



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

FINAL REPORT

**By
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1. Introduction:

Scheduled areas in India are inhabited by the tribal population who have been managing their natural resources and governing their social, economic and political life through a well- knit system of ancient customs and practices. However, in the wake of modernisation these age old institutions of self governance are fast becoming extinct¹. It is a challenge to usher the tribals in the mainstream of development efforts without disturbing or destroying their cultural identity and socio- economic milieu². To achieve this objective Bhuria Committee was constituted 1994 to examine various dimensions of self rule for tribals, the constitutional requirements and to make recommendations for extending the provisions of the Constitution 73rd (Amendment) Act, 1992 to the Scheduled Areas. Following the recommendations of the committee, the Parliament extended the provisions of 73rd Amendment Act to the Scheduled Areas in the then eight states (now nine states) by passing Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (hereinafter PESA).

1.1 Devolution of Powers under PESA:

PESA legally recognizes the right of tribal communities to govern themselves through their own systems of self-government and also acknowledges their traditional rights over natural resources.

In pursuance of this objective, PESA empowers Gram Sabhas (village assemblies) to play a key role in approving development plans, controlling all social sectors – including the processes and personnel who implement policies, exercising control over minor (non-timber) forest resources, minor water bodies and minor minerals, managing

¹ Self Governance for Tribals, MoRD- UNDP Sub Program on People's Empowerment through Panchayati Raj Institutions in Schedules V Areas and Studies on Law Affecting the Poor, Singh S.K. (ed.), Vol. IV, NIRD.

² Ibid.



local markets, preventing land alienation and regulating intoxicants among other things.³ Box below highlights the devolution of powers on PRIs in PESA.

- 1) Mandatory Powers of Gram Sabha
 - a. Management of community resources
 - b. Approve all plans/projects
 - c. Identification of beneficiaries
 - d. Issue certificate of utilization of funds
 - e. Customary mode of dispute resolution
- 3) Discretionary Powers to Gram Sabha or the Panchayat at appropriate level
 - f. Prior mandatory recommendation for acquisition of land and rehabilitation and reconstruction in scheduled areas.
 - g. Prior mandatory recommendation for grant of prospective license or lease for mining minor minerals.
 - h. Prior mandatory recommendation for grant of concession for exploitation of minor minerals by auction
- 4) Mandatory Powers to Panchayat at appropriate level
 - i. Planning and management of minor water bodies.
- 5) Powers to Gram Sabha and Panchayat at appropriate level
 - j. Ownership of minor forest produce
 - k. Control over money lending
 - l. Manage and regulate village markets
 - m. Control over manufacture, sale and consumption of intoxicants, and
 - n. Prevent land alienation and restore alienated lands
 - o. Control over institutions and functionaries in all social sectors
 - p. To control local plans and resources for such plans including tribal sub plans

1.2 Adoption of PESA by the State of Maharashtra:

State governments were required to amend their respective Panchayat Raj Acts within a year and not to make any law that would be inconsistent with the mandate of PESA. The Panchayati Raj Institutions in Maharashtra is governed by two separate legislations. While the Gram Sabha and the Village Panchayat is governed by *Bombay Village Panchayat Act of 1958*,⁴ the Zila Parishad and Panchayat Samiti is governed by *Maharashtra Zila Parishad and Panchayat Samitis Act 1961*.⁵ To conform to the Central Act of PESA the Government of Maharashtra has enacted the *Maharashtra endowing upon the Panchayat in the Scheduled Area, the powers to function as self Government (Amendment of Certain State Laws) Act, 1997*, which was further amended in 2003 via the *Bombay Village Panchayats and Maharashtra Zilla Parishads and*

³Section 4, Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996.

⁴ Hereinafter referred to as BVPA.

⁵ Hereinafter referred to as MZPPSA.



Panchayat Samitis (Amendment) Act, 2003. At a very broad level it can be said that the drafting of Amendments in Maharashtra to conform to the spirit of PESA, suggest that it represents one of the more progressive adaptations of PESA. Besides, there is a very distinctive attempt to simultaneously empower the Gram Sabha with all the tiers of the Panchayati Raj System while making the recommendations of the Gram Sabha binding on all the higher tiers. Having said that, most of these powers are limited by their being only consultative or recommendatory in nature.

Besides, parallel provisions exist in other state laws governing the subject matters under PESA, which do not distinguish between a Scheduled Area and a non Scheduled Area. Finally, since the focus nationally is on reviewing the existing approaches to natural resource management in Scheduled Areas and to create an ideal framework for forest and Scheduled Area governance and also various key legislations on forest tribal interface such as new the *Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006*, have been enacted, therefore, the PESA framework in Maharashtra also needs to be updated in the light of national and global developments. With this backdrop, this report presents an analysis of the current status of PESA implementation in the State of Maharashtra and our suggestions and recommendation on effective devolution of powers on each of the subject matters of PESA.

2. Structure and Function of Gram Sabha

2.1 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.
- 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 prohibited⁶ as per provisions of the *Wildlife (Protection) Act, 1972* with certain exceptions⁷ that are provided within the act.

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

As per the BVPA, the Gram Sabha shall be competent to safeguard and preserve traditions and customs of the *tribals*, their cultural identity, community resources and customary mode of dispute resolution.⁸ Significantly, the word Tribal has been used rather than people in general such as in PESA. However, it has not been mentioned in the Act as well as any of the Rules pursuant to it, as to what procedure to be followed to bring about the protection of these traditions and customs.

To this end the following provisions needs to be included in the BVPA:

Insert sub-clauses (i) and (ii) to sub-section (a) of Section 54A, BVPA

“(i) The Gram Sabha shall document the customary law, social and religious practices and traditional management of community resources 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.

(ii) Such documentation shall be carried out with the aid of State Tribes Research Institute or any specialized authority, institute, institution working in the field of tribal affairs within a period of two years of coming into effect of this provision with the aid and assistance of the State government as well.”

Insert Explanation after sub- clause (ii) to sub-section (a) of Section 54A, BVPA

Explanation: “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.”

⁶ Section 9 Wildlife (Protection) Act, 1972

⁷ Section 11 Wildlife (Protection) Act, 1972

⁸ Section 54A (a), BVPA



2.2 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 legislations while copying the Central PESA do not delineate the next legal or operational steps of reconstituting the village as per PESA. 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.

2.2.1 Definition of village in Maharashtra: Legal Issues

Under BVPA, the village is defined as “*village or, as the case may be, a group of villages specified in the notification issued under clause (g) of Article 243 of the Constitution of India.*” The definition of village under PESA, as habitation/hamlet on community lines, has however not been adopted under the BVPA. The result is that the definition of village under the BVPA continues to apply even to the Scheduled Areas. Under the said Act villages are revenue villages or local area/hamlets/ administrative unit within revenue villages.

It has been further stated under this section that the Standing Committee and Panchayat concerned⁹ shall be consulted before recommending any local area for being specified as a village under Article 243 (g) of the Constitution. The problem with such a stipulation is that the competent authority is in no position to understand the traditions and customs of the villagers. The best body in this light would be the Gram Sabha, which comprise of those people following such traditions and customs. It is advisable that recommendations from the competent authority must go to the Governor only after due consultation with the Gram Sabha.

⁹ Section 4 (2), BVPA



The concerned Panchayat has to consult with the Standing Committee before making recommendations to the Governor to include or exclude any local area from a village or alter the limits of any village or for cesser of any local area to be a village and no reference has been made to the Gram Sabha for the purpose of such recommendations. This defeats the purpose of the PESA in the sense that any activity related to a village must not ignore the part which a Gram Sabha has to play. Thus it must be given equal, in fact greater powers than the Panchayats in the management of a village.

The process for declaring any local area to be a village under sub-section (1) of the BVPA, is given under the *Bombay Village Panchayats (Declaration of Village) Enquiry Rules, 1959* and the *Maharashtra Village Panchayats (Principles for Extension of Village Sites and Regulation of Buildings) Rules, 1967*. The enquiry before declaration of a local area as a village shall be done by a concerned officer of the Zilla Parishad.¹⁰ In the process of selecting site for village extension, a Panchayat shall assess with the assistance of Mamlatadar in charge of a taluka and select sites which satisfy various requirements within the *Maharashtra Village Panchayats (Principles for Extension of Village Sites and Regulation of Buildings) Rules, 1967*.¹¹ It would only be appropriate that the Governor notifies and consults with such villages at the hamlet or group of hamlets level to know whether they are comfortable with such an arrangement or not. Here the role of the Collector becomes important to carry out the administrative and legal responsibility. In fact, 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.

In light of the fact that the Maharashtra PESA has tended to assign a more significant role to the Zilla Parishad, Panchayat Samiti and at the lowest level to the Gram Panchayat, clearly there is a need to (a) amend laws to empower Gram Sabha in the areas mentioned above and (b) develop a well-defined perspective

¹⁰ Rule 2, Bombay Village Panchayats (Declaration of Village) Enquiry Rules, 1959

¹¹ Rule 3, Maharashtra Village Panchayats (Principles for Extension of Village Sites and Regulation of Buildings) Rules, 1967



where simultaneous empowerment of Gram Sabha along with higher tiers of the Panchayat is made possible.

It almost seems that the State legislature has, by design, restricted the role of the Gram Sabha. Even where the central PESA provides for mandatory role of both the Gram Sabha and the Panchayat at appropriate level the amended Act and related rules have deliberately given such powers to either the Zilla Parishad or the Panchayat Samiti or the Village Panchayats. In this context there is an imperative need to explore vesting of more powers with the Gram Sabha in the State in keeping with the spirit of PESA.

With this backdrop following amendments are suggested:

Insert Section 4A to BVPA

4A. Procedure for constitution or reconstitution of village in Scheduled Areas as per PESA- “Every such hamlet or group of hamlets constituting a village shall be notified by the Governor at the request of the Gram Sabha of such village through a duly passed resolution.

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.

Insert Proviso to Rule 2 of the Bombay Village Panchayats (Declaration of Village) Enquiry Rules, 1959

“Provided that in Scheduled Areas, any enquiry towards declaration of a local area as a village shall be done at the request of the concerned Gram Sabha through a duly passed resolution.”

Insert Proviso to Rule 3 of the Maharashtra Village Panchayats (Principles for Extension of Village Sites and Regulation of Buildings) Rules, 1967

“Provided that in Scheduled Areas, any such assessment for the extension of a village site shall be done in consultation with the concerned Gram Sabha through a duly passed resolution.”



2.2.2 Presiding Officer of Gram Sabha in Scheduled Areas

As PESA intend to give greater autonomy and control to the Gram Sabha in managing its affairs according to its customs and traditions it would be useful to not leave these powers of the Gram Sabha subject to rules framed by the State Government. Section 54C of BVPA caters to the situation by mandating that Secretary of the Gram Sabha shall be responsible to call the meetings presided by the Sarpanch and in his absenc, the Upa- Sarpanch. Any disputes between the Gram Sabhas shall be brought before the joint meeting of all the Gram Sabhas and decision shall be taken by the majority in this meeting. Even though the procedure is clear, it is necessary to add that the proceedings of the Gram Sabha shall be conducted according to the traditional customs.

Notwithstanding anything given in this provision, in Scheduled Areas, the Gram Sabha shall be presided over by a respected person according to custom usage traditionally prevalent in that area.

Insert sub-section 7 to Section 54C, BVPA

“Notwithstanding anything given in this provision, in Scheduled Areas, the Gram Sabha shall be presided over by a respected person according to custom usage traditionally prevalent in that area.”

3. Powers Exclusive to Gram Sabha:

3.1 Approve the Plans, Programmes and Projects for Social and Economic Development

The Central PESA mandates that *“every Gram Sabha shall 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.”*

The BVPA makes clear that the Gram Sabha shall approve the plans, programmes and projects which are taken up for implementation by the Village Panchayat.¹² This Act makes it mandatory for all tiers of Panchayat to obtain approval of Gram Sabha before executing the plan, program etc. Thus, the control of Gram Sabha would extend not only to the Gram Panchayat but also over the higher tiers.

¹² Section 54C (b), BVPA



Significantly, this provision under the BVPA not only goes beyond the corresponding provisions under the other state acts, but seems to be going beyond the mandate of PESA.

However, there are no rules or by-laws which prescribe the procedure for such approval. It would also be comfortable for the concerned Gram Sabha, if such plan, program or project is provided to it in a language understood by its members, preferably vernacular.

The *Bombay Land Improvement Scheme Act, 1942* and its subsequent Rules provide for the formation of a Board in every district by the State Government¹³ for the preparation of a land improvement scheme. Such a scheme would include various matters as given under section 4 of the Act

Accordingly the following amendments shall have to be made.

Insert proviso to Section 4, The Bombay Land Improvement Scheme Act, 1942

“Provided that while undertaking any work or land development scheme in Scheduled Areas, the Gram Sabha shall decide criteria for approval of every work or development scheme and implemented at the Panchayat level within which 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.”

3.2 Identification or selection of persons as beneficiaries

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)]*

As per the BVPA, the Gram Sabha shall also be competent *“to decide priority for implementation of various development schemes of the State or as the case maybe, of the Central Government and also to identify and select personas as beneficiaries under the various poverty alleviation and similar other programmes or schemes.”*¹⁴

Though the BVPA has followed the mandate of PESA verbatim, it would be useful to go a step ahead and formulating certain criterions before selection of such beneficiaries.

Accordingly, the following amendments are to be made.

Add the following words after Section 54A (d), BVPA

“as per a criteria set by the Gram Sabha.”

¹³ Section 3

¹⁴ Section 54A (d), BVPA



3.3 Power to Issue certification of utilisation of funds

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)]

As per sub- section (c) of section 54A of the BVPA, the Gram Sabha shall be competent to “to issue to the Panchayat certificate of utilization of funds spent by that Panchayat for the plans, programmes and projects referred to in clause (b);”¹⁵ in Scheduled Areas. It is also the duty of every Panchayat to obtain such certificate from the Gram Sabha.¹⁶

This provision is in conformity with PESA; hence, no change is required. However, it is important that the format of the utilization certificate shall be developed by the Gram Sabha. Necessary provisions for the same need to be inserted in the abovementioned section as:

Insert the following Proviso to sub- section (c) of section 54A, BVPA

“Provided that every Gram Sabha shall also develop a format for granting utilization certificate which shall be formally recognized as such by the respective Panchayat within which such Gram Sabha exists.”

Format of Utilization certificate for use by Gram Sabha

Form of Utilization Certificate

Amount:
Total:

2. Certified that we the Gram Sabha of Village _____ have satisfied itself 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 _____ 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 ourselves that the conditions on which the funds were allocated have been duly fulfilled / are being fulfilled and that we have exercised the

¹⁵ Section 54A (c), BVPA
¹⁶ Section 54B (a), BVPA



following checks to see that the money was actually utilized for the purpose for which it was sanctioned.

Signature(Mukhiya/ Head of Gram Sabha of _____village)

Date

Note: If this form is accepted then the insertion suggested as Proviso to sub- section (c) of section 54A, BVPA shall be deleted.

4. Powers Exclusive to the Panchayat at Appropriate Level

4.1 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)]*

Common property resources (forest, water and common land) have formed an important livelihood resource base of the tribal communities. But laws enacted before independence and after it also, did not give control and management of these resources to the people. Recognizing this issue, PESA is an important step towards empowering the communities to manage the community resources. Minor water bodies are used by villagers for domestic purposes such as drinking, bathing, washing, irrigation, and fishing or even for religious purposes. Many water sources are owned by individuals and others are mainly for community use. Thus it becomes important for vesting rights in these common natural resources with the people who use it, rather than the administrators.

The underlying concept of PESA is to give more power to the Gram Sabha in managing daily affairs of the people in the villages. Thus it would have been appropriate to vest the planning and management of minor water bodies with the gram Sabha, which was not done. Moreover, PESA also does not define a minor water body



which makes it difficult to ascertain the role of a Panchayat in planning and managing it.

The central PESA Act empowers the Panchayat at appropriate level to plan and manage minor bodies in Scheduled Areas. It has been provided within the BVPA that the Gram Sabha shall be competent to plan the minor water bodies and grant approval to the decision taken in this regard by the Panchayat concerned. The term “minor water bodies” have also been defined herein to mean “*any water storage and irrigation storage including village tanks, percolation tanks, lift irrigation works upto 100 hectares.*” Along with this, every Panchayat in the Scheduled Areas will also be competent to manage the minor water bodies. There is a problem with this arrangement because it has not been demarcated as to which body shall manage a water body which is coming within the jurisdictions of two Gram Sabhas or two Panchayats. An amendment has to be introduced in this regard.

In the *Maharashtra Irrigation Act, 1976*, the chief controlling authority in all matters connected with the construction, maintenance and management of canals and matters in his region or regions, shall, in relation to canals of the State Government vest in the Additional Chief Engineer or an officer bearing any other designation, if any, specified in this behalf, and in relation to canals of the company or a Zilla Parishad vest in such Canal Officer appointed by it as may be specified by it, subject to the superintendence, direction and control of the Chief Engineer and the State Government.¹⁷ It would be advisable that any such work sought to be undertaken in a minor water body within the jurisdiction of a Gram Sabha, should be done so after consultation with the concerned Gram Sabha. This should be followed in all regions within the Scheduled Areas.

The *Maharashtra Prevention of Water Pollution Act, 1969* provides for the Constitution of a Board for prevention of water pollution.¹⁸ Any minor water body within Scheduled Areas, where pollution control measures needs to be taken by the Pollution Control Board, therein permission should be taken from the Gram Sabha or the Panchayat at the appropriate level in order to confirm with the PESA mandate. Section 4 of the Maharashtra Fisheries Act, 1960 provides for the protection of fish in selected waters. Moreover, any amount of money due to the State Government under

¹⁷ Section 7, Maharashtra Irrigation Act, 1976

¹⁸ Section 3, Maharashtra Prevention of Water Pollution Act, 1969



this Act, or the rules made hereunder, shall be recoverable as an arrear of land revenue.¹⁹ In Scheduled Areas, such an amount recovered from a minor water body within the jurisdiction of any Panchayats, must go into the Village Fund

The role of the Gram Sabha on these aspects seems to have been missed and this assumes significance in the light of the fact that the Gram Sabha has a very minimal- if not negligible - control over the village Panchayats. This is especially the case when most of the water bodies are community owned and within the limits of a village. Any development or change which is brought about in these water-bodies, closely affect the lives of the villagers too. This is the reason why participation and consultation of the Gram Sabha is important in a context when the water body is situated within the precincts of a village. The other aspect we need to consider is that besides agriculture and irrigation, there are various other purposes and uses of minor water bodies too.

In light of the above points, the following amendments need to be made.

Amendments in the BVPA

Insert sub-clause (i) to Section 54A (j)

“(i) It shall be the duty of the Village Panchayat to undertake control and administer planning and management of minor water bodies within the jurisdictions of two Gram Sabhas along with the Gram Sabha.”

Insert Explanation to Section 54A (j)

Explanation II: Planning of minor water bodies shall also include planning and construction of a new water body

Insert sub-clause (i) to Section 54B (h)

“(i) It shall be the duty of the Panchayat Samiti to undertake control and administer planning and management of minor water bodies within the jurisdictions of two Village Panchayats along with the Gram Sabha.

(ii) It shall be the duty of the Zilla Parishad to undertake control and administer planning and management of minor water bodies within the jurisdictions of two Panchayat Samitis along with the Gram Sabha.”

Insert Explanation to Section 54B (h)

Explanation II: Management of minor water body shall include all works of repair, restoration for maintenance, collection of lease money, levy of water rate, its collection and utilization as per annual plan prepared in consultation with the respective Gram Sabha.”

Add proviso to Section 7 of Maharashtra Irrigation Act, 1976

¹⁹ Section 12, Maharashtra Fisheries Act, 1960



“Provided that in Scheduled Areas, if the canal is a minor water body, the permission to construct, extend, improve or alter shall be taken from the appropriate level of Panchayat as per the size of the irrigation work as mentioned below.

- i. If the minor water bodies within the jurisdictions of two Gram Sabhas, then the Village Panchayat along with the Gram Sabha.*
- ii. If the minor water bodies within the jurisdictions of two Village Panchayats, then the Panchayat Samiti along with the Gram Sabha.*
- iii. If the minor water bodies within the jurisdictions of two Panchayat Samitis, then the Zilla Parishad.”*

Maharashtra Prevention of Water Pollution Act, 1969

Add Proviso to Section 2(g)

“Provided that in Scheduled Areas, minor water bodies means any water body upto 100 hectares.”

Add sub-section (4) to Section 3

In Scheduled Areas if the Water Pollution Prevention Area includes a minor water body the Board shall function with the permission of Panchayat at the appropriate level as per the size as mentioned below

- a. If the minor water bodies within the jurisdictions of two Gram Sabhas, then the Village Panchayat along with the Gram Sabha.*
- b. If the minor water bodies within the jurisdictions of two Village Panchayats, then the Panchayat Samiti along with the Gram Sabha.*
- c. If the minor water bodies within the jurisdictions of two Panchayat Samitis, then the Zilla Parishad.”*

Maharashtra Fisheries Act, 1960

Insert sub-section (1A) to Section 4

“In Scheduled Areas if such waters is minor water bodies the State Government shall make such rules with the permission of Panchayat at the appropriate level as per the size as mentioned below

- a. If the minor water bodies within the jurisdictions of two Gram Sabhas, then the Village Panchayat along with the Gram Sabha.*
- b. If the minor water bodies within the jurisdictions of two Village Panchayats, then the Panchayat Samiti along with the Gram Sabha.*
- c. If the minor water bodies within the jurisdictions of two Panchayat Samitis, then the Zilla Parishad.”*

Add proviso to Section 12

“Provided that in Scheduled Areas, money due with respect to minor water bodies shall be recoverable by the Panchayat at the appropriate level, as mentioned in Section 4(1A), and shall be appropriated to the Village Fund.”



5. Powers of the Gram Sabha or Panchayat at Appropriate Level

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

The Central PESA mandates as follows: *‘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)]

PESA makes it mandatory that the gram Sabha or the Panchayat at the appropriate level be consulted before land is acquired for development projects and before resettling affecting persons. The PESA left it to the discretion of the states to decide the appropriate tier for fulfilling this function. Ideally, all the tiers must be engaged. There must be a safeguard that gram Sabha would not only be consulted but also that its decisions would be adhered by the panchayats at the higher tiers.

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.
- 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.

The BVPA makes Gram Sabha competent to be consulted before acquiring any land in the Scheduled Areas and also for resettling or rehabilitating any person affected by such projects. The Panchayats at all levels shall also be consulted by the Land Acquisition Authority before acquiring any land in the Scheduled Areas though there is a proviso to this provision that every Panchayat shall consult with the Gram Sabha before conveying its views to the Land Acquisition Authority. In this regard the land acquisition authority is also required to consult the Panchayat, which in turn shall consult the Gram Sabha before conveying its views on any proposed acquisition. What happens if the views of Gram Sabha are different from that of Panchayat? Would the



Gram Panchayat compulsorily adhere to the views of the Gram Sabha? Further if the land acquisition authority decides, in the name of public purpose, to acquire the land without paying heed to the Panchayat, would it have any penal consequences? All these questions remain unanswered.

The provision under the BVPA is very progressive. The Act has gone beyond the PESA by empowering all tiers. Further, the Act has also provided for a safeguard to ensure that not only should the Gram Sabha be consulted, but also that the higher tiers adhere to the decision of the Gram Sabha. The problem however is that there is no mandate or compulsion to adhere to the views of the Gram Sabha. This change has to be brought about. Moreover, the meaning of consultation and the process of such consultation is absent from the provisions.

Language of clause section 4 (i) of PESA clearly shows that consultation is envisaged with either of the two entities, gram Sabha or Panchayats at appropriate levels. Had the legislative intent been that irrespective of consultation with Panchayats at any level, consultation with gram Sabha at village level was mandatory before acquisition of land in Scheduled Area for development project and before settling and rehabilitating persons affected by it, the said clause would have been so worded, and the legislature would have made its intention explicit by using words like “*as the case may be*” after the words “*Gram Sabha or Panchayats at appropriate level*”.

Neither in PESA nor in any of the panchayat or land acquisition laws of Maharashtra the term “*Consultation*” has been defined. “*Consultation*” as per its Dictionary meaning is an “*act of seeking advice or opinion*”²⁰ which is non-binding in nature. In other words, the power of mandatory consultation does not give the right to accept or reject the proposal of acquisition or resettlement or rehabilitation, hence is inadequate to secure the rights of the village community affected by the acquisition. Therefore, it is recommended that in Central PESA and subsequently in respective Panchayat laws of Maharashtra that the term consultation needs to be defined on the lines of “*free and prior informed consent*”.

Section 3 of the *Land Acquisition Act, 1894*, applicable in Maharashtra defines public purpose in sub-section (f) to include:

²⁰ Black’s Law Dictionary, 8th ed.



“(1) the provision of village-sites in districts in which the [Provincial Government] shall have declared by notification in the official Gazette that it is customary for the Government to make such provision: and

(2) the acquisition of land for purposes of the development of areas from public revenue or some fund controlled or managed by a local authority thereof in whole or in part by lease, assignment or sale, with the object of securing further development.”

Section 4 of the above given Act describes the power of the officials, pursuant to the publication of a preliminary notification of land meant for any public purpose and also the procedures thereafter. In this case, the Collector has the responsibility to give a public notice of such notification to the people of the said locality. Further on section 5-A stipulates the procedure for hearing of objections to any notification under section 4. In these provisions, it would be useful to include the role of Gram Sabha for land within the Scheduled Areas.

Moreover, the Maharashtra Industrial Development Act, 1961 has designated those local authorities which need to be consulted before any land can be acquired for purposes mentioned within the statute. The State Government shall consult with Gram Sabha and the Village Panchayat, if the area is coming within one Panchayat; Gram Sabha and Panchayat Samiti if area falling within more than one Panchayat in the Block concerned; Gram Sabha and Zilla Parishad if the area is falling within more than one Block in the district concerned.²¹ No further changes need to be added to this Act. The Maharashtra Housing and Area Development Act, 1976 incorporates the same provisions as the above-mentioned Act.

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

- First, the term “Consultation needs to be defined on the lines of “Free, Prior and Informed Consent (FPIC) affirmed by international law and standards.”²²

²¹ Section 32, Maharashtra Industrial Development Act, 1961

²² 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.



- Secondly, as said earlier, the power of mandatory consultation is supposed to be given to either the Gram Sabha or any of the three tiers of Panchayats. In case of Maharashtra, it is being given to the Panchayats at all three levels. Although, it is not incorrect, for the sake of protecting the rights of the communities, ideally, the village community which is directly affected by the proposed acquisition should have the power to give consent or refuse the proposed acquisition or approve rehabilitation and resettlement schemes. The Village Panchayat, must facilitate the process of consultation.
- Thirdly, since, as of now, there is no legislation on resettlement and rehabilitation either at the Central level or at the State level, therefore, to implement the provisions of PESA, the National Resettlement and Rehabilitation policy, 2007 needs to be given legal sanctity.

The following amendments are suggested:

BVPA

Insert the following after sub-section (1) to Section 54A

“Provided that Rehabilitation and Resettlement in Scheduled Areas shall be carried out as per the provisions of National Resettlement and Rehabilitation Policy 2007 till the time a new legislation is passed

Provided that 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.

Explanation 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.

Explanation II: The proposal shall include, the area proposed to be acquired, location of the area, purpose of acquisition, type of land to be acquired, estimate number of people to be displaced, impact on resources of the village, estimate number of trees shall be cut, impact on wildlife, consequences of acquisition of land particularly on the livelihood and the effects on surrounding area, resettlement and rehabilitation scheme proposed and such other information as the Gram Sabha may requires to take decision on the proposal”



Similar enabling provisions may be inserted in Land Acquisition Act, 1894 as applicable in Maharashtra, through an Amendment Act to make it consistent with PESA and State Panchayat legislations.

Insert proviso after section 4 (1), Land Acquisition Act, 1894 as applicable in Maharashtra:

“Provided that in Scheduled Areas, the smallest revenue administrative unit is a ‘village’ as defined in PESA.

Provided that in Scheduled Areas, the Collector shall convene a meeting of the of the Gram Sabha as per the provisions of Section 7 of Bombay Village Panchayats Act, 1958 and carry out a consultation process with the Gram Sabha on the proposed acquisition of land or before resettlement or rehabilitation of persons affected by such acquisition before publication of such preliminary notification.

Rehabilitation and Resettlement in Scheduled Areas shall be carried out as per the provisions of National Resettlement and Rehabilitation Policy 2007 till the time a new legislation is passed”

5.2 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)]

PESA makes the recommendations of the Gram Sabha or the Panchayats at the appropriate level mandatory prior to grant of prospective license or mining lease minor minerals in the Scheduled areas. As far as the recommendation of the Gram Sabha before grant of minor minerals for auction is concerned, the prior recommendation of Gram Sabha or Panchayats at the appropriate level should be mandatory for grant of concession for the exploitation of minor minerals by auction. The relevant State laws need to be amended to redress this omission.

- 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, ideally, the power of free and prior informed consent in case of grant of mining leases shall be given to Gram Sabha. It is important to ensure participation of the communities directly affected by mining operations in the decision making process.
- The BVPA stipulates that Gram Sabha shall “*be consulted before grant of any license or any permission for prospective license for mining lease for minor minerals by concession for the exploitation of minor minerals by auction. Any decision taken by the majority of the Gram Sabha concerned shall be binding on the concerned authorities and the Panchayat at the appropriate level.*”
- This provision gives the Gram Sabha power over the Panchayats at the appropriate level. This is a very commendable provision within the state mandate. However, it could be made more robust by including the stipulation of “free and prior informed consent”. Thus, the Gram Sabha will not only give consent but also give it on the basis of information provided to them in advance. The process for obtaining this consent is also not given within the BVPA, hence the following amendments.
- The Bombay Minor Minerals Extraction Rules, 1955 have subscribed certain procedures with regard to extraction of minor minerals. (**To be analysed once the Rules are procured**). However these Rules do not satisfy the conditions prescribed for conformity to PESA as the Gram Sabha has not been given any role within these Rules. Hence there is a pressing need to amend these laws as well.

Bombay Village Panchayats Act, 1958

Rephrase sub-section (m) of Section 54A

Replace the phrase “to be consulted before” with “Free, prior and informed consent of the Gram Sabha shall be made mandatory prior to”

Add the following to sub-section (m) of Section 54A

“Explanation: Free, prior and informed consent with its cognate and grammatical variations shall mean publicising the proposal for mining or quarrying 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 mining/quarrying proposal and its impact on livelihood and conservation.

(2) Every application for renewal or transfer of quarry 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.



(4) Gram Sabha may take assistance from Village Panchayat, Panchayat Samiti or Zilla Parishad as the case may be in carrying out its functions under this section.

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 of minor minerals by auction”

Rephrase sub-section (c) of Section 54B as follows

“assist the Gram Sabha in carrying out its functions regarding grant of prospecting licenses, quarry lease, quarry permit of minor minerals or concessions for exploitation of minor mineral by auction as prescribed under provisions of the Bombay Minor Minerals Extraction Rules, 1955.”

• **Maharashtra Land Revenue Code, 1966:**

As per section 48 of the Code, the rights to mines, minerals discovered and quarries situate within the limits of the state territory vest in the State Government subject to the provisions of the Mines and Minerals (Regulation and Development Act, 1957. The State Government shall have the rights to access, occupy such lands and any other purposes which is required for prospecting and working mines. It shall also assign any other person its rights which are mentioned above. Any person whose rights get affected by such vesting of rights in the state government, shall be entitled to compensation. In all of these processes, the rights of the tribals and the Scheduled Tribes residing in the land for generations have been ignored. They have in fact been given no power to interfere in cases wherein their rights to the common property have been ignored. In order to fulfil the purpose of the central PESA, it would be appropriate to include the power of Gram Sabha in giving free, prior and informed consent prior to grant of quarry lease or quarry permits or prospecting licences for exploitation of minor minerals in the Scheduled Areas and also for grant of concession for the exploitation of minor minerals by auction. To this effect the following amendment should be made.

Insert proviso to section 48 (1), Maharashtra Land Revenue Code, 1966

“Provided that in Scheduled Areas free and informed consent of the Gram Sabha within the jurisdiction of which such land is situate shall be obtained prior to grant of quarry lease or quarry permits or prospecting licences for exploitation of minor minerals in the Scheduled Areas and also for grant of concession for the exploitation of minor minerals by auction.”



6. Powers to Gram Sabha and Panchayat at Appropriate Level

6.1 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 power to enforce prohibition or regulate or restrict the sale and consumption of Intoxicants in Scheduled Areas has been given to Gram Sabha which it shall exercise through the panchayat concerned. Thus the role of the Gram Sabha has been made inclusive at appropriate level of Panchayat. Further exact nature of the power and consequences of its non co-operation with the other levels of the system has not been detailed in the Act.

The study of the *Bombay Prohibition Act, 1949* as applicable to Maharashtra dealing with intoxicants reveals that the substantial powers in this respect have been vested in government. It confers all the powers in respect of granting licenses for manufacture, possession and sale of any intoxicants to the Director of Prohibition and Excise²³. Further it is the duty of the state to regulate import, export and transport²⁴ 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,²⁵ but the action against such erring persons shall be taken by the State officials.

- In scheduled areas of Maharashtra this power needs to be granted to the Gram Sabha along with the Panchayat at Appropriate Level depending on the area of influence. **The Bombay Prohibition Act, 1949** needs to be amended as follows through an amendment Act.

²³ Section 3

²⁴ Section 33

²⁵ Section 133 and 134



Delete Section 11A from the Act and insert the following Chapter VI-B

Regulating Manufacture, Sale, Consumption, Possession of Intoxicants in Scheduled Areas

“Notwithstanding anything contained in any part of this Act or rules framed thereunder, from the day of coming into force of this amendment, the provisions of this Chapter shall be applicable to Scheduled Areas of Maharashtra. All acts done previously under the provisions of this Act in Scheduled Areas shall be deemed to have been done under the provisions of this Chapter.

a. In the Scheduled Areas, no licence for manufacture, possession or sale, or any exclusive privilege for manufacture or sale, of any intoxicant, establishment of breweries, distilleries and warehouses 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 Sabha 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 Sabha 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.

b. Where the intoxicant is manufactured for personal consumption in the village, the Gram Sabha shall specify the quantity allowed to be manufactured per household, stored and possessed in consultation with the Collector.

c. The Gram Sabha shall specify the quantity for retail sale and wholesale of any intoxicants in the village in consultation with the Collector.

d. The Gram Sabha shall specify the licensing fee and other conditions for manufacturing intoxicants for commercial purposes only and their sale in consultation with the Collector.

e. The Gram Sabha shall specify the area for setting up of distilleries, breweries, outlets for sale and warehouses for intoxicants within the village in consultation with the Collector.

f. The Gram Sabha shall also specify the terms and conditions for employment of women and children in the manufacturing units in consultation with the Collector,

g. The Gram Sabha shall also specify the terms of lease, rent, time of opening and closing of retail and wholesale outlets within the village and such other conditions as the Gram Sasan may deem necessary to prescribe from time to time in consultation with the Collector.

h. Twenty percent of the revenue generated from payment of licensing fee, rent, penalty shall be deposited in the funds of the Gram Sabha and shall be used for the development of the village.

i. The Gram Sabha shall maintain a register, to record the particulars of the licensee, manufacturing unit, retail and wholesale outlets operating in the village, terms and period of license, renewal of licenses and such other particulars as the Gram Sasan may deem necessary.

j. The Gram Sabha may impose prohibition on the manufacture, sale, consumption, possession of many intoxicants within the village in consultation with the Collector.

k. In case of violation of any of the conditions of the license or rules framed by the Gram Sabha regarding manufacture, sale, consumption or possession of any intoxicants, the Gram Sabha shall after giving the licensee a reasonable opportunity of being heard, impose a penalty or any other restriction as prescribed by it and shall also have the power to cancel



the license. After passing a resolution to impose a penalty or cancel the license, or impose any other restriction, the Gram Sabha shall send a copy of its resolution to the Competent Authority which issued the license, and to the Gram Panchayat. The Competent Authority shall proceed to act on the decision of the Gram Sabha and recover the penalty or cancel the license of the manufacturer or the retailer or impose any other restriction specified by the Gram Sabha in its resolution, within one month of receiving the resolution of the Gram Sabha. The Gram Panchayat shall assist the Gram Sabha to carry out all functions mentioned in this Chapter.

Provided that on the death of a licensee operating in Scheduled Areas, the licence shall be allowed to be continued in favour of the legal representative or heir of the deceased, only after seeking prior written approval of the Gram Sabha”

Insert Proviso to Section 60

“Provided that, prior to collection, storage and sale of Mhowra Flowers from within a Scheduled Area, permission of the Gram Sabha of that village or villages shall be taken”

Insert Subsection in Section 89

“For regulation of Intoxicants in Scheduled Areas, the Gram Sabha shall make rules for grant of license for manufacture and sale of intoxicants, duration of licenses, terms for renewal of licenses, fix the number of manufacturing units or retail outlets to be set up in the village, places for establishing manufacturing units or retail outlets, time of opening and closing of liquor shops, prohibition on sale manufacture and sale of certain intoxicants in the village, restriction on the quantity or retail sale of intoxicants, prohibition on sale of intoxicants to certain persons and such other rules as the Gram Sabha deems necessary. Gram Panchayat shall organise a meeting of the Gram Sabha for framing rules for regulating the above mentioned activities.”

Insert Proviso in Section 105 (1)

“Provided that provisions of this Chapter or rules framed thereunder, shall not apply to Scheduled Areas of Maharashtra to the extent they are inconsistent with the provisions of Section 4m (i) of Panchayats (Extension to the Scheduled Areas) Act, 1996 and Section 54A (e) of Bombay Village Panchayats Act, 1958. All acts done previously under the provisions of this Chapter in Scheduled Areas shall be deemed to have been done under the provisions of this proviso.”

Insert Section 143(3A)

“If any rule framed by the State Government for regulation of intoxicants within the purview of this Act, so far as it is applicable to Scheduled Areas, is inconsistent with a corresponding Rule(s) framed by the Gram Sabha or Gram Sabhas, in that case the said rule(s) framed by the Gram Sabha or Gram Sabhas shall supersede the one framed by the State Government.”

Insert Proviso in Section 146B:

“Provided that in Scheduled Areas, no intoxicant shall be exempted by the State Government from the purview of this Act except with the prior approval of the Gram Sabha”



Insert Rule 4-A to The Bombay Foreign Liquor Rules, 1953

“Applicability to Scheduled Areas-. These Rules shall not be applicable to the sale of intoxicants in Scheduled Areas.”

Insert Proviso to Rule 32

“Provided that in Scheduled Areas, the licensee shall also affix a list of categories of persons to whom the sale of liquor is prohibited.”

6.2 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)]*

PESA and FRA vest the right of ownership of MFP in the Gram Sabha. Ownership right is a collection of several rights which include, access, collection, storage, local level processing and disposal among others. Both of these legislations are key legislations of Scheduled Area governance, therefore they need to be read together. PESA endows ownership of MFP but is silent on other aspects like access and use.

The PESA Acts in Maharashtra is adrift from this idea as it does not grant ownership rights upon the Gram Sabha. The ultimate power here rests with the Panchayat as it has been made competent to regulate exploitation, management and trade of minor forest produce, reducing the role of Gram Sabha to mere directive in nature. The BVPA, empowers the Gram Sabha in the Scheduled Areas to issue direction to the Panchayat with regard to the exploitation and regulation of trading of minor forest produce, subject to provisions of the *Maharashtra Transfer of Ownership of Minor Forest Produce in the Scheduled Areas, and the Maharashtra Minor Forest Produce (Regulation of Trade) (Amendment) Act, 1997*.²⁶ However, it does not transfer ownership. The ambiguous language of the sub section further hinders its implementation.

An examination of the *Maharashtra Minor Forest Produce (Regulation of Trade) Act, 1969* reveals that the State government may, for the purpose of purchase of, and trade in minor forest produce on its behalf, appoint agents and the terms, conditions

²⁶ Section 54A (f), BVPA



and the procedure for appointment of agents shall be prescribed.²⁷ Collectors and growers of minor forest produce might trade in them but they cannot sell them outside of a prescribed unit. The price fixation for the minor forest produce is done by an Advisory Committee constituted by the State Government. This Committee has no representatives from any Gram Sabhas and it need to be changed.

The Maharashtra Forest Development (Tax on Sale of Forest Produce by Government or Forest Development Corporation) (Continuance) Act, 1983 stipulates as such that the State Government shall levy tax on sale of forest produce at the rate of five percent of the sale of the sale price of such produce sold to the producer. The proceeds of this collection shall then be routed after deductions by the State Government, to the Forest Department for forest development work. This requirement needs to be amended with respect to Scheduled Areas, wherein the Gram Sabha must be consulted before fixation of price of MFP.

Moreover, the term, minor forest produce has also not been defined anywhere except the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.

The ownership of minor forest produce must be vested in the Gram Sabha and the Gram Panchayat. The functions carried out by the Gram Panchayat by virtue of its ownership rights over minor forest produce should ideally be controlled and supervised by the Gram Sabha as well the instructions issued by the State Government. PESA does not impose any condition on the enjoyment of ownership rights over MFP.

In the light of the spirit of the PESA certain amendments needs to be carried out in the provisions of purchase/registration and disposal of minor forest produce for the Scheduled Areas of the State.

The BVPA needs to be amended in the following manner.

In section 54A, after sub-section (f), clause (2) shall be inserted

“ (2) to possess the right to own and right of access to collect, use and dispose of minor forest produce within and outside the village boundaries where members of Gram Sabha of a village have had traditional access shall be vested in the Gram Sabha and the Gram Panchayat.

The Gram Sabha shall prepare a list of minor forest produce that are of importance for the livelihood of the people of the village and send a copy of it to the Gram Panchayat and the

²⁷ Section 4



Forest Department each. The Gram Sabha shall also have the power to revise this list to include or exclude any minor forest produce, as and when it may deem necessary and having due regard to its sustainability.

Explanation – for the purposes of this section, “Minor Forest Produce” includes all non-timber forest produce of plant origin including bamboo, brush, wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or tendu leaves, medicinal plants and herbs, roots, tubers and the like and ‘forest produce’ which would be notified by the State Government.

Explanation- The term ‘timber’ would be assigned the same meaning as in Indian Forest Act as applicable in Maharashtra except the inclusion of bamboo.

(3) 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.”

- Besides, amendments needs to be inserted in existing legislations regulating access, use, transit, marketing of forest produce in Maharashtra, to bring them in conformity with PESA and Panchayat legislation.

Maharashtra Forest Act, 1994

Insert Explanation in Section 2(4),

“Forest produce shall include minor forest produce also. Minor Forest Produce shall include all non-timber forest produce of plant origin including bamboo, brush, wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or tendu leaves, medicinal plants and herbs, roots, tubers and the like and ‘forest produce’ which would be notified by the State Government.”

Insert Amendment in Section 2(7)

Delete “bamboo” from the definition of tree

Insert proviso in Section 15

“Provided that in Scheduled Areas the bonafide right of ownership access to collect, use and dispose of minor forest produce as mentioned in PESA and Forest Rights Act, of any person or person living in and around a proposed reserved forest shall be affected by the settlement and recording of rights process carried out by the Collector. The right shall be recorded as it is by the Collector.”

Insert proviso to Section 24(2)

“Provided that in Scheduled Areas this provision shall not apply to “minor forest produce.””

Insert proviso in Section 26(1)(g)

“Provided that where in a Scheduled Area, any person commits theft of any minor forest produce or collects more than the quantity permissible by the Gram Sabha , shall be punishable with such additional fine as may be prescribed by the Gram Sabha.”

Insert Proviso in Section 28 (2)

“Provided that in Scheduled Areas, the constitution of a village forest shall not affect the right



to own, access to collect, use and dispose of minor forest produce within and outside the village boundaries where the members of the Gram Sabha have had traditional access. This right shall continue to be exercised by the Gram Sabha and the Gram Panchayat, notwithstanding the constitution of a village forest by the State Government.”

Insert Proviso in Section 30(a)

“Provided that in a protected forest falling within a Scheduled Area, the Government shall not reserve any tree which has been declared as a minor forest produce without the approval of the Gram Sabha or Gram Sabhas within whose jurisdiction notified area is situated”

Insert Proviso in Section 30(c)

“Provided that in a protected forest falling within a Scheduled Area, the Government shall not prohibit the collection and removal of minor forest produce without seeking prior permission from the Gram Sabha or Gram Sabhas within whose jurisdiction the notified area is situated.”

Insert Proviso in section 32

“Provided that in Scheduled Areas, any rules framed by the state government within this section, which impacts minor forest produce shall be in conformity with any rules framed by the Gram Sabha or Gram Sabhas governing, access to collect, use and dispose of minor forest produce.”

Insert Section 41(3)(a)

“In Scheduled Areas, all rules regarding the transit and possession of minor forest produce shall be framed in consultation by the Gram Sabha.”

Insert Proviso in Section 55

“Provided that in Scheduled Areas, in case any offence is committed regarding a minor forest produce, such power shall be exercised by the Gram Sabha. The forest officers shall render all necessary assistance to the Gram Sabha in preventing the commission of such offences.”

Maharashtra Minor Forest Produce (Regulation of Trade) Act, 1969

Include Sub Section (iii) to Section 4

“In units having Scheduled Areas the agents shall function under the Gram Sabha.”

Add proviso to Section 5(1)

“Provided that in Scheduled Areas, the purchase or transport of minor forest produce shall take place only with the permission of the Gram Sabha.”

Add proviso to Section 5(2)

“Provided that in Scheduled Areas the terms and conditions of the permit shall be specified by Gram Sabha and shall be issued by the Gram Panchayats.”

Add proviso to Section 5(3)

“Provided that in Scheduled Areas, the person shall sell only with the permission of the Gram Sabha.”



Add proviso to Section 6

“Provided that in Scheduled Areas, two of the members shall be from the Gram Sabha.”

Add proviso to Section 8

“Provided that in Scheduled Areas, depots shall be set up only after consultation with the Gram Sabha and shall be managed by the Gram Sabha.”

Add proviso to Section 9

“Provided that in Scheduled Areas, the sale shall be carried out under the supervision of the Gram Sabha.”

Add proviso to Section 10

“Provided that the registering authority for the growers of minor forest produce in Scheduled Areas shall be Village Panchayats”

Add proviso to Section 11

“Provided that the registering authority in Scheduled Areas shall be Village Panchayat.”

Add proviso to Section 12

“Provided that in Scheduled Areas the power shall be given to Gram Sabha.”

Add proviso to Section 19

Provided that in Scheduled Areas the rules shall be formulated with approval of the Gram Sabha

The Maharashtra Forest Development (Tax on Sale of Forest Produce by Government or Forest Development Corporation) (Continuance) Act, 1983

Add proviso to Section 3

Provided that in Scheduled Areas the tax shall be levied and collected by the Village Panchayat under the supervision of the Gram Sabha at the rate determined by the Gram Sabha.

Add proviso to Section 6

Provided that in Scheduled Areas the proceeds of the tax levied shall be credited to the Village Fund and shall be utilised for the purpose of development of that area.

Add proviso to Section 10

Provided that in Scheduled Areas the rules shall be framed with the approval of the Gram Sabha.

6.3 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;” [Section 4(m)(iii)]

Unlawful transfer or alienation of land is one of the predominant problems existing among the tribal population which requires involvement at the local level. With this view the power to prevent unlawful alienation and to restore unlawfully alienated land has been granted jointly to Gram Sabha and Panchayat at appropriate level under the central PESA Act.

The BVPA, on the contrary, relegates the powers of Gram Sabha from being central to the local affairs of the village to mere recommendatory. The Gram Sabha may make recommendations to the Collector through the concerned Panchayats which is not obliged to be followed by them. Even the Panchayats have been granted the power to make recommendations to the Collector regarding alienation and restoration of land without any reference to the Gram Sabha, however after consultation with the Gram Sabha. This provision undermining the significance of the Gram Sabha in managing the local affairs of the village and requires to be corrected through amendment in relevant laws.

The ideal approach would be to vest the power to prevent alienation of land and restoration of any unlawfully alienated land in the Scheduled Areas, to the Gram Panchayat, under the supervision and control of the Gram Sabha.

Following amendments are suggested in the BVPA:

Replace the lines in sub-section (g) of Section 54A with the following:

“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.

Change Sub-section (e) of Section 54B

Replace the lines “be competent to make recommendations pertaining to alienation of land of the persons belonging to the Scheduled Tribes, to the Collector with a view to” with “have authority to prevent alienation of land in the Scheduled Areas and to restore unlawfully alienated land of a Scheduled Tribe along with the Gram Sabha.”



6.4 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; [Section 4(m)(vi)]*”

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:

- Employment
- Education
- Health
- Rural water supply and sanitation
- Women and child development

The BVPA has provided that it shall be competent for every Gram Sabha to monitor progress and supervise functioning of institutions and functionaries entrusted with implementation of social sector programmes in the village concerned and make suitable recommendations to the panchayats at the appropriate level. Decisions taken by majority of the Gram Sabha would be binding on the Panchayats at the appropriate level. For the convenience of limiting the scope of “social sector” it has been defined through an explanation to this section, to mean all the schemes, programmes, work or project entrusted to a Zilla Parishad or Panchayat Samiti or even Village Panchayat given under prescribed sections of the MZPPSA or BVPA. The provisions go on to speak about the administrative functions of the Zilla Parishad, Panchayat Samitis as well as the Village Panchayats in the social sectors mentioned above.



There is a definite clarity in role as per the provisions of the BVPA in scheduled areas especially. The mention of the relevant sections within Section 54A of BVPA makes it even more convenient to demarcate responsibilities between all levels of Panchayats. This formulation satisfies the PESA mandate to a great extent and thus it requires no further change except adding a certain Explanation on the ambit of coverage this section has over people who work within these social sectors.

Insert Explanation II in sub-section (n) after Explanation to Section 54A of BVPA

“Explanation II.--All community workers, employees of government working in schools, dispensaries, hospitals, anganwadis, rest houses any other social institution or under any scheme initiated by the central or state government or assisting the Panchayat in carrying out its functions mentioned in the Eleventh Schedule of the Constitution and respective Panchayat legislations in Maharashtra, functioning within the village, shall be registered with the Gram Sabha of that village.”

6.5 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)]*

As per the BVPA, the Gram Sabha shall be competent to grant approval for establishment of a village market and the Panchayats at all three levels would be competent to establish such market villages approved by the Gram Sabha.²⁸

It would also be useful to incorporate changes in the *Market and Fairs Act, 1862*, to bring it in consonance with the PESA mandate so as to allow for the intervention of Gram Sabha in the management of village market especially for agricultural produce. The said Act regulates the establishment of markets and fairs. The authority in charge of this regulation is the Magistrate. It provides for a procedure through which application is to be made to get a license for establishing a market. At present there is no representation of Panchayat in the statute. The Gram Sabha particularly can be involved in the management of the market because the duty of every market committee is to collect and maintain information related to market intelligence

²⁸ Section 54A (k) and 54B (i)



and supply the same to the government whenever so required. On these aspects the Gram Sabha can be said to be more capable than any other body²⁹.

In light of the above given observations, the following amendments need to be made.

Insert Section 1A after section 1, The Market and Fairs Act, 1862

“Establishment of village markets and their management in Scheduled Areas.-

In Scheduled Areas, the Gram Panchayat shall manage village markets by whatever name called, under the control and supervision of Gram Sabha. In the exercise of this power Gram Panchayat shall

(1) Specify, with prior consultation with the Gram Sabha the place of setting up such markets,

(2) No shops shall be allowed to be opened in a market area without a license issued by the Gram Panchayat. The person for applying license shall submit an application. The Gram Panchayat shall take approval of the Gram Sabha on the applications submitted. The Gram Sabha shall pass a resolution, within one month of receiving the application, accepting or rejecting the application and prescribing such conditions of license as it may deem necessary. The resolution shall be forwarded to the Gram Panchayat which shall then proceed to act upon the resolution.

(3) The Gram Sabha may also auction the shops in the market area.

(4) The Gram Sabha shall fix the schedule of rate of fee in respect of every such market operating within its jurisdiction such as;

- i. fee for the use of, or for exposing goods for sale in such market*
- ii. fee for the use of shops, stalls, stands, pens in such market,*
- iii. Fee on vehicle (including motor vehicles as defined in the Motor Vehicles Act, 1939) or park animals bringing, or on persons carrying any good for sale in such market;*
- iv. Fees on animals brought for sale into or sold in such market*
- v. License fees on brokers, commission agents, weighman and measures practicing their calling in such market*

The schedule of rates shall be exhibited at the place of the market by the Gram Panchayat, at the office of the Gram Sabha or any other conspicuous place in the village.

(5) The Gram Sabha shall also levy such penalty or cancel the license of any person acting in contravention of any of the terms of the license or this provision.

(6) The Gram Sabha shall also fix the days of operation of a village market in a month.

(7) The Gram Sabha may also prohibit the display or sale of any commodity in a village market.

(8) Gram Sabha shall make such Rules for the proper management of the village markets as and when it may deem necessary.

Explanation.--*Market means any place set apart ordinarily or periodically used for the assembling of persons for the sale or purchase of grains, fruits, vegetables, meat, fish or other perishable articles of food or for the sale or purchase of livestock or poultry or any agricultural or industrial produce or any raw or manufactured products or any other articles or commodities necessary for the convenience of life.”*

²⁹ For detailed understanding of powers and statues of market committees see chapter IV of 1963 Act.



6.6 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)]*

The central PESA Act empowers the Gram Sabha as well as the Village Panchayat to exercise control over money lending to the Scheduled Tribes. The amendments to Village Panchayat Act and other relevant Acts recognize the role of Gram Sabha by making its decisions binding on the Panchayats at all levels. The problem is that the Gram Sabha can exercise control over money lending only through the Panchayat concerned whereas the Panchayats have the power to make recommendations directly to the Registrar appointed under Money Lenders’ Act, 1946. This undermines the position of the Gram Sabha in this exercise of power over money lending.

However, the position of Gram Sabha has been duly recognised in Zilla Parishads and Panchayat Samitis where the decision taken by the majority of the Gram Sabha is final and binding on the Zilla Parishads and Panchayat Samitis. Moreover, there are provisions within the Bombay Money Lenders’ Act where the Registrar grants license for money lending only after consultation with Gram Sabha and Panchayat concerned and the decision of Gram Sabha is binding on the Panchayat Samitis. This provision is required to be applicable not only for Panchayat Samitis but for other levels of Panchayats as well.

Thus, the problem requires to be cured by bringing in amendments recognising the central role of Gram Sabha at all levels in the exercise of power of money lending.

Bombay Money- Lenders Act, 1946

Insert Proviso to section 3

“Provided that in Scheduled Areas, the officers appointed under this section shall comply with the directions of the Gram Sabha and shall assist the Gram Sabha in controlling over money lending within its jurisdiction”

Insert Proviso to 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.

Insert Proviso to section 7 after sub-section (1)

“Provided that in Scheduled Areas, every license shall be granted in such form as may be prescribed by the Gram Panchayat and on such conditions as may be prescribed by the Gram Sabha in consultation with the Village Panchayat.”

Insert Proviso to Section 25 after sub-section (3)

“Provided that in Scheduled Areas, the rates of interest may be revised by the Gram Sabha periodically. The revised rates shall be publicised by affixing a notice on conspicuous places in the village, forwarding a copy to the money lenders in the village and to the Village Panchayat.

Copies of the Order shall also be sent to the Gram Sabha concerned, Village and Panchayat Samiti within whose local jurisdiction the money lender’s principle place of business is situated.”

Insert Proviso to Section 39

“Provided that in Scheduled Areas, the Gram Sabha in consultation with the Gram Panchayat shall also have the power to formulate Rules for controlling money lending in Scheduled Areas.

Provided that the Rules passed by the State Government shall not be inconsistent with the Rules enacted by the Gram Sabha.”

6.7 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 exercise control over local plans and resources for such plans including tribal sub-plans.” [Section 4(m)(vii)]*

Gram Sabha shall be competent to make recommendations to the Panchayat concerned, for exercising control over local plans and resources for such plans including tribal sub plans. The mandate under PESA on this aspect was empowering both the Panchayat at appropriate level and Gram Sabha. This mandate has been satisfied within the BVPA. It would be also be desirable to make the following amendment to the provision.

Add Proviso to sub-section (i) of Section 54A, BVPA

“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.”



7. Some General Observation in Maharashtra Panchayati Raj Framework

The Bombay Village Panchayats and the Maharashtra Zilla Parishads and Panchayat Samitis (Amendment) Act, 2003 has included a new chapter III-A, “Special Provisions for Gram Sabhas and Panchayats in Scheduled Areas”, within the BVPA. This Chapter covers the Gram Sabhas as well as the Panchayats at all three levels. In order to bring the MZPPSA as well as other relevant local laws in conformity with PESA, it would be pertinent to add an exception in the BVPA as well. It would be as follows.

Add the following line before Section 54A of Chapter III-A, BVPA

Notwithstanding anything contained in the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 or in any other law for the time being in force, the provisions of the said Act or any other law, as the case may be, shall, as respect to the Scheduled Areas of Maharashtra be applicable, subject to the following provisions.

The powers of the Gram Sabha, Village Panchayat, Panchayat Samiti and Zilla Parishad are made subject to Rules framed by the State government or any directions issued by any officer of the State Government from time to time. Thus for example, Section 176 of the BVPA gives the State Government power to make rules. Section 287 of the MZPPSA gives the State Government, the power to adapt laws without prejudice to the generality of the foregoing power. In Scheduled Areas, such a provision goes against the basic tenets of PESA and hence needs to be amended.

Insert Proviso to section 176, BVPA

“Provided that for Scheduled Areas, no Rule or by-law framed by the State Government shall be inconsistent with PESA or shall restrict the powers by the Gram Sabha and Panchayat at appropriate level.”

Insert Proviso to section 287, MZPPSA

“Provided that for Scheduled Areas, no Rule or by-law framed by the State Government shall be inconsistent with PESA or shall restrict the powers by the Gram Sabha and Panchayat at appropriate level.”

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 ties. 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.