



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

**FINAL REPORT**

**By**

**ENVIRO LEGAL DEFENCE FIRM**

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## **PESA IMPLEMENTATION – SOME ESSENTIAL PREREQUISITES AND SUGGESTIONS FOR THE STATE OF HIMACHAL PRADESH**

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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 extinct<sup>1</sup>. It is a challenge to usher the tribals in the mainstream of development efforts without disturbing or destroying their cultural identity and socio- economic milieu<sup>2</sup>. 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 73<sup>rd</sup> (Amendment) Act, 1992 to the Scheduled Areas. Following the recommendations of the committee, the Parliament extended the provisions of 73<sup>rd</sup> 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 local markets, preventing land alienation and regulating intoxicants among other things.<sup>3</sup> Box below highlights the devolution of powers on PRIs in PESA.

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<sup>1</sup> 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.

<sup>2</sup> Ibid.

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



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 modes 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 prospecting 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 only

- i. Planning and management of minor water bodies.

5) Mandatory 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 Himachal Pradesh:***

Pursuant to the Constitution (73rd Amendment) Act, the State of Himachal Pradesh (hereinafter referred to as H.P) passed a new Panchayati Raj Act in 1994 (hereinafter referred to as the HPPRA). Since this Act did not extend to the Scheduled Areas in the state, in 1997, the State Legislature, in accordance with the PESA extended the provisions of the 1994 Act to the Scheduled Areas of H.P through 'The H.P. Panchayati Raj (Second Amendment) Act, 1997' by



adding a new Chapter titled 'Chapter VI-A' to the 1994 Act (hereinafter referred to as H.P.PESA). Chapter VI-A of the 1994 Act, lays down the special provisions that are to apply to the Scheduled Areas in H.P, over and above those mentioned in the 1994. Perhaps the most important thrust of the new law on Panchayat is the empowerment of the lowest unit of governance i.e. the Gram Sabha. The underlying assumption is that it is ultimately the village assembly that should be accountable as well as responsible for the affairs of the local plans and programmes that affect them. In 2011, the State government notified the Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011.<sup>4</sup>

## **2. Provisions underlying the Basic Principles of PESA**

### **2.1 Definition of a Village Scheduled Areas:**

Chapter-VI-A was introduced into the Panchayati raj act in 1998 to make special provisions for extension of Panchayati raj Act to Scheduled areas. Section 97-B defines the village as: “*a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets thereof comprising a community of communities and managing their affairs in accordance with traditions and customs.*”

The definition has been adopted in consonance with the Central PESA which 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 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, and same should be adopted by the states.

Further the use of the phrase “*community of communities*” without a clear definition gives conflicting signals whether such community includes a group of community, 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 phrase “*community of communities*” 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.

### **Himachal Pradesh Panchayat Raj Act, 1994, Chapter VI-A**

***Delete Section 97-B and instead insert***

*“Village’ means a village in the scheduled areas which shall consist of a habitation or a group of habitations or a hamlet or a group of hamlets, comprising the majority tribal members within such village who manage their affairs in accordance with traditions and customs”.*

#### **2.1.1 Declaration of a Village**

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<sup>4</sup> Notification No. PCH-HA (1) 4/ 2006-III, dated 26th March, 2011 and published in the official Gazette on 1st April, 2011.



As Part IX of the Constitution, the Governor is authorised to declare villages. Secondly, there is no provision for consultation with the community before declaring villages. In our view, since the villages are to be declared as per traditional customs and boundaries, community should be involved in the process of constitution. Also, the Governor needs 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, but only to the extent of carrying 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.

***Insert 97(B)(i) in HP PRA-***

***Procedure for Constituting the Villages in Scheduled Areas***

*(i) "Every such hamlet or group of hamlets constituting a village in a Scheduled area shall be notified by the Governor as follows-*

*The hamlet or the group of hamlets in the Scheduled Areas as notified by the state government, which are managing their affairs in accordance with traditions and customs shall submit a resolution to the District Collector who shall then forward it to the State Government for such notification.*

*Before the resolution is forwarded to the state government the District 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 the office of the District Collector.*

*Provided further that the District Collector shall also give an opportunity to any hamlet or group of hamlets to object to any such formation within sixty days of such submission."*

*(ii) The Governor shall cancel the notification constituting a village or altering the area of a village constituted as per PESA only at the request of the members of such village through a duly passed resolution."*

**2.2 Gram Sabha in Scheduled Areas**

**Selection of Presiding Officer of the Gram Sabha and Conduct of Business**

It is important to give greater autonomy to the Gram Sabha in managing its affairs and in taking decisions regarding the access and use of its resources as mandated by PESA. Therefore, It should be given the power to select its own head from amongst its members, who may or may not be the Sarpanch of the Gram Panchayat. Further, every Gram Sabha should elect its own head, rather than one person presiding over several Gram Sabha meetings. Therefore, to give autonomy to the Gram Sabha to select its representatives and functionaries following provisions may be added.



## HPPRA, 1994

### *Insert the following as Section 5(1)*

*“The Gram Sabha in its first meeting shall elect its Presiding Officer, Vice President and Secretary from amongst its members. The Presiding Officer of the Gram Sabha shall be , a member of the scheduled tribes who is not the Mukhia, Up-Mukhia or member of the Panchayat, 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, or one known by any other name, or by a person proposed by them or unanimously nominated/ supported by the members present in the meeting.”*

## **2.3 Traditions, customs, customary resources and traditional methods of dispute resolution:**

PESA states, *“Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution.”* [Section 4(d)]

H.P Panchayat Act provided that, *“Every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and without detriment to any law for the time being in force, the customary mode of dispute resolution.”* [Section 97-C (1)]

The special provisions for Scheduled Areas make it clear that the Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people and their cultural identities and community resources and customary mode of dispute resolution. However, going beyond the letter, if not the spirit of PESA, the special provisions in H.P. require that the Gram Sabha is to carry out these functions “without detriment to any law for the time being in force”. This would directly imply that in case where the customary laws are in conflict with the existing formal laws the latter would prevail.

- 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:
  - 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 prohibited<sup>5</sup> as per provisions of the Wildlife (Protection) Act, 1972 with certain exceptions<sup>6</sup> that are provided within the act. A sample formulation is pasted below which can be used by State Panchayat law.

- 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:

The Following provisions needs to be included in the Himachal Pradesh Gram Panchayat Act, 1994

***Insert Section 97-C (1) in The Himachal Pradesh Panchayati Raj Act, 1994***

*“(i) 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. 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.*

*(ii) The state government shall provide aid and assistance to Gram Sabha to carry out such documentation.*

The rules further mandates that Gram Sabha should not only preserve and safeguard natural resources but also shall ensure that resources are utilized in an equitable and sustainable manner. The rules state that, *“Gram Sabha, under section 97-C, shall be competent to safeguard and preserve the natural resources located in its area as well as those over which it enjoys traditional rights in relation to water, forest, land and mineral as per local tradition and the spirit of the laws of the Central and State Governments.*

*(2) The Gram Sabha shall ensure that resources are utilized in such a way that,-*

*(a) livelihood means are sustained;*

*(b) inequality among the people does not increase;*

*(c) resources are not confined to a few people; and*

*(d) there is full utilization of local resources, in keeping with sustainability, and the management of resources shall be done by the Gram Sabha keeping in view the inherent spirit of the community legacy by honouring the individual rights over natural and other resources as per the prevalent rules.” [Rule 3]*

<sup>5</sup> Section 9 Wildlife (Protection) Act, 1972

<sup>6</sup> Section 11 Wildlife (Protection) Act, 1972



The above rule is in conformity with PESA and requires no change.

### **3. Powers Exclusive to the Gram Sabha:**

The Central PESA mandates certain exclusive powers to the Gram Sabha. The first among them is “*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*” [Section 4( e) (i)]

H.P PRA mandates that the 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. [Section 97-C (2) (i)]

#### **Resource, planning and management committee (RPMC):**

Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011 further mandates the formation of Resource, planning and management committee constituted by the Gram Sabha constituting of the Pradhan of the Gram Panchayat and at least five other sabha members to be nominated by the Gram Sabha, who are not the office bearers of the Gram Panchayat. The rule states that, “*The Gram Sabha shall constitute a Resource Planning and Management Committee (hereinafter referred to as 'RPMC') consisting of the Pradhan of the Gram Panchayat and at least five other sabha members to be nominated by the Gram Sabha, who are not the office bearers of the Gram Panchayat.*

(2) *The term of the RPMC shall be co-terminous with the term of the Gram Panchayat.*

(3) *The meeting of the RPMC shall be held at least once a year and it shall be the duty of the Pradhan to convene such meeting. The Secretary or the Panchayat Sahayak, as case may be, shall be the Secretary of the RPMC.*

(4) *The representatives of the Development Block level offices of the Agriculture, Forest, Horticulture, Industries, Irrigation and Public Health and Revenue departments of the State Government shall function as advisors to the RPMC and shall also attend its meetings.*

(5) *The RPMC shall chalk out a plan for the best possible use of all the resources within the sabha area and shall advise and cooperate with the sabha members to make use of them accordingly.*

(6) *The RPMC shall consider all the aspects, including difference of opinion or dispute about the management and use of the resources and in case the RPMC is not able to resolve any issue then the said issue shall be referred to the Gram Sabha for consideration. The decision of the Gram Sabha thereon shall be final.”[Rule 4]*



## **H.P PESA Rules, 2011**

### **Insert proviso in Rule 4(7)**

*“Provided a mandatory consultation with the Gram Sabha shall be organized to assess the needs of the village, by the RPMC. The need assessment shall be done by the Gram Sabha and shall be forwarded to the RPMC. Thereafter plans and programs to addressing the needs of the village will be prepared by the RPMC and approval of the Gram Sabha shall be taken before they are executed.”*

### **Insert in proviso to Rule 4(8)**

*“Provided that full and prior information on each such plan, program and project is provided by the project proponent to the Gram Sabha in a language that is easily and commonly understood preferably in a vernacular language. Every such plan, program and project shall be approved by such Gram Sabha accordingly.”*

The rules further provide that Gram Sabha to be competent to plan and take action for making farming economically viable by considering the measures prevention of soil erosion; regulating grazing in order to protect crops and enhance the capacity of meadows; harvesting rain water for its use in farming and for its distribution; ensuring provision of seeds, manure etc. as well as knowledge sharing with mutual cooperation or otherwise; and promoting organic manures, fertilizers and insecticides. [Rule 5]

**Though these measures go a step ahead as mandated by PESA, they however do not prejudice it. Therefore no change is required.**

## **3.2 Identification and Selection of 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)]

H.P PRA in consonance with the Central Act provided that every Gram Sabha shall be responsible for the identification or selection of persons as beneficiaries under poverty alleviation and other programmes. [Section 97-C (2) (b)]

*Therefore, no change is required in the above provision.*

## **3.3 Issuing Certificate of Utilization 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)]



H.P PRA also mandates that, “Every Gram Panchayat shall obtain from the Gram Sabha, a certification of utilization of funds by that Panchayat for the plans, programmes and project referred to in sub-section(2).” [Section 97-C (3) (b)]

This provision is a good example as it not only makes the Gram Panchayat accountable to the Gram Sabha but every government authority/department Central PESA as certificate is required not only by Gram Panchayat but by concerned authority/ Government department as well to which the funds for the development of village have been released under schemes of programs.

To supplement the above provisions the following may be added to H.P PESA Rules, 2011

**H.P PESA Rules, 2011**

***Insert Rules 21(4)***

*“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 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 .....

***Note: If this form is accepted then the suggested 21(4) insertion in HP PESA Rules, 2011 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)]

#### ***Provisions relating to planning and management of water bodies entrusted to Gram Panchayat and Zilla Parishad in Himachal Pradesh:***

**H.P PRA** states that, *“Planning and management of minor water bodies in the scheduled areas shall be entrusted to Gram Panchayats, Panchayat Samitis or the Zila Parishads, as the case may be, in such manner as may be prescribed.”* [Section 97-G]

H.P PESA Rules, 2011 also defines Panchayat at appropriate level as the lowest tier of Panchayat which can perform a particular function or in whose area a particular resource is situated [Rule 2(g)]

Further the rules throw some clarity on the functions of Gram Sabha and the various tiers of Panchayats in the planning and management of minor water bodies. H.P PESA rules also define a minor water bodies as , *“water body used for fetching drinking water whether a stream, a rivulet, lake and on which the construction of check dams can be made and which has a capacity of irrigating land up to 5 hectares.”* [Rule 2(f)]

#### **H.P PESA Rules, 2011**

##### **Delete Rule 2(f)**

*“water body used for fetching drinking water whether a stream, a rivulet, lake and on which the construction of check dams can be made and which has a capacity of irrigating land up to 5 hectares.”*

##### **Instead Insert**

*“Minor Water Body means any water body water body used for fetching drinking water whether a stream, a rivulet, lake and on which the construction of check dams can be made and which has a capacity of irrigating land up to 20 hectares.”*

Planning and management of water resources the management and use of water resources shall be planned by the Gram Sabha, as per provisions of section 97-G of the Act, in such a manner that these are kept intact for future generations, and all the villagers have equal rights over these resources.

The rules further mandates that Water bodies within a Gram Panchayat shall be managed by the Gram Panchayat, those extending to more than one Gram Panchayat area, by the Panchayat Samiti concerned and those extending to more than one Panchayat Samiti area, by Zila Parishad.



The Gram Panchayat, Panchayat Samiti, Zila Parishad, as the case may be, after consulting the RPMC and the Gram Sabhas concerned, keeping in view its traditions and the spirit of prevalent laws, shall regulate the use of available water in the village for various purposes and also decide about the priority of use.

For the Management of land for ponds, the Gram Panchayat, Panchayat Samiti, Zila Parishad, as the case may be, shall make arrangements for the farming of land available as a consequence of the receding of water level of ponds meant for the irrigation and other purposes, in consultation with RPMC and concerned departments. It shall also decide about the levy rate on that land, keeping in view State Government rules.

All Gram Sabha members shall have equal rights for fishing as per the convention in the water resources located within the territory of the village. The Gram Panchayat shall impose necessary conditions, keeping in view the local traditions, regarding any aspect of fishing to ensure that one or more persons do not encroach their limit in an unjust manner and also to maintain the availability of the fish.

Except the above, no change in HP Panchayat Raj Act or PESA Rules is required as powers of planning and management have been allocated with reasonable clarity. However, it is also important to look at the subject matter laws, whether they are in conformity with the PESA provisions in Scheduled Areas.

## **5. Powers to 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:*

- 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)**)*

Three legal issues emerge here.

- First, what is the legal meaning of consultation or mandatory 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.

Prior to answering these questions, it is important to examine how the state of H.P has allocated this power.





**HP Panchayat Raj Act, 1994 states:**

The Gram Sabha shall be consulted before making the acquisition of land in the scheduled area for development of projects and before re-setting or rehabilitating persons evicted by such projects in the scheduled areas; the actual planning and implementation of the projects in the scheduled areas shall be co-ordinated at the State level. [Section 97-F]

It may just be mentioned here that by using the words “ persons evicted” by such projects instead of the formulation of the PESA ‘affected by such projects’, the H. P. PESA seems to narrow down the ambit of the provision. However, it is noticeable that unlike in some other State where this power has been vested with the higher tiers of Panchayats the H.P. PESA empowers the Gram Sabha in this regard.

**Therefore,**

*Delete the word ‘evicted’ and instead insert “affected” in Section 97-F*

The **HP PESA rules** made in this behalf provide the process of such consultation for acquisition of land in the Scheduled Areas

According to the rules, "*Consultation*" means a mandatory consultation. [Rule 2(g)]

Further, as per the rules, for the purposes of Land management, the Gram Sabha, within its area, shall be competent to review records of the entire land of the village for ensuring that the farmer’s names are correctly recorded and records are properly maintained; it shall be mandatory for concerned revenue officials to take permission from the Gram Sabha prior to transfer of land by sale, mortgage, lease-contract etc in which the owner or tiller of the land changes. [Rule 6]

The following procedure has been prescribed:

*(1) When the government considers any case of land acquisition under any law for the time being in force, the government or the concerned authority shall submit to the Gram Sabha as per provisions of section 97-F, the following written, information along with the proposal:-*

- (a) the complete outline of the proposed project including the possible impact of the project;*
- (b) proposed land acquisition;*
- (c) new people likely to settle in the sabha area and possible impact on the area and society;*
- (d) the proposed participation, amount of compensation, job opportunities, for the people of the village; and*
- (e) the rehabilitation and sustainable livelihood plan.*

*(2) After getting complete information, the concerned Gram Sabha shall be competent to summon the representatives of the concerned authorities and the government to examine*



*them either individually or collectively. It shall be mandatory for all such persons summoned to furnish point-wise clear and correct information.*

*(3) The Gram Sabha, after considering all the facts shall make a recommendation regarding the proposed land acquisition and rehabilitation plan of persons to be displaced.*

*(4) The recommendation of the Gram Sabha shall be considered by the land Acquisition Officer.*

*(5) In case the land Acquisitions Officer is not in agreement with the recommendations of the Gram Sabha, he shall send the case again to the Gram Sabha for reconsideration.*

*(6) If after a second consultation, the Land Acquisition Officer passes an order against the recommendations of the Gram Sabha, he shall record the reasons for doing so in writing.*

*(7) In case of industrial projects, the Gram Sabha(s), of whose area is/are influenced by such projects, shall be consulted. In the event of more than one Gram Sabha, in case of difference of opinion amongst the Gram Sabhas, the matter shall be resolved at the Panchayat Samiti level, whose decision thereon shall be final.*

*(8) The progress report of rehabilitation and sustainable livelihood plan shall be placed before the Gram Sabha after every three months from the date of notification for land acquisition.*

*(9) If in the opinion of the Gram Sabha, the Panchayat Samiti, as the case may be, suggested measures are not followed, the Gram Sabha may inform the concerned department of the State Government in writing regarding the same, and it shall be mandatory for the said department to take appropriate action. [Rule 9]*

Though the rules are very comprehensive in detailing the acquisition process, however, they can be strengthened further to secure the rights of the marginalised. Following issues and corrective measures are noteworthy:

- The above provisions allocate the power of ‘consultation’ to Gram Sabha in case of land acquisition in Scheduled Areas. However, in PESA rules of Himachal Pradesh the term “Consultation” means “mandatory Consultation” but still it does not define it. “Consultation” as per its Dictionary meaning is an “act of seeking advice or opinion”<sup>7</sup> 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. Further, as mentioned above, the Land Acquisition Officer is not bound to accept the recommendations of the Gram Sabha. In this case it is not an effective provision as the land can be acquired even if the Gram Sabha does not approve of it. Therefore, it is recommended that in Central PESA and subsequently in respective Panchayat law of H.FP that the term consultation needs to be defined on the lines of “*free and prior informed consent*”.
- Secondly, the power to give recommendations on the acquisition and resettlement and rehabilitation scheme has been given to the Gram Panchayat. In our view, it should be

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<sup>7</sup> Black’s Law Dictionary, 8<sup>th</sup> ed.





given to the Gram Sabha, as the Gram Sabha is directly affected by acquisition proposal instead of the Gram Sabha and therefore should have the power to approve or reject the proposal.

- 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 H.P Panchayat Raj Act, 1994**

##### ***Replace the provisions 1, 3,4,5,6 of rule 9 with***

*“(1) In Scheduled Areas, no acquisition of land or resettlement and rehabilitation of persons affected by such acquisition shall take place without prior consultation with the Gram Sabha. The Land Acquisition Officer shall convene a meeting of the Gram Sabha and carry out a consultation process on the proposed acquisition of land or before resettlement or rehabilitation of persons affected by such acquisition.*

*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.*

*(2) All the three levels of Panchayat shall render necessary assistance to the Gram Sabha in exercising the powers under this section and in ensuring proper implementation of Rehabilitation and Resettlement schemes proposed.”*

*(3)The Gram Sabha(s) shall after considering all the opinions, facts, documents, information shall pass a resolution approving, rejecting or modifying the proposal. The Resolution shall be sent to the Gram Panchayat and Land acquisition officer within 15 days of its passing.*

*(4)The decision of the Gram Sabha shall be binding on the State Government. In case the Land Acquisition Officer is not in agreement with the decision of the Gram Sabha, it can file its objections with reasons before the Gram Sabha for its consideration. The Gram Sabha shall give due consideration to the objections and pass a resolution accepting or rejecting the objections partly or wholly as it may deem necessary.*

*(5)In deciding the acquisition proposal the Gram Sabha may take recommendations of the Gram Panchayat, Panchayat Samiti and Zilla Parishad.”*

*(6)Gram Sabha may also rescind its acceptance of the proposal.*

##### ***Insert in rule 9(8)***

*“Or in any other measure that the Gram Sabha decides”*

##### ***Delete Rule 2(g) and Insert Explanation in 97-A(3)***

*“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.”*



### ***Insert Explanation in Rule 9***

*“ Explanation: 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”*

Thirdly, similar enabling provisions may be inserted in Land Acquisition Act as applicable in H.P to make it consistent with PESA and HPPRA. **The Himachal Pradesh Transfer of Land (Regulation) Act, 1968** has been amended in 2003; suggestions regarding those provisions will be supplied as soon as the amendments become available.

## **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)]*

### **The HP Panchayat Raj Act, 1994**

#### ***Minor minerals in the Scheduled Areas:***

*The recommendations of the Gram Sabha, made in such manner as may be prescribed, shall be taken into consideration prior to grant of prospecting license or mining lease, for minor minerals in the scheduled areas. [97-H (1)]*

*The prior recommendation of the Gram Sabha, made in such manners as may be prescribed, shall be taken into consideration for grant of concession for the exploitation of minor minerals by auction. [97-H (2)]*

#### **The H.P PESA Rule 13 provides that:**

*(1) The Gram Sabha, under section 97-H, shall be competent to plan and control the excavation and use of all the minor minerals including soil, stones, sands, etc in the Sabha area. The*



*decision of the Gram Sabha taken in this behalf shall be implemented by the Gram Panchayat concerned.*

*(2)The sabha members may use minor minerals for their individual needs as per their traditional practice subject to the condition that,-*

*(a) the Gram Sabha shall decide the extent of use of the minor minerals such as stone, sand, etc for making Pukka houses different from the traditional dwellings and may also impose royalty thereon which shall form part of the Panchayat fund ;*

*(b) the permission of Gram Panchayat shall be compulsory for use and exploitation of minor minerals; and*

*(c)the Gram Sabha shall fix the responsibilities such as filling up of pits, planting trees, constructing ponds etc. by persons undertaking excavation for use of minor minerals to compensate for ill effects of excavation.*

*(3)The concerned department of the State Government may award mining lease for minor minerals only in consultation with Gram Sabha by incorporating additional conditions, if any, imposed by the Gram Sabha for protecting the environment, employment, etc for such leases.*

*(4)(a) In villages having commercial feasibility of minor mineral production, before permitting the minor minerals to be used commercially, it shall be the responsibility of the concerned department of the State Government to consult Gram Sabha.*

*(b)If any condition has been imposed by the Government for the protection of the environment etc. the concerned officer shall provide complete information to the Gram Sabha in this regard.*

*(c)The plan for exploitation of minor minerals shall include arrangements such as excavation area, the type of area, managing of ill effects of excavation such as existence of pits, water shortage or reduction in vegetation, effect of ash or smoke on fields, etc. so as to nullify all these effects by filling up the pits, planting trees or by taking other suitable measures.*

*(5) If any concession is given by any Government department for the exploitation of minor minerals, it shall be mandatory for the said department to obtain the permission of the Gram Sabha for grant of concession for exploitation of minor minerals by auction.*

#### **Legal issues in allocation of the above powers:**

- The HP PESA rules appropriately vests the rights in Gram Sabha but, in law, recommendation, consultation 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”.
- Also, PESA envisages the Gram Sabha as the custodian of the natural resources of the village, therefore, it must have a right to regulate, approve, and prohibit any activity in the village which has impact on the life and livelihood of its people.

In the light of the above following amendments are recommended:

#### ***Delete Section 97-H (1) and (2) replace the provisions with the following:***

*(1) “The Free, prior and informed consent of the Gram Sabha or Gram Sabhas in case the proposed area for lease falls within the jurisdiction of two or more Gram Sabhas, shall be made mandatory prior to grant of prospecting licenses, mining leases, or for concessions for*



*exploitation of minor minerals by auction, in the Scheduled Areas.”*

*Explanation: Free, prior and informed consent with its cognate and grammatical variations shall mean publicizing 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. “Provided that every application for renewal or transfer of mining leases, or quarry license, or for concession shall be treated as a fresh application and a free, prior and informed consent of the Gram Sabha(s) is mandatory.*

*(2) The Gram Sabha shall have the authority to accept or reject the application for prospecting license, mining leases 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 or concession for exploitation of minor minerals by auction*

*(3) The Gram Sabha(s) shall maintain a record of prospecting licenses, mining leases and concessions for exploitation of minor minerals by auction for which consent has been given.*

*(4) On the request of the Gram Sabha, the Gram Panchayat, Panchayat Samiti and Zilla Parishad shall render necessary assistance to the Gram Sabha in carrying out its function under this section.”*

#### ***HP PESA Rules, 2011***

##### ***Delete Rule 13(2)(b) and instead insert the following provisions***

*“Gram Sabha shall have the discretion to grant prospecting license, mining leases or concessions for exploitation of minor minerals by auction to any tribal or non tribal person or organisation. Gram Sabha may give special preference to the applications of individual local members of ST or societies comprising exclusively of local ST members.”*

##### ***Delete sub rule 13 (3) and (4) Insert Sub Rules to Rule 7 in the following manner***

*“(3) After receipt of the application for mining leases in Scheduled Areas, the Mining Department shall within fifteen days, inform the Gram Panchayat and the Gram Sabha or Gram Sabhas as the case may be, within whose jurisdiction the proposed area of mining falls, by issuing a public notification, beat of drum and by affixing a copy of the notification at a conspicuous place in the village(s).*

*(4) The notification shall contain location, size of the proposed mining area and type of minor minerals proposed for extraction, period of lease and such other particulars as it may deem necessary.*

*(5) Thereafter, the authorised officer of the Mining Department along with the Applicant shall within fifteen days of publication of notice organize a consultation with the Gram Sabha or Gram Sabhas as the case may be and inform about the conditions of quarry leases, area proposed for mining, period of lease, rehabilitation and resettlement plan for the persons displaced by proposed mining operations (if any), impact on the forest, wildlife and biodiversity and livelihood of the village communities and such other information sought by the Gram Sabha.*

*(6) The Gram Sabha shall then, through a resolution decide on the proposal within four weeks which shall be binding on the Mining department and the Applicant. The Gram Sabha may*



*accept, reject the proposal or alter or impose such terms and conditions on lease as it may deem necessary. The Gram Sabha(s) may alter the location and size of the Area proposed for exploitation of minor minerals.*

*(7) A copy of the resolution of the Gram Sabha(s) shall be sent to the Gram Panchayat and to the Mining department within 15 days of its passing.*

*(8) Every application for renewal of mining leases shall be treated as a fresh application and a free, prior and informed consent of the Gram Sabha as per the procedure mentioned above shall be obtained.*

*(9) A register of mining leases granted within its jurisdiction shall be maintained by the Gram Sabha and Gram Panchayat, containing such particulars as it may deem necessary.*

### **The Himachal Pradesh Minor Minerals (Concession) Revised Rules, 1971:**

As mentioned above, PESA vests the above powers in the Gram Sabha or Panchayat at appropriate level in Scheduled Areas. Though some amendments have been done in Minor mineral rules but they need to be modified in order to fully appreciate the mandate of the PESA. Therefore, following amendments are proposed:

#### **Himachal Pradesh Minor Minerals (Concession) Revised Rules, 1971**

##### ***Insert exception in to Rule 5(2)***

*“provided that the Government shall have the power to grant exemption from obtaining a lease or permit for quarrying minor minerals in any area ‘except Scheduled Areas in the state’ in case of any category of persons, subject to such conditions as may be specified in the order granting such exemption.”*

##### ***Insert this as Sub Rule 5(4) and also :***

*(i) The free, prior and informed consent of the Gram Sabha or Gram Sabhas in case the proposed area for lease falls within the jurisdiction of two or more Gram Sabhas, shall be obtained by the competent Licensing Authority, prior to grant of prospecting licenses, quarry leases and permits, or for concessions for exploitation of minor minerals by auction.*

*“Explanation: Free, prior and informed consent with its cognate and grammatical variations shall mean publicizing 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.*

*“Provided that every application for renewal or transfer of mining leases, or quarry license, or for concession shall be treated as a fresh application and a free, prior and informed consent of the Gram Sabha(s) is mandatory.*

*(ii) The Gram Sabha shall have the authority to accept or reject the application for prospecting license, mining leases 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 or concession for exploitation of minor minerals by auction”*





**Delete the provision under rule 24 regarding Schedule areas and instead insert:**

*(i) The free, prior and informed consent of the Gram Sabha or Gram Sabhas in case the proposed area for lease falls within the jurisdiction of two or more Gram Sabhas, shall be obtained by the competent Licensing Authority, prior to grant of prospecting licenses, quarry leases and permits, or for concessions for exploitation of minor minerals by auction.*

*“Explanation: Free, prior and informed consent with its cognate and grammatical variations shall mean publicizing 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.*

*“Provided that every application for renewal or transfer of mining leases, or quarry license, or for concession shall be treated as a fresh application and a free, prior and informed consent of the Gram Sabha(s) is mandatory.*

*(ii) The Gram Sabha shall have the authority to accept or reject the application for prospecting license, mining leases 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 or concession for exploitation of minor minerals by auction”*

**Insert exception in Rule 24(3)**

*“Provided that no tender or auction or contract as the case may be, regarding exploitation of minor minerals in scheduled areas of the State shall be considered by the Government for acceptance unless a free, prior and informed consent of the Gram Sabha or Gram Sabhas is obtained.”*

**Insert sub rule 3 in Rule 53**

*“Gram Sabha may also pass a resolution with reasons to be recorded in writing imposing a penalty or recommending closing of the quarry area or imposing such other conditions as it may deem necessary, after giving a reasonable opportunity of being heard to the lessee. The Director shall take necessary action on the resolution of the Gram Sabha.” If a penalty is imposed, it shall be deposited in the funds of the Gram Sabha and shall be used for the development of the village or for any other purpose that the Gram Sabha decides.”*

**Insert in Sub Rule 2 in Rule 53**

*“ten percent of the penalty collected from unauthorised quarrying shall be deposited in the funds of the Gram Sabha within whose jurisdiction the quarry area lies”*

**Insert Rule 28(6)**

*“Particulars of any mining lease, prospecting license or concession for exploitation of minor minerals by auction granted in scheduled Areas, shall be informed to the Gram Sabha concerned within 15 days of grant of such mining lease, prospecting license or concession for 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)].

**HPPRA states:**

**Powers and functions of Gram Panchayats and Panchayat Samiti.**-(1) *The Gram Panchayat or as the case may be, the Gram Sabha shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed in respect of the following matters, namely:- enforcement of prohibition or regulation or restriction of the sale and consumption of any intoxicant; [Section 97-I (1) (b)]*

**It may be noted here that the Central PESA endows the power on the Panchayats at the appropriate level along with the Gram Sabha, whereas the above provision in HPPRA makes a distinction between the two by using “or” instead of “and”. Therefore, same needs to be changed to bring conformity with PESA.**

The **HP PESA rules** further lays down the following procedure for the regulation of intoxicants:

**Regulation of intoxicants.**-(1) *The Gram Sabha, under section 97-I (b), shall be competent to enforce prohibition or regulation or restriction on sale and consumption of any intoxicant within its limits for which the Gram Sabha, by a resolution passed in this behalf, may,-(a) completely stop the relaxation of allowing tribals to make local liquor for their own use or impose any type of ban on it in the village;*

(b) *give instructions to stop the sale of any type of intoxicant from a shop or in any other manner;*

*Provided that these instructions shall come into force from the forthcoming financial year;*

(c) *impose restrictions on bringing in any type of intoxicant or taking it outside the village territory;*

(d) *prohibit or fix a limit on the storage of intoxicants at any place;*

(e) *completely stop the use of liquor or other intoxicants in its area or impose any restriction;*

(f) *regulate the sale of material used for brewing of liquor such as corn, fruits, Jaggrey etc. ; and*

(g) *regulate the use of locally made liquor such as anguri, sulphi, chuli, bemi, apple, kiwi, brandy, chhang or known by any other local name.*



- (2) (a) *The Gram Sabha may constitute an Intoxication Control Committee, consisting of at least seven members to be nominated by the Gram Sabha, to inquire into matters relating to intoxicants either on the basis of complaint(s) or suo motto, and to make suitable suggestions regarding the control of intoxicants for the benefit of the Sabha members:*

*Provided that at least half of the members of the Intoxication Control Committee shall be women.*

*(b) The Intoxication Committee shall,-*

*(i) ensure as to whether the factories/distilleries manufacturing any type of intoxicants are adhering to all the conditions mentioned in the license and in case of any infringements, report the matter to the Gram Sabha for initiating further action through the competent excise authorities; and*

*(ii) ask the owner of the concerned factory/distillery to present all matters relating to the welfare of the people including manufacture of liquor, distribution system, its environmental impact etc. before the Gram Sabha.*

*(c) The Gram Sabha through the Pradhan of the Gram Panchayat may take advice and help from the Excise Department for the smooth functioning of the Intoxication Control Committee.*

*(3) (a) Without the concurrence of the Gram Sabha, no factory/distillery for manufacturing liquor or other intoxicants shall be established.*

*(b) Proposal to establish a factory/distillery to manufacture liquor or other intoxicants or to open a new shop for the sale of liquor in the limits of a Gram Sabha, by the Government or any other agency, shall be presented before the Gram Sabha for consultation through the Pradhan of the Gram Panchayat. Such proposal shall be presented for the information of the sabha members in the meeting of the Gram Sabha, which shall be considered in the next meeting or in a special meeting of the Gram Sabha. The decision of the Gram Sabha on the said proposal shall be final.*

*(c) In case the Gram Sabha does not arrive at any decision on the issue or if the proposal is not considered, then that proposal shall be deemed not to have been accepted. [Rule 14]*

**The above rules are appropriate and in conformity with the objective of the PESA, hence need not to be changed.**

Besides the above, Subject matter State Law that regulates the intoxicants as applicable to H.P is The Punjab Excise Act of 1914. This regulates the manufacture, sale and consumption of intoxicants in H.P. Since the H.P. PESA and rules thereunder vests the powers of enforcing prohibition, restricting and regulating the sale and consumption of intoxicants with the Gram Sabha, in absence of any amendment removing the inconsistencies between the existing State authorities and those mentioned under PESA, there is bound to be overlapping in jurisdiction. Under the 1914 Act, the State Government can declare “*the maximum or minimum quantity or both of any intoxicant which, for the purpose of this Act, may be sold by retail or by wholesale*”<sup>8</sup>. Once such a declaration has been made, no person can have in his possession any intoxicant in excess of the quantity so

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<sup>8</sup> Section 5, The Punjab Excise Act of 1914





prescribed<sup>9</sup>. Further, the State Government also has the power to lease to any person the right to sell by wholesale or retail any country liquor or intoxicating drug within any specified local area. Since these powers primarily involve regulation of sale/consumption of intoxicants and since such power of regulating sale, as per the H.P. PESA, now vests with the Gram Sabha, there is a clear overlapping between the powers of the State Government and that of the Gram Sabha. Further, under the Punjab Excise Act, all licenses for sale of intoxicants, within a district are given by the Collector, subject to the rules made by the Financial Commissioner<sup>10</sup>. The Collector can also cancel or suspend the license, permit or pass if the conditions specified under the Act are violated<sup>11</sup>. Since all powers of the Collector pertain to regulating/restricting the sale of intoxicants, these provisions need to be amended so as to empower the Gram Sabha or Panchayat at appropriate level. This is because, by a one half-majority vote, the Gram Sabha may now enforce prohibition/restore and regulate sale of intoxicant in the local area of Gram Sabha concerned. What has not been made clear is when there are conflicting orders then which authorities will prevail. The Act and the Rules do not make a distinction between the scheduled and non scheduled areas and therefore, does not take into account the powers of the Gram Sabha and Panchayat in imposing prohibition and regulating sale and consumption of intoxicants in Scheduled Areas, as per the provisions of PESA. Therefore, there is overlapping jurisdiction over intoxicants. Several amendments are suggested to correct this anomaly and ensure effective transfer of authority over intoxicants to the local bodies in Scheduled Areas.

#### **Punjab Excise Act, 1914**

##### ***Insert Section 1(2-A)- Regulating Manufacture, Sale, Consumption, possession of Intoxicants in Scheduled Areas***

- a) *“Provisions of this Act or rules framed thereunder, shall not apply to Scheduled Areas of Himachal Pradesh to the extent they are inconsistent with the provisions of Section 97-I (1)(b) of Himachal Pradesh Panchayati Raj Act, 1994 and Rule 14(I) of Himachal Pradesh Panchayat Extension to Scheduled Areas (PESA), Rules 2011 . 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 Section.”*
- b) *“For the purpose of Scheduled Areas, ‘intoxicants’ shall include ‘intoxicating drugs’.”*

##### ***Insert the following to section 35(1)***

*“provided that in Scheduled Areas no such license shall be issued without the free, prior, informed, consent of the Gram Sabha along with the respective Gram Panchayat.”*

*“Explanation: Free, prior and informed consent with its cognate and grammatical variations shall mean publicizing the application for issue of license of permit for manufacture, sale, consumption and possession of intoxicants or any other related acts, by issuing of public*

<sup>9</sup> Section 24, The Punjab Excise Act of 1914

<sup>10</sup> Section 35, The Punjab Excise Act of 1914

<sup>11</sup> Section 36, The Punjab Excise Act of 1914



*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.”*

*“The procedure for seeking approval of the Gram Sabha shall be as mentioned in Rule 8(I)(b) of Himachal Pradesh Panchayat Extension to Scheduled Areas (PESA), Rules 2011.”*

***Insert proviso to section 6(a)***

*“Provided that no such notification shall be issued for scheduled areas without seeking approval of the Gram Sabha or Gram Sabhas as the case may be and the Gram Panchayat concerned.”*

***Insert proviso in section 24(1)***

*“provided that in scheduled areas, such limits shall be prescribed by the Gram Sabha along with the Gram Panchayat while granting permit for possession of intoxicants.”*

***Insert proviso to Section 21***

*“In Scheduled Areas, the license for sale and buying shall not be given without obtaining free, prior and informed consent of the Gram Sabha along with the Gram Panchayat of the village in which the buying and selling have to take place.”*

***Insert proviso in Section 32***

*“provided that the Gram Sabha shall also levy penalty for violation of any term of the license or possession of intoxicants in excess of the permissible limit or for violation of any Rules framed by the Gram Sabha to prohibit or regulate manufacture, sale and consumption of intoxicants in Scheduled Areas.”*

*“provided further that, twenty percent of the penalty amount collected by the Excise Department from Scheduled Areas shall be deposited in the funds of the Gram Sabha is levied and shall be used for the development of the village.”*

***Insert proviso in Section 36 and Section 37***

*“In Scheduled Areas, no license shall be cancelled or suspended without the prior, written approval of the Gram Sabha along with the concerned Gram Panchayat.”*

***Insert proviso to Section 44***

*“In Scheduled Areas, if a license is surrendered the vendor of intoxicants, the Gram Sabha within whose jurisdiction the vendor used to operate shall be intimidated in writing within 15 days of acceptance of the surrender by the Excise Department.”*

**Himachal Pradesh intoxicants license and sale orders, 1965.**

***Insert :***

*Provisions of this order, shall not apply to Scheduled Areas of Himachal Pradesh to*



*the extent they are inconsistent with the provisions of Section 97-I (1)(b) of Himachal Pradesh Panchayati Raj Act, 1994 and Rule 14(I) of Himachal Pradesh Panchayat Extension to Scheduled Areas (PESA), Rules 2011 . All acts done previously under the provisions of this order in Scheduled Areas shall be deemed to have been done under the provisions of this Section.”*

### **The Himachal Pradesh Liquor Licence Rules, 1986**

#### **Insert Section 1-A**

*“these Rules shall not be applicable to the Scheduled Areas, to the extent they are inconsistent with the provisions of Section 97I(1)(a) of Himachal Pradesh Panchayati Raj Act, 1994; Rule 14(1) of Himachal Pradesh Panchayat Extension to Scheduled Areas (PESA), Rules 2011.*

### **The Punjab Brewery Rules, 1932**

#### **Insert Rule 10.3-A “Application for license for setting up Brewery in Scheduled Areas”**

- a. *“If the Commissioner receives an application for license to establish a brewery in a Scheduled Area, the Commissioner shall publish the contents of the application in the village or villages where the brewery is proposed to be established and in nearby areas, within 15 days of the receipt of the Application and shall seek the free, prior and informed consent of the Gram Sabha (s) concerned. Gram Sabha shall pass a resolution within 30 days of publication of application rejecting or approving or modifying the application and shall send a copy of its decision to the Commissioner and Gram Sabha within 15 days of passing the resolution. The resolution of the Gram Sabha shall be binding on the Commissioner. In case the Commissioner disagrees with the decision of the Gram Sabha, it can send the Resolution for reconsideration with reasons recorded in writing. The Gram Sabha shall consider the resolution again and may rescind, modify or approve the decision. Gram Sabha shall pass a fresh resolution and shall send to the Commissioner within 15 days which shall be binding on the Commissioner.*

*Provided that, in case the proposed area of the brewery covers more than village, the Gram Sabhas concerned shall pass a joint Resolution.*

- b. *The Commissioner shall issue the license on the terms of the Resolution of the Gram Sabha.*
- c. *The Resolution of the Gram Sabha issued as per Rule 10.3-A(a) may contain conditions including, duration of licenses, terms for renewal of licenses, places for construction of brewery, conditions of employment of members of village community, prohibition on employment of women and children, disposal of waste from the brewery, rehabilitation and resettlement plan for displaced person of the village if any and any other condition that the Gram Sabha deems necessary.*
- d. *“The Gram Sabha shall maintain a register of the particulars of the licensee,*



- employees working in the brewery, terms of the license and such other particulars as the Gram Sabha deems necessary.”*
- e. *“Every application for transfer of license shall be treated as a fresh application and Procedure mentioned in Rule 10.3-A (a) shall be complied with.”*

### **The Punjab Distillery Rules, 1932**

#### **Insert Sub Rule 9.1 A**

##### **“Application for license for setting up a distillery in Scheduled Areas”**

- a. *“If the Commissioner receives an application for license to establish a brewery in a Scheduled Area, the Commissioner shall publish the contents of the application in the village or villages where the distillery is proposed to be established and in nearby areas, within 15 days of the receipt of the Application and shall seek the free, prior and informed consent of the Gram Sabha (s) concerned. Gram Sabha shall pass a resolution within 30 days of publication of application rejecting or approving or modifying the application and shall send a copy of its decision to the Commissioner and Gram Sabha within 15 days of passing the resolution. The resolution of the Gram Sabha shall be binding on the Commissioner. In case the Commissioner disagrees with the decision of the Gram Sabha, it can send the Resolution for reconsideration with reasons recorded in writing. The Gram Sabha shall consider the resolution again and may rescind, modify or approve the decision. Gram Sabha shall pass a fresh resolution and shall send to the Commissioner within 15 days which shall be binding on the Commissioner.*

*Provided that, in case the proposed area of the distillery covers more than village, the Gram Sabhas concerned shall pass a joint Resolution.*

- b. *The Commissioner shall issue the license on the terms of the Resolution of the Gram Sabha.*
- c. *The Resolution of the Gram Sabha issued as per Rule 1-A may contain conditions including, duration of licenses, terms for renewal of licenses, places for construction of distillery, conditions of employment of members of village community, prohibition on employment of women and children, disposal of waste from the brewery, rehabilitation and resettlement plan for displaced person of the village if any and any other condition that the Gram Sabha deems necessary.*
- d. *The Gram Sabha shall maintain a register of the particulars of the licensee, employees working in the Distillery, terms of the license and such other particulars as the Gram Sabha deems necessary.*
- e. *Every application for transfer of license shall be treated as a fresh application and Procedure mentioned in Rule 1-A shall be complied with.”*

*Note: Rules have also been framed for regulating the manufacture, sale, purchase, transport, import and export of denatured spirits, denatured spirituous preparations, rectified spirits, which are also types of alcohol but and used in industrial preparations and not meant for human consumptions and hence need not to be regulated by the Gram Sabha and Gram Panchayat.*



## **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))

Besides, Forest Rights Act, 2006 (FRA) gives the right of ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected within or outside village boundaries. Both and FRA and PESA 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.

### **HPPRA:**

**Powers and functions of Gram Panchayats and Panchayat Samiti.**-(1) *The Gram Panchayat or as the case may be, the Gram Sabha shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed in respect of the following matters, namely:-* (a) *the ownership of minor forest produce; [97-I (1) (a)]*

**As stated earlier, the distinction in endowing powers does not go along with PESA.**

**The HP PESA rules define the procedure as follows:**

**“15. Consultation with Gram Sabha for exploitation of forest produce.**- (1) *Before chalking out the departmental programme for exploitation of forest produce under section 97-I (a), the Forest Department shall consult the Gram Sabha.*

(2) *The Forest Department shall ensure that the exploitation of the forest produce is in consonance with the scheme chalked out with people’s consent keeping in view the general Forest laws and no such plants/ trees shall be cut which are useful to the local people. It shall also be ensured that there is no illegal export of the forest produce.*

(3) *Despite any provisions about minor forest produce in any law for the time being in force, the management of forest produce shall be done to protect the right of ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected within or outside the sabha area in consonance with section 3 of the Forest Rights Act, 2006.*

(4) *The Gram Sabha may chalk out an action plan about the use or exploitation of minor forest produce in consultation with the forest officer concerned.*

(5) *Gram Sabha may, in case of limited quantity of a minor forest produce, make a cyclic arrangement for its collection and use by a few people such as re-sourceless and economically weaker groups.*

(6) *Gram Sabha shall be competent to ensure strict compliance of rules for the exploitation of minor forest produce so that the persons collecting minor forest produce do not commit any act which damages the forest.*

**16. Royalty on minor forest produce.**- (1) *The Forest Department, keeping in view the sale price of the minor forest produce, from time to time, shall determine and notify the royalty payable by*





*the trader of minor forest produce.*

*(2)The trader of the minor forest produce shall make an application to the Gram Panchayat concerned through its Pradhan for issue of transit permit for export of minor forest produce.*

*(3)Immediately after receipt of the application(s), the Pradhan of the Gram Panchayat shall place the same in the meeting of the Gram Panchayat for consideration and approval.*

*(4)Subject to the approval of the Gram Panchayat, it shall be the duty of the Pradhan to forward the said application(s) to the concerned forest guard of the forest department for recommendations. On receipt of the said application(s), the forest guard shall verify that the species have been extracted from the specified area in accordance with the approved extraction cycle and that the extraction has been done in a sustainable manner and has not caused any ecological or environmental damage in the area and shall return the said application to the Pradhan of the Gram Panchayat concerned after his written recommendations on the said application(s) for issue of transit permit(s).*

*(5)After receiving the recommendation of the forest guard, the Pradhan, through the Secretary or the Panchayat Sahayak, as the case may be, shall realize permit fee from the trader(s) for export of minor forest produce against receipt issued in Form-3 appended to the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002 at such rates as are notified by the Forest Department of the State Government from time to time.*

*(6)After the completion of the process mentioned in sub-rules (3) and (4), the transit permit(s) shall be issued to the applicant(s), on the Form specified under the Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978, duly signed by the Secretary or the Panchayat Sahayak, as the case may be, and countersigned by the Pradhan of the Gram Panchayat. The duplicate copy of the transit permit shall also be forwarded to the Divisional Forest Officer concerned.*

*(7)It shall be the duty of Secretary or the Panchayat Sahayak, as the case may be, to give the following details on the transit permit:-*

*(a) resolution number and date of meeting in which the Gram Panchayat has approved the matter regarding issue of transit permit;*

*(b) the type and quantity of the minor forest produce proposed to be exported;*

*(c) the amount of permit fee realized along with the receipt number of the Gram Panchayat; and*

*(d) the period for which the transit permit shall be valid:*

*Provided that the validity of any transit permit, under no circumstances, shall exceed a period of six months from its date of issue.*

*(8) The amount of fee realized for issue of transit permit for export of minor forest produce shall form part of the Panchayat fund and shall immediately be deposited in the account of the Gram Panchayat in post office or co-operative bank or a scheduled bank, as the case may be, where the Panchayat fund is kept.*

*(9)It shall be the duty of the Secretary or the Panchayat Sahayak, as the case may be, to place the following details with regard to issue of permit in the Gram Sabha meetings for the information of the sabha members:-*

*(a) number of transit permit(s) issued;*

*(b) names of the trader(s) to whom the transit permit(s) have been issued;*

*(c) types and quantity of the minor forest produce for which transit permit(s) have been issued; and*

*(d) amount of permit fee realised.*

*(10)The Divisional Forest Officer shall maintain the record pertaining to permits issued by the*



Gram Panchayats, fee realized, type and quantity of minor forest produce for which permits have been issued so as to have vigil over the cases of illegal export of minor forest produce and misappropriation of funds.

**17. Official management of minor forest produce.-** (1) If the State Government organizes the trade of any minor forest produce in order to protect tribal interests, that trade shall be treated as trade carried out on behalf of the sabha members, but prior approval of the Gram Sabha shall be compulsory for the said arrangement. On the basis of suggestions of the Gram Sabha, necessary changes shall be carried out in such trade.

(2) In such trade, Gram Sabha and the persons collecting and trading in minor forest produce shall have complete right over net profit.

**18. Scheme for minor forests produce.-** (1) For meeting the requirements of sabha members such as grazing, fuel wood, making houses and ploughs, the Gram Sabha shall chalk out a scheme for the use of forest resources used traditionally by the people in consultation with the concerned Forest Officer. Under this scheme every person residing in the sabha area shall be able to use the resources after getting written permission from the RPMC.

(2) Gram Sabha may make regulations so as to ensure that the interest of the sabha members for collecting the fuel wood and other minor forest produce are protected.

(3) Gram Sabha may chalk out suitable programmes to conserve the forest, improve the environment and enhance employment at local level in their respective areas.

(4) Gram Sabha shall be competent to make enquiries, despite the departmental permit, about the wood or the forest produce passing through its areas. In the case of a doubt of illegal operations, Gram Sabha through its Pradhan shall be competent to stop it on the spot.”

#### **HP PESA Rules, 2011**

##### ***Insert the following provisions in Rule 13(2)***

*(d) The Gram Sabha shall prepare a list of minor forest produce that are of important for the livelihood of the people of the village and also the quantity and type of minor forest produce collected by each family based on their livelihood needs a copy of which shall be sent to the Gram Panchayat and the 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 Himachal Pradesh except the inclusion of bamboo.”*

*(e) “Gram Panchayat shall assist Gram Sabha in the integrated management and supervision of collection, storage, processing, marketing, value addition of minor forest produces through the Gram Sabha.*

*(f) 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.”*



### **State Amendments in Himachal Pradesh Forest Produce Transit (Land Routes) rules, 1978:**

In exercise of the powers conferred under sub section (2) of section 2 of the Indian Forest Act, 1927, in Himachal Pradesh Pradhans of the Panchayats have been appointed as Forest Officer to carry out the purposes of rule 11 of the Himachal Pradesh Forest Produce Transit (Land Routes) rules, 1978 for the issuance pass for transport of Minor Forest Produce collected from the forest in the concerned Panchayat. Further, The Forest Department vide executive order dated 28th February, 2003 has identified 37 species of Medicinal herbs and other non timer Forest Produce on which control has been given to the concerned Panchayats and the Pradhan of the concerned Panchayat has been empowered to issue passes for these items and to levy export fee which will form the fund of the Panchayat.<sup>12</sup>

#### **Himachal Pradesh Forest Produce Transit (Land Routes) rules, 1978**

##### ***Delete Rule 10(i) and (ii) and instead Insert :***

*“ (i) Any person desiring to remove for transit any minor forest produce from any forest in a Scheduled Area, permission shall be taken from the Gram Sabha concerned.*

*(ii) Application shall be filed with the Divisional Forest Officer who shall forward the same to the Gram Sabha within 15 days of its receipt for its approval.. The Gram Sabha shall organise a meeting within one month of receiving the application and take a decision to accept or reject the application or impose such conditions as it deems necessary. The Resolution shall be forwarded to the Divisional Forest Officer and the Gram Panchayat within 15 days of its passing. If the application is accepted the DFO shall issue the permit in Form I, along with such conditions as the Gram Sabha may have prescribed.*

*(iii) Gram Panchayat shall maintain a list of particulars of the persons to whom permits have been issued for removal and transit of minor forest produce.”*

#### **The Chamba Minor Forest Produce Exploitation and Export Act, 2003**

##### ***Insert proviso to section 1***

*“Provided that nothing in this Act or Rules framed thereunder shall apply to minor forest produce over which the Gram Sabha and Panchayat have ownership right as per Provisions of Panchayat (Extension to Scheduled Areas) Act, 1996 and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and any area in relation to such minor forest produce falling within a Scheduled Area.”*

#### **The Mandi Minor Forest Produce Exploitation and Export Act, 1997**

##### ***Insert proviso to section 1***

*“Provided that nothing in this Act or Rules framed thereunder shall apply to minor forest produce over which the Gram Sabha and Panchayat have ownership right as per Provisions of Panchayat (Extension to Scheduled Areas) Act, 1996 and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and any area in relation to*

<sup>12</sup> No. FFE-B-G (9)-9/94-II dated Shimla-2, the 28th February, 2003





### **The Himachal Pradesh Forest Produce (regulation of trade) Act, 1982 and Rules**

*The Himachal Pradesh Forest Produce (regulation of trade) Act, 1982 and rules thereunder shall be repealed as they are inconsistent with PESA and FRA. The above Act and Rules, create state aims to create state monopoly in the trade of minor forest produce whereas, as mentioned above, PESA and the recently enacted Forest Rights Act, instead vests the ownership rights over minor forest produce in 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)]

**HPPRA does not make any mention of land alienation, but following procedure has been laid down in Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011:**

**“Prevention of land alienation.-** (1) *The Gram Sabha Shall ensure that no land belonging to a Scheduled Tribe is transferred to a non-scheduled Tribe person. If any case of alienation of such land comes to the notice of the Gram Panchayat or the Gram Sabha, in that event it shall be the duty of the Pradhan to make a report in this regard to the concerned authority of the Revenue Department of the State Government. The said authority shall take further necessary action for restoration of unlawfully alienated land to the actual owner of the land.*

(2) *The Gram Sabha shall be competent to enquire into any land transactions on the basis of complaints or suo-moto. The enquiry report of the Gram Sabha shall be forwarded by the Pradhan of the Gram Panchayat concerned to the concerned authority of the Revenue Department of the State Government along with a copy each of the said report to the Chairman of the Panchayat Samiti and Zila Parishad concerned.*

(3) *If the Gram Sabha is of the opinion that attempts are being made to alienate lands belonging to a Scheduled Tribe, it shall issue instructions to prohibit such transaction. The decision of the Gram Sabha in such cases shall be final and binding upon the concerned revenue authority.*

8. **Restoration of alienated land.-** (1) *If Gram Sabha finds that any person other than a member of the scheduled tribe, without any lawful authority, is in possession of any land owned by of a scheduled tribe, it shall, through the Pradhan of the Gram Panchayat, take up the matter with the concerned authority of the Revenue Department of the State Government for restoration*



*of the possession of such land to that person to whom it originally belonged and if that person is dead, in that event to his legal heirs.*

*(2) In case of dispute regarding restoration of land under sub-rule (1), the Gram Sabha shall follow its customary mode of dispute resolution.*

***The above rules are in conformity with PESA.***

#### **6.4 Management of Village Markets**

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)]

**Himachal Pradesh Panchayati Raj Act:** *the Gram Panchayat or as the case may be, the Gram Sabha shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed in respect of the following matters, namely: - management of village markets by whatever name called [Section 97-I (1) (c)]*

**As stated earlier, the distinction in endowing powers does not go along with PESA.**

**Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011 state,**

**“Control over markets.-** (1) *Gram Sabha, under section 97-I (c), through the Gram Panchayat, shall be competent to control and manage the markets within its territory. It shall be the duty of the Gram Panchayat to,-*

*(a) make available water, sheds and other physical facilities to the shopkeepers and the consumers in the market;*

*(b) prohibit the inflow and sale of harmful objects in the market;*

*(c) ensure that the weight, measurement and payment in the transactions are genuine;*

*(d) obtain and share information about the prices being charged;*

*(e) prohibit all unfair practices, including cheating or misinformation regarding prices;*

*(f) prohibit gambling, betting, testing luck, cock-fighting etc. in the market or its surrounding area; and*

*(g) levy tax or teh-bazari on the shopkeepers of the market:*

*Provided that no tax or teh-bazari shall be levied on small vendors coming to the market to sell the yield. The Gram Sabha shall be competent to decide who qualifies as a small vender.*



(2) Gram Sabha may constitute a Market Committee for the management of the market of the villages in its area. Market Committee shall be accountable for the arrangement of such market and for keeping peace at the place where the market is held and also for ensuring smooth functioning of the market without any conflict or quarrel.

(3) In case of any dispute the decision of the Market Committee may be challenged in Gram Sabha. The decision of Gram Sabha thereon shall be final.”[Rule19]

**Here again powers have been divided between the Gram Sabha and the Panchayat, whereas as per PESA they should go hand in hand. Therefore, following amendments are suggested.**

### **HP PESA Rules, 2011**

**Delete sub rule(1 and 2) of Rule 19 and instead insert the following**

(1) The Gram Sabha shall form a market committee of 10 members from amongst its members. The head of the Gram Sabha or any other competent person as decided by majority members of the Gram Sabha shall be the Chairman of the Village Market Committee.

(2) The Market Committee shall manage the village markets by whatever name called and shall perform the following functions:

(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 a market area without a license issued by the Market Committee. The person for applying license shall submit an application. The Market Committee 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.

(3) The Market Committee may also auction the shops in the market area.

(4) The Market Committee shall fix the schedule of rate of fee in respect of every such market operating within its jurisdiction in Consultation with the Gram Sabha 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 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) Other Functions of the Gram Sabha and the Market Committee:

a. maintain and manage the market yards.

b. regulate and opening, closing and suspending of transactions in a market yard.



- c. *Supervise the conduct of market functionaries.*
- d. *enforce the conditions of license;*
- e. *regulate the making, execution and enforcement or cancellation of agreement of sales, the weightment, delivery, payment and all other matters relating to marketing of agricultural produce, NTFP Produce, live stock or product of live stock and all matters ancillary thereto.*
- f. *Disposal of minor forest produce include local level processing value addition, transportation in forest area through head load, bicycle and carts for use of such produce for sale by the gatherers or the communities for livelihood.*
- g. *Provide necessary facilities for marketing of agricultural produce, NTFP Produce, live stock or products of live stock in the market area;*
- h. *Provide for settlement of all disputes between the seller and the buyer and others arising out of any kind of transaction connected with the marketing of notified agricultural produce, NTFP Produce, live stock or product of live stock and other products and all matters ancillary thereto;*
- i. *Collect, maintain and disseminate information in respect of ;-*
  - i. *sale prices and movement of notified agricultural produce, live stock or products of live stock; and any other product and*
  - ii. *production, processing and storage of notified commodities.*
- j. *Take all possible steps to prevent adulteration and to promote grading standardization.*
- k. *Levy, recover and receive fees, subscriptions and other sums of money to which the Panchayat is entitled;*
- l. *Employ necessary number of officers and servants for efficient implementation of for above rules in scheduled Areas.*
- m. *Conduct the auction of notified agricultural produce, live stock o products of live stock above rules in accordance with the rules.*
- n. *Ensure current weightment of notified commodities.*
- o. *Regulate the entry of persons and the vehicular traffic into the market yard;*
- p. *Prosecute persons violating the rules as per of the concerned department.*
- q. *Institute or defend a suit, action, proceedings, application or arbitration and compromise such suit, action, proceedings, application or arbitration; and*
- r. *Provide facilities, such as provision of adequate space for direct sales by a producer and assist a producer by preparing invoices and bills on his behalf when he sell his produce to a trader without employing a commission agent.*
- s. *Take actions to prevent hoarding, black marketing, monopoly and restrictive trade practices.*
- t. *Any other function as the Gram Sabha or the State Government prescribes.*

*(7) In case of dispute between the Gram Sabha and the Market Committee, the Gram Panchayat shall adjudicate on the matter and in case of disputes between two or more market committees of several villages, all the Gram Sabhas of the concerned market committees shall adjudicate on the dispute in a joint meeting. The appeal from the decision of the Gram Sabha shall lie with the*



*Gram Panchayat.*

*(8) The Gram Panchayat shall assist the Market Committee in carrying out its functions*

## **6.5 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)]

**Himachal Pradesh Panchayati Raj Act:** *The Gram Panchayat or as the case may be, the Gram Sabha shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed in respect of the following matters, namely :- Exercising control over money lending to the Scheduled Tribe [Section 97-I (d)]*

**As stated earlier, the distinction in endowing powers does not go along with PESA.**

**Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011 state,** “**Control over money lending transaction.-** (1) Notwithstanding any provisions in any law, as per the spirit of section 4 (m) of the Panchayats (Extension to the Scheduled Areas) Act, 1996 [Act No.40 of 1996], the Gram Sabha, under provisions of section 97-I (d), shall be competent to control money lending transactions of all the sabha members and for this purpose, the Gram Sabha may form a Debt Control Committee consisting of not less than five sabha members to be nominated by the Gram Sabha.

**Explanation.-** Money lending transactions shall include loan etc. extended by the government, cooperative society, money lenders, banks and other institutions under an Act or privately or informally, as per the convention or otherwise.

(2) Gram Sabha shall be competent to decide the condition of maximum interest and repayment in the matters of private transactions.

(3) Gram Sabha may ask for any information regarding the loan extended by any person or institution to the villagers, its conditions, repayment status etc. In these matters, on being asked for the information, the concerned person or institution shall provide complete information to the Gram Sabha within the reasonable time specified by the Gram Sabha through the Pradhan of the Gram Panchayat.

(4) A sabha member may put up his case in writing or orally before the Gram Sabha or Debt Control Committee regarding any kind of irregularity, corruption in transaction, the recovery proceeding, inability to repay the loan etc. in respect of the loan extended by any institution or person. If there is an oral complaint, it shall be the duty of the Secretary or Panchayat Sahayak of the Gram Panchayat to get the same reduced in writing in this regard and to keep the same in records.





- (5) *After considering the application mentioned in sub-rule (4) if the Gram Sabha itself or on the basis of the conclusions of the Debt Control Committee finds that there has been injustice with the applicant, it may instruct the concerned institution/person to redress the said injustice.*
- (6) *Gram Sabha, through the Pradhan of the Gram Panchayat especially in the case of the tribals, may instruct a bank, society or any lender that loans be disbursed only in the presence of Gram Sabha or its Debt Control Committee. The same instructions may be issued about the repayment of the loan. The instructions of Gram Sabha shall be binding.*

*If the concerned institution has any objection with regard to the instructions mentioned in sub-rule (6), it may appeal to the District Collector .The District Collector shall appoint an arbitrator, who shall decide the said appeal, whose decision thereon shall be final.*

*(8) Gram Sabha may review written, oral and informal agreements of all kinds of labourers in the village and ensure that there is no bonded labour for repayment of loan.” [Rule 20]*

Following amendments are suggested in the above stated rules:

#### **HP PESA Rules, 2011**

##### ***Under Explanation , Insert sub rule in rule 20***

*(9) No money lender shall operate in a village in Scheduled Areas without obtaining a license from the Gram Sabha.*

*(10) 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 Gram Panchayat.*

*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.*

##### ***Insert in Sub-rule 2***

*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 Gram Panchayat.”*

In the state money lending is also regulated by The Himachal Pradesh Registration of Money Lenders Act, 1976. The regulation of the same business is through a system of licenses; the power to grant/ refuse to grant a licence, cancel or suspend the licenses issued, has been entrusted to the Collector.<sup>13</sup> Therefore, there is a need to bring these legislations in conformity with PESA. Following amendments are suggested:

<sup>13</sup> Section 5, The Himachal Pradesh Registration of Money Lenders Act, 1976.



### **The Himachal Pradesh Registration of Money Lenders Act, 1976**

#### ***Insert proviso in Section 3(a), Section 4 and Section 5***

*“Provided that in case of Scheduled Areas, the prescribed licensing authority shall be Gram Sabha.”*

#### ***Insert Section 9-A***

*“Provided that in case of Scheduled Areas, In case the money lender violates any of the conditions of the license, or has acted fraudulently or molested or physically harassed the debtor or acted immorally, the Gram Sabha may pass a resolution cancelling the license and impose such penalty on the moneylender as it deems necessary. The Gram Panchayat on receipt of the resolution of the Gram Sabha shall proceed to cancel the license and intimate the same to the Gram Sabha. Nothing in this section debars the debtor to take recourse to other legal remedies prescribed in other legislations.”*

#### ***Insert clause in Section 12(4)***

*“In case of Scheduled Areas, The Gram Sabha may prescribe such other rules to exercise control over money lending within its jurisdiction.”*

## **6.6 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)]*

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. Education
2. Management of Welfare Hostels
3. Health
4. Women and Child Welfare

**Himachal Pradesh Panchayati Raj Act states:** *“The Panchayat Samiti shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed, in respect of the following matter, namely:-(a) exercising control over institutions and functionaries in all social sector;” [Section 97-I (2)]*



**As stated earlier, the distinction in endowing powers does not go along with PESA.**

In accordance with Section 97-I (2), **Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011** make the following rules:

**“Powers to exercise control over institutions and functionaries.-** (1) *The Panchayat Samiti, under section 97-I (2)(a), shall be competent to supervise and monitor the functioning of schemes of the departments, namely, Agriculture, Animal Husbandry, Ayurveda, Education, Food and Supplies, Forest, Health and Family Welfare, Horticulture, Industries, Irrigation and Public Health, Public Works, Revenue, Rural Development and Social Justice and Women Welfare. The office bearers of Panchayat Samiti shall be competent to inspect and make report about the physical attendance of the block and village level functionaries of the said departments in their assigned areas of work.*

(2) *The Panchayat Samiti, through its Secretary shall issue directions for field visit by the Block level functionaries of the departments mentioned in sub-rule (1) and also to approve their tour programmes.*

(3) *The Chairman of the Panchayat Samiti shall record his remarks on the annual confidential reports of the Block level functionaries of the departments mentioned in sub-rule (1).” [Rule 23]*

**Here again, the distinction in endowing powers to Panchayat Samiti does not go along with PESA, the power of Gram Sabha has again been neglected. Therefore, we suggest following amendments.**

#### **HP Panchayat Raj Act, 1994**

**Delete section 97-I (2) and instead insert**

*“The Gram Sabha and Panchayat Samiti shall exercise control over institutions and functionaries in social sector.”*

#### **HP PESA Rules, 2011**

**Insert sub rule in 23 (1)**

*“The Gram Sabha shall be competent to supervise and monitor the functioning of schemes of the departments, namely, Agriculture, Animal Husbandry, Ayurveda, Education, Food and Supplies, Forest, Health and Family Welfare, Horticulture, Industries, Irrigation and Public Health, Public Works, Revenue, Rural Development and Social Justice and Women Welfare. The office bearers of Panchayat Samiti shall be competent to inspect and make report about the physical attendance of the block and village level functionaries of the said departments in their assigned areas of work. along with the Panchayat Samiti.”*





## **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)]

**As stated earlier, the distinction in endowing powers does not go along with PESA.**

**Himachal Pradesh Panchayati Raj Act states:** “The Panchayat Samiti shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed, in respect of the following matter, namely(b) control over local plans and resources for such plans including tribal sub-plan” [Section 97-I (2)]

**Himachal Pradesh Panchayati Raj (Extension to the Scheduled Areas) Rules, 2011** make the rules as stated above. Ideally the planning process should begin at the grass roots level i.e. with the Gram Sabha. The recommendations of the Gram Sabha should be incorporated in the district plan or Tribal sub plan or any other local plan. Following amendments are suggested:

### **HP Panchayat Act**

**Delete the provisions of Section Section 97-I (2)(b)**

*“The Panchayat Samiti shall exercise such powers and perform such functions in such manner and to such extent as may be prescribed, in respect of the following matter, namely(b) control over local plans and resources for such plans including tribal sub-plan”*

### **HP PESA Rules, 2011**

**Insert sub Rule in Rule 23(4)**

*“Local Plans formulated at district level shall not be finalised without incorporating the recommendations of the all the Gram Sabha(s) in the district. The relevant departments shall take assistance of the Gram Panchayat and Panchayat Samiti in organising meetings of the Gram Sabha , collating suggestions, ensuring incorporation of recommendations in the plans.”  
The Gram Panchayat shall inform the Gram Sabhas of the resources allocated for various plans to be implemented at village level. Gram Sabha shall be involved in reviewing the implementation of plans and in preparing the implementation report.”*