 (iii) should be replaced as follows:

Every village as defined and notified under Section 2(ii-a) shall have a Gram Sabha of members above the age of eighteen and their names included in the electoral list and it shall be recognised as such by the respective Gram Panchayat within which such village Gram Sabha exists.

The procedure for Constitution of Gram Sabha has been prescribed in Rule 4 of Jharkhand Gram Sabha Niamawali, 2003 as follows:

A notification shall be issued in district gazette inviting applications from the residents of villages in the district for constitution of separate Gram Sabhas at hamlet



or group of hamlet level. The applications shall be presented within one month of the publishing of Gazette notification. The District magistrate will then issue a public notification describing the names, population of the Gram Sabha for which applications are revived and invite objections. After all objections have been received the District magistrate shall take a decision on the applications. Thereafter, a public notification will be issued declaring the constitution of the new Gram Sabha, describing the villages within its jurisdictions, its customs and traditions among others.

The above Rule should be partially amended to read as follows:

Rule 4 of Jharkhand Gram Sabha Niamawali, 2003 : A notification shall be issued in district gazette inviting applications from the residents of villages (**as defined and notified in Section 2(ii)**) in the district for constitution of separate Gram Sabhas . (*
***...time limit of one month to be deleted). The District magistrate will then issue a public notification describing the names, population of the Gram Sabha for which applications are received and invite objections. After all objections have been received the District magistrate shall take a decision on the applications (...add **“in consultation with the respective proposed Gram Sabhas and after giving them reasonable opportunity of being heard”**). Thereafter, a public notification (**shall**) be issued declaring the constitution of the new Gram Sabha, describing the villages within its jurisdictions, its customs and traditions among others.

Another minor but important point that is relevant in case of many Gram Sabhas in scheduled areas is as follows:

For example, sec 75 (B) of the 2001 JPR Act vests the gram Sabha with the power to exercise control over gram Panchayats. If there is more than one gram Sabhas, which one of them shall exercise control over the Gram Panchayat is not clear. This aspect needs further clarity from the state. Though there is section 109 JPRA that provides for a mechanism for resolution of dispute between Panchayats and other local authorities. This provision could be used to provide a mechanism to resolve disputes between two or more gram sabhas within the Gram Panchayat on issues specified in Section 75 (B) JPRA.

Insertion of section 109 (1-a)

(1-a) In case of any dispute arising between two or more Gram Sabha, the disputewould be resolved jointly by the Gram Sabha. If the Gram Sabhas are not able to resolve the dispute jointly then the dispute may be referred to the state government and the decision of the state government thereto shall be final.

Presiding Officer in Scheduled Areas

JPRA-

Section 8

(i)

(iii) Presiding over of meetings of Gram Sabhas in scheduled area -

Meeting of Gram Sabha in scheduled did area shall be presided over by such, a member of the scheduled tribes who is not the Mukhia, Up-Mukhia or



member of the Panchyat, and such meeting shall be presided over by a respected person according to the custom usage traditionally prevalent in that area such as Gram Pradhan, Manjhee, Munda, Pahan, Mahto or one Khown by any other name, or by a person proposed by them or unanimously by nominated/ supported by the members present in the meeting.

6. Traditions, Customs, customary resources and traditional methods of dispute resolution:

- While the assertion of the Act that the Gram Sabha is competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution deserves praise, but what constitute “community resources” (as explained earlier) and what are the accepted customary modes of dispute resolution or atleast the principles that are used for the adjudication in a traditional mode must be laid down or documented to avoid any confusion. A clear provision in the state law to this effect must be incorporated. Add Section 4(d-a) to (Section 4(d)) in Central PESA or respective State Panchayat law as follows:

Section 4(d-a) - Every Gram Sabha shall document the customary modes of dispute resolution or the general principles that are followed within such customary modes in their respective jurisdiction and such customary modes dispute resolution shall have precedence over other practices as long as they are within the constitutional mandate on similar dispute resolution methods .

In JPRA a special provision with respect to the above has been inserted as follows:

5. Extra powers and functional of Gram Sabha in scheduled area -

(i) It shall protect and preserve the traditions and customs of persons their cultural identity and community means (Sarna, Masna, Gohar-Sthan etc.) and their customary manners of disposal of disputes, which are not inconsistent with constitutional view-point, and when needed may for the sake of extending co-operation in this regard, duly bring proposals before the Gram Panchayat, Panchayat Samiti and Zila Parishad as well as the State Government;

This could be rephrased as follows:

5 (i) The Gram Sabha shall document, protect and preserve the traditions and customs of persons their cultural identity and community resources including Sarna, Masna, Gohar-Sthan and their customary manners of disputes resolution in



their respective jurisdiction and also ensure that they are in accordance with the basic principles of the Constitution.

(ii) Further, the Gram Sabha shall build on the existing customary law documentation in special tenancy legislations such as Chota Nagpur Tenancy Act, 1908 and Santhal Paraganna Tenancy (Supplementary Provisions) Act, 1949

7. Powers Exclusive to Gram Sabha:

7.1. The Central PESA mandates three exclusive powers to the Gram Sabha: It states :” every Gram Sabha shall (i) approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level” While the above is important it is important to add the following after Section 4(e) (i) :

Section 4(e)(i-a) should read as follows:

(i-a) Each Gram Sabha shall decide criteria for approval of every plans, programs and projects for social and economic development and implemented at the Panchayat level within such Gram Sabha (s) exist. Provided that full and prior information on each such plan, program and project is provided by the project proponent to the Gram Sabha (s) in a language that is easily and commonly understood preferably in a vernacular language.

(i-b) Every such plan, program and project shall be approved by such Gram Sabha (s) accordingly.

Note that the above formulation may also be added as a specific function for the Gram Sabha in scheduled areas in the respective Panchayat law.

7.2 The Central PESA also mandates that *the Gram Sabha shall be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes.* (Section 4 (e) (ii))

In Jharkhand the JPRA provides under the General Functions of the Gram Sabha as follows:

“Under Rules to be made by the State Government in this regard and subject to such general or specific orders as may time-to-time be issued by the State Government, the Gram Sabha shall perform the following functions, namely -

Identification and selection of persons as beneficiaries under poverty alleviation and other programmes” (Section 10(1)(a)(vi))



As seen from above, the decision of the Gram Sabha regarding identification and selection of beneficiaries been made subject to Rules or orders issued by the State Government. This is inconsistent with the spirit of PESA. Secondly this function has been included among the general functions of the Gram Sabha applicable to both scheduled and non scheduled areas. It has not been included in the additional powers of the Gram Sabha in scheduled areas. In our view this should be added in the Additional Powers of Gram Sabha in Scheduled areas as follows:

Following amendments are suggested in JPRA:

Insert: Section 10 (5)(vi)- *Each Gram Sabha shall be responsible for identification or selection of persons as beneficiaries under poverty alleviation and other programs within such Gram Sabha .*

Explanation: *These poverty alleviation and other programmes include those that are in carried out by the Gram Panchayats under Section 75(A) (15)⁵; By the Panchayat Samiti under Section 76 (A) (xv)⁶; and by the Zila Parishad under Section 77 (A)(xiv)⁷*

Section 10(5)(vii) The Gram Sabha shall also decide criteria for identifying such beneficiaries which shall be duly recognized by the Panchayat within which such Gram Sabha exists.

⁵ **Functions of Panchayats**

Section 75

(A) Functions of Gram Panchayat - subject to such conditions as may be specified by the Government from time to time, the Gram Panchayat shall perform the functions specified below:

(15) Poverty alleviation programme -

- (i) Promotion of public awareness and participation in poverty alleviation programmes for full employment and creation of productive assets;
- (ii) Selection of beneficiaries under various programmes through Gram Sabhas;

⁶ **Section 76**

(A) Functions of Panchayat Samiti -

Subject to such conditions as may be prescribed by the Government from time to time, as far as in keeping with the Panchayat Samiti Fund, the Panchayat Samiti shall perform in its area the functions enumerated as follows :-

(xv) Poverty alleviation programme –

- (a) Preparation of plans for full employment and creation of productive assets et al and taking action with respect to their implementation;
- (b) Cooperation in effective implementation and monitoring.

⁷ **Section 77**

(A) Functions of Zila Parishad -

Subject to such conditions as may be prescribed by the Government from time to time, the Zila Parishad shall perform the following functions:

..(xiv) Poverty alleviation programme-

- (a) Preparing a time bound plan for poverty alleviation and ensuring its implementation;
- (b) Arousing awareness in people for full employment and creation of productive assets et al and participation in poverty alleviation programmes;
- (c) Supervision and monitoring of all poverty alleviation programmes.



7.3 Central PESA mandates that “*Every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilisation of funds by that Panchayat for the plans, programmes and projects referred to in, clause (e)*”; (Section 4(f))

In JPRA , with regard to certification of utilization the following provisions are mentioned:

Section 10 -Powers and functions of Gram Sabha and its annual meeting -

1. Under Rules to be made by the State Government in this regard and subject to such general or specific orders as may time-to-time be issued by the State Government, the Gram Sabha shall perform the following functions, namely:.....

.....
(v) Determination and confirmation of appropriate utilization of funds for the schemes, programmes and projects specified under section 10(1) (a)(2) by the Gram Panchayat; [i.e. (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;]

A new provision must be added as Additional Powers of Gram Sabha in Scheduled areas in a more definitive way as follows: Insert after Section 10(5) (vi) as follows:

Insert Section 10(5)(vii): ***Every Panchayat at the village level shall obtain from the Gram Sabha a certification of utilisation of funds in the form appended to this act by that Panchayat for the plans, programmes and projects at the village level.***

10(5)(viii) Every Gram Sabha shall also develop a format for granting utilisation certificate which shall be formally recognised as such by the respective Panchayat within which such Gram Sabha exists.

Format of Utilisation certificate as given in GFR, 2005 modified for use by Gram Sabha



FORM of Form of Utilization Certificate

Amount:

Total:

2. Certified that we the Gram Sabha of Village _____ have satisfied ourself that the specifications on which the fund was sanctioned have been duly fulfilled / are being fulfilled and that we have exercised the following checks to see that the money was actually utilized for the purpose for which it was sanctioned.

Certified that out of Rs. Of fund sanctioned during the year in favour of For utilisation towards construction _____ for which it was sanctioned and that the balance of Rs. remaining unutilized at the end of the year has been surrendered to, dated

Certified that we have satisfied myself that the conditions on which the funds were allocated have been duly fulfilled / are being fulfilled and that we have exercised the following checks to see that the money was actually utilized for the purpose for which it was sanctioned.

Signature(Gram Sabha of _____village)

Date

(If the forms as given above are accepted then the provision section 10(5)(viii) would be deleted.

8. Powers Exclusive to the Panchayat at Appropriate Level

8.1. *Planning and Management of Minor water bodies:*

The Central PESA mandates as follows: *Planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level; (Section 4(j))*

In JPRA there are several provisions where even Gram Sabha (although the Central PESA does not mandate as such), the various tiers of Panchayats have been vested with several functions relating to minor water bodies or water in general. The fact that there is no definition of minor water body in the parent legislation actually may be treated in a more creative way rather than taking the lack of definition as a negative aspect. But before that it's important to examine the provisions relating to water in the JPRA. The following sections in the JPRA are relevant.

Section 10

Powers and functions of Gram Sabha and its annual meeting -

1. Under Rules to be made by the State Government in this regard and subject to such general or specific orders as may time-to-time be issued by the State Government, the Gram Sabha shall perform the following functions, namely -
*(xi) Managing natural sources such as land, **water**, forest falling within the limits of the village area according to the constitution and other relevant laws then in force;*

.....



(xv) Construction, repairs and maintenance of **public wells and ponds** as well as making available drinking water for domestic use;

(xvi) Making available and maintaining **water sources for bathing, washing and for drinking purposes of domestic animals**;

.....

5. Extra powers and functional of Gram Sabha in scheduled area -

.....
(ii) It may manage the natural sources including land, water and forest within the village areas according to its tradition but in tandem with the provision of the Constitution and duly keeping in view the spirit of other relevant laws in force for the time being;

Section 75

(A) Functions of Gram Panchayat - subject to such conditions as may be specified by the Government from time to time, the Gram Panchayat shall perform the functions specified below:

(4) Implementation of minor irrigation, water management and water coverage development plans.

Section 76

(A) **Functions of Panchayat Samiti -**

Subject to such conditions as may be prescribed by the Government from time to time, as far as in keeping with the Panchayat Samiti Fund, the Panchayat Samiti shall perform in its area the functions enumerated as follows :-

(i) **It shall make schemes for its balanced uplift and for ensuring their implementation in the following fields :-**

(m) Integrated minor irrigation.

(v) **Development of minor irrigation, water management and water shed as well as drainage of slanting water -**

(a) Assistance to Government and Zila Parishad in providing minor irrigation works;

(b) Preparation of integrated plan for community and private minor irrigation and ensuring implementation thereof.

Others :-

(z) Letting of minor water bodies for pisciculture and other commercial purposes.

(B) **Additional powers of Panchayat Samiti in scheduled area -**

Without prejudice to the generality of the powers endowed by this Act, a Panchayat Samiti in any of the scheduled areas shall have the following powers:-

1. Preparing a plan for minor reservoirs belonging up to a specified water area, owning and managing the same;

Section 77



(A) Functions of Zila Parishad -

Subject to such conditions as may be prescribed by the Government from time to time, the Zila Parishad shall perform the following functions:

(i) General Functions –

.....

(iv) Minor irrigation, water management and water shed - development -

- (a) Construction and management of lift irrigation;*
- (b) Extension of water shed programme;*
- (c) Maintenance of available water sources;*
- (d) Development of ground level water resources;*
- (e) Encouraging community water committees and installing community pump sets.*

(vi) Pisciculture -

- (a) Production and distribution of spawns;*
- (b) Setting up fish shopping cooperative societies;*
- (c) Pisciculture in private and community tanks;*

(x) Drinking water facility -

- (a) Control and prevention of water pollution;*
- (b) Extension of rural water supply;*
- (c) Management of drinking water sources.*

(c) Additional powers of Zila Parishad in Scheduled area -

Without prejudice to the generality of the powers endowed by this Act, the Zila Parishad in a scheduled area shall have following powers -

- (1) Making a plan for minor reservoirs up to the limit of an specified area, having ownership on them and managing the same;*

The numerous provisions enumerated above with respect to minor water bodies (minor irrigation, water management) especially in the Scheduled Areas makes it clear that, the State Act not only gives the powers of planning, management and control of the same to the Panchayat Samiti and the Zila Parishad but also the ownership of the same. Clearly this is desirable and progressive but actually beyond the mandate of PESA, as PESA does not mandate ownership of minor water bodies to any tier of Panchayat. The provisions also mandate the role of Gram Sabha where as the parent law i.e. PESA allocates the powers exclusively to Panchayat at appropriate level.

Further, a careful analysis of the ***Bihar Irrigation Act, 1997 (applicable to Jharkhand)*** expressly vests *all rights* in water of *any river, natural stream or natural drainage channel, natural lake or other natural collection of water* in the State Government⁸. Further all the irrigation works shall also vest in the Government⁹. The Act gives significant powers over the management and planning of water bodies to the government officials such as canal officers,

⁸ Sec 3

⁹ Sec 4



Divisional Canal Officer and Collector etc. This clearly conflicts with the mandate of PESA, which requires the PAL's planning, *management and control* over minor water bodies.

The Act also provides for the acquisition of ownership of any existing village channel by any person including water users associations¹⁰. Further the Government may transfer any distributory, minor or watercourse to the Water Users Associations¹¹. Such Water Users Associations could function as parallel bodies to the formal Panchayats and could create conflicts on the ground.

Another Act which vests broad, unchecked powers over the collector is ***Bihar Emergency Cultivation and Irrigation Act, 1956***, (applicable to Jharkhand- TBC) whereby he is empowered to order that a certain land shall be irrigated from a particular natural stream, river or *chaur*¹ or a particular irrigation work.¹ This amounts to encroachment upon the right of PS and ZP over management and control of minor water bodies. Further the Collector can exercise such powers notwithstanding any *record-of-rights*. The Act nowhere defines the term *record-of-rights*. It probably means a record containing customary rights of the village community over natural resources¹. This again conflicts with JPRA, which provides for the gram Sabha to safeguard and preserve the traditions and customs of the people. Thus the power of the collector notwithstanding record-of-rights clearly conflicts with the Gram Sabha's power to preserve and safeguard the same .

A suitable formulation after confirming that the Bihar Irrigation Act, 1997 and Bihar Emergency Cultivation and Irrigation Act, 1956 are applicable and in what modified form, in the respective Acts will be submitted later.

9. Powers to the Gram Sabha or Panchayat at Appropriate Level

9.1. Consultation before Land Acquisition for Development Projects and before resettling or rehabilitating persons affected by such projects

The Central PESA mandates as follows:

- i) 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; (**Section 4(i)**)*

It is important to examine how has the state of Jharkhand allocated this power.

Three legal issues emerge here.

- First, what is the legal meaning of consultation in the absence of any definition in the Act.
- Second, what should be the process of such consultation.

¹⁰ Sec 32

¹¹ Sec 46



- Third, how has the discretion of allocating such power been exercised, given that the state can choose between the Gram Sabha or the Panchayat at appropriate level for allocating such important power where the Gram Sabha is most likely to be affected.

In scheduled areas, the JPRA does not provide for mandatory consultation of the Gram Sabha or Panchayat at Gram, Block or District level before acquisition of land for development projects or before resettling or rehabilitating persons affected by such projects.

However three related sections in the JPRA deserve mention.

Section 84(1) Fund of Gram Panchayat and its property:

Gram Panchayat shall have power to acquire, hold and dispose of property and to enter into contract with respect thereof; Provided that in every case of disposal of immovable property by the Gram Panchayat, it shall have to obtain prior permission of the Government.

Section 85(1) Fund of Panchayat Samiti and its property -

Panchayat Samiti shall have power to acquire, hold and dispose of property and to enter into contract with respect thereto; Provided that in every case of disposal of immovable property, it shall have to obtain prior permission of the government

Section 85(5) *If any Panchayat Samiti requires land to fulfil any objective of this Act, it shall negotiate with the person or persons having interest in the said land and, if consent is not arrived at, shall apply to the District Magistrate for acquisition of the said land. If the latter is satisfied that the land is required for public purposes, he will take measures to acquire the land under the relevant provisions of the Land Acquisition Act, 1894 (Act 1 of 1894), and the land having been acquired shall vest in the Panchayat Samiti.*

Section 86(1) Fund of Zila Parishad and its property-

The Zila Parishad shall have the power to acquire, hold and dispose of property and to enter into contract in respect thereto; Provided that in all cases of acquisition or disposal of immovable properties, it shall have to obtain prior permission of the Government.

Section 86(5) *-If a Zila Parishad requires land for fulfilling any purpose of this Act, it will negotiate with the person or persons having interest in the said land and, if consent is not arrived at, will apply to the District Magistrate for acquisition of the land. If the latter is satisfied that the land is required for public purpose, he will take measures for acquisition of the Land under the relevant provisions of the Land Acquisition Act and the said land having been acquired, shall vest in the Panchayat Samiti.*

Though, JPRA empowers Panchayats (in both scheduled and non scheduled areas) to acquire land for carrying out their functions, in this case too, it does not provide for a prior consultation with the Gram Sabha.

In light of the above gaps, clearly, the following corrective measures are required:



First, the term “Consultation needs to be defined on the lines of “Free, Prior and Informed Consent (FPIC) affirmed by international law and standards¹²”

The formulation may be as follows: Note that this can be also added as a part of the Central Act which can be adapted in every state.

Insert Explanation in Section 4(i), “For the purposes of this Act, Consultation with its cognate and grammatical variations shall mean publicising the acquisition proposal by issuing of public notice in local dailies or by beat of drums in the village and nearby areas, discussion and dialogue with the concerned Gram Sabha, formal written consent of the Gram Sabha after providing full and prior information about the acquisition proposal and its impact on livelihood and conservation.”

Similarly for R&R, Insert Section 4(i)(a), “Resettlement and Rehabilitation shall be carried out as per the provisions of National Resettlement and Rehabilitation Policy 2007 as well as corresponding state policies, if any, whichever is more beneficial in favour of the displaced, until a new legislation governing resettlement and rehabilitation of displaced person due to acquisition is passed either by the Central or the State Government.”

Second, the JPRA should be amended to include a provision which mandates consultation with the Gram Sabha mandatory in case of acquisition of land in Scheduled Areas and also before any resettlement or rehabilitation that takes place in such scheduled areas.

The Jharkhand Panchayati Raj Act, 2001 may be amended as follows:

Insert Section 10(5)(vii)(a)- “Prior consultation with the Gram Sabha is mandatory in case of acquisition of land and also before finalization of any resettlement or rehabilitation scheme for displaced persons in such scheduled areas.

Provided that in case of acquisition in Scheduled areas, the Collector shall convene an extra-ordinary meeting of the Gram Sabha as per section 5 and 6 of Jharkhand Panchayati Raj Act 2001, and carry out a consultation process with the Gram Sabha on the proposed acquisition.

Provided that Rehabilitation and Resettlement in Scheduled Areas shall be carried out as per the provisions of Jharkhand Resettlement and Rehabilitation Policy, 2008 till the time a new legislation is passed”

Insert proviso to Section 10(5)(vii)(b) “Land compulsorily acquired for a project cannot be transferred to any other project or purpose except for a public purpose, without carrying out a fresh and prior consultation with the Gram Sabha.

¹² General Recommendation XXIII of the United Nations (UN) Committee on the Elimination of Racial Discrimination, the UN General Assembly’s Plan of Action for the 2nd International Decade of the World’s Indigenous Peoples, International Labor Organization Convention 169 and many other international instruments recognize FPIC as a right of Indigenous Peoples and obligate states (countries) to uphold this right.



Insert Explanation to section 10(5)(vii): “Consultation shall mean consultation as defined in section 4(i) of PESA.”

Add second proviso to Section 84(1) -Fund of Gram Panchayat and its property – “provided that the State Government shall not give its consent unless and prior consultation with the Gram Sabha has been carried out.”

Add second proviso to Section 85(1)- Fund of Panchayat Samiti and its property- “provided that the State Government shall not give its consent unless and prior consultation with the Gram Sabha has been carried out.”

Add second proviso to Section 86 (1) Fund of Zila Parishad and its property - “provided that the State Government shall not give its consent unless and prior consultation with the Gram Sabha has been carried out.”

Thirdly, similar enabling provisions may be inserted in Land Acquisition Act, 1894 as applicable in Jharkhand to make it consistent with PESA and JPRA.

Land Acquisition Act. 1894 as applicable in Jharkhand:

Insert proviso in section 4 (explanation)– “ provided that in Scheduled areas, the smallest revenue administrative unit is a ‘village’ as defined in PESA.”

Insert proviso to Section 5-A -, “provided that in case of acquisition in Scheduled areas, the Collector shall convene an extra-ordinary meeting of the Gram Sabha as per section 5 and 6 of Jharkhand Panchayati Raj Act 2001, and carry out a consultation process with the Gram Sabha on the proposed acquisition.

As an alternative to the amendments to Land Acquisition Act, the above provisions are being included in the JPRA.

Fourthly, since, as of now, there is no legislation on resettlement and rehabilitation therefore, to implement the provisions of PESA, the resettlement and rehabilitation policy of Jharkhand needs to be given legal sanctity.

Insert Section 5-B – “Rehabilitation and Resettlement in Scheduled Areas shall be carried out as per the provisions of Jharkhand Resettlement and Rehabilitation Policy, 2008 till the time a new legislation is passed”

9.1.1. Voluntary acquisition of land: A violation of PESA!



As regards land acquisition, another interesting provision in the JPRA relates to one of the Functions of Zila Parishad where it states that Subject to such conditions as may be prescribed by the Government from time to time, the Zila Parishad in performing its functions, regarding *Roads, buildings, bridges - culverts, waterways and other means of communication*, it would among others organize people for voluntary land acquisition for new roads and widening the existing roads. (Section 77(A) ((xi)of JPRA). Although this seems benign, it amounts to violation of PESA as there cannot be any provision relating to voluntary acquisition by a statutory body in scheduled areas. *This needs to be deleted in the context of scheduled areas or the process of acquisition as provided above needs to be followed for the purpose of voluntary acquisition, essentially meaning that compensation for the land acquired is to be remitted to the land owner.*

9.2 Prior recommendation in granting prospecting license or mining leases for minor minerals as well as grant of concession for exploitation of minor minerals by auction

*Central PESA states that : The **recommendations** of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective license or mining lease for minor minerals in the Scheduled Areas; (Section 4(k))*

*Central PESA states that “the **prior recommendation** of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction”; (Section 4(l))*

There are no such provisions under JPRA, 2001 regarding minor minerals. Also minor minerals have not been defined either.

Section 10(5)(2) of JPRA provides for a generic provision as follows: *Gram Sabha to manage the natural sources including land, water and forest within the village areas according to its tradition but in tandem with the provision of the Constitution and duly keeping in view the spirit of other relevant laws in force for the time being.*

As stated earlier, in JPRA, there is no specific provision in on taking mandatory recommendation of the Gram Sabha or the Panchayat at appropriate level prior to the grant of prospecting licence or mining lease for minor minerals or for grant of concession for the exploitation of minor minerals by auction in the Scheduled Areas. However, the Act gives the power to the Gram Sabha to manage its land resources among others. This would per se include minerals including minor minerals.¹³

The Jharkhand Minor Mineral Rules 2004 which deal with granting of leases and permits for exploitation of minor minerals and related provisions have been analysed here especially Rules 4, 5, 6, 7, 8, 9, 10 and 11

¹³ Land as defined in Land Acquisition Act, 1894



No person shall undertake any mining operation without a quarrying permit or a mining lease¹⁴ is granted on an application made to Collector or the Competent Officer (except for granite) as defined in the Rules. Application shall be made in Form A appended to the Rules and shall be accompanied by valid clearance certificate of the payment of mining dues (such as royalty, rent deed), income tax returns, affidavit showing surface rights obtained from the owner of the land among others.¹⁵ The application shall be disposed off within 120 days of its receipt.¹⁶ The maximum area on which a mining lease is granted is 100 hectares and the period of the leases shall not exceed 10 years.

A special mention of Rule 5(4), which states that in scheduled areas no mining lease or quarry permit shall be granted without prior recommendation of the Gram Sabha or the Panchayat.

Special Provisions on mining of Sand was introduced as follows:

Rule 12- *the settlement of sand as minor mineral shall be done by the Gram Sabha within whose jurisdiction the proposed mining area fall. Gram Sabha shall govern sand mining areas and give them on contract for mining purposes. Revenue generated from such mining shall be deposited in the Gram Sabha and shall be used for the village development.*

Order of Preference while granting mining leases:

Rule 13 *states that while granting mining leases first preference shall be given to cooperative societies of scheduled tribes, followed by cooperative societies of scheduled castes, followed by cooperative societies of people belonging to general category followed by applicants belonging to general category.*

While issuing permits the Collector may give preference to duly registered Cooperative Societies.¹⁷

Rule 22- Conditions of for mining leases given in Form D- Relevant among them are:

- *Time, mode and place of payment of royalty*
- *Payment of compensation to the occupier of the surface of the land as per Rules*
- *Lessee shall take measures for planting for planting in the same area or any other area selected by the central or the state government not less than twice the number of trees destroyed due to mining operations or to the extent possible restoration of flora destroyed*
- *Payment of wages as per Minimum Wages Act.*
- *The restriction on surface operations in any area prohibited by any authority*
- *Any other restriction imposed by Collector*

¹⁴ Rule 4, **Jharkhand Minor Mineral Concession Rules, 2004**

¹⁵ Rule 9, **Jharkhand Minor Mineral Concession Rules, 2004**

¹⁶ Rule 6 and 7 **Jharkhand Minor Mineral Concession Rules, 2004**

¹⁷ Rule 11B and C, **Jharkhand Minor Mineral Concession Rules, 2004**



Rule 23- Renewal of Mining leases- Application to be submitted in Form AA. Existing quarrying leases shall not be renewed but would be allowed to subsist for the remaining period for which they have already been granted on the same terms and conditions

Rule 24- Leases cannot be transferred without the previous permission of Collector in writing

Rule 29- Assessment of Rent/ Royalty as per Rates Specified in Schedule I and II and other conditions mentioned in the Rules.

Rule 32 - Application for quarrying permit shall be submitted to the competent officer in Form 1 will necessary documents which shall be decided within 30 days of its receipt.

Rule 35- Auction of Royalty Collection Contract

Rule 41- The amount of royalty shall be decided by the officer appointed for this purpose by the state government as per the rules.

Rule 54- Penalty shall be levied and recovered as per the provisions of the Rule for unauthorized extraction and removal of Minor minerals by the authorized officers of mining department

The above is by and large the manner in which minor minerals are treated in most scheduled states including Jharkhand.

Jharkhand minor mineral concession Rules 2004 though provide for prior recommendation of Gram Sabha or Panchayat at appropriate level before granting mining leases only, but not in case of prospecting licenses or for concession for exploitation of minor minerals by auction in Scheduled Areas. To this extent the Rules are inconsistent with PESA and needs to be amended. Also the Rules also do not provide for the procedure for carrying out prior recommendation.

To correct the aforementioned anomalies following recommendations are made:

As mentioned before, PESA only makes recommendation of the Gram Sabha or the Panchayat at appropriate level mandatory, prior to the grant of prospecting licence or mining lease for minor minerals or for grant of concession for the exploitation of minor minerals by auction in the Scheduled Areas. However, in law, recommendation is in the nature of opinion or view and is not binding on the party. Therefore, in order to adequately protect the interest and resources of the Gram Sabha, recommendation may be replaced with **“Free and Prior Informed Consent”**

Besides, the power of free and prior informed consent in case of grant of mining leases shall be given to Gram Sabha and the provision is included in the section on Additional powers of the Gram Sabha in Scheduled Areas.

Thirdly, appropriate amendments may be made in Jharkhand Minor Mineral Concession Rules, 2004 as per the provisions of PESA and JPRA as follows:



Suggested Amendments:

PESA:

Section 4(k and l) should be amended as follows:

(1) “The Free, prior and Informed Consent of the Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas and also for grant of concession for the exploitation of minor minerals by auction.

(2) The revenue received from the Lease Rent/Royalty or penalties imposed by the Gram Sabha and the Panchayats shall be utilised for the purposes of the Gram Sabha within which such mining for minor minerals are carried out. The State mining department shall assist the Gram Sabha and the Panchayats at the appropriate level depending upon the area to be distributed.

JPRA:

Insert Subsection in section 10(5) *(1) The Free, prior and informed consent of the Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas and also for grant of concession for the exploitation of minor minerals by auction.”*

(2) Every application for renewal or transfer of mining leases, quarrying permit, or for concession shall be treated as a fresh application and a free, prior and informed consent of the Gram Sabha is mandatory.

(3)The Gram Sabha shall also maintain a record of the mining leases, quarrying permits , concessions for exploitation of minor minerals by auction for which consent has been given.

Explanation:

The Gram Sabha shall have the authority to accept or reject the application of mining leases, quarrying permits and for concessions for exploitation of minor minerals by auction, prescribe or alter the rate of royalty/rent, promote competitive bid, prescribe conditions for mining leases, alter the area proposed for mining and period of such lease, renewal of mining leases, quarrying permits or concession for exploitation by auction.

Jharkhand Minor Mineral Concession Rules, 2004

Insert Sub rule in Rule 2- “Free, Prior and Informed Consent” shall mean

Amend Sub Rule in Rule 5(4)- *“ No mining lease or quarrying permit shall be granted without obtaining a “Free, Prior and Informed Consent” of the Gram Sabha or Gram Sabhas if the proposed area for mining falls within the jurisdiction of two or more Gram Sabhas”*



Insert sub rule in Rule 11:

After receipt of the application for mining leases the Collector or the Competent Authority shall inform the Gram Sabha of Gram Sabhas within whose jurisdiction the area proposed for mining falls, of the Particulars of such an application. Thereafter, Collector or the Competent Authority along with the Applicant shall organize a consultation with the Gram Sabha or Gram Sabhas as the case may be and inform about the conditions of mining leases, area proposed for mining, period of lease among others. The Gram Sabha shall then, through a resolution decide on the proposal and inform its decision to the Collector or the Competent authority which shall be binding.

Insert sub rule in Rule 22: *The Gram Sabha may impose such other conditions, alter of modify prescribed conditions for mining leases in scheduled areas, as it deems necessary*

Insert sub rule in Rule 23: *Free , prior and informed Consent of the Gram Sabha shall be mandatory on every application for renewal of mining lease in scheduled areas.*

Insert sub rule in Rule 24: *Free , prior and informed Consent of the Gram Sabha shall be mandatory on every application for transfer of mining lease in scheduled areas*

Insert sub rule in Rule 34: *Free , prior and informed Consent of the Gram Sabha shall be mandatory as per the procedure prescribed in the Rules on every application for quarrying permit in scheduled areas.*

Insert sub rule in Rule 34: *The Gram Sabha may impose such other conditions, alter of modify prescribed conditions for quarrying permits in scheduled areas, as it deems necessary*

Insert sub rule in Rule 59: *Rent/ Royalty received from mining leases or quarrying permits in scheduled areas shall be shared with the Gram Sabha or Gram Sabhas in such proportion to be decided by the Mining department and Gram Sabha or Gram Sabhas.*

Insert sub rule in Rule 54: *Revenue generated from penalty levied for unauthorized extraction and removal of minor minerals in scheduled areas shall be shared with the Gram Sabha or Gram Sabhas in such proportion to be decided by the Mining department and Gram Sabha or Gram Sabhas*



10. Powers to Gram Sabha and Panchayat at Appropriate Level

10.1. *Enforcing prohibition, regulation or restriction on the sale or consumption of any intoxicants*

The Central PESA mandates that “*While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with, among others, the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant (Section 4m(i)) .*

The Jharkhand PRA, 2001, does not contain this provision in any manner.

The only reference is under the social welfare functions of the Zila Parishad as follows:

.....

Section 77 (A) (xxiii) Social welfare and social security including women's welfare -
(f) Campaign against superstition, intoxication, untouchability and others

While the study of the excise laws dealing with intoxicants reveals that the substantial powers in this respect have been vested in government. The ***Bihar and Orissa Opium Smoking Act, 1928***, provides for the registration of opium smokers¹⁸ and maintenance of a register of opium smokers by an authority to be prescribed by the State.¹⁹ In light of the new 2001 Act the Gram Sabha along with one of the tiers of the Panchayat depending on the area it covers should be the authority responsible for registration of smokers in the Scheduled Areas under the Act. Similarly the ***Bihar & Orissa Excise Act, 1915***, confers all the powers in respect of granting licenses for manufacture, possession and sale²⁰ of any intoxicants to the Collector. Further it is the duty of the state to regulate import²¹, export and transport²² of the intoxicants in the State. Thus we see that the State officials enjoy the overall control over the sale and consumption of intoxicants. However the Act casts a duty on the Panchayats to give information about the unlicensed manufacture of any intoxicant.²³, but the action against such erring persons shall be taken by the State officials.

In scheduled areas of Jharkhand this power needs to be granted to the Gram Sabha along with the PAL depending on the area of influence. The Bihar and Orissa Excise Act, 1915 need to be amended as follows through an amendment Act (if not already done) :

¹⁸ A person who is above 25 years of age and who is in a habit of smoking opium. Only a registered person can manufacture, possess or smoke opium in the State.

¹⁹ Sec 3 & 4

²⁰ Secs 13-20

²¹ Sec 9

²² Sec 11

²³ Sec 76



In the Scheduled Areas, no licence for manufacture, possession or sale, or any exclusive privilege for manufacture or sale, of any intoxicant shall be provided, without the prior approval of the Gram Sabha. The competent authority to grant license for the sale, possession or manufacture of any intoxicant shall refer every proposal to the concerned Gram Panchayat along with the respective Gram Sabhas within that jurisdiction for their decision, within thirty days from the date of receipt of such a reference. The Gram Panchayat along with the concerned Gram Sabhas shall intimate their decision within thirty days thereafter. The competent Authority shall ensure that such intimation has been sent and also a response received conveying the decisions of the Gram Panchayat as well as the respective Gram Sabha.

10.2. Ownership of Minor Forest Produce

Regarding Minor Forest Produce, the Central PESA provides ... “While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the ownership of minor forest produce; (Section 4(m) (ii))

Amendment to section 4(m) (ii) to endow both the Gram Sabha and Gram Panchayat the power and authority to exercise ownership over minor forest produce

While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the **Gram Panchayat** and **the Gram Sabha** are endowed specifically with the ownership of minor forest produce; (Section 4(m) (ii))

The JPRA in total contravention of this doesn't talk about ownership of the same, instead it vests, all three tiers of PRIs with the power of collection, processing, storage, marketing of MFP to Gram Panchayat, integrated management and supervision, collection, storage, processing and marketing management of MFP to Panchayat Samiti and integrated management of MFPs to Zila Parishad as follows:

“Section 75

(A) Functions of Gram Panchayat - subject to such conditions as may be specified by the Government from time to time, the Gram Panchayat shall perform the specified below:

(8) Minor forest produce -

(i) Providing for collection, processing, storage and marketing of minor forest produce.

Section 76

A) Functions of Panchayat Samiti -

Subject to such conditions as may be prescribed by the Government



from time to time, as far as in keeping with the Panchayat Samiti Fund, the Panchayat Samiti shall perform in its area the functions enumerated as follows :-

(viii) Social and farm forestry and minor forest produce -

(a)

(d) Integrated management and supervision of collection, storage, processing and marketing management of minor forest products;

Section 77

(A) Functions of Zila Parishad -

Subject to such conditions as may be prescribed by the Government from time to time, the Zila Parishad shall perform the following functions:

(c) Integrated management of minor forest products”.

As is clear from the above the functions are listed under the general functions of the PRIs, which are subject to conditions prescribed by the state and the funds available with Panchayats. And as stated earlier the most important aspect of ownership to Gram Sabha along with Panchayat at appropriate level is missing in total contravention of PESA.

The ***Bihar Forest Produce (Regulation of Trade) Act, 1984 (applicable in Jharkhand)*** creates monopoly of the State in the trade of certain forest produce. By virtue of the Act, the State Govt may appoint agents to carry out purchase and trade of forest produce on its behalf. It is pertinent to mention here that the State may appoint the Gram Panchayat as its agent²⁴ apart from tribal cooperatives like *LAMPS (Large Scale Multipurpose Society), Vyapar Mandal or PACS* etc. Further, it is provided that no person other than the Government or its agent shall purchase or transport or import or export the specified forest produce²⁵. Thus all the primary collectors²⁶ who collect the forest produce have to sell it to the Agent of the State, at the depots established by the State that too at the price determined by the latter. In Jharkhand the State Trading Organization, which is the wing of the Forest Department harvests and does marketing of the major forest produces of the State. These provisions are in clear conflict with PESA as well as the 2001 Act as the new Panchayat Raj Act vests the PRIs with the right over marketing and management of MFPs, which the former legislation seeks to regulate by creating state monopoly.

Having realised the incongruity, the State of Jharkhand has initiated a process of issuing an Ordinance titled “ *Jharkhand Laghu Van Upaj (Gram Sabha ko Swamitva ka Sandan) Vidheyak, 2000*” . Although a careful reading of the draft Ordinance clearly makes the Forest Department as the ultimate controller and not a facilitator. The said draft needs to be re-examined and redrafted to make it in conformity to PESA. This is also necessary now with the enactment of the Forest Rights Act (FRA) where ownership of MFP for subsistence and bonafide livelihood has been granted to the forest right holders as a community forest right under FRA. For the current requirement an enabling provision within the JPRA may be added as follows:

²⁴ Sec 4

²⁵ Sec 5

²⁶ Sec 2 (4)



- (1) *The Gram Sabha shall have ownership rights over minor forest produce as defined under the Forest Rights Act within and outside the village boundaries where they have had traditional access.*
- (2) *The Gram Panchayat, shall facilitate the integrated management and supervision of collection, storage, processing, marketing, value addition of minor forest produce through the Gram Sabha .*
- (3) *The Gram Sabha and the Gram Panchayat shall be facilitated by the Forest Department in the overall management of MFP for its sustainable management and use especially through value addition, market linkages and minimum support price among others .*

10.3. Prevention of alienation of land in Scheduled Areas and taking appropriate action to restore alienated land to the Scheduled Tribe

The Central PESA mandates “*While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;*”

The JPRA has not made any special provision regarding the same.

However, two strong Tenancy Laws namely the Chota Nagpur Tenancy Act, 1908²⁷ and Santhal Paraganna Tenancy (Supplementary Provisions) Act, 1949²⁸ does provide for prevention of land alienation of Scheduled Tribes in those regions through the authority of the Deputy Commissioner. While the strength of the two Acts should be used to the maximum, the linkage with PESA as applicable in the scheduled areas within the coterminous areas of the two tenancy regions cannot be missed.

In the light of the above a formulation is suggested below:

(1) The Gram Sabha along with the Panchayat at appropriate level depending on the area of the land and their jurisdiction shall have the authority to prevent any unlawful alienation of land as well restore unlawfully alienated lands belonging to the scheduled tribe in a scheduled area as well as any land within a scheduled area.

Provided further that the Collector through the Sub Divisional Officer or any other officer so authorised shall provide all assistance in implementing the decision of the Gram Sabha along with the Panchayat at appropriate level of the concerned jurisdiction in a time bound manner preferably within a period of three months of receipt of reference from the Gram Sabha along with the concerned Panchayat.

²⁷As amended by the Bihar Scheduled Areas Regulation, 1969

²⁸As amended by the Bihar Scheduled Areas Regulation, 1969



10.4. Control over Institutions and Functionaries in all Social Sectors

Regarding Institutions and functionaries in all social sectors, the Central PESA provides “While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to exercise control over institutions and functionaries in all social sectors;

There are two issues that require analysis. First is the identification of the social sectors and functionaries within those social sectors and secondly, prescribing various types of control over those social sectors. Control over social sectors can be exercised through financial and administrative mechanisms and Gram Sabha and Panchayat at appropriate level can be accorded mechanism for control over different aspects of the social sector.

Some of the indicative social sectors are as follows:

- 1. Employment*
- 2. Education*
- 3. Health*
- 4. Rural water supply and sanitation*
- 5. Women and child development*

The JPRA in their various provisions relating to institutions of social sector has provided as follows:

Section 10

Powers and functions of Gram Sabha and its annual meeting -

1. Under Rules to be made by The State Government in this regard and subject to such general or specific orders as may time-to-time be issued by the State Government, the Gram Sabha shall perform the following functions, namely –

.....

(x) Keeping control through Gram Panchayat over such organizations and such functionaries in social sectors, as have been transferred to the Gram Panchayat or appointed by the Gram Panchayat;

Section 77

(A) Functions of Zila Parishad -

Subject to such conditions as may be prescribed by the Government from time to time, the Zila Parishad shall perform the following functions:

.....

(d) Maintenance of orphanage, reformatory home and welfare institutions;

Section 86

Fund of Zila Parishad and its property -

.....

(e) All receipts connected with schools, hospitals, dispensaries, buildings, institutions or under construction works whatsoever vested in the Zila Parishad or constructed by it or coming under its control and management;



Section 162

Administrative control of Panchayats over projects, schemes etc. :-

(1) Subject to any general or special order of the State Government notified in the official gazette, the function and administrative control of all State Government institutions, projects, schemes and offices located within the Gram Panchayat, shall vest in the Gram Panchayat.

(2) Where the institutions, projects, schemes and offices serve the areas of more than one Gram Panchayat, their function and administrative control shall vest in the Panchayat Samiti.

(3) Where the institutions, projects, schemes and offices serve the area beyond that of a Panchayat Samiti, the function and administrative control of theirs shall vest in the Zila Parishad.

Illustrations :-

(a) Function and administrative control of the primary, middle and secondary Schools, health sub-centers, hand pumps, irrigational tube wells etc., which serve within the area of one Gram Panchayat shall vest in a Gram Panchayat;

(b) Function and administrative control of the Health sub-centres etc., which serve in areas of more than one Gram Panchayat, shall vest in a Panchayat Samiti;

(c) Function and administrative control of the referral Hospitals etc., service area of which extends to more than one Panchayat Samiti, shall vest in the Zila Parishad;

(d) Functions of the officers and employees of the State Government and the power of administrative control over those serving in these institutions, projects and schemes as well as offices shall vest in the Panchayat concerned but for their dismissal, removal or reduction in rank. The State Government shall specify a clear mechanism relating to such administrative control.

Although the institutional sector gets adequate coverage through the Gram Sabha as well as various tiers of the Panchayats as envisaged in PESA, (See Sections 10, 77, 86, 162 among others, they all have been made subject to Rules and prescriptions. The initial sub clause needs to be removed.

10.5. Management of Village Market

The Central PESA mandates: “While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to manage village markets by whatever name called. (Section 4(m) (iv))

Under the JPRA: There are various provisions that relate to market and fairs as follows:

Section 2 (xxxviii) "Public Market" or "Public Fair" means a market or a fair, as the case may be, notified under section 83 of this Act;

Section 75 (B) Additional functions of Gram Panchayat in Scheduled Area -



Without prejudice to the generality of the powers conferred by this Act, a Gram Panchayat, in the scheduled area, subject to the support, control and instruction of the Gram Sabha, shall have the following powers:-

1. To manage the village market, fairs including cattle fair, by any name whatever the same be known;

Section 77A-Functions of Zila Parishad

(xix) Market and fair -

(a) Aids in managing fairs (cattle fair included), markets and hats in the Panchayats' areas.

Section 83

Regulation of markets or fairs -

(1) Save as provided in the Agricultural Market Act for the time being (in force), no person save the Gram Panchayat shall either fix or use any place within the Gram Panchayat for the purpose or establishment of any market or fairs;

Provided that the State Government may declare any market or fair to be public market or public fair, and the public market or the public fair declared as such shall be vested in the Panchayat Samiti.

(2) The State Government may make rules for the market or the fair specified in sub-section (1).

Taxation and Realisation of Claims

Section 93

Taxation -

(1) Taxation by a Gram Panchayat-

(ii) Subject to the maximum rate as assessed by the Government, a Gram Panchayat may realise the following fees and rates, namely -

(a) Fees on registration of such vehicles which are not registered under any Act for the time being in force;

(b) Fees on management of sanitation - means in places of pilgrimage, hats and fairs lying within its jurisdiction as ascertained by the Government, by notification;

(2) Taxation by a Panchayat Samiti -

2) Subject to that specified by a notification of the government, fees on management of sanitary means in places of pilgrimage, hats and fairs lying within its jurisdiction;

3) Fees for permission of hat and market;

(3) Taxation by a Zila Parishad

(b) May impose fees and tax on the following, namely -

1) Boat or conveyance registration fees;

2) Fees for affording sanitation arrangements in places of pilgrimage and fairs within its jurisdiction, as prescribed by the government, by notification;



(ii) The Zila Parishad shall not impose tax within its jurisdiction on such vehicles as have been registered by any other authority under any rule for the time being in force or on sanitation arrangements made available at places of pilgrimage or fairs etc. by any other local authority;

The above sections largely covers the mandate of PESA however small modifications will bring it in total conformity of PESA

Section 83 may be rephrased as follows:

Regulation of markets or fairs -

*(1) Save as provided in the Agricultural Market Act for the time being (in force), no person save the Gram Panchayat **and in consultation with the Gram, Sabha** shall either fix or use any place within the Gram Panchayat for the purpose or establishment of any market or fairs;*

Provided that the State Government may declare any market or fair to be public market or public fair, and the public market or the public fair declared as such shall be vested in the Panchayat Samiti.

.....to be deleted....(subject to State Rules to be deleted in case of scheduled areas)

Taxation and Realisation of Claims may be modified as under:

Section 93-A

Taxation -

(1) Taxation by a Gram Panchayat in Scheduled areas-

(ii) a Gram Panchayat , in consultation with the Gram Sabha (s) within the respective Gram Panchayat in a scheduled area may realise the following fees and rates, namely -

(a) Fees on registration of such vehicles which are not registered under any Act for the time being in force;

(b) Fees on management of sanitation - means in places of pilgrimage, hats and fairs lying within its jurisdiction.....(delete);

(2) Taxation by a Panchayat Samiti in Scheduled areas -

2) ...The Panchayat Samiti in a scheduled area in consultation with the respective Gram Panchayats who in turn shall consult their respective Gram Sabha(s) may levy fees on management of sanitary means in places of pilgrimage, hats and fairs lying within its jurisdiction;

Provided that panchayat samiti may fix a minimum fee for permission to set shop in a haat within the scheduled area

3) It may follow a similar process as in subsection 2 for fees for permission of hat and market;

(3) Taxation by a Zila Parishad in Scheduled areas

(b) The Zila Parishad in a scheduled area in consultation with the respective Panchayat Samiti who in turn shall consult their respective Gram Panchayats who in



turn shall consult their respective Gram Sabha(s) may impose fees and tax on the following, namely -

- 1) Boat or conveyance registration fees;*
- 2) Fees for affording sanitation arrangements in places of pilgrimage and fairs within its jurisdiction ...(delete) ...;*

(ii) The Zila Parishad shall not impose tax within its jurisdiction on such vehicles as have been registered by any other authority under any rule for the time being in force or on sanitation arrangements made available at places of pilgrimage or fairs etc. by any other local authority;

10.6. Control over money lending

The Central PESA mandates: “While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to exercise control over money lending to the Scheduled Tribes; (Section (4 (m) (v))

There is no provision in JPRA on control over money lending. In other words this power has neither been given to Gram Sabha or Panchayat at appropriate level.

The Bihar Money Lender’s Act, 1974 as adapted in Jharkhand is applicable. Some specific Sections are as follows:

Sec 3: *State Government may exempt any class of money Lenders or any class of Loans from the operation of this Act*

Sec 4: *A Register of Money Lenders shall be maintained by Anchal Adhikari or such other officer as may be appointed by the State Government.*

Sec 5: *Registration of Money Lenders and Registration fee- every money lender shall get himself registered and unless he is so registered it shall not be lawful for him to act as such.*

For the purpose of registration as a money lenders, he shall make an application and a prescribed registration fee to the Anchal Adhikari in whose jurisdiction his place of business lies. The Anchal Adhikari on receipt of the application and registration fee shall grant the registration certificate.

Sec 6- *The registration certificate granted shall be valid for a period of 5 years unless sooner cancelled under section 33.*

Section 7 *Duty of Registered Money Lender to maintain accounts and give receipts and inspection of accounts*

Sec 9- *Maximum rate on interest- in case of a secured loan it is 12% and in case of an unsecured loan it is 15%. No court shall pass a decree for a higher rate of interest than this.*



Suggested amendments in JPRA as well as Bihar Money Lender's Act, 1974 as adapted in Jharkhand as follows:

Suggested amendment in JPRA

Insert subsection in section 10(5)

The Gram Sabha along with the Panchayat at appropriate level for respective jurisdictions shall exercise control over money lending and money lenders who operate in scheduled areas.

Suggested amendments in Bihar Money Lender's Act, 1974 as adapted in Jharkhand

Insert Proviso in Section 3 *“provided that in Scheduled Areas this power shall be exercised by the Gram Sabha along with the Panchayat at appropriate level for respective jurisdictions”*

Add in section 4; *“ Provided that in Scheduled Areas, the Gram Sabha shall maintain a register of money lenders in such form and containing such particulars as may be decided by the Gram Sabha and inform the respective Panchayats where such money lenders operate as per their information.*

Insert Sub section in section 5-

Every Money Lender operating in scheduled areas shall make an application to the Gram Sabha or Gram Sabhas within whose jurisdiction his place of business lies, for registration.

The Gram Sabha in its meeting shall enter the name of the applicant money lender along with such particulars as the Gram Sabha may decide, in the register of money lenders and Gram Panchayat shall issue a certificate of registration to him. The Applicant shall deposit a registration fee to the Gram Sabha.



The details of Registration shall be sent to the concerned Panchayats where such money lenders wish to operate for record.

Insert after subsection (7) in section 7

Section 7(8) (1)

A Registered money lender operating in scheduled areas shall submit to the Gram Sabha and Panchayats within whose jurisdiction he/she operates, an yearly record of transactions made. This shall include:

- i) the date of the loan, the amount of the principle of the loan and rate per centum annum of interest charged on the loan.*
- ii) Particulars of the person to whom the loan was advanced*
- iii) The amount of every payment received by the money lender in respect of the loan and the date of such payment*
- iv) Any other term which may be agreed on between the money lender and the debtor.*

The Gram Sabha shall submit the records to the concerned Panchayats where such money lenders has operated for their record.

(2) Penalty for non-furnishing of reports: Any registered money lender who contravenes the provisions of section 7(8) (1) is liable to pay a penalty not exceeding Rs. 500 for first offence and Rs 100/- per day for each subsequent day till the default continues. The District Collector within whose jurisdiction the registered money lender is registered is empowered to recover the penalty otherwise. In case of default in payment of the penalty it may be recovered as arrears of land revenue.

Provided the registered money lender is accorded a hearing before the imposition of the penalty.

Insert Proviso in section 9:

For money lenders operating in scheduled areas, the maximum rate of interest shall be decided by the gram Sabha, which however shall not exceed more than 12% for secured loans and 15% for unsecured loans.

10.7. Control over local plans and resources for such plans including tribal sub plans

The Central PESA mandates: “While endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with the power to control over local plans and resources for such plans including tribal sub-plans.



There are several related provisions in the JPRA as follows: The words local schemes and tribal schemes have also been used instead of local plans and tribal sub plans.

Section 5-. Extra powers and functional of Gram Sabha in scheduled area

....

(iii) It may provide for local schemes including tribal sub-schemes and sources and costs for such schemes;

Section 75

(A) Functions of Gram Panchayat - subject to such conditions as may be specified by the Government from time to time, the Gram Panchayat shall perform the functions specified below:

(1) General functions -

(i) Preparation of annual plans for development of the Panchayat area;

....

(2) Agriculture, including Agriculture Extension -

(i) Execution of plans for development of agriculture and horticulture;

(ii) Execution of plans for reclamation of wasteland;

(4) Implementation of minor irrigation, water management and water coverage development plans.

.....

(B) Additional functions of Gram Panchayat in Scheduled Area -

2. To have control over the sources and expenditure of the local scheme

Section 76

(A) Functions of Panchayat Samiti -

Subject to such conditions as may be prescribed by the Government from time to time, as far as in keeping with the Panchayat Samiti Fund, the Panchayat Samiti shall perform in its area the functions enumerated as follows :-

(ii) General Work -

(a) Preparation of the Annual Plans for development of the Panchayat Samiti area and submission thereof to the Zila Parishad for inclusion in the District Plan;

.....

(c) Preparation of plans for relief work during natural calamities and their implementation;

77 (c) Additional powers of Zila Parishad in Scheduled area –

(3) Having control of the sources and expenditure of the local scheme, in which tribal sub-scheme is included; and

Apart from the above detailed provisions add a generic provision as follows:



In Scheduled areas the Gram Sabha along with the Panchayat at appropriate level within which such local plans including tribal sub plans are implemented shall have control²⁹ over such plans and their resources.

Provided further that the state agencies shall facilitate implementation of all such plans and their budgets with the approval of the Gram Sabha and the Panchayat at appropriate level within which such local plans including tribal sub plans are implemented.

11. Some General Observation in JPRA:

Inter-tier allocation of powers and subject to availability of funds:

The powers among the three tiers of the PRIs are distributed in such a way that all the three tiers have the same power over the same subject matter, especially in respect of additional powers in scheduled areas.³⁰

The Central PESA clearly says that the “*State legislation.... shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or the gram sabha*³¹”. The State instead of providing safeguards as required by this provision itself violated it by endowing higher levels of PRIs with powers which should have been vested with the lower tiers of the PRIs. For example all the three tiers of PRIs have the power to manage village markets, which could have been vested at the village level only, there being no need to involve the higher tiers here. Further all the three tiers of PRIs can exercise “*control*” over local plans including tribal sub-plans. The State needs to frame enabling rules to clarify as to how different tiers of PRIs will exercise control over the same subject matter. Similarly both Panchayat Samiti and Zilla Parishad have the right to own minor water bodies. This again is quite vague. The scheme of inter-tier allocation of powers clearly reflects that the linkages between different tiers of Panchayats haven’t been thought through.

It is interesting to note here that the general powers of all three tiers of PRIs have been made subject to the availability of funds with the respective tiers. The Act does not prescribe as to how different powers of the PRIs shall be accorded priority in case of paucity of funds. That has been left to the discretion of the PRI concerned.

²⁹ Control has to be detailed

³⁰ Note here that in other State laws the various powers under PESA have been clearly devolved upon specific tiers of Panchayats

³¹ 4 (n)